

Section I

Security in and around the Baltic States

On the eve of NATO and the EU enlargements the Baltic Defence Review once again suggests to reflect on the issues that need to be carefully thought through in the Baltic states before entering the new period of their history.

In the first article, Ambassador Torstern Orn offers a broad description of the Baltic Sea Region, both in historical and contemporary contexts, and its importance in the new and united Europe. His eloquent and insightful account of transformations that the region has been, and still is, going through also reminds us of the questions which call for our attention. Some of those questions are new, stemming from the new realities of the region, and some are old but still unanswered, which underlines both change and continuity as a defining feature of the region's development. The author's simple but powerful words on the need "to master the past without negligence or nostalgia" describe very accurately one of the most fundamental challenges that the entire Baltic Sea Region will have to tackle in the coming decades.

In the second article of this section, Brigadier General Michael H. Clemmesen casts a critical look at the expectations of the incoming NATO members towards the deterrent value of membership. He contrasts those expectations with the direction of military reforms that the entire Alliance is pursuing. Thus article's argument revolves around the dilemma of new members, who are positioned on the periphery of the Alliance and have some distinct security concerns. On the one hand, they have to make a meaningful contribution to the missions of NATO, which is preparing to project power globally. On the other hand, they wish to retain some effective capability to address their own, local or regional, security realities. Inevitably, the question of how much of the allied assistance would be available and what difference it would make in dealing with the direct military threat comes into equation. The author assesses military reforms undertaken by the old and new members of NATO and offers clear recommendations on how to balance the two imperatives – an optimal contribution to the Alliance by the new members and security of those new members on the periphery of NATO – through adjustments to the concepts and direction of developing military capabilities within the Alliance.

The Baltic Sea Region – an Important Economic and Political Factor in the New Europe

By Torsten Orn*

The Baltic Sea region has a stormy history. It has been marked by the Vikings, the Crusading Knights, the Hanseatic merchants, great power navies and armies under different flags. In their struggle for “dominium maris Baltici”, to use the classical phrase, nearly all the bordering States have had their moment or moments of power and glory. But very little eternity.

For those of us who came to geographical and political maturity after 1945 the Baltic Sea was a moat in the Cold War. A northwards prolongation of that Iron Curtain, whose most concrete expression

was the wall between East and West Berlin. Few Swedes were thinking of Tallinn as the closest capital city to Stockholm, even fewer remembered that Riga had once been the largest city of the Swedish realm. Poland had returned to the map of Europe but hardly in a manner that befitted this proud and creative nation. The Nordic Countries – Denmark, Norway, Sweden, Finland and Iceland – were as split in military orientation as if they had been situated in the Balkans or in the Middle East. The old truth that water unites seemed to have been relegated to a museum of history. This to the detriment of

most of the commercial and cultural centres around the Baltic Sea, who all bear the imprint of how much one can learn from one another.

After the great dramatic – and for once peaceful – changes in Europe around 1990 also this “eternity” had come to its end. Some people were busy talking of a return to conditions after World War I. But that soon proved to be a mistaken conclusion. For one thing the three Baltic Republics got a much warmer international reception now than in the 1920s. A bad conscience in the West certainly played its part. So did Balts in exile.

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Every period in history has its own and partly very different challenges. So also this new period, which still hasn't even got a proper name.

How do we define the Baltic Sea region? Denmark, Sweden, Finland, Estonia, Latvia and Lithuania in their entirety of course. But how much of Russia east of Pskov and Novgorod? How much of Poland south of Gdansk and Szczecin? Which German "Länder" apart from Mecklenburg-Vorpommern and Schleswig-Holstein? Should we not also for cultural and economic reasons include Hamburg and Norway? The Nordic Iceland? Belarus? Some people would go as far as to include all land around the rivers flowing into the Baltic Sea. This is not a matter for geographers only. It has a great bearing on the national agendas drawn up in Moscow, Warsaw and Berlin. What importance do the ruling circles in those capitals give to developments in our region?

Events in the Baltic Sea region were also important for the winding up of the Cold War. Lech Walesa and his shipyard workers in Gdansk are already history. The importance of the Polish Pope John Paul

II has been recognized by no less an authority than Mikhail Gorbachov. And we should certainly not forget the Singing Revolutions in the Baltic States. Those who critically spoke about "Finlandisierung", when trying to define Finland's skilful balancing act between East and West, probably had no idea about what an attractive model such a policy constituted for Balts and Poles. The Prime Minister of Schleswig-Holstein, Björn Engholm, now began to talk about a New Hansa. What importance will future historians attach to the fact that Vladimir Putin is a native of St Petersburg rather than of the Ukraine, the Caucasus or Siberia?

Many things are needed to make this a better century than the last one for the inhabitants of the Baltic Sea region. First of all mistrust and armaments must give way to hope and optimism. We must all realize that we will grow much bigger, stronger and more beautiful if we cooperate - with respect, of course, for each others' cultural identity and right to exist. Openness, tolerance and free trade are the roads to prosperity and political structures which can guarantee a more humane existence.

"Vergangenheitsbewältigung" is important. To master the past without negligence or nostalgia. West Germany has achieved a lot in this respect, East Germany considerably less. Russia has hardly begun. This is also important in the Baltic states when it comes to Jews, Nazis and Soviets during the last century. It involves not only professional historians but practically every family. Was your beloved grandmother a gallant partisan or an opportunistic fellow-traveller? Telling stories about the stupidity of one's neighbours is one thing. Racial persecution and ethnic cleansing is a very different matter.

After the fall of the Berlin wall there was a general movement towards the West. Sweden and Finland wanted to become full members of the EU, Poland left the Warsaw Pact, the Baltic states also left the Soviet Union. Membership of the EU and NATO was automatic for East Germany as part of the German reunification, but the reunification itself was not easy, neither economically nor psychologically. Mental reunification may well take another generation.

Sweden and Finland entered the EU in 1995, but unfortunately not Norway,

where a majority had voted “no” in 1994. Poland joined NATO in 1999 and will join the EU next year. The Baltic states will join both next year. Much sooner than anybody had dared to think only a few years ago!

This represented a tremendous effort from the countries concerned. Other countries have assisted them in their own enlightened self-interest. But the bulk everybody had to do by himself. From totalitarian dictatorship and command economy to pluralistic democracy and market economy is a long way. The course has been remarkably steady in spite of many changes in government colour.

Membership of the EU is not a permanent state but a process. More like going on board a ship than entering a house. There is no “*liberum veto*” for everybody on everything. In matters of vital importance for one’s own country one may stand aside, but in most other cases not. What do the new members want to give priority to? We look particularly to Poland, one of Europe’s great historic nations, which will carry the same weight in

the EU as Spain. Hopefully the northern dimension of the EU will be more pronounced after this enlargement.

Membership of the EU will probably also work as a useful tool, as a lever, to modernize the societies of the new members in a western sense. Much would have happened anyway, but now it will happen quicker. It will probably be painful in certain sectors, which have been spoiled by protection without competition. Governments must be able to deliver the famous omelette rather soon as explanation for the broken eggs, if they want to survive politically.

There is a great economic growth potential in a more intensified cooperation. A common currency will also help. Unfortunately a majority of Swedes has decided to wait.

The same goes for research, science and culture. There is a large ground to recover after the long period of the Iron Curtain.

The threats against our common Baltic Sea environment were in focus already before the fall of communism for obvious and deplorable reasons.

The struggle against trafficking, smuggling of narcotics and other forms of

organized international crime also requires joint efforts. Most of us didn’t realize that crime would be privatized before anything else. How much corruption can we tolerate in a state that claims to be democratic? All these are serious threats to our societies, even if they are of different character compared to tanks and missiles.

It is important to remember that everything doesn’t have to be done on interstate levels. In Europe of the regions much can be achieved transnationally by regions of various countries without involving the national centres. Even more can be done by non-governmental institutions and organizations, companies, associations and individuals. That is also what we have been particularly missing during the previous era. Modern technology moreover makes it much easier to establish such networks across the borders today.

But don’t expect immediate results in all fields. Look at our bridge Malmö–Copenhagen in existence since 2000. We had a long time to prepare synergetic effects, but we are still waiting for most of them to materialize.

In which language shall we cooperate? “Plattdeutsch” was the lingua franca in the Baltic Sea region in medieval times. In the EU officially it is French and English. If you ask young people almost anywhere today they answer English. That is the language in which they surf on the net. Perhaps this will also ease the linguistic situation in Estonia and Latvia? But those who wish to do business with Germany should not neglect the language of the Hansa.

English and French are not native languages to the Baltic Sea region. But our lake has never been a “mare clausum” reserved for the countries bordering on it. The Dutch, French, English and lately the Americans have all played an important part. Not least to counterbalance an all too powerful state in the region.

What will happen to the Nordic Council, the Council of Baltic Sea States etc.? Are they still needed? If Western European institutions are an example, they will probably continue to work in their special fields, even if nobody would have created them today. Today it is only the EU that matters. The EU and, in military matters, NATO.

Given the history of our region I find it very understandable that most countries round the Baltic Sea now want to join NATO in order to get an American guarantee for the future. Only Finland and Sweden, which did not suffer foreign occupation during or after World War II, still prefer to remain outside.

That leads me over to the real strategic challenge for the region. What kind of relations are we going to have with Russia? A Russia that is now only a Baltic Sea state thanks to St Petersburg and Kaliningrad.

The latter is moreover a problem by itself, as we all know. A typical imperial leftover. It is not only a question of transit rights. What will Kaliningrad’s role be vis-à-vis the EU and vis-à-vis Russia proper?

But the main issue is Russia itself. What does she want to be in the future? A part of Europe or something quite apart? This is an old theme in Russian culture. In spite of all *glasnost* it is still not easy to understand Russian decision-making. Also within the EU we have different opinions on Russia’s place in the European context.

This is not only a psychological or philosophical question. For the Baltic Sea region it is of paramount importance, whether we should become a link or a barrier eastwards. This goes, of course, in particular for the Baltic States. They might hopefully develop a relationship to Russia similar to what has developed between Germany and the three Benelux countries after World War II. The experience of Poland tells its own story.

The Russian market has always attracted enormous interest and attention in the West. Almost like a mirage. That is so also today, even if the Russian economy is not much larger than that of the Netherlands. Where does the future lie?

It goes also for Russia that only a close relationship with the EU can help in modernization of economic and social conditions which is a prerequisite for a lasting democracy within the country and durable peace with other countries.

So, we, who have the fortune to live in the Baltic Sea region at the beginning of this century, do not lack challenges. But we must also have visions! The Baltic Sea – a Sea of Peace! At long last!

The New NATO and the Security of the Alliance Periphery States

By Brigadier General Michael H. Clemmesen*

NATO is enlarging to new borders in 2004 and thereby embracing all issues and threat perceptions linked to this new periphery, e.g. the concerns of the Baltic states in relation to future developments in Russia and Belarus.

They see and hear that Russia's feelings and ego have been humiliated and hurt by enlargement. The minor, but recognized, threat against Russia from the South has not yet drawn attention away from this perceived humiliation. The major challenge to Russia, from the East, from China, still seems to be deliberately ignored by the Russian leadership as this would undermine its attempt to balance American influence in the world through

co-operation with the rapidly developing Asiatic superpower.

At the same time, however, NATO's focus has clearly changed beyond that periphery. In order to remain relevant in the eyes of the key member states, especially the U.S., the organization must accept and succeed in meeting the real and perceived challenges of the early 21st Century. One may assume that the "New NATO" operation in Afghanistan is the forerunner for similar tasks in the future: a mixture of Counter Terrorism, Counter Infiltration, Counter Insurgency, Peace Making, Peace Keeping, Humanitarian and Nation Building Operations.

Any failure of the operation in Afghanistan could break the Alliance.

The contradiction between new member states' concerns and the future role of the alliance is very difficult to handle politically in those new member states that still feel a potential threat against their territory. NATO is not a super-national entity, even if some Alliance officials sometimes behave as if it were.

The member states' governments can neither ignore domestic political reality and the advice from their national military advisors, nor the pressure from the Alliance, and are therefore painfully "suspended" between the two.

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This problem is worsened by the fact that the land forces of most NATO members, the “European Rear” – old, new and future – do not match the requirements of any of the new situations. Most are still inadequately trained, low combat readiness, heavy forces, based on the mobilization of both personnel and some equipment, with only a short or medium range logistics capability.

The fact that these forces are dominated by heavy equipment, mainly relevant to high-intensity warfare in open terrain, makes transport and logistical support both complex and expensive. Such heavy forces would need major re-training and full or partial re-equipping before they would be capable of conducting operations in close and difficult terrain. They would similarly need re-training and some new equipment before becoming fully suitable for low-intensity operations.

Only a small proportion of member states’ forces are balanced for the likely future operations. Many have too high a percentage of combat and artillery units. The forces – and especially the higher

readiness land forces – lack logistics capabilities, including medical units, military police and engineer units (both for combat support and construction purposes).

This state of affairs in the “Rear” means that it is difficult to convince the new periphery members that they would have timely and effective assistance if the Alliance was proven wrong in its collective threat perception, which is dominated by the perspective from the “Rear.” In spite of what now seems likely, a quantitatively limited but locally significant military threat could become reality with little strategic warning.

Most member states’ land forces – both from the “Rear” and from other parts of the periphery – would take so long to deploy and be so dependent upon host nation support that an effective response would be very slow. The relatively limited number of high readiness, expeditionary forces could be deployed on missions outside the NATO area, just when they were needed on the periphery.

Non-peripheral NATO states may underline that any challenge to new mem-

bers’ territories would be deterred by the threat of the Alliance’s highly effective air power. However, periphery states could respond that many situations in real life lack the clarity of a significant border crossing invasion that could justify a massive air force response in retaliation.

This feeling of vulnerability is, with good reason, nourished by the slow transformation of the forces of the “European Rear”. This feeling has led to two reactions in new periphery state members: an uncritical copy-cat force development to please NATO; and unrealistic illusions about the potential capabilities of small territorial forces.

The future NATO members have very limited resources to utilise for their armed forces. Their societies are still developing after the transition from run-down command economies, and their own experience combined with Western economic advice, leads to small state sectors. Both populations and politicians rejected a repetition of the deep Soviet/Warsaw Treaty Organisation doctrine of the mobilisation of society for defence. Independent self-

defence against a resurgent Russian neighbour would be hopeless anyway. Future independence and security is dependent upon external – NATO – guarantees and support.

The limited resources and the combined pressure of the post 1999 advice from the NATO International Staff as well as from advisors from the U.S. and UK has led to the present force plans, with very small deployable forces, a somewhat larger mobile army structure and a weak “homeland security” organisation. The search for the mirage of a perfect plan, constantly changing, uncoordinated and sometimes conflicting advice, as well as an underdeveloped appetite to get things done, have significantly delayed the implementation of anything.

The force development plans emphasise that the forces to be developed should be sustainable within the available resource levels. This is sound, common sense.

However, the advice has also led to a very slow, phased, cost-harnessed generation of forces, one unit at the time. This approach is unprofessional as it creates a

“bottle-neck” in the development of cadre expertise. It is a bureaucrat’s approach: filling units with new equipment and paid personnel.

Instead, the advice should have exhibited a deeper understanding of how high-quality military units are developed. It should have encouraged the creation of a sustainable force structure right away (in the Baltic states a brigade or brigade training organisational framework), with the available quality cadre assigned, manned and equipped with what was currently available together with a rigorous and realistic training schedule. Military force development must take place in parallel processes rather than in sequential phases to create the right balance of structure and expertise.

The NATO International Staff and Anglo-Saxon advisors pressed for the ending of conscription, driven by ideological rather than pragmatic, analytical reasons. This advice ignored the local conditions, and unfortunately it was taken up – for ideological reasons – by liberal politicians in the states.

It is logical in the “New NATO” that the members should try to recruit as many high-quality contract soldiers as possible within the available state pay framework. However, in states with small population base, and especially those with a high employment level, it may not be feasible to recruit more than a few hundred soldiers of a suitable quality to the land force combat elements. Where this is the case, the force will simply be too small to create a viable basis for the maintenance of national armed forces: producing officers and NCOs with practical unit experience for the national training and management structures. Such countries can either choose the path of Luxembourg and accept the situation or recruit the soldiers in the Third World (which may be difficult to accept in domestic politics) or keep a limited element of compulsory, but fundamentally reformed national service in the recruiting package. The latter option might make it possible to maintain viable, minimum size national forces and enhance the recruiting of regulars, since a part of the popula-

tion is compelled to come into personal contact with the armed forces. It is extremely arrogant to conclude that member states that cannot recruit enough volunteers to create viable regular forces should give-up the ambitions to try. It is also rather dim-witted, as it is likely to result in a smaller force contribution.

The potential member states were advised to create small “niche capabilities”. This assumed that the states accepted NATO as a super-national authority and undermined their potential at a later stage to regenerate self-defence forces. The type of niche capability was left to the nations to decide. This advice ignored that what the Alliance really is missing is a much higher number of well-trained and equipped, light, high-readiness land combat units. The transport and logistic requirements are relatively easy to meet in relation to light infantry and combat support units, especially if their basic equipment package matches the equipment of similar US, UK, French or German units.

Some advice also seemed to ignore the fact that the Alliance has an adequate num-

ber of heavy, mechanized units to meet more than any realistic requirements. Even if the U.S. and UK forces are now reforming, too many member states’ advisors have found it difficult to acknowledge the limitations of heavy land forces.

In the smaller periphery states, the combination of the feeling of vulnerability and the low force levels has undermined logical military and political analysis. It seemed impossible for patriotic officers and citizens to acknowledge that self-defence had been made impossible by the force levels resulting from the very limited commitment of the politicians and justified by the NATO advice. The politicians were simply not willing to accept steps similar to those implemented in the Nordic States during the Cold War in order to create large and robust territorial forces.

Periphery states the size of the Baltic states cannot cover and defend their territories with the land forces their governments have agreed to prepare and that could be available even after full mobilisation: a thinly dispersed volunteer

home guard, with insufficiently trained, inexperienced leaders, weakly-trained and equipped, plus a handful of similarly weakly-led and trained territorial battalions plus the main force, one infantry brigade.

Even if an aggressor only controlled very limited forces (he would have to guard against an Alliance response to a force built-up prior to aggression) he could maintain the initiative and ignore and by-pass the defence forces, whose limited tactical mobility and light equipment makes them unsuitable for meetings engagements. Even if the aggressor made the unlikely mistake of attacking the one brigade in its maximum 15 x 10 km area, it would have no effect on the outcome due to the relatively limited fire power and mobility of the brigade. The enemy could easily move to the flank and rear of the brigade. No matter what development might lead to any aggression, the national forces would be insufficient to contain the situation.

Any simple war gaming would underline that the available defence forces have

only minimal defensive capability – and thus very little deterrent effect. Crisis gaming would further underline the limitations that are a consequence of forces relying on mobilisation and reserve cadres.

With the current NATO state land force structure, with its over-reliance on heavy, low-readiness forces, the ability to respond rapidly to any sudden pressure on a periphery member state is limited. The NATO Reaction Force will improve the reaction time, but its use will depend on an Alliance consensus that is only likely if the issue and the threat are clear. Effective deterrence remains linked directly to the fact that any open aggression would make a response involving Alliance air power highly likely.

The solution to the combined problems of NATO and its new periphery states is that all member states should do the maximum possible to concentrate on the development of high-readiness forces. This is what NATO force planners have been pressing for over the last four years, and precisely because of their potentially

exposed situation, the periphery states should be leading the positive response, showing a good example and encouraging the “Rear” to follow suit.

The wealthier or larger states could develop or maintain a light-heavy force mix and the associated complex and expensive military logistic – including transportation – structures. Part of that logistic support, however, could be built on contracts with civilian companies, freeing resources for training and equipment.

Less ambitious states should develop lighter forces, but should also build and maintain the capability to sustain the forces logistically far from home. Part of that logistic support should be built on contracts with civilian companies

Small, periphery member states should concentrate on light combined arms forces such as a light infantry brigade structure with a high readiness element. For operations inside the country it could depend on mobilised civilian logistics to a large extent. For expeditionary operations it might have to “plug-into” the logistics structure of a larger or wealthier state. The

only relevant armoured vehicles would be a pool of wheeled Armoured Personnel Carriers, some mine clearing vehicles and some Armoured Cars for escort and patrolling.

Such a solution would make it possible for the Alliance to succeed in difficult, demanding operations, such as the present one in Afghanistan, without calling for a much higher, therefore politically unrealistic, resource allocation to the member states’ armed forces.

The solution would also effectively ally the concerns of the periphery states. Even if the Alliance was pressurised by demanding external operations, there would be a large pool of high-readiness land forces to draw from, both in the Alliance “rear” and from other, non-challenged, parts of the periphery. Most of these forces could deploy at short notice, and they would not depend on prepared host nation support for their effectiveness. Even if some states did not agree that it would appropriate to meet any individual challenge with a preventive military deployment (and thus blocked collective decision mak-

ing) there would be plenty of other member states that could agree to act bilaterally and thereby assist in a timely and effective deterrence.

Because the future of NATO depends on an early and effective transformation of its force structures, and since the security of the Baltic states and other periphery members totally depends on the survival of an effective Alliance, this should logically make them lead the way and deliberately postpone considerations of self-defence in their force development.

Section II

International law

The following section deals with the issue of international law, a vital part of system of relations both between the States and between the State and the individual. It has been an area much overshadowed and disentangled from the military by limits and restraints of the Cold War. But it is now more than ever, that the military realm and security are perceived through the norms set forth by the civil society, the rule of law being one of the cornerstones of the democratic societies. Special importance in this respect has the body of law designed to constrain excesses of the use of force - law of armed conflict. With its designation not to hamper the military but to help to adhere to standards commonplace in modern society, the rules that were conceived and distilled in the body of the international humanitarian law also reflect the pragmatism of their authors. Although they wanted no more war, and expressly prohibited resort to the use of force in the United Nations Charter, they recognized that reality would be different. This unification between the law and war could be summed up in the quote by General Colin Powell on the Gulf War: "Decisions were impacted by legal considerations at every level. The law of war proved invaluable in the decision-making process." But the inclusion of international law in the everyday "business" does indicate that it is not sufficient to have full compliance with only contractual commitments. We must make treaties operational at the national level, that is to say, in the context where its effects must unfold. States must translate the provisions of treaties into practice, in order for them to be truly effective. This implies that national measures must be taken in peacetime and that they must be incorporated into domestic legislation. Therefore it is the idea of both the importance of international law and its constant reflection in the actions of military personnel that this section will endeavor to expound. Although mainly centering on the law of armed conflict, the section steps into areas as important for the military - the status of forces abroad and international criminal law.

In the first article Dr. Dieter Fleck gives an insight into the development of the international humanitarian law through the life and work of Prof. Friedrich von Martens, a world-famous lawyer from Pärnu (Estonia), explaining both the essence of the international humanitarian law and the way in which the norms of the law have been shaped and evolved.

The next article by Mr. René Värk proceeds on the role of international law as the only system univocally consented to by the world community. The article outlines the position of international law with respect to the major ongoing debate and source of friction and misunderstanding in the international system – the legality of the use of force.

The article by Mrs. Mette Prassé Hartov gives comprehensive overview in terms of role and scope of application of the NATO Status of Forces Agreement, suggesting the ways to incorporate the provisions of this treaty into practice. The Baltic states with the long-sought membership of NATO pending must be able to render successful military cooperation both between themselves and within the Alliance, and a clear understanding of the status of foreign troops is one of the prerequisites.

Following the theme of national implementation of international law, Mr. Martin Roger in his article focuses on the jurisdiction and command responsibility drawing on one of the major improvements in the enforcement of international law – the establishment of the International Criminal Court.

In the last contribution, Professor Ole Espersen touches upon the burning issues facing the international law and shares his opinion on the question of the use of force as highlighted in the armed conflict in Iraq. We hope this short and sharp commentary will provoke reactions from our readers and will inspire some discussion on the subject.

Friedrich von Martens: A Great International Lawyer from Pärnu

By Dieter Fleck*

Next year, in 2005, a centenary after Friedrich von Martens' official retirement from an excellent diplomatic and academic career in St. Petersburg and 160 years after his birth in Pärnu in 1845, the international community will have good reasons again to commemorate this great international lawyer whose wisdom, creative spirit and loyalty has indebted the mighty and encouraged the weak.

His lasting contribution to the development of international law cannot be overestimated. But many of his important activities have fallen into oblivion.

Hence I was amazed, during one of my recent visits in Tallinn, to learn about Lauri Almann's excellent idea to make Jaan Kross' novel "Professor Martens' Departure"¹ mandatory reading for his international law course. This great piece of literature, although not meant as exact historical source, gives an excellent insight in Martens' life and work and can be strongly recommended to law students not only in Estonia.

Friedrich Fromhold Martens was born on 27 August (15 August old style) 1845 as son of a tailor. Having lost both his



Friedrich von Martens

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parents at the age of nine, he was sent to a Lutheran orphanage in St. Petersburg where he completed the full course of studies at a German high school. In 1863 he entered the law faculty of St. Petersburg University, soon caught the attention of his professors and started a brilliant academic career. After four years of service in the Russian foreign ministry, Martens taught public law at St. Petersburg University from 1872 to 1905. The themes of his publications include the right of private property in war (1869), the goals of contemporary international law (1871), the law of consular jurisdiction in the Orient (1874), the Russian policy towards the Ottoman Empire (1877), the expansion of Russia and Great Britain in Central Asia (1879), and the Berlin conference of 1884-85 in which European spheres of interest in Africa, the Middle East, China and the Pacific had been rearranged. Martens's standard textbook of the contemporary international law of civilised nations was first published in 1882 and translated into many languages. From 1874-1909 he edited the ambitious

“Recueil des traités et conventions conclus par la Russie”, a work in 15 volumes – four volumes on Russian treaties with Austria (1648-1877), four with Germany (1659-1888), four with Great Britain (1710-1895), and the remaining three with France (1717-1906), each printed in Russian and French in parallel columns, which not only contain the texts of treaties between Russia and other states but also offer inside explanations on the historical background and diplomatic conditions of their conclusion.

Martens was instrumental in practical negotiations at many diplomatic conferences. Impressive was his role as a renowned arbitrator in disputes such as between Great Britain and France over Newfoundland (1891), Great Britain and Holland on the imprisonment of a British subject by Dutch authorities (1892), and Great Britain and Venezuela on the Orinoco river basin (1899). For the latter case he developed a code of arbitration which was later used as a model for the code elaborated at the First Hague Peace Conference. In the newly created

Permanent Court of Arbitration, Martens was involved in the settlement of the Mexican-US dispute (1902). He was also instrumental in the negotiations of the Russo-Japanese peace treaty of Portsmouth, N.H. (1905).

Martens acted as a Russian delegate at nearly all International Red Cross Conferences since 1884. At the First Hague Peace Conference in 1899 he was elected President of the Second Commission which dealt with the 1874 Declaration of Brussels (concerning the laws and customs of war on land) and with the Red Cross in time of naval war. In the Second Peace Conference in 1907 he served as President of the Fourth Commission, that on maritime law, which was a task particularly sensitive due to the Anglo-German rivalry in this field.

There are some surprising similarities with the life and work of another self-made man who had lived one century before. They are worth being mentioned here, although no family relationship exists: Georg Friedrich von Martens (1756-1821) from Hamburg, became professor

of law in Göttingen in 1783. He was ennobled in 1789, served as a counsellor of state by the Prince Elector of Hanover since 1808, was appointed as President of the financial section of the council of state of the Kingdom of Westphalia in 1810, and a privy cabinet councillor (Geheimer Kabinettsrat) by the King of Hanover since 1814. This Martens was the editor of another famous collection of treaties (Recueils des Traités), which was later continued by his nephew Karl von Martens and numerous later scholars, covering international treaties from 1761 onwards, until 1944.

While I always looked at efforts in paying tribute to Friedrich von Martens as a noble competition in which Estonians, Russians, Germans and the Red Cross have a privileged role to play, we know from Jaan Kross' famous novel that German cultural roots were not dominating Martens' life and work. He was brought up in St. Petersburg, ennobled by the Tsar², and was never registered in the matricles of the knightage of Livonia (Livländische Ritterschaft) or one of the other three

knightages (that is of Estonia, Courland and the Isle of Ösel/Saaremaa), which were all German at the time. One can imagine that his contributions at the Hague Peace Conferences might not have always been vigorously supported by the German delegation, although he was on excellent terms with General von Voigt-Reetz and other German delegates since the Brussels conference in 1874.

Martens was a true internationalist of his time. His academic and diplomatic standing was widely recognised. In his capacity as a renowned international lawyer he had soon become an active Member of the Institut de Droit International, where he authored projects on consular jurisdiction in the Orient (Munich 1883) and a convention on the publication of international treaties (Geneva 1892). He received honorary degrees from universities such as Oxford, Cambridge and Yale and was granted membership of the prestigious Institut de France. For his services as arbitrator there had been conferred upon him the most honourable title, 'Lord Chief Justice of Christendom'. In

1902 he came very close to receiving a Nobel Peace Prize. He died in St. Petersburg on 20 June (7 June old style) 1909.

Until today, his influence on the application and further development of the law of armed conflict is connected with the "Martens' Clause" which, indeed, forms "part of the absolute core of knowledge which all legal experts interested in international humanitarian law must possess"³. This clause was developed in a conciliation process in the Second Commission at the 1899 Hague Conference, when a group of smaller powers led by Belgium did not agree with the majority on the rights and duties of armies of occupation, but demanded an unlimited right of resistance for the population of occupied territories. Martens proposed to include in the Preamble of the Hague Convention Respecting the Laws and Customs of War on Land the following:

"Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and

belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the dictates of the public conscience”.

This proposal was greeted by applause, and the Convention to which the Hague Regulations Respecting the Laws and Customs of War on Land were annexed, was adopted unanimously⁴. In fact, in the dispute which was solved by Professor Martens with such elegance, no concessions were made as to the full application of legal rules: the rights and duties of armies of occupation were fully incorporated in Section III of the Hague Regulations (Military Authority Over the Territory of the Hostile State),⁵ and no combatant rights were accepted for resistance fighters once military occupation was established.

In his own written accounts of the First Hague Peace Conference, Martens did not mention this important personal contribution to the outcome and final success of the multilateral negotiations. In the first publication for American readership⁶, he

rather emphasised the conference achievements for international arbitration, not without referring to the landmark development of the *ius in bello* which had been achieved at The Hague. He expressly stated that the Second Commission of the conference (which he had chaired) had accomplished its task in full. But the main parts of his report were focussing on the possibilities for peaceful settlement of disputes by arbitration which he considered as a realistic option, worth being pursued with the greatest efforts. Martens underlined the importance of the 1899 conference in comparison with similar events in the 19th century. In his opinion, the Congress of Vienna in 1815 had left no leading provision concerning the political interests and the territorial rights of nations which was still in force, except for “a few provisions which concern navigation of international streams and the declaration that the slave-trade is abolished forever”. The Congress of Paris of 1856, by which the Crimean war was ended, had left nothing behind which tends to the pacific and progressive development of

international relations, except for rearranging the status quo in Turkey and the famous declaration on maritime law. The Congress in Berlin 1878 “had in view nothing but the political interests of the [participating] nations, and political interests change and develop under the influence of circumstances, of time and the prejudices of the nations”. The 1899 Conference at The Hague, however, “will ever remain the foundation, the corner-stone, of every useful attempt made towards the establishment of normal and peaceful relations between the nations, and of creating an order of things more in conformity with the permanent and legitimate interest of the nations independent of the transitory aspirations of statesmen”⁷.

One year later, Martens published a book on the history of the First Hague Peace Conference⁸ in which such ideas were further pursued, but again no reference to the Martens Clause was made. Another year later, his voluminous book on the 1874 Brussels Conference and the First Hague Peace Conference was published⁹. Here Martens gave a detailed ac-

count of his role as President of the Second Commission and in extenso reproduced statements he had made both at the beginning and the end of that conference in which he had eloquently expressed himself against any temptation to let the interests of power triumph over humanity. He argued in favour of clear and unequivocal interpretations and even raised the question as to who would profit more from doubts and incertitude: the weak or the powerful? Again he did not dwell on the preamble provision of the Hague Convention Respecting the Laws and Customs of War on Land which he himself may have looked at as an episode. But he strongly underlined one of the driving ideas behind all activities of developing the laws of war: 'Si la limitation des armements n'est pas décidée, ne doit-on pas au moins atténuer l'usage et les effets désastreux de certaines armes au cours des guerres entre nations civilisées?'¹⁰

The Martens Clause, however, was confirmed at the Second Peace Conference in 1907,¹¹ and, as soon as international cooperation on further developing Hague

law could be resumed after two world wars and many other conflicts in the 20th century, the legal community has again put new emphasis to Martens' approach of securing compromise solutions without excluding further resort to principles of international law, deriving from established custom, principles of humanity and the dictates of public conscience. In Nuremberg the Martens Clause was invoked in response to assertions that the Nuremberg Charter, as applied by the tribunals, constituted retroactive penal legislation and that deportation of inhabitants of occupied territories was prohibited by, and constituted a crime under customary law¹². In the Krupp Trial (1948), the United States Military Tribunal declared that the Martens Clause was much more than "a pious declaration" but rather an element of "the legal yardstick to be applied if and when the specific provisions of the [Hague] Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare"¹³. Elements of the Martens Clause had been recognised al-

ready in Articles 63/62/142/158 respectively of the four Geneva Conventions of 1949, which provide that any "denunciation shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience".

On the background of this legal development it was important to also reaffirm the Martens Clause in the Additional Protocols of the Geneva Conventions which finally achieved the task to bring Hague law and Geneva law closely together. I still remember my participation as a young delegate at the 1973 Red Cross Conference in Teheran: when I was given the floor by the conference President, Jean S. Pictet, I proposed to revive the famous Martens Clause in the forthcoming text of the Additional Protocols of the Geneva Conventions. My reference, speaking as a Western German, to the outstanding 'Russian' delegate at the Hague Peace Confer-

ences in 1899 and 1907 was met with some surprise in the Soviet delegation in 1973, but the proposal was generously supported and later incorporated in Art. 1 (2) of AP I¹⁴ and the Preamble (para. 4) of AP II¹⁵.

It has been observed that the language of AP I “may have deprived the Martens Clause of its intrinsic coherence and legal logic: by replacing ‘usages’ with ‘established custom’ the Protocol conflates the emerging product (principles of international law) with one of its component factors (established custom) and raises questions about the function, role, and necessity of the uncodified principles of humanity and dictates of public conscience. The original wording had a coherence that the Protocol lacks. It is not at all clear that this result was intended or realized by its drafters.”¹⁶ Indeed, no such limitation was intended in these negotiations, and a strict linguistic approach should not obscure the policy effects that were pursued and finally reached at the Diplomatic Conference.

The developments during the last three decades show that Martens’ famous clause

has vigorously supported the adoption of further international instruments, such as the 1980 Convention on Certain Conventional Weapons¹⁷ (which incorporated the clause in the Preamble para. 5), the 1995 prohibition of anti-personnel laser weapons¹⁸, the 1997 prohibition of anti-personnel land mines¹⁹ and the 1998 Rome Statute of the International Criminal Court²⁰. Without the Martens Clause many issues would have led to long controversies which might have stalled the negotiations. The Clause points to the fact that conventional law is imperfect and further improvements have to be achieved in the light of general principles and custom. By this it has proved the French wisdom that ‘il n’y a plus permanent que le provisoire’²¹. But the contents of the clause, highly important as it is, must not be over-interpreted.

For the interpretation of the Martens Clause, three different aspects have been mentioned in legal literature²²: the Clause first serves as a reminder that customary international law continues to apply after adoption of a treaty norm²³. In a broader

sense, the Clause provides that something that is not explicitly prohibited by a treaty is not *ipso facto* permitted²⁴. The Clause is also phrased dynamically so as to support the opinion that conduct in armed conflicts is not only judged according to treaties but as well to the principles of “natural law” as expressed by international law derived from established custom, from the principles of humanity or from the dictates of public conscience, thus resulting from any of these sources or from their combined significance²⁵. To consider these different interpretations as being exclusive of each other, would be less than convincing. All three aspects may well be supplementing each other. But as Christopher Greenwood had explained²⁶, the public conscience is too vague a concept to be used as the exclusive basis for a prohibition of specific means or methods of combat.

This latter aspect was extensively discussed by the International Court of Justice in its Advisory Opinion on the legality of the threat or use of nuclear weapons²⁷, after intensive debate in literature in which many arguments used by the

Court had in fact been anticipated²⁸. In its Opinion the Court referred to the Martens Clause as “an effective means of addressing the rapid evolution of military technology” without, however, drawing specific conclusions from such assessment²⁹. In view of controversial state submissions, in particular by Australia, Japan, Nauru, the Russian Federation, and the United Kingdom, the argument was not driven any further. However, Judges Koroma, Shahabuddeen, and Weeramantry in their dissenting opinions offered interesting insight in the meaning of the Clause and its significance.

The forthcoming ICRC study on customary international humanitarian law is influenced by Martens' underlying ideas as much as my own project in the International Institute of Humanitarian Law, San Remo³⁰, which is designed to develop a Manual on the Protection of Victims of Non-international Armed Conflicts³¹.

The impressive personality of Friedrich von Martens, his strong involvement in many international activities which went far beyond Russian foreign policy of his time, and his lasting contribution to in-

ternational rules concerning the peaceful settlement of disputes and humanitarian protection of the weak are worth being remembered as a great service to mankind.

¹ Jaan Kross, Professor Martensi äräsõit, Tallinn 1984 [Le départ du professeur Martens, Paris 1990; Professor Martens' Departure, Tallinn 1994; Уход Профессора Мартенса, Moscow 1996; Professor Martens' Abreise, Hamburg 2002].

² The date and circumstances of this ennoblement are difficult to trace. While it is undisputed that he called himself and was referred to as ‘von’ or ‘de’ Martens in publications since the early 1870s, this title might have been bestowed upon him either with one of the more distinguished Russian Orders, or simply with his appointment as a full professor. His social advancement was the more remarkable, as it was exclusively based on his professional merits.

³ International Review of the Red Cross N° 317, 1997, Note from the Editor, Dr. Hans-Peter Gasser, p. 124.

⁴ Vladimir Pustogarov, Fyodor Fyodorovich Martens (1845-1909) a humanist of modern times, in: International Review of the Red Cross, No 312, 1996, pp. 300-14 [310-11]. Professor Vladimir V. Poustogarov was awarded the Martens Prize of the Russian Academy of Science in 1996. He also published a biography on F. Martens (Пустогаров, В.В., “С пальмовой ветвью мира: Ф. Ф. Мартенс – юрист, дипломат,

публицист”, Moscow, 1993) in which reference is made to the Estonian biography by E. Rahumaa and P. Järvelaid, #; Фридрих Фромголд (Фёдор Фёдорович) Мартенс и юристы Татурского университета, Tartu ülikooli teaduslikud sidemed, XVI, Tartu 1985.

⁵ This Section of the Hague Regulations has been replaced by the IVth Geneva Convention of 1949.

⁶ F. de Martens, International Arbitration and the Peace Conference at The Hague, in: The North American Review, Vol. CLXIX, N° 516 (1899), 605-24 [http://cdl.library.cornell.edu/ Cornell University Making of America].

⁷ Ibid. pp. 622-3.

⁸ F. de Martens, La Conférence de la Paix à La Haye. Etude d'histoire contemporaine, traduit du russe par M. le Comte de Sancé (Paris 1900).

⁹ F. de Martens, La Paix et la Guerre. La Conférence de Bruxelles 1874, Droit et devoirs des belligérants (leur application pendant la guerre d'Orient 1874-1878), La Conférence de La Haye 1899. Traduit du russe par M. L. Comte N. De Sancé (Paris 1901).

¹⁰ Ibid., p. vi.

¹¹ The slightly revised version of 1907 reads: “Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public con-

science.” Again, no particular reference by Martens as to the reaffirmation and significance of this clause in 1907 can be found. However, at the last meeting of the Fourth Commission on 26 September 1907 he was reported to summarise its achievements in the following terms: “If from the days of antiquity to our own time people have been repeating the Roman adage ‘Inter arma silent leges’, we have loudly proclaimed ‘Inter arma vivunt leges’. This is the greatest triumph of law and justice over brute force and the necessities of war.” (J.B.Scott, *The Conference of 1907, The Proceedings of the Hague Peace Conferences, 1921, Vol. III*, p. 914.

¹² Altstötter, 6 Law Reports of Trials of War Criminals, 40 [58-59].

¹³ Krupp 10 Law Reports of Trials of War Criminals, 69 [133]. Erroneously, in this judgment the Martens Clause was referred to the „Belgian delegate, Martens“, but there was no Belgian delegate of this name at the Hague Peace Conference.

¹⁴ Art. 1 (2) 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [www.cicr.org/ihl] (AP I): “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”

¹⁵ Preamble (para. 4) 1977 Geneva Protocol II Additional to the Geneva Conventions of 12

August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [www.cicr.org/ihl] (AP II): „Recalling that in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience“.

¹⁶ Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, in 94 *AJIL* (2000), 78-89.

¹⁷ 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects [www.cicr.org/ihl].

¹⁸ 1995 Protocol IV on Blinding Laser Weapons to the UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects [www.cicr.org/ihl].

¹⁹ 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction [www.cicr.org/ihl].

²⁰ 1998 Rome Statute of the International Criminal Court [www.un.org/law/icc/statute, www.iccnw.org].

²¹ George H. Aldrich and Christine M. Chinkin, *A Century of Achievement and Unfinished Work*, in: 94 *AJIL* (2000), 90-98 [97].

²² Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, in: *International Review of the Red Cross*, No 317, 1997, pp. 125-134.

²³ Christopher Greenwood, „Historical Development and Legal Basis“, in: Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, reprint Oxford 1999, p. 128-9.

²⁴ Bruno Zimmermann in: Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva 1987, p. 39.

²⁵ Helmut Strebel, *Martens’ Clause*, in: Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 3 (1997), pp. 326-327; Theodor Meron, loc. cit. (supra, note 16).

²⁶ Supra (note 23).

²⁷ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, 226; 35 *ILM* 809 (1996), [www.icj-cij.org/icjwww/idecisions.htm].

²⁸ Fr. Münch, *Die Martens’sche Klausel und die Grundlagen des Völkerrechts*, in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 36 (1976), pp. 347-73; Shigeki Miyazaki, *The Martens Clause and international humanitarian law*, in: Christophe Swinarski, *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet*, Geneva-The Hague 1984, pp. 433-44; Nagendra Singh and E. McWhinney, *Nuclear Weapons and Contemporary International Law*, 2nd ed. Dordrecht 1989, pp. 46-47.

²⁹ Supra (note 27), para. 78.

³⁰ See www.ihl.org.

³¹ Tentative Text available through the author, DieterFleck@t-online.de.

The Use of Force in the Modern World: Recent Developments and Legal Regulation of the Use of Force

By René Värk*

The use of force is undoubtedly among the most debated topics within international law as well as international relations. Indeed, the rules concerning the use of force form a central part of the international legal system, and, together with other fundamental principles, they have for a long time provided the framework for organised international intercourse and successful co-existence of states. The circumstances in which the use of force might be justified concerned already the earliest legal writers, for example, Aristotle and Cicero, and the topic has remained at the centre of

political and legal debates since those early times. Both domestic societies and the international community need to limit and regulate the use of force in order to secure peaceful, harmonious and mutually beneficial co-existence of individuals or states within the respective societies or the international community. The domestic legal systems have generally managed to monopolise the use of force in favour of the governmental institutions, which means that people have given up their right to use force, save for self-defence, in return of the guarantee that the mentioned institutions will instead protect their

person and property. The international legal system has attempted to move in the same direction since the end of the First World War, but, due to its characteristic features, the task has proved quite difficult. This is so, because the international legal system lacks an effective enforcement mechanism, which can ensure the observance of international law if necessary. Unlike a domestic legal system, which can utilise different law enforcement authorities, the international legal system has to rely simply on such means as consent, good faith and reciprocity. Moreover, states do not only

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follow international law when planning their conduct, but take into serious consideration also their political preferences and vital interests. These considerations often tend to override the obligations under international law, and therefore the armed forces of states are sometimes engaged in real military operations in addition to numerous military training exercises. Consequently, the use of force very often constitutes a clear violation of international law because the official justifications for such actions are usually based on violent interpretations of the relevant law or simply on political propaganda. Although the law itself is actually reasonably clear on the question of the legality of the use of force and prescribes a very limited number of exceptions to the general prohibition of the use of force, states and legal authors have for a long time advocated additional exceptions in order to further their individual interests or to cope with new developments and problems at the international level. The present article attempts first to describe the current legal

regulation of the use of force and then to analyse the recent developments and their influence on the legality of the use of force by states.

1. Legal regulation under the United Nations Charter

The United Nations was created in a mood of popular outrage after the horrors of the Second World War. The war had caused more destruction than any previous armed conflict and urged the leaders of states to take steps to secure and maintain international peace and security in the future and “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”.¹ The creation of the United Nations resulted in the most important and certainly the most ambitious modification of international law in the twentieth century, namely in outlawing the use of force in international relations. Such a rule is prescribed in Article 2, paragraph 4 of the United Nations Charter,

which states that “all Members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. This is accompanied by another underlying principle, enshrined in Article 2, paragraph 3, which demands that “all Members [of the United Nations] shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”.² In order to overcome the deficiencies of the international legal system in enforcing international law, the framers of the United Nations Charter also devised a collective security system, controlled by the Security Council, to ensure the compliance of the member of the United Nations with the mentioned rules.

This provision is the most important norm of contemporary international law, which encompasses the primary values of the inter-state system – the defence of state

sovereignty and state autonomy – and declares international peace and security to be the supreme value of the international legal system. However, the general prohibition of the use of force by states for their selfish interests as well as for benign purposes attempts to secure not merely sovereignty and autonomy of a single state, but a fundamental order for all members of the international community. The United Nations Charter declares international peace and security to be more compelling than inter-state justice, more compelling even than human rights or other human values.³ Although Article 2, paragraph 4 was originally intended to be legally binding only for the members of the United Nations, the provision is no more considered just another contractual international legal norm, but what is known as a peremptory norm of international law or *ius cogens* norm.⁴ This is defined as “a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted, and which can be modified only by a subsequent norm of

general international law having the same character”.⁵ Generally speaking, the body of *ius cogens* norms represents overriding principles of international law which are so fundamental that they must be followed at any time and in any place, for example, the prohibition of aggression, slavery, torture, racial discrimination, genocide and violation of the right of self-determination.⁶ As *ius cogens* is essentially a form of customary international law, this is legally binding for all members of the international community, regardless of whether they have expressed their approval or disapproval of a particular norm, or not.⁷ When taking into consideration the characteristics of *ius cogens* norms, the obligations deriving from them are not like usual contractual obligations, but are obligations towards the international community as a whole. This means that every state may feel that its essential interests are breached due to the violation of an *ius cogens* norm, and therefore not only the directly injured state, but also any other state is entitled to invoke the responsibility of the violating state.⁸

1.1. Interpretation of Article 2, paragraph 4

Undoubtedly, the wording of Article 2, paragraph 4 is a considerable improvement compared to previous attempts to outlaw the use of force, but at the same time the text of this provision is still not without ambiguities. Below we shall consider the elements of Article 2, paragraph 4 as well as relevant international documents and state practice and try to determine the content and scope of the prohibition of the use of force.

Article 2, paragraph 4 is well drafted in so far as it talks about “the threat or use of force”, not about “war”.⁹ The term “war” refers to a narrow and technical legal situation, which begins with a declaration of war and ends with a peace treaty. The war was generally prohibited before the Second World War, but states found a way to avoid such prohibition. For example, Japan refused to declare war on China and called its military operations in Manchuria (1932-1941) an incident in

order not to violate the prohibition of waging war. In the light of such experiences, the term “use of force” was preferred because it covers all forms of hostilities, both technical wars and incidents falling short of an official state of war, which ranges from minor border clashes to extensive military operations. Therefore the prohibition of the use of force is not dependent on how the involved states prefer to define their military conflict.

Now, Article 2, paragraph 4 has several negative, or at least problematic, aspects. First, the provision talks about “force”, not “military force”, and therefore there has always been a dispute over the exact scope of the term “force”. The prevailing and undoubtedly correct view is that in this context the scope of the term “force” is limited to military force and does not include political or economic coercion.¹⁰

Second, the provision stipulates that the members of the United Nations should refrain from the threat or use of force “against the territorial integrity or po-

litical independence of any State, or in any other manner inconsistent with the Purposes of the United Nations”. Does this truly mean that the prohibition is conditional, and force can be used for a wide variety of purposes because it is not aimed “against the territorial integrity or political independence of any State”? This line of reasoning has been utilised to justify numerous humanitarian and pro-democratic interventions as well as other “altruistic” uses of force. However, these clauses were never intended to restrict the scope of the prohibition of the use of force, but, on the contrary, “to give more specific guarantees to small States” and therefore they “cannot be interpreted to have a qualifying effect”.¹¹ The International Court of Justice (ICJ) supported such interpretation in the *Corfu Channel* case,¹² where the United Kingdom argued that it had a right to intervene and sweep the minefield in the Albanian territorial sea, which is a part of state territory, in order to guarantee the right of innocent passage, and to produce mines as evidence

before an international court. The ICJ regarded such an intervention as a “manifestation of a policy of force, which has, in the past, given rise to most serious abuses” and declared that it cannot “find a place in international law” because the “respect for territorial sovereignty is an essential foundation of international relations”. Thus, an incursion into the territory of another state constitutes an infringement of Article 2, paragraph 4, even if the incursion is not intended to deprive that state of part or whole of its territory, and the word “integrity” has to be actually read as “inviolability”.¹³ However, the clauses “the territorial integrity” and “political independence” should not distract our attention from the phrase “any other manner inconsistent with the Purposes of the United Nations”. The paramount and overriding purpose of the United Nations is to maintain international peace and security, and to that end to prevent and remove threats to peace and suppress acts of aggression and other breaches of peace.¹⁴ Indeed, every single use of force

can potentially endanger that precious and often unstable international peace and security. The Second World War saw unprecedented suffering, and thus the United Nations Charter represents the universal agreement that “even justified grievances and a sincere concern for “national security” or other “vital interests” would not warrant any nation’s initiating war”.¹⁵ Therefore, such concepts as humanitarian intervention and pro-democratic intervention cannot be seen as legal, because by furthering the democratic human rights of the peoples of particular states or eliminating despotic and undemocratic governments in other states, the intervening states violate both the territorial integrity and political independence of the relevant states as well as endanger international peace and security (at least on a regional level). Moreover, decisions to intervene are based on the opinion and understanding of one or a few states only, and not on the general consensus of the international community. The United Nations Charter stresses that it is for the organisation “to ensure that armed force

shall not be used, save in the common interest”. Unfortunately, state practice indicates that the true reasons for intervention are usually egoistic rather than altruistic and aim to further the political or economic interests of the intervening states.

In conclusion, the United Nations Charter has established a general and unconditional prohibition of the use of force in international relations.

***1.2. Exceptions to Article 2,
paragraph 4***

As every rule, the prohibition of the use of force is not without exceptions. Although certain states and legal authors have furthered several, and at least questionable, justifications for lawful use of force, only two explicitly stated legal exceptions to the general prohibition of the use of force exist under the United Nations Charter:

- individual and collective self-defence (Article 51);
- Security Council enforcement actions (Chapter VII).

***1.2.1. Individual and collective
self-defence***

Without a doubt, every state must have the right to defend itself when being attacked. All instruments, which have restricted or prohibited the use of force, have explicitly or implicitly recognised such a right. Similarly, Article 51 states that “nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations”. Although it may sound clear enough, there is a serious disagreement about the circumstances in which the right of self-defence may be exercised. We shall consider those problems in the next chapter and we shall do so in the light of recent developments and cases.

However, at this point we should pay attention to the fact that states have the right to use force for self-defence from the beginning of an armed attack “until the Security Council has taken measures necessary to maintain international peace

and security”.¹⁶ In order to ensure that the Security Council can take the measures necessary, the members of the United Nations should immediately inform the Security Council of the measures taken in the exercise of the right of self-defence. What if the Security Council fails to act or does not take the measures necessary to maintain international peace and security? The right to exercise self-defence does not disappear as soon as the Security Council has simply passed on the matter; it continues until the Security Council has taken effective measures rendering the armed responses by the victim state unnecessary and inappropriate.¹⁷ Otherwise, the self-defensive military actions must stop when their purpose, repelling the armed attack, has been achieved.

1.2.2. Security Council enforcement actions

Taking into consideration the negative experience with the League of Nations, states decided to establish a more advanced and effective collective security system in

order to enforce international peace and security and punish the violators of the prohibition of the use of force. The Security Council was conferred the primary responsibility for the maintenance of international peace and security.¹⁸ The Security Council consists of fifteen members of which five are permanent members (China, France, Russia, the United Kingdom and the United States) and ten are non-permanent members (elected for two years by the General Assembly). Although the Security Council is undoubtedly a political institution which does not necessarily adopt its decisions on the basis of legal arguments, but rather on political arguments, its resolutions have a legally binding effect on the members of the United Nations, and they are obliged to follow these resolutions.¹⁹

When maintaining international peace and security, the Security Council acts under Chapter VII, which has the promising title of “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”. As a watch-dog, the Security Council shall determine, ac-

ording to Article 39, the existence of any threat to or breach of the peace and act of aggression, and shall make recommendations or decide what measures shall be taken to maintain or restore international peace and security. After determining any of those situations, the Security Council may decide upon non-military action, for example, economic sanctions,²⁰ or authorise military action with “air, sea, or land forces as may be necessary to maintain or restore international peace and security”.²¹ Such collective authorisation to use force should ensure that military intervention is not arbitrary, but only what is necessary to further the interest of the whole international community. However, the Security Council cannot compel any state to participate in military operations; the authorisation is more of a recommendation or justification to use force rather than a command, and therefore the Security Council has to rely on the hope that there are states, which, for one reason or another, wish to engage themselves in such operations. The authorisation also has another aspect,

namely that the target state is barred from legally invoking the right of self-defence and later claiming reparations for damage caused by the military operations.

2. Problematic issues and recent developments

As mentioned above, any specific use of force can be regarded lawful only if it can be based on an exception to the general prohibition of the use of force, which is valid as a matter of law. The Security Council authorisation to use force is usually clear enough and rarely results in controversial interpretations.²² But the right of self-defence has proved problematic and has been used, through strange and violent interpretations, to justify a number of military operations directed against another sovereign state. The majority of states and legal authors insists that the right of self-defence must be interpreted narrowly so that it corresponds to an actual armed attack. Another school prefers a wider interpretation and argues that states may exercise self-defence in an an-

tipicatory or even pre-emptive manner and that this right does not require an actual armed attack. The proponents of this concept have so far been the minority, but the question of whether international law permits or should permit the use of force not merely in response to existing violence, but also to avert future attacks, has taken on added significance in the aftermath of the 11 September 2001 events. Below we shall consider certain aspects relating to the right of self-defence and we shall do that in the light of the events in New York, Afghanistan and Iraq.

2.1. Definition of “armed attack”

To be precise, Article 51 refers to the right of self-defence “if an armed attack occurs”. If this is indeed a prerequisite of the right to exercise a lawful self-defence, then we have to establish the scope of the term “armed attack”. First, according to the rules of the law of treaties, the interpretation of a treaty must start with the “ordinary meaning to be given to the terms of the treaty”.²³ The usual method

to determine the ordinary meaning of a word is to refer to dictionaries. In this case different English dictionaries suggest that an attack is an actual action, not merely a threat. Furthermore, we should take into consideration other parts of the United Nations Charter, namely Article 2, paragraph 4. This prohibits both the actual use of force as well as the threat of force, and it is difficult to conceive that the drafter of the United Nations Charter, due to an oversight, simply forgot to add the words “or threatens” to Article 51.²⁴ Moreover, an interpretation of Article 51, which excludes the threat of an armed attack, is more likely compatible with the main purpose of the United Nations to restrain the unilateral use of force. So, according to an overwhelming majority within the legal doctrine, the definition of armed attack refers to an actual armed attack which has occurred, not simply to threats.²⁵

After the events of 11 September 2001, it is necessary to ask whether the concept of armed attack is capable of including a terrorist attack. Article 51 does not specify

that the armed attack has to originate from a state, but this condition may be taken as implicit. Self-defence is an exception to the general prohibition of the use of force and Article 2, paragraph 4, which contains that prohibition expressly concerns states.²⁶ However, if a state is actually involved to a sufficient degree in a non-state armed attack, it is acceptable that such an involvement is equivalent to an armed attack and may therefore entail the same consequences as an armed attack by a state. The basis for such argument can be found from the Definition of Aggression, adopted by the General Assembly, which defines as an act of aggression, *inter alia*, “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to “an actual armed attack conducted by regular forces” or its substantial involvement therein”.²⁷ The ICJ has accepted this provision as being an expression of customary international law, although the General Assembly resolution itself is not legally binding.²⁸ Such

a situation can, in legal reasoning, be called a constructive armed attack or a situation equivalent to an armed attack.²⁹

Therefore, a non-state armed attack may trigger the right of self-defence if such an attack is of sufficient gravity, and the involvement of a state is of a sufficient degree. The level of violence used in the terrorist attacks of 11 September 2001 undoubtedly reached the level of sufficient gravity, and if those attacks had been the work of a state, they would have been classified as an armed attack for the purpose of Article 51. So, it would indeed be strange to regard the right of self-defence to be dependent upon whether respective violent attacks were carried out by a state or non-state actor. The constructive armed attack is not completely alien to international legal reasoning, but whether such construction has actually become positive international law is another question. It is worth mentioning that the famous *Caroline* dispute,³⁰ which has been cited to support the wider concept of self-defence, shows that an armed attack need not emanate from a state. Indeed, in that

situation the threat came from a non-state group of the kind most would probably call terrorist today. Nowhere in the correspondence between the United Kingdom and the United States or in the subsequent reliance on the Webster formula on self-defence has it been hinted that the applicability of the Webster formula is dependent on the source of armed attack.³¹ Nevertheless, the international reaction after the 11 September events confirms that the concept of armed attack is not indeed limited to state acts. The Security Council expressly recognised the right of self-defence in two resolutions adopted in the immediate aftermath of the terrorist attacks.³² The resolutions do not explicitly state that terrorist attacks equal to armed attacks, but the recognition of the right of self-defence had to mean that the Security Council considered those terrorist attacks as armed attacks for the purpose of Article 51. At that time, it was already known that those attacks were most likely to be the work of a terrorist organisation rather than a state. The position of the Security Council was

widely accepted, and similar positions were adopted by other international institutions. For example, the North Atlantic Council agreed that “if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all”.³³

2.2. Anticipatory or pre-emptive

Although most authors and politicians use the terms “anticipatory” and “pre-emptive” interchangeably, the distinction between these two terms offers a useful precision. The anticipatory military action refers to military action that is taken against an imminent attack. For example, if one state has learnt that another state has assembled its armed forces at its border, and the beginning of a military assault is just a matter of time, then, instead of waiting for the actual assault to begin,

it attacks first in order to protect its nationals and prevent possible damages. The pre-emptive military action describes military action that is taken against a threat which has not yet materialised and which is uncertain and remote in time. For example, if one state has learnt that another state has acquired weapons of mass destruction and fears that these weapons may be used against it in the future, then, instead of waiting for the assault to become imminent, it attacks first the buildings where these weapons are kept and destroys the weapons in order to prevent the threat or assault ever becoming even imminent. Now we shall consider both of these concepts in relation to self-defence.

2.2.1. Anticipatory self-defence

Article 51 explicitly requires an “armed attack” as a pre-condition to the use of defensive force; states have the right to exercise self-defence “if an armed attack occurs”. Thus the terms of Article 51 contrast with the terms of Article 4, paragraph 2, because the latter prohibits both the

use of force and the threat of force. All this permits to conclude that neither the threat of force nor an imminent armed attack justifies the use of defensive force under the United Nations Charter.³⁴ This interpretation corresponds to the predominant state practice, since a general right to anticipatory self-defence has never been invoked under the United Nations Charter.³⁵ The intent of the drafter and the purpose of the United Nations Charter were to minimise the unilateral use of force in international relations, and to draw a line at the precise point of an armed attack, an event the occurrence of which could be objectively established, served the purpose of eliminating uncertainties.³⁶ Indeed, the alleged imminence of an armed attack usually cannot be assessed by means of objective criteria, and therefore any decision for anticipatory action would necessarily have to be left to the discretion of the state concerned. Such discretion involves a mentionable possibility of mistake, which may have devastating results, as well as a manifest risk of abuse, which can seriously undermine the

prohibition of the use of force. Moreover, the argument that an armed attack begins with planning, organisation and logistical preparation is not plausible, because then an armed attack would begin with pencil and paper rather than with bullets and bombs. Once again, there is no reason to suggest that the plain language of Article 51 does not convey precisely the meaning that was intended – an actual armed attack.³⁷

Although the arguments that the United Nations Charter permits anticipatory self-defence are unpersuasive, several states and legal authors have more plausibly and successfully defended the right of anticipatory self-defence under customary international law. True enough, anticipatory self-defence has some basis under customary international law, and in some limited cases it may be seen as lawful. The proponents of anticipatory self-defence refer to the famous *Caroline* incident.³⁸ The 1837 rebellion in the colonial Canada found active support from American volunteers and private suppliers operating out of the border region

in the United States. The steamship *Caroline* was involved in the supply of both men and materials to rebel-occupied Navy Island in the Cippewa Channel, which served as a base for the volunteers' attacks on the Canadian riverside and on British vessels. The Government of the United States knew about these activities, but did little to prevent them. Therefore a British force from the Canadian side crossed the border into the United States, seized the *Caroline*, set her on fire and cast the vessel adrift so that she fell to her destruction over the Niagara Falls. Two citizens of the United States were shot dead aboard the *Caroline* and one British officer was arrested and charged with murder and arson.³⁹ The British government justified its action as being necessary for self-defence and self-preservation, since the United States did not hinder the threatening activities on its territory; it also cited the perceived future threats posed by the operations of the *Caroline*. Reply of the U.S. Secretary of State Daniel Webster to the British Government has long been regarded as a definitive state-

ment of the right of self-defence in international law. Webster recognised that the right of self-defence did not depend upon the United Kingdom having already been the subject of an armed attack, but accepted that there was a right of anticipatory self-defence in the face of a threatened armed attack, provided that there was "a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation".⁴⁰ The Webster formula has since then been used frequently by states and judicial institutions; even the International Military Tribunals at Nuremberg and Tokyo referred to the formula when rejecting the defence plea that the German invasion of Norway had been an act of anticipatory self-defence.

This may suggest that the right of anticipatory self-defence against an imminent armed attack was a part of customary international law at that time, but whether this is still true today is another question. The restrictionist school – the supporters of a narrower right of self-defence – argues that the customary international law, predating the United Nations, could not

have survived the adoption of the United Nations Charter, and hence Article 51 is the only, true and adequate representation of the right of self-defence in the United Nations Charter era.⁴¹ The counter-restrictionist school – the supporters of a wider right of self-defence – claims that Article 51, by pledging not to “impair the inherent right of self-defence”, left intact and unchanged customary international law on self-defence predating the adoption of the United Nations Charter.

The so-called “inherent right” theory has numerous weaknesses. First, it may be contended that the right of self-defence is inherent not in natural law, but in state sovereignty. State sovereignty, however, has a variable content, which depends on the stage of development of the international legal order at any given moment.⁴² So, what may have been inherent in state sovereignty after the *Caroline* incident, namely, the right of anticipatory self-defence, was not necessarily inherent in state sovereignty when and after the United Nations was created. Indeed, the liberty

of every state to resort to war whenever it pleased was considered a right inherent in state sovereignty in the nineteenth century, but after the abolition of such a right after the Second World War, state sovereignty still survived, though losing one of its inherent components.

Second, the United Nations Charter was adopted for the very purpose of creating far wider prohibition of the use of force than existed under treaty or customary international law in 1945, let alone in 1837. Even if earlier customary international law allowed anticipatory self-defence, it does not mean that such self-defence was lawful under customary international law as it existed in 1945. To argue that customary international law was exactly the same in 1837 and 1945, one has to disregard the change in the field of regulating the use of force that took place in the 1920s and the 1930s as well as to treat both the Kellogg-Briand Pact and the United Nations Charter as irrelevant. The use of force in reaction to force was the only generally accepted view as to the justified use of force in self-defence, and

the delegations at the San Francisco Conference naturally did not regard the wording of Article 51 as being an innovation in its reference to self-defence.⁴³ In other words, it is questionable whether the right of anticipatory self-defence even existed at the very moment when different nations prepared the United Nations Charter. Nevertheless, let us suppose that the pre-United Nations customary international law allowing anticipatory self-defence did survive the inter-World War period and Article 51. But this still does not mean that the scope of self-defence was not fixed in customary international law in 1945, and it cannot be reasonably claimed that the customary international law is not susceptible to restrictions in the light of subsequent state practice.⁴⁴

Third, the supporters of the “inherent right” theory argue that the right of self-defence is unchangeable by the United Nations Charter and subsequent state practice. Indeed, some fundamental principles of international law are only with great difficulty, if at all, changeable by subsequent treaty or state practice. These

are the above mentioned *ius cogens* norms. However, no authority has ever identified the right of anticipatory self-defence as an *ius cogens* norm,⁴⁵ whereas the ICJ did identify the prohibition of the use of force as an *ius cogens* norm.⁴⁶

So far, the “inherent right” theory has been widely discredited by the great majority of states and legal authors. Due to the ambiguities and fogginess connected with it, states normally do not expressly advocate anticipatory self-defence, in fear of unleashing an uncontrollable creature. Indeed, there has been little *expressis verbis* support from states for anticipatory self-defence after the creation of the United Nations (if states actually exercise anticipatory self-defence, they do not call it by the true name, but refer simply to their inherent right of self-defence). State practice actually tends to support the opposite position. For example, in 1967 there was a remarkable assembly of armed forces in the Sinai Peninsula, near the southern frontier of Israel. When the United Nations peace-keeping forces were withdrawn from the buffer zone between the two

countries, Israel launched air strikes against Egypt, claiming that it had the right to anticipatory self-defence as the Egyptian forces had been deployed as part of an impending armed attack.⁴⁷ However, in the Security Council, the other states saw Israel’s first strike as a clear proof that Israel was an aggressor. Even those delegations which were more sympathetic towards Israel, namely the United Kingdom and the United States, refrained from any discussion of the permissibility of anticipatory self-defence.⁴⁸ So, Israel was the only state to examine the concept, and we now know that Israel acted on evidence that was little convincing. This example illustrates appropriately the possibility of mistake and the risk of abuse. A state may act forcefully in a situation without proper reason – the imminence of an armed attack proves to be a mistake of interpretation or a falsification on the part of the attacking state. Put simply, the right to anticipatory self-defence is dangerous to international peace and security, since it is open to abuse by powerful states.

Whatever customary international law may have been, or still is, on the matter, states have occasionally exercised anticipatory self-defence, whether calling it so or not. Sometimes other states have understood the need for such action, and they have been ready to accept politically and approve anticipatory self-defence in those specific cases. Indeed, a threat of an armed attack may be so direct and overwhelming that it is not feasible to require the future victim state to wait until the armed attack has actually started and then act in self-defence. In such a case, a situation equivalent to an armed attack exists.⁴⁹ To be sure that anticipatory self-defence is not exercised mistakenly or abusively, it must be shown that the other state has “committed itself to an armed attack in an ostensibly irrevocable way”.⁵⁰ However, all this does not amount to an open-ended endorsement of a general right to anticipatory self-defence. But it means that, in demonstrable circumstances of extreme necessity, anticipatory self-defence may be a legitimate way to exercise the state’s right to self-defence.⁵¹ The realities of the mod-

ern world and contemporary military capabilities seem to necessitate, in certain proved cases, anticipatory self-defence, because otherwise the United Nations Charter could be called a suicide pact. Common sense does not allow for a state to wait passively and accept its fate before it can defend itself. In a nuclear age and in the face of contemporary conventional warfare, the first attack (resort to non-defensive force) can have so formidably devastating results that the victim state is no longer capable of reacting in self-defence.

Such exceptional cases of anticipatory self-defence are confined to instances where an armed attack of sufficient gravity is imminent; the Webster formula has to be satisfied. The imminence depends on the factual circumstance of a particular case, because where an armed attack by weapons of mass destruction can reasonably be treated as imminent (due to impossibility or difficulty of affording an effective defence against such an attack once it has been launched), an armed attack by conventional means would not be regarded as such.

The permissibility of anticipatory self-defence is least controversial in the situation where, after an armed attack, there is clear and convincing evidence that the enemy is preparing to attack again. The victim state need not wait for a new attack to be mounted, but at the same time the self-defence measures must be carried out within a reasonable time from the initial attack, in order to fit the characterisation of self-defence during ongoing armed attack and not to be considered as an armed reprisal or punishment.⁵² The international community confirmed such an approach in relation with the 11 September events. The United States and its allies consistently based their justification for military action against Afghanistan on their right to self-defence, not on any collective security authorisation from the Security Council.⁵³ The coalition has argued that the 11 September terrorist attacks were part of a series of armed attacks against the United States, which had begun already in 1993, and that even more armed attacks in the same series were planned.⁵⁴ The United

States and the United Kingdom claimed to have had clear and convincing evidence that the United States faced on-going attacks; NATO members called the evidence “compelling”. After the launch of operation “Enduring Freedom”, the United States found documentary evidence in Afghanistan confirming that more armed attacks in the series were indeed being planned. So, the military operation in Afghanistan was itself justified, but the coalition was rightfully criticised for the extent of collateral damage and the means of warfare.

2.2.2. Pre-emptive self-defence

In September 2002, President George W. Bush submitted to the Congress a report on the national security strategy, which asserted, among other things, an evolving right to use force pre-emptively against threats coming from “Rogue States” and terrorists, possessing weapons of mass destruction.⁵⁵ The report stated that:

“The United States has long maintained the option of preemptive actions to

counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.”⁵⁶

There is nothing in contemporary state practice, case law or legal writing which would suggest that such a broad, even overly broad, construction of a situation equivalent to an armed attack is a part of current customary international law.⁵⁷ Such an approach is undoubtedly dangerous, and the application of the precautionary principle is alarming and un-

desirable. In the field of environmental law, the precautionary principle requires action to be taken to protect the environment even in the case of uncertainty about the danger. Now, if one would apply the same principle in connection with self-defence, the rule would read that “in the case of uncertainty, strike”. Such a conclusion is somewhat weird and widely open to mistakes or abuses; it is also difficult to understand how this can contribute to global stability and maintenance of international peace and security.

Pre-emptive self-defence is clearly unlawful under international law – states may not use force against another state when an armed attack is merely a hypothetical possibility, even in the case of weapons of mass destruction. The International Military Tribunals at Nuremberg rejected the argument of Germany that the invasion of Norway was a necessary act of self-defence in order to prevent a future Allied invasion and to pre-empt subsequent possible Allied attack from there.

When Israel attacked the Iraqi nuclear reactor in 1981, Israel specifically argued

that Article 51 allowed self-defence in order to pre-empt a threat to Israeli national security.⁵⁸ Israel explained that it had been forced to defend itself against the construction of nuclear weapons in Iraq, which would not have hesitated to use such weapons against Israel. The nuclear reactor, Israel argued, was to become operational in a matter of weeks, and Israel decided to strike before the nuclear reactor became an immediate and greater menace to Israel. So, Israel reacted neither to an actual armed attack nor to a situation equivalent to an armed attack, but instead to a potential and remote threat. All members of the Security Council disagreed with the Israeli interpretation of Article 51 and supported without reservations the resolution which declared “the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct”.⁵⁹ True, the Security Council did not reject anticipatory self-defence as such, but more likely concluded that Israel failed to demonstrate the imminence of an armed attack from Iraq.

There is no doubt that force can and should be used pre-emptively, but also no doubt that this is the prerogative of the Security Council. As mentioned above, Article 39 states that the Security Council shall determine the existence of any "threat to the peace" and, accordingly, shall make recommendations or decide what measures shall be taken to maintain or restore international peace and security. Nothing in the United Nations Charter suggests that the authority of the Security Council to take pre-emptive measures is limited to those threats that are imminent. The historical importance of the lack of pre-emptive action against Nazi Germany as a cause of the Second World War strongly suggests that the pre-emptive power of the Security Council was intended to be much more far-reaching than the power of individual states to take action as self-defence against a threat of an armed attack.⁶⁰ The collective security system should be the best means to fight the threats to international peace and security, because the Security Council is a collective institution which represents

better the interests and needs of the international community. Such collective system can also eliminate the cases, where a single state abuses the possibility of a threat or even fabricates a threat in order to further its political or economic interests.

The U.S.-led intervention to Iraq in March 2003 was clearly illegal in the light of the previous discussion. The coalition lacked a clear authorisation of the Security Council to use force as well as the other plausible legal justification for invasion, namely self-defence. Did Iraq attack anyone? Was there an imminent armed attack threatening someone? No! Iraq had not done anything that would have triggered the right of self-defence. There were merely accusations that Iraq was developing nuclear weapons and allegedly conspired with terrorists, especially with Osama bin Laden and al-Qaeda. But these accusations have not been convincingly and publicly proven. Furthermore, the mere possession of weapons of mass destruction without a threat of use does not amount to an unlawful armed

attack. Even if a state is forbidden to acquire or is ordered to destroy weapons of mass destruction, the violation of disarmament requirement does not itself amount to an armed attack or a situation equivalent to an armed attack. If the reasons for the invasion of Iraq had been well founded, legitimate and justified, and in the general and common interest of the international community, the United States and its allies would have obtained a proper authorisation from the Security Council. The members of the United Nations conferred upon the Security Council the primary responsibility for the maintenance of international peace and security.⁶¹ States do not have the right either to take over the responsibility of the Security Council or to assume individually a secondary responsibility.

3. Conclusion

Since the oldest times, the international legal system has been preoccupied with one important question: When is the use of force legal? Legal regulation of the use

of force has gone through a considerable evolution; starting with the “just war” doctrine in the ancient times, continuing with the complete liberty to use force from the seventeenth to the twentieth century and ending with the general prohibition of the use of force in the United Nations Charter. The latter recognises two explicit exceptions where states may legally use force, namely individual and collective self-defence and Security Council enforcement actions. The scope of self-defence has proved to be very difficult to determine, but we can still reach certain conclusions. First, all states have the right of self-defence against an actual armed attack. Second, states may have a limited right of anticipatory self-defence against an imminent armed attack of sufficient gravity under customary international law. The arguments that the United Nations Charter permits anticipatory self-defence are unpersuasive. Third, states do not have the right of pre-emptive self-defence against a threat which has not yet materialised and which is uncertain and remote in time. It is the exclusive respon-

sibility of the Security Council to deal with the threats to international peace and security; states do not have the right to exercise their own complementary or parallel responsibility. Fourth, an armed attack need not emanate from a state actor; a non-state armed attack may trigger the right of self-defence if such an attack is of sufficient gravity, and the involvement of a state is of a sufficient degree.

¹ Preamble of the Charter of the United Nations.

² Hereinafter all references to articles are to those of the Charter of the United Nations if not otherwise stated.

³ Louis Henkin, *International Law: Politics, Values and Functions*, Dordrecht: Martinus Nijhoff Publisher, 1990, p. 146.

⁴ The International Court of Justice has regarded the prohibition of the use of force as being “a conspicuous example of a rule of international law having the character of *ius cogens*”. *Military and Paramilitary in and against Nicaragua (The Merits)*, ICJ Reports, 1986, p. 3, para. 190.

⁵ Article 53 of the Vienna Convention on the Law of Treaties. However, it is important to stress here, that the definition is given in the context of the law of treaties and explains the term by the effect of these norms as being non-derogable by a treaty. But at the same time, this definition has

also been adopted to general international law and has been used outside the field of the law of treaties.

⁶ Cf. *Barcelona Traction, Light and Power Company, Limited (Second Phase)*, ICJ Reports, 1970, p. 3, paras. 33-34.

⁷ See, for example, Rudolf Bernhardt, “Customary International Law” in Rudolf Bernhardt, *Encyclopedia of Public International Law*, Volume 1, Amsterdam: North-Holland, 1992, pp. 898-905, for more information on customary international law. Customary international law consists of actual State conduct and beliefs that such conduct is law.

⁸ See also Article 48 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/RES/56/83 (2002).

⁹ For example, Article 1 of the General Treaty for the Renunciation of War (1928), otherwise known as the Kellogg-Briand Pact, reads that states “condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another”.

¹⁰ Indeed, the Brazilian proposal to extend the prohibition of the use of force to economic coercion was explicitly rejected by other states. Moreover, other provisions of the United Nations Charter, for example paragraph 7 of the Preamble and Article 44, also support the position that “force” means “military force”. The Friendly Relations Declaration confirms that political and economic coercion is not covered by the prohibition of the use of force, but by the general principle of non-

intervention. UN Doc. A/RES/3314 (XXIX) (1974).

¹¹ Ian Brownlie, *International Law and the Use of Force by States*, Oxford: Clarendon Press, 1963, p. 268.

¹² *Cofu Channel*, ICJ Reports, 1949, p. 4.

¹³ Albrecht Randelzhofer, "Article 2(4)" in Bruno Simma, *The Charter of the United Nations: A Commentary*, Second Edition, Oxford: Oxford University Press, 2002, p. 123.

¹⁴ Article 1, paragraph 1 of the Charter of the United Nations.

¹⁵ Louis Henkin, "Use of Force: Law and U.S. Policy" in Louis Henkin et al, *Right v. Might: International Law and the Use of Force*, New York: Council on Foreign Relations Press, 1991, pp. 38-39.

¹⁶ Article 51 of the Charter of the United Nations.

¹⁷ Cf. Antonio Cassese, *International Law*, Oxford: Oxford University Press, 2001, p. 305. The British Commentary on the Charter reads that "it will be for the Security Council to decide whether these measures have been taken and whether they are adequate for the purpose", but at the same "in the event of the Security Council failing to take any action, or if such action as it does take is clearly inadequate, the right of self-defence could be invoked by any Member or group of Members as justifying any action they thought fit to take". Misc. 9 (1945), Cmd. 6666, p. 9.

¹⁸ Article 24, paragraph 1 of the Charter of the United Nations.

¹⁹ *Ibid.* Non-compliance with the obligations imposed by the resolutions of the Security Council,

as with all other international obligations, may result in state responsibility under international law.

²⁰ Article 41 of the Charter of the United Nations.

²¹ Article 42 of the Charter of the United Nations. See, for example, UN Doc. S/RES/678 (1990) with which the Security Council authorised all the members of the United Nations to use "all necessary means" to end the Iraqi occupation of Kuwait and restore international peace and security.

²² However, the United Kingdom, the United States and their allies have argued that, although there was no explicit Security Council authorisation to use force against Iraq in 2003, such authorisation can be found if one interprets the Security Council resolutions 678, 687 and 1441 together. Such an approach is more than doubtful because no interpretation in good faith can result in the authorisation to use force twelve years after the First Iraqi War and because the members of the Security Council assured, while adopting resolution 1441, that it did not intentionally include any automatic or hidden trigger to authorise the use of force against Iraq.

²³ Article 31, paragraph 1 of the Vienna Convention on the Law of Treaties. It is true that the convention does not officially apply to the interpretation of the United Nations Charter because the latter was adopted before the convention entered into force, but the same rule exists in customary international law and that definitely applies.

²⁴ Michael Bothe, "Terrorism and the Legality of Pre-emptive Force" in *European Journal of International Law*, Vol. 14, 2003, p. 229.

²⁵ See for example Yoram Dinstein, *War, Aggression and Self-defence*, Third Edition, Cambridge: Cambridge University Press, 2001, pp. 165-169; Albrecht Randelzhofer, "Article 51" in Bruno Simma, *supra* note xiii, p. 803.

²⁶ Article 2, paragraph 4 demands that all *members of the United Nations* shall refrain from the threat or use of force and, according to Article 4, paragraph 1, only *states* can become members of the United Nations.

²⁷ Article 3, paragraph g, UN Doc. A/RES/3314 (XXIX) (1974).

²⁸ *Military and Paramilitary in and against Nicaragua (The Merits)*, *supra* note iv, para. 195.

²⁹ Michael Bothe, *supra* note xxiv, p. 230.

³⁰ See Chapter 2.2.1. for more information.

³¹ Christopher Greenwood, "International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq" in *San Diego International Law Journal*, Vol. 4, 2003, p. 17.

³² UN Doc. S/RES/1368 (2001); UN Doc. S/RES/1373 (2001).

³³ Press Release (2001) 124, available at <http://www.nato.int/docu/pr/2001/p01-124e.htm> (30 November 2003).

³⁴ The majority of states and legal authors supports this position. For example, Louis Henkin has written that "the fair reading of Article 51 is persuasive that the Charter intended to permit unilateral use of force only in a very narrow and clear circumstance, in self-defense if an armed at-

tack occurs". Louis Henkin, *Nations Behave: Law and Foreign Policy*, Second Edition, New York: Columbia University Press, 1979, p. 295. Ian Brownlie has concluded that "the view that Article 51 does not permit anticipatory action is correct" and "arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence". Ian Brownlie, *supra* note xi, p. 278. Phillip C. Jessup has stated that "Article 51 very definitely narrows the freedom of action which States had under traditional law" and found that "under the Charter, alarming military preparations by a neighboring State would justify a resort to the Security Council, but would not justify resort to anticipatory force by the State which believed itself threatened". Phillip C. Jessup, *A Modern Law of Nations*, New York: Macmillan, 1948, p. 166.

³⁵ Albrecht Randelzhofer, *supra* note xxv, p. 804.

³⁶ Michael J. Glennon, "The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter" in *Harvard Journal of Law & Public Policy*, Vol. 25, 2002, p. 546.

³⁷ Ian Brownlie, *supra* note xi, p. 278.

³⁸ See *BFSP* Vol. 26, 1937-1938, pp. 1372-1377; *BFSP* Vol. 29, 1840-1841, pp. 1126-1142; *BFSP* Vol. 30, 1841-1842, pp. 193-202 for the subsequent correspondence between the United Kingdom and the United States.

³⁹ Warner Meng, "The Caroline" in Rudolf Bernhardt, *supra* note vii, pp. 537-538.

⁴⁰ *BFSP* Vol. 29, 1840-1841, p. 1138.

⁴¹ It is possible to argue that the application of the Webster formula by the International Military Tribunals at Nuremberg and Tokyo does

not prove that the right of anticipatory self-defence was still alive after the creation of the United Nations. The tribunals simply had to apply the customary international law predating the United Nations because they considered state acts which also predated the United Nations.

⁴² Yoram Dinstein, *supra* note xxv, pp. 163-164.

⁴³ Ian Brownlie, *supra* note xi, p. 274.

⁴⁴ The ICJ has confirmed that the customary international law concerning self-defence continues to exist alongside treaty law, that is, Article 51, but did not specify the actual contents of it. *Military and Paramilitary in and against Nicaragua (The Merits)*, *supra* note iv, para. 176.

⁴⁵ Mary Ellen O'Connell, *The Myth of Pre-emptive Self-Defence*, ASIL Presidential Task Force on Terrorism Paper, 2002, p. 13.

⁴⁶ See *supra* note iv.

⁴⁷ See for example Stanimir A. Alexandrov, *Self-Defense against the Use of Force in International Law*, The Hague: Kluwer Law International, 1996, pp. 153-154.

⁴⁸ Anthony Clark Arend, Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm*, London: Routledge, 1993, p. 77.

⁴⁹ Michael Bothe, *supra* note xxiv, p. 231.

⁵⁰ Yoram Dinstein, *supra* note xxv, p. 172.

⁵¹ Thomas Franck, *Recourse to Force: State Action against Threats and Armed Attacks*, Cambridge: Cambridge University Press, 2002, p. 105.

⁵² Mary Ellen O'Connell, *supra* note xlv, pp. 9-10.

⁵³ See, for example, Letter from the Permanent Representative of the United States of America to

the United Nations, 7 October 2001, UN Doc. S/2001/946 (2001).

⁵⁴ Mary Ellen O'Connell, "Lawful Self-Defense to Terrorism", *University of Pittsburgh Law Review*, 2002, Vol. 63, p. 899.

⁵⁵ National Security Strategy of the United States of America, available at <http://www.whitehouse.gov/nsc/nss.pdf> (30 November 2003).

⁵⁶ *Ibid.*, p. 15.

⁵⁷ Michael Bothe, *supra* note xxiv, p. 232.

⁵⁸ Stanimir A. Alexandrov, *supra* note xlvii, pp. 159-165.

⁵⁹ UN Doc. S/RES/487 (1981).

⁶⁰ Christopher Greenwood, *supra* note xxxi, p. 19.

⁶¹ Article 24, paragraph 1 of the Charter of the United Nations.

NATO Status of Forces Agreement: Background and a Suggestion for the Scope of Application

By Mette Prassé Hartov*

The article summarises the historical developments of status of forces agreements in international law and provides an overview of the negotiations of the NATO Status of Forces Agreement (NATO SOFA) from 1951. It outlines the rules of consent (*ius ad praesentiam*) confirmed in the NATO SOFA Preamble. The article also presents a suggestion as to the scope of application of the NATO SOFA, based on an analysis of its Article 1, the definition of a “force”, and of the

negotiations that led to the wording of the said article. The article recommends to adopt a “default” clause, or rule of assumption that when Parties to the NATO SOFA send or receive forces, including individual members of a force, it is assumed that the NATO SOFA applies, no matter the nature of the visit or the stationing. The same clause, or rule of assumption, is suggested to be adopted for the application of the PfP Status of Forces Agreement (PfP SOFA).

1. Background

The Baltic states are all Parties to the “Agreement among the States parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces” and its additional Protocol – in short, the PfP SOFA. The agreement makes the “Agreement between the States Parties to the North Atlantic Treaty regarding the Status of their Forces” (NATO SOFA)

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applicable between the signatories, as if they were signatories to that Agreement. The NATO SOFA regulates the status of forces between NATO allies when they send forces to serve in the territory of another ally, both for short-term visits (exercises, joint training, and meetings) and for long-term stationing.

The provisions of the Pfp SOFA (and as such, the NATO SOFA) mainly govern exercises and other military co-operation activities between NATO and Pfp States. Among the three Baltic states the agreement is applied for the status of forces and co-operation in the Baltic military co-operation projects: The Baltic Battalion,¹ the Baltic Naval Squadron,² the Baltic Air Surveillance Network³ and the Baltic Defence College.⁴ In addition, the provisions of the Pfp SOFA regulate the status of the foreign non-Baltic personnel assigned to the Baltic Defence College in Tartu. The norms and rules established by the NATO SOFA are, through the Pfp SOFA, applied on a daily basis in Estonia, and it has been subject to a thorough implementation

by the Estonian Ministry of Defence as a part of the process instituted under NATO Membership Action Plan.⁵ Once acceded to the Washington Treaty, Estonia will be invited (and expected) to join the NATO SOFA and other NATO status agreements.⁶

Special agreements on the status of the Baltic Battalion Headquarters and Baltic Defence College as intergovernmental institutions are concluded separately and are not made subject of the discussions of this Article. Neither is the Further Additional Protocol to the “Agreement among the States parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces”, which enables Pfp States to recognise the international legal status of NATO International Military Headquarters established under the “Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty” (done in Paris, 28 August, 1952).

2. Historical overview

Peacetime stationing of troops abroad is a more recent development that has coincided with the adoption of the United Nations Charter and its limitations to the right of states to use force. In 1982, a writer argued that “today, the permanent stationing of foreign armed forces overseas is commonplace, firmly embedded in the post-war global order that has been moulded by the geo-strategic interests of the United States and the Soviet Union.”⁷ Whereas friendly transit has been applied through history,⁸ although not on a very frequent basis, the stationing of foreign troops abroad has normally been associated with aggression and occupation. After World War II, the number of bases and personnel stationed abroad increased. The United States remained stationed in Japan, the Philippines and in Germany. During the Cold War, the establishment of NATO and the Warsaw Pact increased the number of bases abroad, and a survey from 1982 recorded that foreign troops were

based or stationed in 58 states, of which 30 hosted U.S. troops, and 12 states - Soviet troops.⁹ In this number is not included the regular presence of troops due to training and exercises. During the Cold War, the typical stationing of troops was divided into four categories¹⁰:

1. The first category, combat situations, falls outside the scope of this article by the assumption that the receiving state does not consent to the presence of the foreign force. This would apply equally to a Peace Enforcement Operation or a Humanitarian Intervention, unless the force is invited by the legitimate authorities of the Receiving State.

2. The second category, the sending of special military assistance to operate as a part of the Sending State diplomatic mission was utilised by the United States in 1949 in order to render military assistance in the form of supplies or equipment (Military Advisory Assistance Groups - MAAG) to and within non-NATO countries. Different agreements¹¹ have been concluded between the United States and the receiving states, the main feature be-

ing that such arrangements grant various levels of diplomatic immunity to the U.S. MAAG-personnel under the Vienna Convention¹²:

3. As for the third category, the more recent term "Peace Support Operations" covers several situations, varying from traditional peacekeeping, preventive deployments to enforcement operations. Traditionally, the Receiving State invites or consents to the deployment of the foreign troops within its territory. The second main characteristic is that the United Nations endorses the operation. The operation itself is conducted either by the United Nations, by a regional organisation, or by a coalition of states. The legal regime applied differs depending on the type of operation, but it seeks in general to prove exclusive jurisdiction to the Sending States, freedom of movement and access to the territory of the receiving state, and compensation of claims from third parties only within a well-defined area. Recent examples are UNPROFOR, IFOR and SFOR (Bosnia-Herzegovina) and KFOR (Kosovo).

4. The fourth category, peacetime garrison, covers the stationing of troops, basing of contingents and conduct of military activities carried out abroad with the consent of and in co-operation with the Receiving State. Within NATO, military co-operation and basing arrangements have constituted a normal part of the alliance operations in pursuit of the objectives of Article 3¹³ of the Washington Treaty. Although the Alliance and, thereby, the co-operation and the presence of Allied Forces ultimately is aimed at deterring and repelling aggression, the presence of the allied foreign force in the Receiving State is based on consent, co-operation and respect for the sovereign powers of the receiving state. This situation has also been named "peaceful military occupation". It is characterised by the stationing of forces over longer periods of time, and by representing a regular co-operation between the sending and the Receiving State, i.e the international community has accepted the co-operation, whereby it lacks exceptional circumstances such as war, implementation of a treaty etc.¹⁴

3. Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, London, 19 June 1951

3.1. Drafting the NATO SOFA – a few significant points¹⁵

In support of the principles instituted by the Washington Treaty, it became obvious very early that the status of allied forces had to be defined in a formal agreement. Two approaches were discussed before the work was initiated: whether to regulate the status in bilateral agreements whereby the agreements could reflect the geographical or political conditions in each of the NATO countries, or to adopt a multilateral agreement. The latter solution was chosen for several reasons: a multilateral agreement ensures reciprocity and transparency; the same rules apply throughout the Alliance - who is today a Receiving State can tomorrow be the Sending State. Thus, there is a com-

mon interest in achieving comparable standards. Another point is that a multinational agreement sets an equal treatment of the forces no matter where they are stationed and the same privileges are applied to all stationed forces, no matter their nationality.

Other arguments were that all the NATO States shared a common concept on main legal and administrative principles, and therefore there was no need to challenge the setting and enter into more difficult bilateral negotiations, which would have demanded cross negotiations between all of the Allies.

On January 15, 1951, the U.S. Representative requested the Deputies of the NATO Council to set up a Working Group in order to draft a Status of Forces Agreement. It was later agreed that the discussion would take its starting point in the Brussels Agreement,¹⁶ a Status of Forces Agreement concluded in support of the Western European Union and applied among five of the NATO Allies (Belgium, France, U.K., Luxembourg and the Netherlands). However, the U.S., after

having studied the Brussels Agreement, submitted an American draft, and when the Working Group met on January 29, 1951, in London for its first meeting, two drafts were on the table.¹⁷ The Working Group submitted the final text on June 01, 1951, and the NATO SOFA was signed in London on June 19, 1951. Between the presentation of the first drafts and the final agreement only 6 drafts were exchanged, a number of meetings were held and a memoranda tabled and discussed.¹⁸

The Working Group insisted that the final draft tied together the different opinions represented in the work - the SOFA should be an acceptable compromise. As it is very difficult to reconcile the interests of the Receiving State and the Sending State, the text of the NATO SOFA has been categorised by its later users as “incomplete” and “not ideal”, and it is stated that only the good will of the Allies makes the application of the various SOFA provisions possible.

■ **Language.** Although the negotiations were conducted in both the English and French languages, it was not clear from

the start that the SOFA would end up in the two NATO languages. This was a compromise, and the reader will be able to find different terms used, depending on which of the texts is being studied.

■ **Who could sign the SOFA.** The question of whether an agreement would be open to signature of all the NATO members arose as Iceland, a member of the Alliance, had (and has) no forces. It was argued that since Iceland could act only as a Receiving State a special arrangement was required. In the spirit of the Alliance and due to the fact that the U.S. signed an Agreement with Iceland during the negotiations on the stationing of the U.S. forces on Iceland, Iceland did in fact sign the SOFA but has not taken steps to ratify it.

■ **Jurisdiction.** This article was subject to several redrafts. The doctrine of the law of the flag (exclusive jurisdiction remains with the Sending States) and that of restricted territorial sovereignty (division of jurisdiction between the courts of the Receiving State and the authorities of the Sending State) meet in a compromise based on both exclusive jurisdiction

to the Sending and the Receiving States within defined areas and concurrent jurisdiction in all other areas with a key to the primary right to exercise jurisdiction.

■ **Time factor.** The text of the NATO SOFA was developed over less than 6 months. Another label that has been sticking to the SOFA is that it - in addition to the compromises - suffers from being negotiated so rapidly: the text is not always clear, there are differences between the English and the French versions, and it is not a self-sufficient document, therefore it was necessary to adopt new laws and regulations in all of the signatory states to comply with the NATO SOFA.

Despite its age and reputation, the NATO SOFA still serves as a model for other SOFAs and will - so I believe - for SOFAs to come.¹⁹

3.2. Sending and receiving forces – the consent

Friendly admittance of troops (whether in transit or to be stationed) requires the

consent of the sovereign Host State²⁰. Armed forces embody the sovereign powers of a State, and the lawful peacetime presence (transit, short visits, stationing) of armed forces of one State on the territory of another State is conditional to the consent of the Receiving State. The consent can be announced in several ways. Depending on the laws and practice of the State receiving the visiting forces, the consent can be informal or formal, and it can be announced as an explicit consent or invitation to conduct or participate in specific activities, or as a license to perform defined actions.²¹ The level of authorisation appointed to confer the consent may vary according to national division of powers, but the consent - when given by or on behalf of the Government - is binding.²² The general framework for the deployment (e.g. standing or ad hoc military co-operation), if any, may implicitly or explicitly announce the consent. This is the common situation when headquarters and military installations are set up.²³ A bi- or multilateral framework may also provide the format for and the

conditions attached to the consent (if any), and some agreements express a general consent, leaving detailed issues to be settled between the parties.

Not many defence agreements express an explicit Host State consent for the Allies to deploy their forces,²⁴ neither does the Washington Treaty. Co-operation and unification of efforts are pointed out as main tools for preserving peace and security in the North Atlantic Treaty Organisation area. However, nothing in NATO legal framework confers any rights to Allied States to deploy forces to the territory of another ally without the consent of that State. Despite of the integrated military co-operation, the principle of consent has remained unchanged, and the principle is confirmed in the NATO SOFA.

As for the format of the consent, the practice within NATO is multiple. Again, the choice is determined by the constitutional imperatives of the Allies, respectively, and very often also by the character of the co-operation. The consent to receive foreign military troops is often accompanied by conditions and specifics

as to the number of troops, the character of the arms to be imported, the use of weapons, designated border crossing areas. E.g. NATO and PfP exercises are conducted upon invitation from the Host State – the status of forces is derived from the NATO SOFA and the details on host nation support, movement co-ordination etc. are set out in a Memorandum of Understanding concluded with the Host State.²⁵ When the sending of forces is more perpetual and/or lasts in time (stationing) the conditions are frequently subject to formal arrangements. The level of the arrangement (treaty vs. administrative arrangement) depends on the decision of the contracting parties.

In the Baltic military co-operation projects, all activities (except e.g. meetings) are agreed upon annually and adopted in Activity Plans, issued for each of the projects. In order to ensure that consent is obtained prior to the conduct of certain activities (e.g. manoeuvres and exercises), the various agreements concluded in support of the projects envisage that approval is obtained at the responsible levels.²⁶

The requirement to obtain prior consent is stated in the Preamble to the NATO SOFA, which states that the NATO SOFA does not affect the (national) decision to send forces, nor does it decide on the special formalities or conditions under which the forces might be disembarked or take up their duties in the Receiving State. The Preamble leaves it to the Parties to conclude separate agreements on the entry and facilities (here understood as the conditions for disembarkation and for taking up stationing) to be provided in support of a foreign force: “Considering that the forces of one Party may be sent, by arrangement, to serve in the territory of another Party; Bearing in mind that the decision to send them and [...], will continue to be the subject of separate arrangements between the Parties concerned.”

3.3. Application of the NATO SOFA

When is the NATO SOFA then to be applied? The question can be addressed as

- to whom (categories of persons);
- where (geographical application);

- when (functional application).

Answers to the questions are, by and large, encompassed in Article I, in particular in paragraph 1, (a), which defines “a force”.²⁷ The definition is limited to defining the status of military personnel. Although this may not be obvious when looking at the wording, this was the clear intention of the drafters, and this is why a separate definition is adopted on civilian components. The main arguments for not including civilians in the general definition were that a) they were not included under the Brussels Treaty, and b) civilians would not, under the current practice in some countries, enjoy the same status as the armed forces in peacetime. The drafters however agreed that the status of civilians and that of dependants needed to be included in the NATO SOFA but separate definitions were required.

To whom (application in personae)

a. Military personnel (article I, paragraph 1, a.):

To be a force or a member of a force, one must **belong to the land, sea or air armed forces** of a Party to the SOFA.

The definition covers collective units and individuals as well as personnel in transit, but excludes certain categories of personnel (diplomatic personnel).

- The definition deliberately covers “force” in the collective sense. Whenever a reference is made to an individual member the term “member of the force” is used throughout the NATO SOFA.²⁸

- In order to ensure that agreed categories would not come under the agreement (i.e. the Dutch-Belgium military agreement), an escape clause had already been inserted in the definition (“...provided that the two Contracting Parties concerned may agree that certain individuals, units or formations shall not be regarded as constituting or included in a ‘force’...”).²⁹ However, in a meeting of the Council Deputies on 24 May 1951³⁰ the U.S. raised a number of points, including that the U.S. Government wished to exclude military members of a diplomatic mission from the definition of a “force” since such members already enjoy a certain privileged status and since their status could be settled by bilateral agreements.

The Chairman of the Working Group replied that the definition already allowed parties to conclude bilateral agreements, and that the U.S. concern could be met by inserting “*individuals*” in the text in order to clarify that bilateral agreements on non-application of the SOFA could be concluded not only on units and formations but also in respect of individuals.³¹

- The issue of whether or not the NATO SOFA would apply to forces in transit or on leave was discussed throughout the drafting of Article I. The discussion is commented on below (“...*in connection with their official duties...*”). The conclusions from the discussions are that personnel in transit come under the agreement, and so do personnel on leave, if they are having their leave in the state to which they are posted.³² A further application can be rendered either unilaterally by a Contracting Party or by agreements between the Parties.³³

The discussions did not touch on the term “belonging to”. At an early point the U.K. categorised civilians, as person-

nel “not entitled to wear uniform” and not subject to “the same close discipline and control as the uniformed members of the force”.³⁴ The term was reversed into a baseline for the definition of “forces” since it proved difficult to reach a common ground on that term (military force, armed forces, contingent, foreign force), and it became a goal to find a wording, which was broad enough to embody all personnel “entitled to wear uniform”/all military personnel³⁵. The wording “belonging to” became the answer, and the definition does accordingly not distinguish between military or paramilitary units or between personnel in active service, reservists and retired personnel. The deciding factor is if the personnel is submitted to military command.³⁶

Unlike the definition of “civilian component” nationality is not an explicit condition. The drafters dismissed proposals to adopt a clause with the argument that only Article III, par. 2 and 5 may pose problems, and that it would be “...dangerous in certain cases, under Article VII and Article VIII, for example, to withdraw

the privileges given under the provisions of the present Convention, from nationals who were members of a force.” It was agreed that instead of inserting a clause on dual citizenship the drafters should rather examine each Article in order to determine if it should apply to members of a force who – at the same time – are nationals of the Receiving State.³⁷ Reservations on nationality were adopted in Article III, par. 5,³⁸ Article VII, par. 4³⁹ and Article X, par. 4.⁴⁰

Finally, the member of the armed service of one Party must be present on the territory of another Contracting Party, i.e. Receiving State personnel are excluded from the definition of a “force”. This is a genuine principle under international law.⁴¹

b. Members of the civilian component (article I, paragraph 1, b.):

An increasing number of civilians are employed by the armed forces. In some states, where stationing of troops abroad is a regular feature, the number and categories of civilians that are either employed or follow the armed forces vary

from Postal/Base Exchange employees, civilian contractors, welfare personnel, teachers etc. to Red Cross personnel. In the course of drafting the NATO SOFA some states were not willing to extend the privileges granted to a force to the civilian personnel, and the chairman concluded that it would be advisable to adopt a separate status. It was also clear that civilians would not enjoy the same status under the NATO SOFA as the status conferred upon members of the force⁴².

The definition of civilians appears clear and understandable, but it has in fact given rise to problems of interpretations, and the drafters have not been complimented for their efforts.⁴³ The definition does not indicate the standing enjoyed under the NATO SOFA – the status is defined (or not defined and thereby left to Receiving State law) in the text of the subsequent articles. Members of the civilian component are, to a large extent, granted the same status as their uniformed colleagues. They are for more obvious reasons excluded from wearing of uniform (Article V), carrying of weapons (Article VI) and

guarding and policing functions (Article VII, par. 10). In some articles members of the civilian component are excluded from the wording of the articles because their nationality already disqualifies them (see below). This applies to Article VII, par. 4, and Article X, par. 4. However the note tabled by the U.K.⁴⁴ (and echoed by other delegations) that it would not be acceptable to extend “full” status to civilians has left its marks in the SOFA.

The definition contains four strict criteria:

- be civilian,
- accompany a force,
- be employed by the armed service,
- fulfil the conditions of nationality.

The *first criterion* does not give rise to comments – it covers a personnel that is not entitled to wear uniform⁴⁵.

The *second criterion* is more complicated: when does the civilian component **accompany** a force; and what if the civilian component deploys before the force in order to make sufficient preparations to prepare and organise the arrival of the

force? It seems to be contradictory to the overall aim of the SOFA if civilian employees are excluded from the NATO SOFA because they deploy separately from the force. Therefore it is assumed that the criterion is overruled by the *third criterion* – that the personnel have to be employed by the armed services of the Sending State⁴⁶. Although this criterion seems obvious, the state practice on employment of support personnel varies greatly. During the drafting, the U.S. outlined the categories of civilians, which were considered to be covered (construction workers, canteen personnel, specialists, office personnel, stenographers, etc.) and those, which were excluded (Red Cross workers, entertainers, YMCA personnel)⁴⁷, but more could be added. The most debated category is probably that of contractors, i.e. non-governmental, non-military companies or individuals, who provide services and support to the visiting forces on the request of the force. Depending on with whom the contract is concluded, individual contractors are considered to be included in the definition, whereas the

employees of companies, which have a contract either with the force or with a government agency, are not to be included in the definition.⁴⁸ In order to overcome the restrictions imposed by the NATO SOFA some states are eager to conclude supplementary agreements to ensure that also categories of civilians not directly employed by the armed service are included in the definition of a civilian component. These can be different personnel groups mentioned before (Post/Base Exchange, civilian contractors, Red Cross personnel, teachers).⁴⁹ In the U.K. practice, members of a Sending State civilian component have to hold a non-U.K.-Commonwealth passport, which declares by an un-cancelled entry that the holder is a member of a civilian component of the visiting force of the issuing state, and entry of accept by the U.K. authorities (U.K. Visiting Forces Act).

The *fourth criterion* on nationality had partly been included in the first U.S. draft. France brought the criterion back into the discussions during the final stage of drafting in response to the draft NATO

SOFA circulated by the Chairman together with his report on 28 February 1951.⁵⁰ To come under the protection of the NATO SOFA, members of a civilian component have to be nationals of a NATO state,⁵¹ and not to be stateless. Furthermore, the person may not be a national of or an ordinarily resident in the Receiving State. The first two requirements are rooted in security screening considerations. The third requirement was adopted to ensure that the person does not escape jurisdiction or enjoys the customs and fiscal benefits of being a member of a civilian component. Whereas the first part of the criterion does not give rise to problems, the second part has proven troublesome in two areas: dual citizenship and the calculation of the time of residence.

c. Dependants (Article I, paragraph 1, c.)

As was the case for civilian personnel, dependants have traditionally accompanied visiting forces when sent abroad to serve. The definition of dependants states that two categories of persons are

recognised as “dependants” under the NATO SOFA: the spouse and the child of a member of a force or civilian component, or of the spouse, when the child is depending on his or her support. The definition in Article I, paragraph 1, c., does not address the question of dual citizenship. The issue is, like for members of the force and of the civilian component, addressed in each of the articles.

The legalities of the relationship is not subject of the NATO SOFA, but the word “spouse” does indeed translate to “wife or husband”⁵² and more than indicates that the relationship has to be formalised. However, it seems reasonable to assume that the relationship only has to be formalised (and acknowledged in the passport of the dependant) in the Sending State and that the Receiving State will accept the legitimacy of the relationship, also if the matrimonial institute does not exist in the Receiving State, unless the international private law of the Receiving States dictates differently (e.g. if the relationship goes against the *ordre public* of the Receiving State).

The English version excludes, if taken

very literally, children of the spouse from the definition of “children” (“...depending on him or her for support...”). The French text, on the other hand, if translated literally, excludes children, who are depending on either of the spouses for support as well as children of single parents (“...qui sont à leur charge...” – “...depending on them for support...”). In practice both children depending on the member of the force or civilian component and/or his or her spouse are covered by the definition,⁵³ including adopted children and children of previous marriages of either the member or the spouse, also in case the member or spouse does not have custody over the child, assuming that the non-custodial parent remains legally responsible (under sending state law) for supporting and providing for the child.⁵⁴ The definition does not fix an age limit for when a “child” is to be considered as such, the criteria is entirely attached to the dependence and each case is to be justified although minority of age does presume dependence. “Dependence” is primarily understood as financial interdependen-

dence; however the degree of dependence is not made clear. In practice this has not given rise to cases.⁵⁵

The definition principally excludes all other family members. To compensate for the narrow definition, some states have, through bilateral agreements, broadened the scope of Article I. The common feature of the wider definitions is that factual dependants are included in the definition, i.e. persons/relatives who are factually dependent on a member of the force or a member of a civilian component.

The definition of “dependants” does not indicate the standing enjoyed under the NATO SOFA – their status is defined (or not defined and thereby left to Receiving State law) in the text of the subsequent articles. The general picture is that dependants are largely treated as other foreigners with the few exemptions listed below. Unless waived by the Receiving State, dependants are subject to visa requirements, and they become subject to Receiving State law (driver’s license, tax).

Where (geographical application)

The force must be operating in **the North Atlantic Treaty area**. This criterion states a geographical limitation, i.e. that the member of a force of one of the Parties must be present on the territory of another Party in the North Atlantic Treaty area, i.e. the area of the North Atlantic Treaty as defined in the Washington Treaty, Article 6. The geographical limitation set out in the NATO SOFA, Article I, is further limited by the NATO SOFA, Article XX (metropolitan territory).

When (functional application)

The member of the force must be present in the territory of another party **in connection with their official duties**. Whereas the wording “*...in connection with official duties...*” itself only gave rise to few discussions, the factual meaning of “*...the North Atlantic Treaty area...*” and the application of the SOFA was addressed throughout the drafting.

In a meeting on 8 February 1951,⁵⁶ the application of the SOFA was on the

agenda: the representative of Belgium inquired if the suggested definition of “armed force” should be understood as if the Agreement applied to members of a force of a Sending State no matter the reason why he was present in the territory of the Receiving State, or if a distinction should be made to clarify that the Agreement would only be applied for the purpose of carrying out duties under the Washington Treaty. The U.S. replied that no distinction was drawn or intended to be drawn, as the Agreement should be applied to all forces of the Participants, whatever the purpose of their presence in the territory of the Receiving State. The Canadian representative suggested that this be highlighted either in the Preamble or in the definitions, and on a Dutch question it was decided to look into the issue if the Agreement affected the status of military representatives accredited to the Receiving State as diplomats. On 12 February 1951,⁵⁷ a redraft of the Article was circulated, reflecting the discussions of the Juridical Subcommittee. In this draft, the “...’force’ means any

personnel belonging to the land, sea or air armed services of one Contracting Party, maintained by it in the territory of another Contracting Party.”

On 22 February 1951, the draft Agreement was re-examined.⁵⁸ As for Article I, “... little was to note beyond drafting points, such as the addition of the words “in connection with the operation of the North Atlantic Treaty” in the definition of a “force” in Article I.”⁵⁹ The commentary does not explain on whose initiative the phrase was adopted, but it could be a reminiscence of earlier discussions. The Chairman of the Working Group submitted a new draft on 28 February 1951⁶⁰ - with the said wording of and without any specific comments on - Article I, paragraph 1(a). In response, the U.S. proposed⁶¹ to change the sentence “*...in connection with the operation of the North Atlantic Treaty*” to read “*... in the North Atlantic Treaty area*”. The proposal is accompanied by the explanation, repeating statements made by the U.S. in a previous meeting that the Agreement should be made applicable to all military personnel on duty

status in the North Atlantic Treaty area (my underlining). The Netherlands had another comment⁶²: if doubts arise about the meaning of the wording “*...in connection with the operation of the North Atlantic Treaty*”, the procedure envisaged in Article XVI (consultations in the North Atlantic Council) should be applied. The proposed amendments were discussed in session,⁶³ and the U.S. delegation supplemented the explanation of the amendment by stating that it would be difficult to determine if forces were present in the territory of another NATO member due to the operation of the Treaty, and that such distinctions would lead to considerable administrative difficulties. The U.S. proposal did not enjoy support throughout the Working Group. The representative of Belgium drew attention to the bilateral military co-operation between Belgium and the Netherlands that was not related to the Washington Treaty, but would be covered by the NATO SOFA if the wording proposed by the U.S. were adopted, “*...which was clearly contrary to the spirit of the [NATO SOFA]*”. Belgium therefore suggested that a clause be inserted leaving it to

the Receiving State to decide if foreign troops were to come within the provisions of the SOFA. Denmark and Norway opposed to the U.S. proposal, stating that members of a force that might be present in the territory of another Ally on leave could not be considered covered by the SOFA. Canada considered it necessary to specify that the text referred to members of a force collectively. The Chairman recognised the concerns of Belgium but dismissed the proposal to introduce a system of unilateral decisions on whether or not the SOFA would be applicable. Instead, an amendment to the text should ensure that exemptions could be agreed. As for the Canadian comments, the Chairman replied that the provision was intended to refer to a force in the collective sense, and whenever reference was intended to an individual member of the force, the expression “member of the force” was used. The Danish and Norwegian comments were not supported either, instead it was emphasised that the SOFA would also apply to members of a force on leave in the same State in which their force was present.

Following the discussions, a new draft was submitted,⁶⁴ and the wording of Article I, paragraph 1(a) is almost the same as the final version, combining the U.S. position (in the Treaty area) with the Belgian concern, by having adopted an escape clause that allows two Parties to agree that "...certain units or formations shall not be regarded as constituting or included in a "force" for the purposes of the present Agreement." The redraft also introduced the wording: "*...North Atlantic Treaty area in connection with their official duties...*" (my underlining). Later, in a meeting of 7 May 1951, "individuals" were added to the escape clause.

In the following meeting of the Working Group,⁶⁵ no comments were made on the adoption of the new wording and a revised draft was submitted.⁶⁶ Whereas no discussion on the principle issues raised by Belgium (contrary to the spirit of the SOFA) or by the U.S. (no distinction is to be adopted on the purpose of the presence) is reflected in the summary of the meeting of 23 April 1951, the Chairman highlights in his comments to the draft of 7 May 1951

that: "The definition of "force" in paragraph 1(a) of Article I has been altered so as to make the Agreement applicable, unless the receiving State and the sending State agree otherwise, to all forces of one Party present in the territory of another Party in the North Atlantic Treaty area in connection with their official duties, and not only to forces on NATO duty. The reason for this is the administrative inconvenience of distinguishing between forces on NATO duty and those not on such duty." Thereby the Belgian reference to the possible limitations implied by the spirit of the SOFA seems to have been overruled by the wish to create an omnibus arrangement that covers all sending and receiving of forces within the geographical area of the SOFA, no matter if it arises out of the general (bi- and multi-lateral lateral) military co-operation among the Allies or it is related directly to the co-operation within the Alliance. A rule of assumption has been introduced: unless otherwise agreed between the parties involved, the NATO SOFA applies whenever the forces of one Party to the SOFA are present in the territory of another Party. The final draft

was circulated on 1 June 1951⁶⁷ - the text defining "force" is identical to that of the signed SOFA.

If reference to the North Atlantic Treaty area establishes that the SOFA applies whenever forces of an Ally are present in the territory of another Allied State, unless otherwise agreed between the two parties, then, what is the meaning of adding that the force is to be present "in connection with their official duty"? Lazareff⁶⁸ classifies this criterion as "essential" and argues that the NATO SOFA only applies to forces on NATO duty. Lazareff points out that it is special to the NATO SOFA, if compared to, for instance, the U.S.-Japan Agreement and the U.S.-West Germany Agreements to link the presence to "official duties". He explains that the origin of the requirement is not that it was regarded inappropriate to apply the NATO SOFA in all cases, but rather that a number of European countries already at the time of negotiating the NATO SOFA had concluded (non-NATO related) agreements on transit and manoeuvring of troops (the Benelux Pow-

ers). Lazareff further argues that although it is not stated clearly, it is “logically implied” that the official duties referred to must be “NATO duties” since: “The whole purpose of the SOFA being, indeed, to define the status of the Forces of the Parties to the North Atlantic Treaty, it seems obvious to us that it can only apply to Forces on NATO duty.”⁶⁹ But, whereas the Benelux co-operation and the request to specifically exempt military personnel accredited to embassies in the Receiving State from the NATO SOFA, was the reason for adopting the escape clause, the discussions of the Working Group, as summarised above, does not lead to the conclusions proposed by Lazareff, on the contrary. As the Chairman of the Working Group states in his presentation of the draft Agreement as of 7 May 1951: “The definition of “force” in paragraph 1(a) of Article I has been altered so as to make the Agreement applicable, unless the Receiving State and the Sending State agree otherwise, to all forces of one Party present in the territory of another Party in the North Atlantic Treaty area in con-

nection with their official duties, and not only to forces on NATO duty. The reason for this is the administrative inconvenience of distinguishing between forces on NATO duty and those not on such duty.” The statement is not later challenged or contradicted by the delegations.

Then, why the reference to official duties? One possible explanation could be that the remarks made by the Danish and Norwegian delegations that members of a force present in the territory of another Ally only on leave could not be considered covered by the SOFA⁷⁰ led the drafters to revise the wording in order to specify that the force had to be admitted to the territory on official duty for the NATO SOFA to apply. This thesis is supported if one looks at the Brussels Agreement, one of the formal starting points of the negotiations. The Brussels Agreement, Article 1, limits the application of the Brussels Agreement to forces operating in the execution of duties under the Brussels Treaty. This wording was discussed and abandoned by the drafters of the NATO SOFA. But maybe the Brus-

sels Agreement, Article 2, paragraph 1, inspired the drafters that had to make statements and viewpoints meet after the meeting on 23 April 1951. The said Article categorises the members of a force into three groups: personnel on permanent duty, personnel on temporary duty and regularly constituted units or formations.

4. Conclusion

The geographical application as well as the categories of personnel to whom the NATO SOFA is to be applied is well described in literature, however, the functional application of the NATO SOFA is still subject to some arguments.⁷¹

If one looks at the co-operation that the NATO SOFA is intended to support, it seems rational to assume that the NATO SOFA applies whenever Allies co-operate. The extensive military co-operation, whether it takes place as an officially labelled NATO activity or as a result of the general military co-operation that has grown out of the Alliance, allows the troops to become acquainted with the geographi-

cal conditions that they might have to operate in, in an Article 5 situation, and it promotes the general co-operation and defensibility of the Alliance in accordance with Article 3 of the Washington Treaty.⁷²

Rather than debate on “when”, it is suggested to apply a rule of assumption: when Parties to the NATO SOFA send or receive forces, including individual members of a force, it is assumed that the NATO SOFA applies, no matter the nature of the visit or the stationing.⁷³ The proposed rule of assumption is to be understood with the implied exception that the NATO SOFA does not apply if the status of the force/the member of the force is defined by other arrangements⁷⁴ and accepted as such by the Receiving State (e.g. through a diplomatic accreditation). As the visit is subject to the consent of the Receiving State, that Party must be expected to object to the default clause if it disagrees with the assumption.

The same default position or rule of assumption is suggested to be adopted for the application of the PFP SOFA. Although repeating the general principle of

consent (preamble), the PFP SOFA relies on the text of the NATO SOFA – it extends the geographical application of the NATO SOFA (Article II) and it does not add any qualifying criteria for the application of the agreement. But the argument offered for the functional application of the NATO SOFA may be reiterated: activities that are conducted in the spirit of NATO and the PFP are aimed at developing and tightening the relations between both the Allies and Partners, and it seems irrational to limit the application of the NATO (PFP) SOFA to only those events that are strictly defined as “PFP activities”. A narrow approach will lead to either less co-operation or more complicated procedures due to the need to negotiate interim agreements or parallel SOFAs, which anyway are not likely to look very differently than the NATO SOFA. And, as receiving of foreign troops is subject to the consent of the Receiving State, that State retains the possibility to request that separate arrangements are concluded, excluding the personnel from the NATO SOFA.

¹ *Protocol between the Government of the Republic of Latvia, the Government of the Republic of Lithuania and the Government of the Republic of Estonia concerning the status of the Baltic Battalion Headquarters and the personnel of the Baltic Battalion* (16 April 1998), Article 3.

² *Agreement between the Government of the Republic of Latvia, the Government of the Republic of Lithuania and the Government of the Republic of Estonia concerning the establishment of the Baltic Naval Squadron* (16 April 1998), Article 4.

³ *Agreement between the Government of the Republic of Latvia, the Government of the Republic of Lithuania and the Government of the Republic of Estonia on the establishment of the Baltic Air Surveillance Network* (16 April 1998), Article II.

⁴ *Agreement between the Government of the Republic of Latvia, the Government of the Republic of Lithuania and the Government of the Republic of Estonia concerning the Baltic Defence College* (12 June 1998), Article V, and the *Protocol between the Government of the Republic of Latvia, the Government of the Republic of Lithuania and the Government of the Republic of Estonia concerning the status of the Baltic Defence College and its personnel* (14 June 1999), Article 9.

⁵ Adopted at the NATO Summit in Washington, 1999.

⁶ 1952 Paris Protocol on NATO International Military Headquarters, 1952 Ottawa Agreement on the status of NATO and its national representatives and international staff, and the 1994 Brussels Agreement on the status of third-party representatives to NATO.

⁷ Robert E. Harkavy, as quoted by John Woodliffe, *The Peacetime Use of Foreign Military Installations under Modern International Law*, 1992, p. 15.

⁸ Serge Lazareff, *Status of Military Forces under Current International Law*, 1971, p. 7-8.

⁹ John Woodliffe, *ibid*, p. 15.

¹⁰ Gordon B. Baldwin, *The international Law of the Armed Forces Abroad*, Newport, 1980.

¹¹ The specifics of the agreements on jurisdiction are described in Serge Lazareff, *ibid*, First Part, Chapter III, Section 4.

¹² Vienna Convention on Diplomatic Relations, 1961.

¹³ "In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack."

¹⁴ The term is used by Serge Lazareff, *ibid*, p. 8. With due regard to the development in the military co-operation after the dissolving of the Warsaw Pact, and as the territorial sovereignty of the Receiving State is unaffected by "peaceful military occupation" as defined above, the phrase "peaceful military occupation" seems to be a contradiction in terms. The classical occupying power seeks to exercise control of the territory and take possession, including to exercise jurisdictional powers (*occupatio bellica*), while conventional occupation constituted by a legal act defines the diverted powers of the occupying power and the occupied state, normally leaving to the occupied state both the title and the exercise of its sovereignty. The

latter situation may have been the starting point for negotiating the stationing of allied forces in some European countries after WW2. However, both within the Alliance and in respect of the Partnership for Peace programme, the co-operation lacks comparison to "occupation" and "garrison of forces" since no activity so far has included permanent garrisoning of troops, except in support of Peace Support Operations. In these cases, the stationing has been based on the consent of the receiving state and on separate agreements, but documents provided under the Partnership for Peace have been applied i.e. for the status of forces. In order to mirror today's relations, the co-operation within NATO and the Partnership for Peace is in the following is referred to as "peacetime military co-operation". This term is chosen due to the type of co-operation taking place within the Partnership for Peace and because the NATO Status of Forces Agreement is required to be reaffirmed in the event of hostilities to which the Washington Treaty (the North Atlantic Treaty) applies (NATO SOFA, Article XV).

¹⁵ The following information is based on Serge Lazareff, Second Part, Chapter I, *Status of Military Forces under Current International Law*, 1971, and the NATO SOFA "Travaux Préparatoires".

¹⁶ Agreement on the Status of the Armed Forces of the Brussels Treaty Powers, 21 December 1949.

¹⁷ D-R(51) 3, Summary of a meeting of the Council Deputies (15 January 1951). Belgium, Canada, Denmark, France, Iceland, Italy, the Netherlands, Norway, Portugal, the United Kingdom, and the United States participated in the drafting.

¹⁸ The preparatory work of the NATO SOFA (and the Paris Protocol) is collected in a Blue Book issued by the U.S. Naval College (U.S. Naval War College, International Law Studies, NATO Agreements on Status: Travaux Préparatoires, edited by Professor of Law Joseph M. Snee, S.J., NAVPERS 15031, Vol. LIV, 1961).

¹⁹ One example is that in its 45th Annual report of the WEU Council to the WEU Assembly, the WEU Council recommends that a SOFA be adopted for the co-operation within the WEU, and another draft WEU recommendation from 1998 suggests that the SOFA should be shaped over the NATO SOFA, see document 1625 as of 10 November, 1998, REPORT submitted on behalf of the Political Committee by Mr. Urbain, Rapporteur, included in the Second Part of the Forty-Fifth Annual Report of the WEU Council to the WEU Assembly. The draft EU Status of Forces Agreement (10th draft of July 2003) does in fact base itself on the NATO SOFA, but at the same time it adopts different terms and attempts to apply to a broader audience (headquarters assigned to the EU and the EU Military Staff).

²⁰ Questions and Answers on the NATO Status of Forces Agreement, Public Services Division, U.S. Department of State (no 6, April 1956), as quoted by Serge Lazareff, *ibid*, p. 57.

²¹ The consent is free (Vienna Convention on the law of treaties, 1969), and is entered into under the principle of sovereign equality and independence of all states as expressed in international law and confirmed by the United Nations Charter, 1945, Article 2 (1).

²² Serge Lazareff, *ibid*, p. 71.

²³ In terms of NATO International Military Headquarters, established under the Paris Protocol, the consent of the Host State is confirmed in a Host Nation Agreement. The Agreement generally elaborates on the immunities and privileges of the Headquarters and its personnel, sets the personnel strengths and the procedures to be applied in respect of co-operation with the Host State and any preconditions for the activities of the Headquarters.

²⁴ John Woodliffe, *ibid*, p. 35.

²⁵ Some Partnership States may still require a different procedure to be applied, many of them due to the strict legal regimes adopted after the Cold War.

²⁶ References:

■ *Protocol between the Government of the Republic of Latvia, the Government of the Republic of Lithuania and the Government of the Republic of Estonia concerning the status of the Baltic Defence College and its personnel* (14 June 1999), Article 12, 2, and *Memorandum of Understanding between the Estonian, Latvian and Lithuanian ministries of defence concerning the operation, administration and funding of the Baltic Defence College* (11 December 1998), Section 8.

■ *Memorandum of Understanding between the Estonian, Latvian and Lithuanian ministries of defence concerning the operation, funding and administration of the Baltic Battalion* (7 May 1999), Section 6.6.

■ *Memorandum of Understanding between the Estonian, Latvian and Lithuanian ministries of defence concerning the organisation, operation, funding and administration of the Baltic Naval Squadron* (Septem-

ber 1999), Section 3.4.

²⁷ “Force” means the personnel belonging to the land, sea or air armed services of one Contracting Party when on the territory of another Contracting Party in the North Atlantic Treaty area in connection with their official duties, provided that the two Contracting Parties concerned may agree that certain individuals, units or formations shall not be regarded as constituting or included in a ‘force’ for the purpose of the present Agreement.

²⁸ As explained by the Chairman in MS-R(51) 13, Summary Record of a meeting of the Working Group on Status (23 April 1951).

²⁹ Inserted in MS-D(51) 28, Status of Forces Agreement – Revised Draft (27 April 1951), after discussions in MS-R(51) 13 Summary Record of a meeting of the Working Group on Status (23 April 1951), which did, in fact, not touch on the issue of diplomatic personnel.

³⁰ D-R(51) 41, Summary Record of a meeting of the Council Deputies, 24 May 1951.

³¹ Despite this statement, in the early 1960s the U.S. Court of Appeals for the District of Columbia raised the question of the formalities of an Agreement excluding personnel from the SOFA (for references, see Lazareff, *ibid*, p. 83, footnote 34). A Belgian corporal serving as a secretary to the Belgian Military Attaché to the U.S. and assigned to the Belgian embassy under the Vienna Convention on Diplomatic Relations (1961) had caused a traffic accident, and the victim was claiming damages under the NATO SOFA Article VIII. The court decided that accrediting the corporal to

the U.S. in accordance with diplomatic procedures did not constitute an agreement in the understanding of NATO SOFA Article I, Paragraph 1(a), and that the corporal was subject to the NATO SOFA. The decision of the court seems controversial and out of line with the intentions of the drafters of the SOFA. Some countries have solved the issue by expressing in unilateral documents, e.g. internal guides to the SOFA, that the NATO SOFA, in fact, does not apply to personnel sent to serve under diplomatic regimes, including the Ottawa Agreement (e.g. the U.K.).

³² See MS-R(51) 13, Summary Record of a meeting of the Working Group on Status (23 April 1951), par. 10 (leave) and 18 (transit).

³³ Lazareff, *ibid*, pp. 80-82, and D-D(51) 269, Status of Forces Agreement – Memorandum by the United Kingdom Deputy on Provisional Implementation and Claims Procedure (29 October 1951), in which the U.K. declares her willingness to waive passport and visa requirements for personnel arriving at the U.K. on leave, provided that the stay in the U.K. does not exceed 21 days, and that the person carries 1) military ID, and 2) a movement order, which indicates a) that the person is on leave and b) the duration of the leave.

³⁴ MS-D(51) 3, Status of Forces Agreement – United Kingdom Note on the Definition of “Contingent” in the Draft (07 February 1951).

³⁵ See MS(F)-R(51) 1 Summary Record of a Meeting of the Working Group on Status (Financial Subcommittee) (13 February 1951), and MS(J)-R(51) 1, Summary Record of a meeting of the

Working Group on Status (Juridical Subcommittee), (8 February 1951).

³⁶ The different categories of military and paramilitary personnel are suggested to be divided into:

■ **Reservists:** Reservists belong to the armed services, and this category qualifies, thus, to come under the NATO SOFA when they are performing their military duties in a Receiving State. If a reservist – in his/her private capacity – is residing abroad, he/she does not come under the NATO SOFA in that capacity, but their status will, once performing their military duties, be determined by the NATO SOFA (“official duties”), see Anderson/Burkhardt, *The Handbook of The Law of Visiting Forces* – edited by Dieter Fleck (Oxford, 2001), p. 52.

■ **Retired military personnel:** The status of this category is similar to that of Reservists. Retired personnel belong to the armed services and can be reactivated. They will come under protection of the NATO SOFA if they are performing their military duties in a Receiving State. If a retired member of a force is residing abroad, he/she does not come under the NATO SOFA in his/her private capacity, but the status will, once he/she is performing military duties, be determined by the NATO SOFA (“official duties”), see Anderson/Burkhardt, *ibid.*, pp. 52-53.

■ **Paramilitary personnel:** Paramilitary forces are used in many NATO and PfP countries, either as special police forces (Gendamerie), as Rescue Board or Border Guards. In some countries the units refer to the Ministry of Interior or to the Ministry of Justice. In times of crises or emergen-

cies the forces may, subject to national laws, be transferred to the military commander, and personnel serving in the units may be on loan from the military structure. The question if such units are entitled to come under the NATO SOFA, if they are sent to serve abroad, is raised in *The Handbook of the Law of Visiting Forces*. According to *Webster's Handy Dictionary* the reference to the “*land, sea or air armed services*” covers the navy, army and air force of a country. It seems thus that only the traditional services are covered by the definition in Article 1. It could, however, be argued that when the armed services are augmented by paramilitary units, i.e. the authority of the units is transferred to the military line of command, the units then fall under the definition as they from the time of transfer are integrated into (belong to) one of the said armed services, no matter if the units are transferred for an exercise or a military operation. This also seems to be the conclusion of Anderson/Burkhardt, *ibid.*, p. 53.

³⁷ MS-R(51) 13, Summary Record of a meeting of the Working Group on Status (23 April 1951), par. 12.

³⁸ The Sending State is not obliged to receive a Receiving State national, despite that the person is employed by the Sending State, if the Receiving state issues an expulsion order on the person.

³⁹ The Sending State retains its right to exercise jurisdiction over members of its force, no matter if the member at the same time is a Receiving state national.

⁴⁰ A Sending State member of a force, who is at the same time the national of the Receiving State,

is subject to taxation in the Receiving State.

⁴¹ The Preamble also spells out the principle that nationals of the receiving state do not enjoy any privileges or immunities under the NATO SOFA: the NATO SOFA only applies to forces, when they are in the territory of another Party: “Desiring, however, to define the status of such forces while in the territory of another Party”. Under the Paris Protocol, nationals who are members of an International Military Headquarters enjoy the privileges granted under that Protocol, but not necessarily those granted under the NATO SOFA, see Serge Lazareff, p. 75, *ibid.*

⁴² MS-D(51) 3, Status of Forces Agreement – United Kingdom Note on the Definition of “Contingent” in the draft (7 February 1951), see Blue Book pp. 365-366. The Chairman of the Working Group pointed this out also in D-R(51) 15, Summary Record of a Meeting of the Council Deputies (2 March 1951), see Blue Book p. 129. See also MS-D(51) 3, Status of Forces Agreement – United Kingdom Note on the Definition of “Contingent” in the draft (7 February 1951), see Blue Book pp. 365-366.

⁴³ Lazareff, *ibid.*, p. 94. More recent authors do not share the sceptics, see Anderson/Burkhardt, *ibid.*, p. 55, who state that “It is a common view with the Alliance that the wording of the text is clear”.

⁴⁴ MS-D(51) 3, Status of Forces Agreement – United Kingdom Note on the Definition of “Contingent” in the draft (7 February 1951), see Blue Book pp. 365-366.

⁴⁵ MS-D(51) 3, Status of Forces Agreement – United Kingdom Note on the Definition of “Con-

tingent" in the draft (7 February 1951), see Blue Book pp. 365-366.

⁴⁶ Lazareff, *ibid*, p. 88.

⁴⁷ MS(J)-R(51) 4, Summary Record of a Meeting of the Working Group on Status, Juridical Subcommittee (16 February 1951), see Blue Book p. 99.

⁴⁸ Lazareff, *ibid*, pp. 89-90, quoting Dr. Richard Schubert (Military Law review, July 1962). See also Anderson/Burkhardt, *ibid*, p. 55, who – slightly confusingly – state both that “...the employer need not necessarily be the force directly, but may be associated with government agencies supporting the force...” and that “Individuals employed with other government organizations outside the armed forces are not considered as falling within the definition of civilian component”.

⁴⁹ Lazareff, *ibid*, pp. 90-91, summarises the French and the U.S. practise (U.S.-Turkey Agreement (1954), U.S.-Japan Administrative Agreement (1952) – both extent the definition. See also the practice under the U.S.-Korea Agreement as quoted above and the practise under the German Supplementary Agreements.

⁵⁰ D-D(51) 57, Status of Forces Agreement – Revised Draft (28 February 1951), see Blue Book pp. 430-431, and the French comments in MS-D(51) 19, Status of Forces Agreement – Observations by the French Government (7 April 1951), see Blue Book p. 463.

⁵¹ The SOFA requires citizenship of a State “Party to the North Atlantic Treaty”. According to Lazareff, *ibid*, p. 92, that means that the State must be a party to the North Atlantic Treaty, but it does not have to be a party to the NATO SOFA.

This can occur if the accession to the SOFA is very time consuming, as was the case for the Federal Republic of Germany (BRD). With the PfP SOFA another aspect is added: a PfP State national may be recognised as a member of a civilian component from a PfP State, but he/she does not qualify to come under the NATO SOFA as a member of a NATO State civilian component.

⁵² Webster’s Handy Dictionary, Oxford University Press, 1992.

⁵³ Lazareff, *ibid*, p. 95.

⁵⁴ See also Anderson/Burkhardt, *ibid*, p. 58.

⁵⁵ See Max Johnson, *The Handbook of The Law of Visiting Forces* – edited by Dieter Fleck (Oxford, 2001), p. 277. Max Johnson also describes the practice on acknowledging dependants to personnel assigned to NATO IMHQs or hired by a NATO IMHQ as international civilians.

⁵⁶ MS(J)-R(51) 1, Summary Record of a meeting of the Working Group on Status, Juridical Subcommittee, (8 February 1951).

⁵⁷ MS-D(51)5, Status of Forces Agreement – Revised Draft of Articles I to VI (12 February 1951).

⁵⁸ MS-D(51) 11/11(R), Status of Forces Agreement – Revised Text (Articles I-V, IX, XI-XIX) of the Draft (19/20 February 1951).

⁵⁹ MS(J)-R(51) 6, Summary Record of a meeting of the Working Group on Status, Juridical Subcommittee, (22 February 1951).

⁶⁰ D-D(51) 57, Status of Forces Agreement – Revised Draft (28 February 1951).

⁶¹ MS-D(51) 20, Status of Forces Agreement – Amendments Proposed by the United States (09 April 1951).

⁶² MS-D(51) 21, Status of Forces Agreement – Amendments Proposed by the Netherlands (10 April 1951).

⁶³ MS-R(51) 13, Summary Record of a meeting of the Working Group on Status (23 April 1951).

⁶⁴ MS-D(51) 28, Status of Forces Agreement – Revised Draft (27 April 1951).

⁶⁵ MS-R(51) 18, Summary Record of a meeting of the Working Group on Status (01 May 1951).

⁶⁶ D-D(51) 127, Status of Forces Agreement – Revised Draft (07 May 1951).

⁶⁷ D-D(51) 138, Status of Forces Agreement – Final Draft, (01 June 1951).

⁶⁸ Lazareff, *ibid*, p. 79.

⁶⁹ Lazareff, *ibid*, p. 80. The *Handbook of the Law of Visiting Forces* contains contradictory statements on this matter. Chapter IV (Anderson/Burkhardt, p. 54) largely repeats the point of view offered by Lazareff (the presence must somehow be associated with the Alliance), whereas Chapter V (Max Johnson, p. 263) suggests that the NATO SOFA is applied as a *default* position.

⁷⁰ MS-R(51) 13, Summary Record of a meeting of the Working Group on Status (23 April 1951).

⁷¹ See footnote 69. In NATO Legal Symposium 2000, Nordwijk, hosted by the Netherlands, the applicability of the NATO SOFA was also addressed. Some of the newest members of the Alliance raised the point that national exercises conducted solely by one NATO State on the territory of another NATO State should not fall under the SOFA. The main (and only?) reason for this being that the NATO SOFA claims provisions concerning parts of the financial liability on the Receiving

State, no matter if the Receiving State takes part in the exercise. It has been a long and standing tradition to conduct national, bilateral as well as multinational exercises within the Alliance, as the understanding of NATO duties among the Allies is closely related to the Washington Treaty, Article 3. Since the conduct of exercises is subject to agreements between the Receiving State and the Sending State (and sometimes also to payment), and since nothing would prevent the Receiving State from monitoring and assisting in the planning and use of the facilities, there seems to be no practical or legal reasons to exclude such activities from the NATO SOFA. See the conclusion from the Symposium: Documents of the Seminar on the NATO/Partnership for Peace Status of Forces Agreement, Noordwijk, the Netherlands, September 2000.

⁷² “In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack.”

⁷³ As proposed by Max Johnson, *The Handbook of The Law of Visiting Forces - edited by Dieter Fleck* (Oxford, 2001), p. 263.

⁷⁴ I.e. Vienna Convention on Diplomatic Relations, the Agreement on the status of NATO, national representatives and international staff (Ottawa, 1951) or bilateral agreements.

International Criminal Court and Its Implications to the Estonian Defence Forces

By Martin Roger*

When I was asked to write to the Baltic Defence Review on the International Criminal Court (ICC), the first suggestion was certainly to tackle the issues related to the controversial agreements with the United States under Article 98 of the Rome Statute of the ICC. Then again, I thought, the topic has somewhat lost its “burning” nature and is apparently off the discussion table, at least for the time being, when Estonia decided not to conclude Article 98 agreement with the U.S..¹ Instead, in this

article I would like to address briefly some of the questions pertaining more long-term issues relating to the impact of being a State Party to the Rome Statute on the defence forces. It is a common knowledge that the perpetrators of the crimes listed in the Rome Statute are more likely to be people connected with the armed forces. In that regard, I would like to touch upon the issues of criminal jurisdiction and command responsibility in Estonian penal legislation and lastly, which nevertheless deals with Article 98, the

question whether the Status of Forces Agreements exclude the application of the provisions of the Rome Statute.

Complementarity and the scope of jurisdiction of domestic courts

The key concept of the ICC is complementarity. According to Article 1 of the Rome Statute, it shall “[...] be complementary to national jurisdictions”. The essence of complementarity is captured in Article 17. In a nutshell, the Court steps

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in only where the State itself is unwilling or unable to investigate and prosecute perpetrators of genocide, crimes against humanity and war crimes. Therefore, the State must have its substantial criminal law in place, i.e. it should, if it does not want the ICC to step in, criminalise acts that amount to crimes under the jurisdiction of the ICC. There is nothing in the Statute that requires the State Party to copy and paste the provisions into the domestic penal laws, but it could be useful to bear them in mind in the legislative process.

In case the ICC can exercise jurisdiction, it can do so only with respect to crimes committed on the territory of a State Party or if it was committed by a State Party national. In order for the domestic court to exercise its primary jurisdiction, it must have laws as a basis for it. Therefore, the prescriptive jurisdiction (power to legislate) is always a prerequisite to enforcement jurisdiction (power to execute the laws). The principal type of jurisdiction is territorial – a State has jurisdiction over acts committed on its

territory.² It must also be noted that territorial jurisdiction applies also in cases where crime was commenced outside, but completed on the territory of a given state.

It is widely accepted that territorial jurisdiction is one of the most common attributes of state sovereignty. The territorial jurisdiction finds its solid place in the Estonian penal code: Section 6 paragraph 1 provides that “the penal law of Estonia applies to acts committed within the territory of Estonia.” Estonian Penal Code criminalises the acts of genocide, crimes against humanity and war crimes. In case these aforementioned crimes are perpetrated in Estonia, the domestic courts can act on an established base of jurisdiction as well as it has subject-matter jurisdiction on these core crimes. Therefore, the ICC cannot exercise jurisdiction, if the law enforcement agencies and domestic courts act *bona fide* in the exercise of their duties.

The case of territorial jurisdiction seems to be clear and simple. As to the other base for jurisdiction of the ICC, namely

jurisdiction over nationals of the State Parties, things might be more complicated. According to Section 7 subparagraph 3 of the Penal Code:

“the penal law of Estonia applies to an act committed outside the territory of Estonia if such an act constitutes a criminal offence pursuant to the penal law of Estonia and is punishable at the place of commission of the act, or if no penal power is applicable at the place of commission of the act and if the offender is a citizen of Estonia at the time of commission of the act or becomes a citizen of Estonia after the commission of the act [...]”

It follows, if, for instance, a member of the Estonian Defence Forces, an Estonian national, commits war crimes abroad, to establish national or active personality jurisdiction, a mere fact of being an Estonian national does not suffice for domestic court to establish jurisdiction. There is a requirement of double criminality – the act must also be punishable under the penal laws of the place of commission.

No such condition has a place in the Finnish Penal Code (see section 6 (1) of Rikoslaki), but almost the same regulation has been provided in the German Penal Code (see Section 7 (2) of Strafgesetzbuch). Therefore the government must be careful in considering sending the troops to post-conflict situations, where there might indeed be no penal laws to give guidance. One might refer to the fact that no troops shall usually be sent unless there is an agreement on the status of the soldiers. The issues relating to the SOFA will be dealt with below. Suffice it to say that they do not always give full exclusion from the jurisdiction of the place of commission. The solution might also be universal jurisdiction – which is provided in Section 8 of the Estonian Penal Code, under which “regardless of the law of the place of commission of an act, the penal law of Estonia shall apply to an act committed outside the territory of Estonia if the punishability of the act arises from an international agreement binding on Estonia.” As one can infer from the wording, no dual criminality is needed for the exer-

cise of universal jurisdiction. As to the crimes under the Rome Statute, Article 5 of the Genocide Convention and the relevant articles of the four Geneva Conventions of 1949 (Articles 49, 50, 129 and 149 respectively) provide an obligation for a Member State to enact criminal legislation to implement the provisions. As to the crimes against humanity, no specific treaty on it exists, neither does the Rome Statute impose an obligation on a State Party to criminalise it in domestic legislation. Germany, for instance, has provided in its new Code of Crimes against International Law (Völkerstrafgesetzbuch, Section 1) a universal condition with respect to the crimes, listed in the Rome Statute, without qualifying conditions. This will give an absolute guarantee against the deficiencies in what reliance on other bases of jurisdiction may bring about. Subsequently, national jurisdiction with respect to crimes against humanity in Estonia is more limited than the other two crimes under the Rome Statute. This also can imply more limited means for the domestic courts to exercise

the primary right of jurisdiction emerging from the principle of complementarity.

Command responsibility in the Rome Statute and the Estonian Penal Code

One of the issues of principles of general international criminal law is the question of superior responsibility, which was first only limited to command (military) responsibility, but later also to the civilian superiors. In short, the concept of command responsibility governs instances when military commander may be held responsible for the criminal activities of his/her subordinates.

The law on the subject is controversial and debatable and is still not clear. The case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has in Čelebici case ruled the following prerequisites:

- existence of superior-subordinate relationship;

- the actual knowledge, or reason to know (through a specific information that indicated the need of further investigation), that the act was about to be committed or had been committed;

- superior's failure to take necessary and reasonable measures to prevent the crime or to repress the perpetrator of it.³

These questions have been more specifically elaborated in Article 28 (a) of the Rome Statute. This encompasses both *de jure* and *de facto* chain of command (forces are under "effective command and control"). The responsibility emerges as a result of the commander's failure to exercise control properly, that is, a commander has to take all measures to ensure that the forces under his command follow the rules of international humanitarian law. The hardest for the prosecutor to prove is usually the subjective element – the actual knowledge or "should have known" standard. It is likely that the ICC will rely on the relevant case-law of the ICTY on this matter. The ICTY has said that circumstantial means could be used

for determining the knowledge but there is no presumption that because of the command position, the commander is automatically liable.⁴ Even more difficult is to determine the "should have known" standard: this implies the duty of the commander to see that relevant data shall be gathered, and he/she has to analyze it. If he/she fails to gather that information, or wantonly ignores information that may indicate the actual or likely commission of crimes, he/she shall meet the "should have known" standard.

The Rome Statute does not impose a duty on a State Party to introduce command responsibility concept to its domestic legislation, although it is very useful to do that due to the complementarity principle. The Estonian Penal Code has regulated the issue of command responsibility in Section 88 (1):

"For an offence provided for in this Chapter, the representative of state powers or the military commander who issued the order to commit the offence, consented to the commission of the offence or failed to prevent the

commission of the offence although it was in his or her power to do so shall also be punished in addition to the principal offender."

This provision is therefore not simply on command responsibility as it is understood in the international criminal law, but addresses some specific issues of individual criminal responsibility, e.g. ordering crimes to be committed. In the two first cases (ordering and consent of the commission of the crime), the commander is liable as an accomplice, and therefore the responsibility arises because of a positive act. The third instance, omission, is a classic case of command responsibility under international criminal law. Therefore it is the view of the author of this article that these sources of responsibility should have been better distinguished in the Penal Code, since they are also distinct concepts under international law. Command responsibility is responsibility for omission; complicity is responsibility through a positive act. Also, there is no responsibility for the commander

when he/she has not failed to take all reasonable measures to ensure that the crimes shall be investigated. The *mens rea* (subjective) element of the responsibility seems to be more lenient: according to the Commentaries of Section 88 (1) of the Penal Code, in order to incur responsibility, the commander has to possess actual knowledge of the acts to be committed, but not when the standard of “should have known” has been met. It is for the possible case law to settle the exact subjective requirements for the command responsibility under Estonian penal law.

ICC and the Status of Forces Agreements

The third issue which I would like to briefly address relates more to the procedural co-operation with the ICC. Article 98 (2) of the Rome Statute provides that the Court must take into account that if the request violates the State Party’s obligations under international agreements under which the consent of a Sending State is required in order to send that

person to the ICC, the Court must first obtain the consent of that State. When foreign military is present on the territory of another state, its status is usually regulated by the Status of Forces Agreement (SOFA). These Agreements, like the NATO SOFA,⁵ provide solutions when concurrent jurisdiction emerges between the State which sends troops and the State that receives the troops on its territory. Usually, in case of commission of crimes in fulfilling the official duties, the sending state has primary jurisdiction over its military personnel. Estonia applies the NATO SOFA through the so-called PfP SOFA.⁶ Two groups of relationships under the SOFA agreements must be distinguished: first, the relations between States which are State Parties to the Rome Statute and, secondly, relations between a State Party and non-State Party. It has been said that SOFAs do not bar the exercise of jurisdiction by the ICC, and therefore attachment of primary jurisdiction to official capacity is irrelevant, when it regulates the relations **between** State Parties to the Rome Statute.⁷ In practice, this will

not be a problem, since, in order for the ICC to exercise jurisdiction, it first has to give domestic authorities the possibility to initiate proceedings itself, and the right of a Sending State to exercise its primary jurisdiction is one aspect of using the complementarity principle. When the SOFA concerns the relations between a State Party and non-State Party, which is not bound by Article 27 of the Rome Statute, the textual interpretation gives a non-State Party in some ways stronger position in invoking the SOFA to exclude its personnel from the ICC. The fact is however, that the final say is for the ICC in that matter. The question whether the SOFA, concluded after the entry into force of the Rome Statute, for that State should be made subject to the Rome Statute is somewhat academic, since Article 98 (2) does not make any distinction between agreements concluded before or after the entry into force of the Rome Statute. For instance, this distinction is made in Article 97 (c) which specifically addresses the issue of pre-existing obligations.

In this short article I have tried to discuss some of the issues relating to the ICC, the defence forces and the Estonian domestic jurisdiction and legislation. There are some deficiencies in the Estonian penal law regarding jurisdiction, which could be more extensive in its scope. The law relating to command responsibility is stipulated in the same article with individual criminal responsibility for positive acts, which could be misleading. Also, it does not seem to provide responsibility when the commander should have known of the crimes committed. Meanwhile, the SOFA agreements, all in all, do not cause problems to co-operation with the ICC, as long as the State exercises its primary jurisdiction *bona fide*.

¹ "Parts: abi lõpp ei muuda Eesti -USA suhteid" (The termination of (military) aid does not change Estonian-US relations), Eesti Päevaleht, July 3, 2003. Despite of that, the U.S. President decided to restore the aid partially in November 2003.

² See the *Lotus* case, Judgment No. 9, 1927 PCIJ, Series A, No. 10: "the territorial character of criminal in all systems of law".

³ Prosecutor v. Delalic and others (Čelebici), Judgement, ICTY Case No 96-21-T, Nov 16, 1998,

paragraph 330. See also K. Ambos, "International Criminal Responsibility in International Criminal Law: a Jurisprudential Analysis - from Nuremberg to the Hague", in G. Kirk McDonald, O. Spaak-Goldman (eds). *Substantive and Procedural Aspects of International Criminal Law*. Kluwer Law International, 2000.

⁴ Prosecutor v. Delalic, supra note 3, paragraph 386.

⁵ Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, London, June 19, 1951. See <http://www.nato.int/docu/basicxt/b510619a.htm>

⁶ Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the status of their forces, Brussels, June 19, 1995. See <http://www.nato.int/docu/basicxt/b950619a.htm>

⁷ S. Wirth. Immunities, related problems, and Article 98 of the Rome Statute. Criminal Law Forum 12, 2001, p. 455.

Commentary on Current Issues: To Become a Member and to be a Member

By Ole Espersen*

For the restored or new democracies membership of international organizations was seen as an important condition for a safe position in the international society of nations. This feeling was fully understood and supported by the Nordic Countries with regard to the Baltic states. First the United Nations, then the Council of Europe, and now NATO and the EU. The process of accession will be over soon, and the everyday life shall begin.

The Baltic states will – as we have done – appreciate that especially for small countries the adherence to international law – the respect for the principle of the “Rule of Law”

- is vital. The very membership of most of the international organizations has that very important purpose. The most impressive example is, of course, the EU. If we – the many smaller or middle-sized countries – implement and develop international law, e.g. within the United Nations and the EU, we have a much better chance of expecting and/or demanding with success the same from big powers. If we give in, maybe to serve short-sighted interest, we will lose the benefit of the rule of law. We have all become full members of the society of international law. Being members obliges us to fight for a civilized and fair world order.

These reflections are the background for the following thoughts which, I believe, are

pertinent for the countries like Estonia, Latvia and Lithuania as well as Denmark.

Big developments have occurred within the field of international law since I first got acquainted with it in the 1950s. My professor spoke about the system which called itself “International Law or Völkerrecht” but which, for a big part, were only principles or ideas. Most of the so-called duties were not connected with any kind of obligatory responsibility, any court system or any implementation procedures. It was a mockery of law! At the same time he, of course, acknowledged that certain parts of international law really functioned in practice. But only because all parties found it useful. This goes, for

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instance, with regard to the International Postal Union.

International law today is something quite different. More countries have acceded to the International Court of Justice, and the court is busy as never before. In 1998 an International Criminal Court was established. The statute of the International Criminal Court is as lengthy and complicated as are most of our national laws on the administration of justice. The World Trade Organization has been given powers to adjudicate more than ever before, and the international organization, the European Community, can impose fines on member countries. Rules have emerged, sovereignty has been limited and a growing basis for international society based on the rule of law has been established.

So far there are reasons to be optimistic. Most of those countries, which have been leading or co-operative in this development, are still eager to create a solid basis for an international community. However, there are dark clouds hanging above us. The areas of human rights and

the protection of human rights are being attacked by certain political and religious quarters. This is, of course, serious, because the human rights, including the freedom of conscience, the freedom of speech, the freedom of assembly and association, are the basic elements of any state governed by the rule of law or any society, also the international society.

The United States has been attacking the International Criminal Court in a way, which is absolutely contrary to any idea of a society based upon the rule of law. Bribing and pressure have been a very often used means. Small countries have been exposed to pressure, which is against any kind of decency. The United Nations have been exposed to pressure and threatened that troops will be withdrawn from participation in the United Nations operations. Many countries have given in and, thereby, weakened the whole idea of stopping impunity, which was one of the main reasons of creating the International Criminal Court. The strongest blow has been given to the United Nations security system by violations of the prohibi-

tion against the use of force except in cases of self-defence or situations where the Security Council has authorized the use of force. The Secretary General of the United Nations, the day before the Iraq war started, very seriously warned against any use of power in this way. He was not listened to. The United States, Spain, Denmark, Australia – amongst others – found that they themselves had the right to interpret a number of the United Nations resolutions in such a way that they were free to use force in Iraq. They undertook upon them the right to interpret on behalf of the world society.

The International Court of Justice, part of the United Nations system, has clearly, already in 1949, decided that unauthorised use of force by one country on the territory of another country is clearly prohibited according to international law. The Court made the following statement:

“The Court would regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and

as such cannot, whatever be the present defect in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful states and might easily lead to perverting the administration of international justice itself.”

Even more serious was the warning issued by the Secretary General, Kofi Annan on 17 March 2003. He said: “The members of the Security Council are now faced with a grave choice. If they fail to agree on a common position, and action is taken without the authority of the Security Council, the legitimacy and support for any such action would be seriously impaired.”

My own country has been known for supporting the international development of human rights and the rule of law. We have, ever since 1945, based our foreign policy upon the United Nations. We have also based it upon the North Atlantic Treaty Organization as an organization

established to defend democracy and the rule of law. It is to be hoped that the events during the last year will be a short parenthesis in our history. It is to be hoped that the big majority in the world and within the membership of the Security Council will change the course. It is to be hoped that Denmark and countries in the similar position will rethink what has been done and ask: “What has really been achieved by this break of important rules of international law?” We have to convince the United States - maybe after some years of functioning of the ICC - that we should all be member states of the court in order to prevent the grave injustice, which impunity in many countries and many relations have created. Then again, hopefully, the positive development of international law and international society based upon the rule of law will be continued after this regrettable and very serious blow, which has been given to it.

Section III

Military Concepts, Structures and Doctrines

Following its long-standing tradition, the Baltic Defence Review is updating its readers on the changes in and developments of key conceptual documents of Estonia, Latvia and Lithuania. This time we are publishing a new National Defence Concept of Latvia, adopted by the Latvian authorities to chart a course for further development of the Latvian National Armed Forces after accession to NATO. Among many other new or adjusted elements of the concept, the document reflects a political decision to abolish conscription and switch to an all-volunteer force format.

Then the section turns attention of our readers to a largely unexplored ground in the field of military thinking. While recognising importance of the principles of war in shaping military profession and military institutions, Lieutenant Commander P. Richard Moller addresses the need to define and apply in practice principles of peacetime readiness, which is crucial if we seek to maintain vigour and dynamism of our military forces. The author suggests that developing adequate principles of peacetime readiness is instrumental in avoiding feeble, cumbersome and ineffective forces mired in peacetime bureaucratic wrangling – forces that lead to an initial military disaster once called to do their job in wartime. Drawing upon success of business organisations in maintaining organisational agility, the author attempts to transfer key elements of this success into the military setting, defines clear-cut principles of peacetime readiness and elaborates on their possible application within military forces.

The last article of the section is a result of a very commendable attempt by one the students of the Baltic Defence College to enter the sphere of public debate on security and defence policies. Here, Major Hennadiy Kovalenko outlines efforts to reform the Armed Forces of Ukraine and discusses the Ukrainian co-operation with NATO. He provides some recommendations on what has to be done to streamline that co-operation and advance Ukraine's strategic goal of integration into Western security and defence community.

State Defence Concept of the Republic of Latvia

**Approved by the Cabinet of Ministers on 30 September 2003
Passed by the Parliament (Saeima) on 13 November 2003**

1. Introduction

The goal of the State Defence Concept is to define the guidelines for strengthening and improving the defence system in accordance with Latvia's geopolitical situation and Latvia's obligations to the collective security of the North Atlantic Treaty Organisation (hereinafter – NATO), of which Latvia is preparing to become a full member in the middle of 2004. The Concept determines the basic strategic principles that will guide the implementation of the tasks associated with state defence and is the basis for planning the development of the National Armed Forces (hereinafter – NAF).

The State Defence Concept is formulated on the basis of Analysis of Endangerment to the State, the Military Risk Analysis and forecasted trends in the development of international security. The state's defence policy and strategy have been formulated to avert possible threats. The Constitution of the Republic of Latvia [Satversme], the National Security Concept and Foreign Policy Concept and other regulations adopted by the Republic of Latvia determine principles, goals, tasks and legal mechanisms of state defence.

Latvia's regulations and action plans related to state defence are up-dated in accordance with the basic principles of the State Defence Concept.

2. International security environment and Latvia

The security of Latvia is determined by its geopolitical and international situation, its internal security and economic situation, the educational and cultural potential of the state, the capabilities of the military and civil defence systems, the ecological situation and other important factors.

The security of Latvia is closely tied to international security. It is characterised by the transnational spread of asymmetric threats (international terrorism, ethnic conflicts, migration, the proliferation of weapons of mass destruction, organised

crime, etc.), the increasing possibility of their occurrence, as well as the limited ability of forecasting the time and place such threats might be carried out.

Since its founding, NATO has worked to promote peace in Europe on the basis of the common values of democracy and the respect for human rights. After the end of the Cold War, the Alliance has adapted to new circumstances and current security needs. The most important goal of NATO is to defend the freedom, security and stability of its member states, as well as to promote stability and peace in the world.

The fundamental basis of Latvia's defence is Latvia's membership in the NATO collective security and defence system. In becoming a member of the Alliance, Latvia's responsibility for strengthening common international security and the prevention and management of asymmetric threats will increase.

Closer co-operation between the European Union (hereinafter – EU) and the United States of America (hereinafter – the USA) is essential for Latvian security,

as long as the functions of NATO and the EU are clearly separated and any overlap in functions is avoided. Co-operation between EU countries in the field of military security and defence must strengthen the growth of the military capabilities of European nations within the parameters of harmonised and balanced transatlantic co-operation.

The USA has an important role to play in the promotion of European security. The support of the United States of America in strengthening the independence and security of the Baltic States is a decisive factor. Therefore, bilateral co-operation with the USA will continue to be one of Latvia's most important priorities in defence policy.

In the context of the threat of terrorism, measures of a preventative nature for guaranteeing international peace and combating the proliferation of weapons of mass destruction have become more important. It is important for Latvian security that no terrorists or terrorist organisations are allowed to be active on its territory.

Latvia supports international arms control measures, which, in light of current asymmetric threats, are important for European and world security. Latvia continues to strengthen its contribution to the European security dialogue and continues to actively participate in the arms control measures implemented by the Organisation for Security and Co-operation in Europe (OSCE), which ensure the promotion of openness and trust between OSCE member states.

Regional co-operation promotes security and stability in Europe. The co-operation between the states of the Baltic Sea region has become a successful example of the promotion of regional security and defence.

Latvia's security is irrevocably bound to the common security of the Baltic States. Military co-operation between the Baltic States promotes not only their individual defence capabilities, but also their purposeful integration into European and NATO security and defence structures.

3. Basic strategic principles of state defence

The basic task of state defence is to guarantee national sovereignty, territorial integrity and the security of population. Latvia's membership in NATO ensures the security and independence of the state. It is NATO's responsibility to defend its member states against any type of threat. Along with its membership in NATO, Latvia's responsibility for strengthening international peace, security and stability will increase as both Latvian and international security are indivisible.

Latvia's goal in the European Union is to participate in the promotion of democracy and prosperity in our country, in the Baltic region, and in other states as well. Participation in the EU increases national security and stability. The EU has become a strategic partner of NATO in the prevention of international conflict. The participation of the NAF in EU-led operations will promote co-operation, mutual trust and success in the preven-

tion and management of crises. It is important to avoid any overlapping of functions between NATO and the EU in this process.

The NAF units assigned for participation in international operations should be prepared for participation in both NATO- and EU-led operations.

Latvia's defence is based on several basic strategic principles: collective defence; professional armed forces; co-operation between society and the National Armed Forces; and international military co-operation.

3.1. Collective defence

The goal of Latvia as one of the next members of the Alliance is to improve the military capabilities of the NAF and its readiness to participate in NATO/EU-led and other international operations. In the event of a threat to the state, the NAF must be able to ensure its military self-defence capabilities until support from NATO forces can be received.

Latvia's defence capabilities are being developed in accordance with NATO's

capabilities development guidelines. The Prague summit declaration specifies the military capabilities fulfilment obligations of NATO member states. The development and improvement of military capabilities takes place in the following directions:

1. Command, control, communication and information system;
2. Development of military capabilities;
3. Defence against weapons of mass destruction; and
4. NAF deployment capabilities.

The interoperability of the NAF with NATO forces is a prerequisite for successful integration into the Alliance. This facilitates effective co-operation among the various types of forces and units in the armed forces of NATO member states.

In case of endangerment to the state, the NAF must be ready to take part in prevention and overcoming of the threat. Latvia must ensure support for foreign armed forces through the host nation support system. This system is utilised both during international military train-

ing exercises and in the case of state endangerment, including operations under Article 5 of the Washington Treaty and those out of Article 5, as well as in case of a natural disaster and the process of dealing with its consequences. The improvement of the host nation support system for foreign armed forces must be continued.

3.2. Professional armed forces

The use of mandatory military service within the NAF could finish till the end of 2006. The reasons for professionalisation of the NAF are the following:

1. Armed forces must meet the demands of the current security situation, which depends on the quality of the armed forces involved and not their quantity;
2. Public support for professional armed forces; and
3. Membership in NATO provides security guarantees to Latvia, while concurrently bearing an obligation to ensure the country's readiness for collective security within the scope of the alliance.

Along with the termination of mandatory military service:

1. NAF will achieve greater operational capabilities to participate in international operations;
2. NAF units will have a higher level of combat-readiness;
3. NAF will utilise modern weapons systems and combat equipment;
4. Financial resources will be used more effectively; and
5. NAF will establish small, but well prepared reserves.

While establishing and developing armed forces based upon professional military service, the issue of attracting personnel will be essential. The recruitment system must be developed to conform with current requirements: flexible, modern and competitive in the labour market.

In addition to the issue of recruitment, providing soldiers and their families with appropriate social guarantees is no less important. The NAF needs to pay special attention to ensure high quality training, modern armament and equipment.

As the professionalisation of the NAF takes place, the National Guard and the Youth Guard will have an irreplaceable role to play in providing a foundation for the selection of professional service soldiers. At the same time, the combat readiness and the quality of training of National Guard units will be raised. The personnel policy and professional development programmes of the National Guard are being established in conformity with current requirements for military capabilities, while preserving the link with society and the military reserve potential. Such an approach is the basis for the future of the National Guard.

3.3. Co-operation between the National Armed Forces and society

The successful implementation of the tasks assigned to the NAF depends on society support and understanding regarding the role and functions of the defence system and the armed forces. Society's understanding of the state defence system,

the NAF and its principles founds sustainable public support for national security and defence.

The armed forces provide support for the prevention, management and elimination of the consequences of national emergencies – take part in the prevention of natural and man-made catastrophes and the elimination of their consequences; the neutralisation of unexploded ammunition, and participate in search and rescue and environmental monitoring operations. In turn, society and civilian institutions provide support in the performance of military tasks – ensure civilian expertise, mobilisation resources or participation in national support measures, as well as the availability of materials and technical facilities for the performance of these tasks.

3.4. International military co-operation

3.4.1. Co-operation with NATO member states

Co-operation with NATO member states is an essential pre-condition for Latvia's successful integration into NATO. The most

important areas of co-operation are the training and education of military personnel (cadets, instructors and officers), expert consultations regarding the development of the defence system, co-operation among armed forces units and their involvement in international exercises. Once a member of NATO, Latvia will retain existing international bilateral co-operation projects, thus continuing the development of the armed forces utilising Western experience. In addition, new areas are being assessed in which co-operation with NATO states will provide Latvia with an opportunity to effectively integrate into NATO.

3.4.2. Co-operation between the Baltic States

Co-operation between the armed forces of the Baltic states is a basic precondition of strengthening Latvia's security. Close and intensive co-operation ensures regional stability. At the same time, co-operation between the Baltic states promotes the development of their armed forces and mutual interoperability.

As they integrate into NATO, the Baltic states must continue to develop and

improve common military projects, which ensure the effective use of limited resources and the improvement of common military capabilities. On the basis of mutual agreement, Latvia will promote the development of common specialised units for the Baltic states in NATO.

3.4.3. Co-operation within the scope of European Union Security and Defence Policy

Latvia supports close co-operation between NATO and the EU. Latvia's goal in European security and defence policy is to promote stability and the strengthening of security in Europe, to strengthen the EU's crisis management capabilities and to contribute promotion of transatlantic co-operation. It is important that NATO and EU security and defence policies complement each other in order to ensure the efficient utilisation of resources and to prevent any overlapping of tasks.

3.4.4. Co-operation with the states of the Baltic Sea region and NATO partner countries

Co-operation among the states of the Baltic Sea region promotes stability and

security. The enlargement of NATO and the EU provides the region with an opportunity to ensure its balanced and successful development, as well as its long-term security. Co-operation with NATO partner countries, including Russia, will promote trust, security, stability and openness in Europe. Membership in NATO will give Latvia the opportunity to participate and provide its contribution to the further development of this co-operation, by sharing its experience with CIS and South-eastern European states and facilitating the democratic reform process in partner countries.

4. Military defence

Military defence is ensured by Latvia's National Armed Forces. The operational goals, tasks and development of the NAF are set in accordance with the Military Risk Analysis and the State Defence Concept. The Commander-in-Chief of the National Armed Forces is the President who chairs the National Security Council, the Military Council, recommends the

Supreme Commander of the NAF to the Parliament [*Saeima*] for approval and performs other functions associated with state defence, which are specified in the Constitution [*Satversme*]. The Saeima approves the National Security Concept and the State Defence Concept, exercises parliamentary control over the National Armed Forces, adopts laws in the field of national security and implements other measures. The Cabinet of Ministers provides national institutions with the necessary funding, in instances specified by law proclaims extraordinary situations, a state of emergency and mobilisation, decides on the participation of NAF units in international operations and performs other functions.

4.1. Tasks and development of the Ministry of Defence and the National Armed Forces

4.1.1. Tasks of the Ministry of Defence

The Ministry of Defence formulates defence policy and co-ordinates and supervises its implementation. The Ministry prepares proposals regarding the funding

necessary for state defence and implements the tasks specified in other regulatory acts.

In the event of a national emergency, the Ministry of Defence, within the scope of its competence, participates in the prevention of threatening situations and manages the elimination of the resulting consequences. The Ministry of Defence promotes and ensures civil-military co-operation and co-ordinates with foreign armed forces the provision of host nation support by those state institutions and authorities involved.

4.1.2. Tasks and development priorities of the NAF

The NAF must ensure the implementation of the following tasks:

1. Defence of the sovereignty, territorial integrity and inhabitants of Latvia against military aggression;
2. Combat readiness, ability to take part in international operations and sustainability of the NAF;
3. Continue modernisation of the NAF and increase the level of professional military training;

4. Effective command and control of the NAF; and

5. Co-operation with state civil institutions.

The NAF takes part in prevention and elimination of the consequences in case of state endangerment and fulfils other tasks specified in regulatory acts.

The development of the National Guard is one of the priorities of the NAF. The operational goal of the National Guard is to ensure the performance of support functions for the NAF and the state civil defence system by implementing the following tasks:

1. Ensure the protection of vitally important objects to national security; participate in the evacuation of civilians; co-ordinate co-operation with the State Border Guard and others.

2. Ensure the fulfilment of support functions for foreign armed forces crossing Latvia's territory or being deployed in Latvia in order to assist in the elimination of endangerment to the state.

3. Establish combat support and logistic units in the fields of transportation,

civil-military co-operation, supply, engineering and air defence.

As it integrates into NATO, the following have been specified as NAF development priorities:

1. On the basis of NATO capability development guidelines: to modernise the command and control, armament, training, logistic and supply systems; improve the air defence, air-space observation and control systems; and to continue the development of NAF units and the ability to deploy them to the location of operations.

2. Continue to develop and look for opportunities for mutual co-operation with the other Baltic states in the development and improvement of the military capabilities necessary for collective defence.

3. Develop host nation support capabilities for foreign armed forces.

4.2. Structure of the National Armed Forces

The NAF consists of the Land Forces, which are based on an infantry brigade

and the National Guard, the Naval Forces, the Air Forces, the Logistic Command, the Training Doctrine Command and the National Defence Academy.

During a war or a state of emergency, the Security Unit of the Bank of Latvia is included in the NAF, and, during war, the State Border Guard is included in the NAF structure.

The military capabilities demanded by the NAF in order to implement the tasks assigned to it, determine its structure, the State Defence and the NAF Development plans. The diverse tasks, assigned to the NAF, include the spectrum of threatening situations from peace to war.

4.3. Personnel and training

The preparation of professional personnel for the state defence system is one of the pre-conditions for ensuring Latvia's readiness for membership in NATO. The training system is regularly improved in order to ensure the development of military capabilities. An important element in increasing the professionalism of per-

sonnel is participation in joint training exercises, which include all types of forces and approximate real battle situations as closely as possible.

In order to provide the defence system with appropriately prepared personnel, the current military career planning system is being improved in accordance with the practice of other NATO member states. Also, a modern NAF personnel management database is being established.

4.4. Armament and infrastructure

It is important for Latvia, as a future NATO member state, to ensure the interoperability of its armed forces with NATO and to provide them with modern armament. The priorities for armament procurement are determined by the armed forces' structures and the development of military capabilities within the system of collective security, including Baltic state co-operation. The armament procurement programs provide for the purchase of weapons systems and combat equipment that conform to modern re-

quirements with the goal of providing the armed forces with armaments suited to fulfilling their tasks.

Military infrastructure is one of the essential pre-conditions in order to fulfil the tasks of the defence system. All infrastructure construction and maintenance is carried out in accordance with the NAF's long-term development plans. The goal of these infrastructural improvements is to ensure the operation of NAF units, the maintenance of armament systems and increased combat capabilities, and to ensure the necessary training environment and opportunities, which is also the efficient utilisation of resources.

4.5. Information security

In order to ensure performance of the state defence system, the capabilities to send, receive and store classified information is being developed in accordance with NATO member state practices. Priority is being given to the ability to exchange classified information quickly and effectively between state institutions, and

Latvia's representations abroad and NATO member states.

4.6. Resources

Up until 2008, 2% of Latvia's Gross Domestic Product will be allotted to state defence, security and integration into NATO.

Financial resources must ensure the professionalization and modernisation of the NAF. Latvia must develop forces that are NATO interoperable, deployable and supplied in accordance with the guidelines specified by NATO. The main areas of investment include the implementation of the tasks set for the defence system in the Timetable for Completion of Reforms, the improvement of the MoD and NAF personnel career planning and training system, the purchase of modern weapons systems and combat equipment, the interoperability of military forces with NATO and other areas, which are specified in the Minister's guidelines for the development of the state defence system and budget planning.

The planning, programming and budgeting system has proven its effectiveness. It improves and ensures an overview of the planning and programming process, and ensures the purposeful utilisation of funding and its control. Budget programmes have been improved to ensure an overview of budget funding and the results achieved.

The planning, programming and budgeting system is continuously up-dated to include current budgeting principles and elements.

The effective and stable development of the national economy and its growth are important factors in increasing state defence capabilities and improving material technical facilities.

5. Civil defence and crisis management system

Civil defence is a part of the national security system. The work of the civil defence system is planned, co-ordinated, managed and controlled by the Ministry of the Interior.

The civil defence system consists of national, administrative and local government institutions, companies, business entities, institutions and organisations, as well as all persons, who have reached legal age, are capable of work and who belong to the Latvian State.

The interoperability of the civil defence and crisis management system with NATO and EU member state crisis management and warning systems, civil defence systems and others is essential for the management of national emergencies.

The co-operation between national administrative institutions within the scope of the crisis management system is co-ordinated by the Crisis Management Centre, which is directly subordinate to the Prime Minister. The Crisis Management Centre formulates potential crisis situation scenarios, standard operational procedures and plans for the prevention, management and elimination of the consequences caused by a threatening situation, and organises and co-ordinates crisis management training.

6. Conclusion

State defence policy is a part of Latvia's security policy. The key priority of defence policy is to ensure the state defence and globally – within international cooperation promote stability and ensure peace in the region and the world.

The basis for effective state defence is participation in the NATO collective security system and the EU security and defence policy, professional armed forces, highly prepared reserve force – the National Guard and the support of society.

The NAF is being developed in order to ensure its military capabilities and preparedness to:

1. Ensure defence of Latvia;
2. Fulfil the obligations of a NATO and EU member; and
3. Participate in international operations.

Latvia's state defence system is being developed according to Latvia's geopolitical and historical situation, available physical and financial resources, the mili-

tary capabilities available within the scope of collective security, which determine the structure of the Latvian NAF, the professional qualification of NAF personnel, the improvement of the training system, the modernisation of armament and infrastructure, information security and the effective utilisation of resources. Society's support for and understanding of the National Armed Forces and its principles is essential.

Principles of Peacetime Readiness

By Lieutenant Commander P. Richard Moller*

[Leadership] is an act of faith. In an age where no secret is sacred, where fabrications and false confidences are the stuff of daily life, [leadership] has retained its mystery... and never has it been talked about so much—the best possible proof of its power and enchant.¹

Christian Dior

In 1947, Christian Dior presented a collection of women's clothing that revolutionized the world. Almost overnight, women were slipping into clothes from his *New Look*. After wartime rationing, the conspicuous consumption embodied in the meters of material required for each outfit signalled the end of the lean, sleek, efficient wartime fashions. Concomitant with the civilian world's entry into a period of extravagant consumption, military leaders were "right sizing" their organizations so their

countries could realize the "peace dividend," to use the modern vernacular.

Even after 5 March 1946, when the Right Honourable Sir Winston Churchill declared that an Iron Curtain had descended across Europe, signalling the start of the Cold War, countries continued to stand down from their wartime footing and commenced the evolution into peacetime militaries. With only a brief pause during the fledgling United Nations' policing action on the Korean peninsula, bureaucracies grew as the number of sail-

ors, soldiers, and airmen diminished. It is not surprising that bureaucratic battles became the way admirals and generals won their promotions and positions.² This is not a new phenomenon; the Comte de Guibert wrote about it in his general essay on tactics: "If by chance, there appears in a nation a good general, the politics of the ministers and the intrigues of the bureaucrats will take care to keep him away from the soldiers in peacetime. They prefer entrusting their soldiers to mediocre men, who are incapable of training them, but rather are passive and docile before all of their whims and within all of their systems... Once war begins, only disaster can force them to turn back to the good general."³

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Baron Antoine Henri de Jomini also warned that “it is particularly necessary to watch over the preservation of armies in the interval of a long peace, for then they are most likely to degenerate.”⁴ One way to combat this tendency would, of course, be to continue to find enemies to fight and keep our countries in a perpetual state of full-scale war. Few, however, would argue that the benefits to our militaries under this strategy would outweigh the costs to our societies. The question then remains: Short of continuous combat, how can we keep our militaries ready to fight while avoiding, or at least mitigating, the initial wartime disaster Guibert predicted?

From Sun Tzu to the present, many have written about the waging of war. Few, however, have provided guidance for structuring and training militaries during the intervals of peace we increasingly, and thankfully, find ourselves living through. The problem today is that ethicists tend to write only about ethics and values, political scientists about politics and policy, psychologists about individual

leadership and organizational behaviour, and sociologists about society and culture. While these groups provide useful theoretical models, it is up to the members of the military profession—who ultimately must apply the various theories—to develop ways to integrate their guidance into our military organizations. The challenge for today’s senior military leaders is to develop self-sustaining, learning organizations that will minimize the initial wartime slaughter that Guibert predicted. This paper will examine the guidance provided in the past, and then derive a set of Principles of Peacetime Readiness from the ideas and theories of educators, historians, ethicists, management gurus, psychologists, sociologists, leaders, and other academics. The better we focus our efforts during peacetime, the better we are prepared to plan and fight battles when called on to do so.

1. The “lantern on the stern”⁵

Over the generations, military officers have developed theories about what is required to successfully prosecute

war. These theories have become known as the principles of war. Sun Tzu’s *The Art of War* was “the first known attempt to formulate a rational basis for the planning and conduct of military operations.”⁶ Since that time, many others have either refined his work or independently developed their own concepts. Today, the principles of war have become standard fare at staff colleges around the globe. Different countries award importance to different numbers and different aspects of principles; however, there is some overlap among almost all of them. A review of principles of war from different countries reveals that France has the fewest (at three) and Canada and China tie with the most (eleven).⁷ We also see that only two principles—concentrating one’s forces in action and surprise—appear on all lists. When working with coalitions, Major General Meille of the French Army advises us that “these principles can be applied differently depending on the operational situation, the personality of the commander, the experience and the nationality of [the

coalition's] main assistants and collaborators."⁸

What is common among countries is a feeling that there is a requirement for an aide-mémoire for planning to fight a campaign or battle. It should be noted that these principles are focused on planning battles and—except, perhaps, for Canada's inclusion of Administration—say little about how to prepare forces to fight that battle or how one's forces should be structured. Perhaps examining personal characteristics will provide us with a clearer framework.

Like the principles of war, there are many points of view on what is required to make up the perfect admiral or general. Jomini wrote: "The most essential qualities for a general will always be as follows: First, *A high moral courage, capable of great resolutions*; secondly, *A physical courage which takes no account of danger*. His scientific or military acquirements are secondary to the above-mentioned characteristics, though if great they will be valuable auxiliaries."⁹

Some countries have delineated a list of characteristics required for a person

to effectively exercise command. The British *Army Doctrine Publication* provides us with the following list of characteristics and traits such a person should have: leadership, professional knowledge, vision and intellect, courage and resolve, self-confidence, ability to communicate, integrity and example.¹⁰

Once again, this is a useful list of elements to develop in our leaders, but they provide little guidance as to how to ensure that our leaders actually possess them or how to structure our military organizations and training systems to routinely develop them. We are still left with the question: How should we structure our forces in peacetime so as to avoid or mitigate a disaster during the first battles of the next war? Perhaps the lessons are in the past.

Not surprisingly, most people who write about military history write about tactics, doctrine, and the strategy of waging war; this is, after all, what militaries ultimately exist to do. Jomini did suggest that there are some things our militaries should have and do:

1. To have a good recruiting system;
2. A good organization;
3. A well-organized system of national reserves;
4. Good instruction of officers and men in drill and internal duties as well as those of a campaign;
5. A strict but not humiliating discipline, and a spirit of subordination and punctuality, based on conviction rather than on the formalities of the service;
6. A well-digested system of rewards, suitable to excite emulation;
7. The special arms of engineering and artillery to be well instructed;
8. An armament superior, if possible, to that of the enemy, both as to defensive and offensive arms;
9. A general staff capable of applying these elements, and having an organization calculated to advance the theoretical and practical education of its officers;
10. A good system for the commissariat, hospitals, and of general administration;
11. A good system of assignment to command, and of directing the principal operations of war;

12. Exciting and keeping alive the military spirit of the people.

To these conditions might be added a good system of clothing and equipment; for, if this be a less direct importance on the field of battle, it nevertheless has a bearing upon the preservation of the troops; and it is always a great object to economize the lives and health of veterans.¹¹

Our societies and militaries have developed considerably since Jomini provided us with this list. Advances in military technology continue to change the nature of the battle space, significantly complicating the task of training our officers and non-commissioned members. The entry of non-state actors into the arena of conflict confuses the very definition of war. The spread of democracy has created corps of commissioned and non-commissioned members no longer willing to live with the “theirs not to make reply, / theirs not to reason why, / theirs but to do and die”¹² standard; while they are still willing to ride “into the jaws of Death,”¹³ they expect a say in how they

are governed and led to that threshold. All these elements have created revolutions in our military affairs¹⁴—at least equal to those in our civil societies—that Jomini could hardly have predicted. Concomitant with the technological changes that have occurred over the last 200 years, there has been a dramatic increase in the study and development of management and leadership models in the civilian (mainly business) community.

Although leadership and management go back to ancient times, they only became a field of specialized study in the early part of the last century. Historically, management and leadership theorists looked to the military for their role models. People like Frederick W. Taylor, Henry Fayol, Max Weber and others fashioned the classical management model from the authoritarian, rigidly structured leadership and management style used in the military. During the early 1930s, the human relations management theory emerged, based mainly on research conducted by Elton Mayo at the Hawthorn Works of the Western Electric Company.

Mayo’s studies were the first to methodically explore the role of personality and human psychological processes in the work environment. Mayo and his researchers concluded that workers wanted more than just money from their jobs, and that effective management required social as well as technical skills. Today, Modern Systems and Contingency Management views the organization as a total system with complex interactions both internally and externally. This recognises that each organization is unique and that no one organizational system will be appropriate in all situations.¹⁵ The military has lagged behind in the development of management and leadership theory and models.

Looking at the past, we find that there are few guiding principles for peacetime militaries that can act as a corollary to the guidance provided by the principles of war during times of conflict. So, the question posed above still remains: Short of continuous combat, how can we keep our militaries ready to fight while avoiding, or at least mitigating, the initial wartime disaster Guibert predicted?

While the requirements of military and civilian leadership are different, they are not mutually exclusive. In an attempt to learn from others' mistakes and view our organizations from a different perspective, we will look to the civilian world to help us formulate our principles. The five principles we will examine are: professional engagement, innovation, ethical clarity, probity, and cultural health.

2. Professional engagement

My vision of the future is...of individuals passing from one stage of independence to a higher, by means of their own activity, through their own effort of will, which constitutes the inner evolution of the individual.¹⁶

Maria Montessori

Life-long learning programmes help develop individuals. While professions do need to ensure that their members are current and capable, more important for their long-term health is that they continuously expand and refine their professional body of knowledge through their

own efforts of will. Some suggest that life-long learning is the key to organizational health. Life-long learning is a solitary endeavour—an individual engaged, all too often, in the arid transmission of knowledge—even when he or she shares a classroom with other students. The military profession, like all professions, requires the practical application of knowledge to accomplish specific goals, and is therefore by its very nature not a primarily academic endeavour. Our learning therefore must remain focused on our vocation, although some academic rigour will be required as well.

The applied professions—engineering, medicine, et cetera—all have a strong link to an adjunct academic group. Today, the military profession seems, along with most of society, to be almost overtaken by technological advances, but it is history that provides us with lessons of strategy and tactics that must guide our use of these new technologies.¹⁷ Our history is the one field that must be studied to develop our professional body of knowledge and to understand the essence of the

leadership challenges that face us. Used wisely, the lessons of the past can assist those of us who will be called upon to practice the management of violence so that we can develop useful models and theories to aid in future warfare. We must be mindful of Samuel Coleridge's observation: "If men could learn from history, what lessons it might teach us! But passion and party blind our eyes, and the light which experience gives us is a lantern on the stern, which shines only on the waves behind us."¹⁸

Those who study and theorize about war generally represent two broad groups. First are those who prepare for the challenges of battle and warfare—members of the military. Second are those who theorize about or study war because they have an interest in military history—academics. These two groups have distinctly different goals. The former primarily seek the most effective and efficient ways to carry out the orders of their superiors and attain victory in the battle space. The latter seek to expand the known by exploring and recounting the past. Be-

cause these two groups have different goals, they view history—and each other—in distinctly different ways. If we rationalize the views of these two groups, our history can become a powerful tool for our defence structure and our nations.

Each group has something to offer the other; however, too often their different goals stifle what should be an open dialogue and co-operative relationship. A systemic and reciprocal relationship could lead to useful theories, thoughts, and ideas that would help win or avoid war or other fighting that spans the spectrum of conflict, and hence support our national interests by providing greater national security. Failure to build a systemic, reciprocal relationship between these two groups will mean that useful ideas will continue to simply be lanterns on the stern, ignored or unseen by those who could use them to greatest effect.

The conflict between these two groups starts with the way that they view each other. Academics tend to treat the military's principles of war with a certain disdain and have tried to marginalize

them. For instance, Paret described the influence of the principles of war on military thinking as having "served generations of soldiers as an excuse not to think things through for themselves."¹⁹

Equally, military officers ignore the work done by academics. Henry Lloyd summed this up by saying that "the moderns, who have undertaken to write the history of different wars, or of some renowned Commanders, being chiefly men of learning only, and utterly unacquainted with the nature of military operations, have given us indeed agreeable, but useless productions."²⁰ Both of these groups use historic examples to support their ideas and theories, but because they view each other with at best professional superciliousness, they rarely benefit from each other's insights. By merging the problem-solving, results-oriented skills and intellectual output of both groups, our countries would realize great benefits.

Both historians and military officers (and hence our nations) can benefit from the combined experience and intellectual power that these two seemingly disparate

groups bring to the study of warfare. Military officers, being focused on present and future warfare or preparations for the same, tend to engage in superficial reviews of historical data to prove their theories. This is dangerous because "it is well known that military history, when superficially studied, will furnish arguments in support of any theory or opinion."²¹ The information, ideas, and theories that could help these military officers more rigorously examine their own models are unavailable to them because "historians are inclined to write for each other."²² The challenge, therefore, is for military officers to develop their understanding of historical analysis and to encourage military historians to engage a wider audience in their writings. Through this process, both communities would see that there is an opportunity for mutual benefit rather than the current state of mutual distrust or disdain. Models already exist for the development of such a symbiotic relationship.

In the scientific realm, physicists, chemists, and biologists observe the world

around them in an attempt to discover how and why it works the way it does. The scientists then publish their work. Once published, engineers—the applied scientists—and doctors—the applied biologists—use these observations, theories and ideas to solve the practical problems presented to them. The dialogue between these two different but closely related groups was built over many generations.

At the other end of the spectrum, a similar model exists in the arts. Painters, sculptors, musicians, and writers observe the world around them and produce works that symbolize what they consider important from those observations. Periodically a new “school” will develop when groups of artists witness similar changes in their societies. Applied artists—fashion designers, graphic artists, architects, et cetera—take these artistic techniques, styles and symbols and use them to produce tangible objects to fulfill specific practical uses. Once again, the relationship between these two groups has been built over many generations.

A similar systemic dialogue does not yet exist between military historians, who gather the threads of history, and military officers, who spin the threads into practical tools, tactics, and strategies for fighting wars. Developing a deeper understanding of history, an expanded awareness of past lessons, and how these past ideas influenced the practical problem of warfare in their time, will help us build a stronger officer corps for the future. In essence: “Leadership...is strengthened and more effective when leaders at all levels know about and understand the implications of trends, developments and new ideas.”²³ Visionaries in both communities must search for examples in the past that will help us develop our leaders in the future. By developing a strong systemic dialogue between the two groups who study and theorize about war, we can create enduring trust, respect and cooperation that will inspire those who follow, and create a strong learning organization.

In order for the military profession and our own militaries to remain viable,

we must recreate ourselves as learning organizations. Having members of the profession engaged in life-long learning is a good start, but it will not in and of itself ensure the long-term health of our profession, and hence the long-term security of our nations. In order for our profession to evolve into a learning organization, we as individuals must evolve past the life-long learning plateau and become life-long teachers. While it is important to have strong ties to our profession’s adjunct academics, who provide the profession with data and insight, it is the members of the profession who must take that information, turn it into knowledge, and apply that knowledge when solving practical problems both in and out of the battle space. It is the members of the military profession who bear the responsibility of command, and hence for the lives of our subordinates—not the professors who teach us our history, math and other courses. When members of the profession engage in life-long teaching, they encourage the growth of a broader, better-informed, robust professional com-

munity. In short, they create a learning organization.

The transition from life-long learning to life-long teaching, however, will require most of us to change the way we respond in different circumstances. It will also require organizational structures to change, because life-long teaching also requires us to learn from our superiors, peers, and subordinates as the situation dictates. Given the traditionally hierarchical structures of military organizations, there is bound to be some defensiveness when superiors are faced with situations in which they must acknowledge that their subordinates have more experience than they. "Teaching people how to reason about their behaviour in new and more effective ways breaks down the defences that block learning,"²⁴ and it is these defences that will limit our ability to share experiences that will help strengthen our profession. Once we have military members who are professionally engaged, we need to develop and encourage innovation so that our whole organization can develop and move forward with the least possible waste of energy.

3. Innovation

*The most grievous danger for any Pope lies in the fact that encompassed as he is by flatterers; he never bears the truth about his own person and ends by not wishing to bear it.*²⁵

Pope Alexander IV

Innovation is more than creativity. Being creative means that you are "inventive and imaginative."²⁶ Having a creative mind is all well and good, but we belong to a practical profession that must accomplish real-world tasks. In this paper, "innovation" is used to mean "applied creativity," id est, having a novel idea and then implementing it. Of course, for our militaries to be innovative, we must develop people who can produce original ideas. The issue facing us is how to develop our organizations to allow these creative people to thrive. Since implementing inventive and imaginative ideas by definition means changing the way things are done, those who engage in this activity will be disruptive.

Encouraging and supporting people who dissent from the status quo will be the biggest challenge for our military organizations, which seem to prize obedience and hierarchy above almost all else. Especially in peacetime, with governments keenly watching expenditures and the media searching for government waste, taking the risk of trying new ways of doing business will be a leadership challenge difficult for some to conquer. If we succeed in encouraging innovation, we can lead our militaries into an era where "for the first time in history we can work backward from our imagination rather than forward from our past."²⁷ Supporting dissent is the basic building block for creating an innovative organization.

Like so many other things, dissent has both positive and negative characteristics and outcomes. Positive dissent is more than simply saying, "This is wrong." It involves defining the problem, proposing a viable solution, and then working toward implementation. As leaders, we must use our positional authority to protect and encourage the innovative people who work for us.

Those who are comfortable with the status quo will, among other things, try to label innovators as troublemakers and malcontents. “What the defenders of orthodoxy see as subversive, the champions of new thinking see as enlightenment.” [Gary Hamel] points out that dissenters are subversive, but their goal is not subversion.”²⁸ A person who dissents for the purpose of innovation is doing so to benefit the organization and not simply for personal gain. Those opposed to change will attempt to throw up as many roadblocks as they can.

Our militaries respect and revere tradition; this means that, especially for our organizations, “one of the hardest things...[will be] getting people to accept that the way they work just might not be the best [way].”²⁹ Military organizations face many challenges when trying to build an innovative culture. The flow of emotions will be strong. As leaders, we must prepare to deal with “the dangerous brew of fear and complacency—[the desire to stay] where [we] are out of fear of failing, of blowing too much money, or of placing the wrong bets”³⁰ that we and our subordinates will

feel. The military’s strong sense of community and experience in dealing with similar strong emotions in the battle space will stand us in good stead, but also bring with them some drawbacks.

Richard Florida, Robert Cushing, and Gary Gates in their paper *When Social Capital Stifles Innovation* present research to show that in cultures where group relationships are highly valued, “relationships can get so strong that the community becomes complacent and insulated from outside information and challenges. Strong ties can also promote the sort of conformity that undermines innovation.”³¹ Individuals in these strong social groups may be wary of upsetting the rest of the group, something that will certainly occur when they try to change the way things are done or challenge long-held beliefs. The way the group reacts will be strongly influenced by its leaders. If they ridicule and shun the dissenter, new ideas are not likely to be brought forward in the future. Achieving acceptance for these dissenters will require most of us to change the way we respond in various situations.

Leading disruptive change is difficult for even the most liberal of organizations. The established hierarchy of the military and our reliance on doctrine and standard operating procedures makes the challenge for us especially difficult. As leaders, we must realize that dissenters are providing us with indications of impending adaptive challenges. As such, we must “provide cover to people who point to the internal contradictions of the enterprise. Those individuals often have the perspective to provoke rethinking that people in authority do not.”³² Once the areas requiring change are identified, it can take time—sometimes years—to change doctrine even when everyone acknowledges that the change needs to happen. Clayton M. Christensen and Michael Overdorf in *Meeting the Challenge of Disruptive Change* warn: “It’s no wonder that innovation is so difficult for established firms. They employ highly capable people—and then set them to work within processes and business models that doom them to failure.”³³ In addition to the systems, we may have problems changing the behaviours

of the very people who must adapt first: our senior leaders.

While it is generally good that our leaders have risen to their current positions based on merit, the road taken—especially in risk-averse, bureaucratic peacetime organizations—most often means that they have rarely openly admitted failure. Generally, they have either avoided failure by not taking risks, or rationalized failures when they occurred. “Because they have rarely failed, they have never learned how to learn from failure.”³⁴ Instead, they have likely developed defensive reasoning mechanisms designed to shield them from having to change the way they perform. “What’s more, those members of the organization that many assume to be the best at learning are, in fact, not very good at it. I am talking about the well-educated, high-powered, high-commitment professionals who occupy key leadership positions in the modern corporation.”³⁵ We can see that it will take a strong desire and a strong will to make this change occur. To facilitate modeling this change, let’s look at some tools we can use to plot our course.

As with all significant leadership challenges, the “experimentation has to start at the top.”³⁶ But where do we begin? Gary Hamel suggests the model of Silicon Valley. The people and organizations in Silicon Valley bring to market a breathtaking number of innovative products every year—everything from computer games to robot pets to business software. “Those who populate Silicon Valley don’t have brains the size of basketballs. They don’t live in some special energy field. What sets the Valley apart is not its people or its climate but the way of doing business... There are none of the numbing bureaucratic controls that paralyse creativity in traditional businesses.”³⁷ In his paper *Bringing Silicon Valley Inside*, Hamel posits that dynamic markets for ideas, capital, and talent are the elements that make Silicon Valley so innovative.³⁸

How to translate these elements into a military ethos that retains a need for hierarchy and obedience in at least part of its actions is the great challenge. This will vary from country to country depend-

ing on the current organizational structure and cultural norms.

Since militaries don’t generally have the option of hiring people from outside the organization to bring new ideas or practices to the culture, building an internal market for talent may be the most difficult challenge. Let me suggest that developing personnel systems that give individuals predominant control over their postings would provide a means of developing an internal talent market and allow us to reap the benefits described by Hamel. Rather than having centralised postings control, commanders would compete to lure people to come work for them. Commanders who failed to lead their people might find it difficult to recruit talented individuals to their organizations. If certain organizations had problems finding staff, it could indicate to senior leaders that the commander had risen above his or her leadership capabilities.

Establishing a market for capital could be far easier than establishing a market for talent. By no means do I intend to

suggest that organizations throw all of their money on the table for everyone's pet projects. For militaries required to account to the government and public, this would be impossible to justify. Rather, I suggest we identify a portion of the overall budget that can be used to implement new ideas or practices. Then allow all members of the organization to put forward projects and apportion the money accordingly. Brilliant ideas are not the sole prerogative of senior leaders, and hence all members should be given a shot at the money. Obviously, a corporal lacks the positional authority to implement major organizational redesigns, but he or she may require seed money to develop a new procedure that is within his/her sphere of influence. Monitoring the implementation of small projects can also give leaders a good measuring tool, indicating potential for career progression.

Remember, however, that success should not be the only meter stick. If the initial idea does not work as planned, what the individual and the organization learned from the failure and how they adjust their

plans is just as important as, if not more than, the plan's initial success or failure.

Since we have defined innovation as applied creativity, the suggestion is not that we throw out all of our current management, command, and control systems in favour of organizational anarchy. "For innovation to be reliable, it needs to be addressed systematically, like any business issue in which you define the problem and then solve it: What do we want to accomplish, and how? What resources will we need? Who will be on the team? How do we motivate and reward them? And how will we measure success?"³⁹ Before we reach this stage, however, we must ensure that our organizations are ready to accept the challenge. We must have people willing to bring forward new and possibly unpopular ideas.

The necessity for military organizations to be innovative comes down to the fact that if we continue to do the same things we have always done, we will become predictable. Predictable military forces cause people to be needlessly killed in battle.

In short, for military organizations, quite literally "those who live by the sword will be shot by those who don't."⁴⁰ Building an innovative organization will help us develop past our historic constraints.

4. Ethical clarity

Ethical theory and applied ethics are closely related: theory without application is sterile and useless, but action without a theoretical perspective is blind.⁴¹

Louis P. Pojman

Recently, much has been said about values and ethics in the business world. A business organization looks at its definition of values as a way to differentiate itself from other companies in order to derive a competitive advantage in the quest for profit. Militaries, on the other hand, seek to define values to save the lives of their members and the civilian citizens they are sworn to protect. To a large extent, our values also assist us in maintaining the psychological well being of the people in our organizations. Knowing

that, even in war, there are things that we will not be asked to do provides us with a certain psychological comfort.

The boundaries on behaviour that militaries establish sometimes comprise a thin, easily cracked veneer. In his novel *Lord of the Flies*, William Golding provides us with a masterful study of both the ease with which humanity can shed its veneer of civilization when confronted with fear and the role of military officers in maintaining that veneer. Golding presents a story of a group of British schoolchildren left to fend for themselves on an uninhabited island. Frightened and alone in unfamiliar surroundings, forced to kill—in their case animals—in order to survive, we can see many parallels with militaries in battle. Golding shows us that “Beelzebub’s ascendancy proceeds through fear, hysteria, violence, and death”⁴²—all elements that are commonplace for militaries during battle.

One of the main roles of a military’s value system is to help combat the erosion of civilization’s veneer and sustain the humanity of our people; however,

“civilization’s power is weak and vulnerable to atavistic, volcanic passion.”⁴³ It is the responsibility of military officers to establish rules and processes that will prevent the breakdown of civilization’s power. In the closing scene of *Lord of the Flies*, it is a naval officer who steps in and re-establishes the rule of civilization among the group. This provides a strong reminder of our ongoing role in the heat of battle. A responsible leader “is one of the things that distinguishes a mob from a people. He maintains the level of individuals. Too few individuals, and a people reverts to a mob.”⁴⁴ By ensuring that our subordinates remember to reason as individuals rather than allowing themselves to be subsumed by group think we can ensure that our military units don’t become mobs. How then should leaders maintain the required level of individuals and clearly establish the presence of civilization in an organization established to apply violence on behalf of its country? Before we address that question, let’s examine other ways in which values affect our organizations.

When we establish a set of values, we must remember why we are doing it. “Values initiatives have nothing to do with building consensus—they’re about imposing a set of fundamental, strategically sound beliefs on a broad group of people.”⁴⁵ Forcing people to conform to an established set of values will not be painless. Some will feel like outcasts. Many will have to modify their behaviours, if not their beliefs. Values initiatives also “limit an organization’s strategic and operational freedom and constrain the behaviour of its people. They leave executives open to heavy criticism for even minor violations. And they demand constant vigilance.”⁴⁶

Why would any organization inflict this pain on itself? Values carry strong benefits. “They serve as fixed points. They determine what is right and wrong, appropriate and inappropriate on a universal basis, every time.”⁴⁷ When a ship leaves harbour, her crew must use known points to fix her position. Whether they are heavenly bodies, fixed points of land, or orbiting Global Positioning System satel-

lites, these known points allow the crew to determine where they are and how to plot a course to their destination. In her paper *Ethics, Virtuousness, and Constant Change*, Professor Kim Cameron presents the results of several studies that relate organizational virtuousness with performance. Evaluation of the results leads to the conclusion that “organizations with high scores on virtuousness significantly outperform organizations with low scores on virtuousness.”⁴⁸ She concluded that more virtuous firms made more money, recovered from downsizing faster, retained customers and employees more effectively, and were more innovative than non-virtuous firms. The studies looked at values such as compassion, integrity, forgiveness, trust, and optimism when evaluating the virtuousness of the organizations.⁴⁹ Defining what values we want, however, will be easier than creating a code of behaviour that encourages these actions.

Establishing a set of governing values that guide ethical reasoning may provide a more robust ethical culture than trying to regulate behaviour with rules and

codes. Malham M. Wakin warns us that “The immature or unsophisticated frequently narrow their ethical sights to the behaviour specifically delineated in the code so that what may have originally been intended as a minimum listing becomes treated as an exhaustive guide for ethical action.”⁵⁰ One of certainly many contributing factors to the recent crisis of corporate leadership in the United States of America was the rule-based legal and accounting systems that let companies find loopholes that they could exploit to accomplish their nefarious desires while still sticking to the letter of the law. Since they seemed focused on following the rules, they never stepped back and asked whether the path they were taking led to a beneficial destination.⁵¹

Outlined above are some values that might be appropriate for our militaries; however, we must recognize that our organizations exist for different reasons than do businesses, and use different means than do other government bodies to accomplish our ends. For this reason, an organizational value such as “do not kill

without sanction” may be appropriate on our list. Because ultimately we may be asked to kill for our country—and hence the outcomes of our decisions are significantly direr—encouraging ethical reasoning, rather than dictating conduct, may provide a more effective road to follow.⁵²

As was examined above, developing and enforcing a set of values in an organization can cause pain. One way some try to avoid this pain is to develop vague or unenforced—or even unenforceable—sets of values.⁵³ Some leaders consider these kinds of statements to be harmless, but in actuality “they’re often highly destructive. Empty values statements create cynical and dispirited employees, ...and undermine managerial credibility.”⁵⁴ Alternatively some organizations try to cover all possible contingencies, thus creating complex codes of behaviour. Overly complex value statements can lead to confusion, having them ignored, or seeing employees use them to justify whatever actions they wish to take. James Baker cautions that we should be alert to “decisions that follow the letter of the law but

violate the spirit of the law. [For instance] accounting rules today are so esoteric and difficult to understand that you might be literally within the legal constraints of a particular rule—but way outside its spirit.”⁵⁵

As James Wilson said in *The Moral Sense*, “I am a bit suspicious of any theory that says that the highest moral stage is one in which people talk like college professors.”⁵⁶ We do need the theoretical perspective, but as members of militaries we must use that perspective to help focus our daily actions.

Unlike our doctrine, tactics, and standard operating procedures, which change based on the level of education and training in our organizations, and on changes in technology, our values must remain relatively constant. Like all things involved with organizational leadership, they should be regularly reviewed and clarified as required, but fundamental change or amendment should be rare. “Developing a Teachable Point of View is a critical step for any leader, but especially when essential topics such as ethics... must be

demonstrated and communicated to an organization.”⁵⁷ In order to understand how to develop our ethical teachable point of view, it may be useful to understand something of our ethical development.

As we mature, our cognitive and physical abilities develop together. Just as our mobility develops from crawling to walking to running, so there are developmental stages in our moral reasoning. Lawrence Kohlberg, in his model describing moral development, defines three stages: preconventional morality, conventional morality, and postconventional morality. We tend to move from preconventional (“I’d better act a certain way or I’ll get into trouble”) to conventional (“we need to accomplish a task together; therefore, I’ll uphold the rules”) in early adolescence. While there is some debate over Kohlberg’s postconventional stage,⁵⁸ we enter it when we begin to balance individual rights against the desires of the groups or societies that we belong to. This tends to occur in late adolescence.⁵⁹ Since most of our recruits join the military as they are entering the postconventional

moral development phase, we have the opportunity and responsibility to help them develop their moral reasoning. A clearly defined ethical system is fundamental to accomplishing that goal, and as we have seen can also have other positive organizational benefits. How we can achieve this, as well as determining whether our stated values reflect the reality within our militaries, forms a large portion of the next principle of organizational readiness.

5. Probity

*It is a delightful harmony when doing and saying go together.*⁶⁰

Michel Eyquem de Montaigne

We see that, since militaries tend to recruit from our countries’ respective pools of adolescents, we have a significant ability—and responsibility—to mould the moral reasoning of our people. Our teachable point of view is best presented by example. “In the end, in business as in politics, credibility is hard to acquire,

but very easy to lose.”⁶¹ Defining and communicating a clear set of values is useless unless we also take action to ensure that they are firmly rooted in our military’s culture and followed by all members of the organization.

Probity means uprightness and honesty.⁶² As leaders in the military profession, it is not enough to simply be personally honest and upright. We must ensure that our organizations—more specifically every individual within the military—act in a moral and upright fashion.

Living up to our stated values can be challenging. There may be political, financial, and social pressures to cut corners. “It’s much harder to be clear and unapologetic for what you stand for than to cave in to politically correct pressures,”⁶³ but it is vital if we wish to maintain a healthy moral climate in our militaries. “The test [of our leaders] should be moral courage.... Resolution and valour, not that which is sharpened by ambition but that which wisdom and reason may implant in a well ordered soul.”⁶⁴

Many organisations have value statements posted on their walls. What happens when they fail to live by these values has been recently experienced in the United States. The bankruptcy of Enron Corporation demonstrated some great ironies for those examining values systems and statements. In its 2000 annual report, Enron listed its values as communication, respect, integrity, and excellence. Further, it said, “We have an obligation to communicate. Here, we take the time to talk with one another... and listen. We believe that information is meant to move and that information moves people.”⁶⁵

In August 2001, Sherron Watkins (Enron’s VP for Corporate Development) warned Ken Lay (Enron’s CEO) that there were financial problems stemming from “a wave of accounting scandals.”⁶⁶ Notwithstanding the company’s stated value of communication, Lay promoted *to his own employees* and to the general investing community the purchases of company stock. When the company finally declared bankruptcy, thousands of people, particularly those who had company 401(k) plans,

lost a significant chunk of their life savings.⁶⁷ While there are certainly lessons to be learned from this incident, there are perhaps more direct parallels to be drawn from the case of Enron’s auditors, Arthur Andersen LLP.

There is little evidence to show that Enron ever took its stated values seriously. However, Arthur Andersen had a long history of operating under a strong moral compass. Within a year of opening his accounting firm, Arthur Andersen refused to certify the books of a client railroad. Andersen lost the client but provided the example that developed into the company’s value of independence. For decades, the firm inculcated this value into its employees, partners, and corporate structure. Exactly when it started to drift away from this core value is debatable, but it was clearly occurring throughout the 1990s. When Arthur Andersen signed off on Enron’s financial statements for the year 2000 that, in October 2001, had to be corrected, reducing company worth by US\$1.2 billion, Andersen signed its own death warrant. Its conviction for

obstruction of justice and the eventual demise of the company was preordained.

Ironically, the same principles that helped Arthur Andersen build a strong ethical compass into its employees also sowed the seeds of its demise. "Like many visionary firms that expend considerable energy and resources to preserve their core, Arthur Andersen recruited young, trained heavily, and fostered a culture that bred a sense of upholding a higher responsibility to the investing public."⁶⁸ Dubbed "androids" by non-Andersen employees, a culture of obedience to rules and the leader was encouraged and fostered. "When the rules and leaders stood for decency and integrity, the lockstep culture was the key to competence and respectability," wrote Barbara Ley Toffler, partner-in-charge of the ethics and responsible business practices group at Andersen from 1995 to 1999. "When the game and the leaders changed direction, the culture of conformity led to disaster."⁶⁹

Andersen had no structure in place to allow people to question the moral integrity of the leaders, so they led the com-

pany to ruin. If Andersen had fulfilled its role as auditor, perhaps Enron would not have been forced to declare bankruptcy. While it is a tragedy that so many lost large amounts of their retirement savings, they can recover from this given time and prudent investing. When military organizations stray from their core values, people don't lose their life savings—they lose their lives. An important point in this case is that Andersen's leaders knew they could sculpt the ethical beliefs of their associates, and originally set out to do just that.

Above, we examined Kohlberg's stages of moral development and discovered that we bring recruits in at the very time they are developing the beginnings of postconventional reasoning. If they do not routinely see examples of organizational members who live by the stated values, this will model their moral behaviour in ways that our countries might live to regret decades down the line. We have it within our power to model their moral development along just and caring lines. When role models and lead-

ers "practice what they preach, their moral principles have an impact. Such was true of the caring parents of those who courageously protected Jews in Nazi Europe.... And when acted upon, moral ideas grow stronger. We are as likely to act ourselves into a way of thinking as to think ourselves into action. To stand up and be counted, to explain and defend our convictions, to commit money and energy is to believe our convictions even more strongly."⁷⁰ Only by believing in our convictions can we mould our militaries into the kinds of organizations that will make our countries proud, rather than embarrassing them on the international stage.⁷¹

We need to develop people who have what "the romantic in Clausewitz called... 'an intellect that, even in the darkest hour, retains some glimmerings of the inner light which leads to truth; and second, the courage to follow this faint light wherever it may lead.'"⁷² Over the last few decades, members of militaries from countries otherwise thought to be progressive, cultured, and civilised have com-

mitted acts that have brought shame and disgrace upon them.⁷³

In short, “integrity, compassion, and trust... create an environment where people are encouraged to be their best, where innovativeness, loyalty, and quality are likely to be higher. That’s the virtue cycle. The amplifying nature of virtuousness causes it to reproduce itself and to improve organizational performance over time.”⁷⁴ We might do well to remember the advice of Gianfrancesco Pico Iella Mirandola: “If we are to win back the enemy and the apostate to our faith, it is more important to restore fallen morality to its ancient rule of virtue than that we should sweep with our fleet the Eurine Sea.”⁷⁵ Of course, it would be much better if we act to maintain our military’s moral standing before it falls and needs restoration.

6. Cultural Health

“She asked me to tell her what it is to rule,” Paul said. “And I said that one commands. And she said I had some unlearning to do.... She said a ruler must learn to persuade and not

to compel. She said he must lay the best coffee hearth to attract the finest men.”⁷⁶

Frank Herbert

Militaries fundamentally exist to protect the citizens, interests, and values of the society and country they serve. Two of the first questions we need to honestly answer in order to determine the cultural health of our military are: Do we reflect the society that we serve, and are we a credit to that society?

Whether or not our subordinates are willing and able to provide us with answers to these questions will also indicate the condition of our organization’s culture. Strong internal voices, indicating an innovative culture, will also be able to raise and openly debate ethical issues. With weakened internal voices, our military’s ability to hear internal and societal concerns will be diminished, thus leading to its ossification. Listening to these voices will help us reflect the values and goals of our parent society.

These internal voices can be silenced in many subtle ways. One of the most

common is by supervisors who avoid conflict by accentuating the positive and avoiding discussions about negative issues within their work groups. “The emphasis on being positive condescendingly assumes that employees can only function in a cheerful world, even if the cheer is false.”⁷⁷

B. W. Tuchman, a pioneer of group-development theory, developed what today is the standard four-phase model of team development: forming, storming, norming, and performing.⁷⁸ If we continually avoid conflict, we will never get through the “storming” development phase, thus preventing our organizations from performing up to their potential. Yes, we must not allow the storming to degenerate into personal attacks, but “leaders who cultivate emotional fortitude soon learn what they can achieve when they maximize their followers’ well-being instead of their comfort.”⁷⁹ Allowing dissent, protecting those who voice unpopular ideas, and developing our subordinates’ emotional fortitude are not the only leadership challenges we will face.

The leadership challenges surrounding organizational structural changes may be even harder to achieve. "When the capabilities have come to reside in processes and values, and especially when they have become embedded in culture, change can be extraordinarily difficult."⁸⁰ Often in our militaries, organizational capabilities and structures have been unquestioned for so long that they, and their outputs, become confused with values. When this occurs, discussions can become polarized rapidly, and the debate itself, let alone any subsequent change that takes place, is painful. Leaders can move their organizations through these changes by asking questions rather than providing answers.

We need to expose our people to the reality of the world we live in rather than trying to insulate them from change. By allowing all members of our organizations to become part of, rather than pawns of, the system of change, we can draw out issues that need to be faced and allow them to set goals worthy of their best efforts. "Instead of quelling conflict, leaders have to draw the issues out. Instead of main-

taining norms, leaders have to challenge 'the way we do business' and help others distinguish immutable values from historical practices that must go."⁸¹ To successfully adapt our culture, we must understand the fear and pain of change, but still maintain a steady hand on the helm and the pressure on our subordinates to learn and adapt. We need to "communicate confidence that [we] and they can tackle the tasks ahead."⁸² Ensuring that we have a diverse organization that reflects the societies we serve can be a strong asset when we seek to make organizational changes.

Our militaries should not be congruent with society, but rather reflect the values and make-up of the societies we serve. For instance, many societies have groups of conscientious objectors or pacifists. While they may provide an important point of view within society at large, their presence within a military community would be destructive. Unfortunately, every country also seems to have a group of habitual criminals. Militaries are quite justified in trying to eliminate these groups from their ranks.

It is important to note that it is the ideas and values of these groups, not the individuals themselves, that so deeply conflict with the values of our militaries and that we can exclude from our organizational structure. Other than obvious groups like those above, striving to reflect the cultural make-up of the society we serve will help our militaries maintain and develop ties to the people we serve. There may be some justification for refusing enrolment to people who belong to groups that do not share the core values of our militaries, but to exclude people because they espouse different cultural norms or belong to groups not traditionally part of our militaries is unconscionable and may ultimately limit our ability to fulfill our role. "Companies that foster diversity and openness internally—even at the cost of some cohesiveness—may do better in attracting talented, creative employees and encouraging innovative collaboration."⁸³ Militaries that can bring innovative collaboration to the battle space will provide their enemies with a significantly more difficult strate-

gic and tactical problem. This is at the core of surprise, one of only two principals of war adopted by all countries.

Healthy organizational cultures can adapt and change to fit changing threats and opportunities. “As long as the organization continues to face the same sorts of problems that its processes and values were designed to address, managing the organization can be straightforward. But because those factors also define what an organization cannot do, they constitute disabilities when the problems facing the company change fundamentally.”⁸⁴ The transition from peace to war might be one of those times when the problems facing us change fundamentally. Dramatic changes in the global politic might be another. A diverse and healthy culture will make our military more prepared to provide for the ongoing security of our nation.

7. Shifting the lantern to the bow

Professional engagement, innovation, ethical clarity, probity, and cultural health:

If we can increase our militaries’ functioning in all of these areas during peacetime, we will be better able to implement the principles of war when called on to do so. A significant part of a military’s *raison d’être* during peacetime is to act as a deterrent to potential enemies so that the use of force is unnecessary. “A deterrent threat...requires that the deterrer both maintain a relevant capability and also a perceived credibility to employ that capability. It is the product of capability and will that deters by threat of retaliation. This ‘product’ is the source of the paradox, well known even to the Romans: *si vis pacem, para bellum* (If you seek peace, prepare for war).”⁸⁵ If we allow our military organizations to ossify during peacetime, we are, in effect, making it more likely that they will have to be used, since potential adversaries will not see that a credible deterrent exists.

It is time for militaries not only to recapture a prominent place in the development of management and leadership theory, but also to actively examine the developments that have occurred around

and adapt the appropriate elements for use in our organizations. The presented Principles of Peacetime Readiness are an attempt to move us toward that goal. While cultural health appears last in this list of principles, it may be wise to consider it as *primus inter pares*. A healthy culture will allow the dissent required for innovation and the ability to have open and frank debates about ethical values or the composition of our professional body of knowledge. These debates and discussions can only effectively take place in an organizational culture that values diversity and inclusion and reflects the society that it serves.

In his book *Principles of War*, Carl von Clausewitz included the following comment: “These principles, though the result of long thought and continuous study of the history of war, have nonetheless been drawn up hastily, and thus will not stand severe criticism in regard to form. In addition, only the most important subjects have been picked from a great number, since certain brevity was necessary. These principles, therefore, will

not so much give complete instruction to Your Royal Highness, as they will stimulate and serve as a guide for your own reflections.”⁸⁶

A similar need for brevity is claimed in this paper. The Principles of Peacetime Readiness that have been proposed are general in nature and only briefly defined. As was seen when examining the principles of war, different countries will wish to focus on different issues, and therefore give more importance to some principles than others. The realization that the disaster Guibert referred to would come at the cost of an unknown number of lives spurred the development of these principles, and is an omnipresent issue that should help motivate us to adapt our militaries.

There is no claim that an exhaustive list has been presented. The intent is to encourage debate and thought on the causes, rather than the symptoms, of organizational decay, and to provide military leaders an aide-mémoire to use during peacetime when they are evaluating the readiness of their organizations to face

an unknown, undefined—and often undefinable—enemy during the next period of war. The principles can help frame this debate, but like the principles of war, are also meant to guide the design and redesign of our organizational structures, how we develop leaders, and the development of our organizational visions and cultures.

The manner in which these principles are implemented is predominantly up to generals and admirals, or perhaps even statesmen and politicians. After all, leadership does begin at the top. Baron Antoine Henri de Jomini observed: “If the skill of a general is one of the surest elements of victory, it will readily be seen that the judicious selection of generals is one of the most delicate points in the science of government and one of the most essential parts of the military policy of a state. Unfortunately, this choice is influenced by so many petty passions, that chance, [civil] rank, age, favour, party spirit, and jealousy, will have as much to do with it as the public interest and justice.”⁸⁷

In peacetime, this is an even greater issue, and always has been. We need only hearken back to Guibert’s warning to see this. Those of us who are not generals and admirals can but bring forward the debates when the opportunities arise and develop our own work groups and units with these principles in mind. To some extent, there can be some leadership from below; so we end the way we began, with an observation from Christian Dior:

*By being natural and sincere, one often can create revolutions without having sought them.*⁸⁸

Annex A – Comparative Principles of War

Canada⁸⁹	United States⁹⁰	Great Britain & Australia⁷⁷	Former Soviet Union⁷⁷	France⁷⁷	People's Republic of China⁷⁷
Selection & Maintenance of the Aim	Objective	Selection & Maintenance of Aim			Selection & Maintenance of Aim
Offensive Action	Offensive	Offensive Action			Offensive Action
Concentration of Force	Mass	Concentration of Force	Massing & Correlation of Forces	Concentration of Effort	Concentration of Force
Economy of Force	Economy of Force	Economy of Force	Economy, Sufficiency of Force		
Flexibility	Manoeuvre	Flexibility	Initiative		Initiative & Flexibility
Cooperation	Unity of Command	Cooperation	Interworking & Coordination		Coordination
Security	Security	Security			Security
Surprise	Surprise	Surprise	Surprise	Surprise	Surprise
Economy of Effort	Simplicity				
Maintenance of Morale		Maintenance of Morale	Preservation of Combat Effectiveness	Liberty of Action	Morale
			Simultaneous Attack on All Levels		
			Mobility and Tempo		Mobility
					Political Mobilization
					Freedom of Action
Administration					

¹ Marie-France Pochna, *Christian Dior: The Man Who Made the World Look New* (Arcade Publishing, Inc, New York, 1994) p. vii.

² For a longer examination of this concept, see "The Dangers of Doctrine" in *The Baltic Defence Review* 5.

³ Comte de Guibert, *Écrits Militaires 1772-1790*, préface et notes du Général Ménard (Paris: Editions Copernic, 1976), p. 192. « Si par hasard il s'élève dans une nation un bon général, la politique des ministres et les intrigues des courtisans ont soin de le tenir éloigné des troupes pendant la paix. On aime mieux confier ces troupes à des hommes médiocres, incapables de les former, mais passifs, dociles à toutes les volontés et à tous les systèmes... La guerre arrive, les malheurs seuls peuvent ramener le choix sur le général habile. »

⁴ Baron Antoine Henri de Jomini, *The Art of War* (Greenhill Books, Mechanicsburg, PA, 1992) p. 47.

⁵ Samuel Coleridge, Quoted in: Barbara W. Tuchman, *The March of Folly: From Troy to Vietnam* (New York: Alfred A. Knopf, 1998), 383.

⁶ Samuel B. Griffith, Translator. *Sun Tzu The Art of War* (Oxford University Press, New York, 1971) p. X.

⁷ A summary is presented at Annex A. The number of principles of war that a country chooses to adopt may, in and of itself, make for an interesting framework on which to evaluate its level of bureaucracy and organizational readiness, but that is a topic for another paper.

⁸ Major General Meille, Commanding the Di-

vision (Objectif Doctrine No 34: La Division, Commandement de la Doctrine et de l'Enseignement militaire Supérieur de l'armée de terre, Paris, 2003) p. 23.

⁹ Baron Antoine Henri de Jomini, *The Art of War* (Greenhill Books, Mechanicsburg, PA, 1992) p. 55.

¹⁰ *Army Doctrine Publication, Volume 2*, HQDT/18/34/51 dated 1995, Army Code No 71564, (Crown Publications, London, England) p. 2-15.

¹¹ Baron Antoine Henri de Jomini, *The Art of War* (Greenhill Books, Mechanicsburg, PA, 1992) pp. 43-4.

¹² Alfred Lord Tennyson, The Charge of the Light Brigade (*Alfred Lord Tennyson: Selected Poems*, Penguin Books, Toronto, 1991) p. 289.

¹³ Alfred Lord Tennyson, The Charge of the Light Brigade (*Alfred Lord Tennyson: Selected Poems*, Penguin Books, Toronto, 1991) p. 289.

¹⁴ There has been plenty of debate about whether there has been a revolution in military affairs, an evolution in military affairs, or a simple progression of activity and development. I would argue that there is an ongoing revolution in military affairs, but perhaps not in the manner meant by most. The Oxford Concise English dictionary includes the following definition for revolution: "motion in orbit or a circular course; rotation." This, I submit, is the true revolution in military affairs. With all the talk of lessons learned, we would probably be more accurate in describing most of them as lessons *re*-learned.

¹⁵ Paul Lerman; John H. Turner, *One Day MBA* (International Center for Creative Thinking, New

York, 1992) p. 3.

¹⁶ Maria Montessori, *From Childhood to Adolescence* (Schocken Books, New York, 1973) p. xii.

¹⁷ Some might argue that defence scientists, political scientists, and policy analysts hold equal claim to status as adjunct academic groups for the military profession. I would respond that here, I mean history in its largest sense, the total accumulation of past events, of which technological and policy changes are a part. Further, one of the things that generally distinguishes democracies from dictatorships is the concept of civilian control of the military. This means that military input into government policy should be limited to providing analysis of the impact of government policy on the military structure. For instance, providing input on the cost of various government policies in capital, operations and maintenance funds, and lives, or providing advice on military options available to accomplish defined strategic goals. While scientists may provide us with tools, the lessons of history will provide us with the knowledge required to evaluate the most efficient way to use those tools to accomplish our military aim.

¹⁸ Samuel Coleridge, Quoted in: Barbara W. Tuchman, *The March of Folly: From Troy to Vietnam* (New York: Alfred A. Knopf, 1998), 383.

¹⁹ Lanir Zvi, "The 'Principles of War' and Military Thinking," *The Journal of Strategic Studies*, Vol 16, No 1 March 1993: 2.

²⁰ Henry Lloyd. Quoted in: Hew Strachan, *European Armies and the Conduct of War* (New York: Routledge, 2001), 1.

²¹ General Bronsart von Schellendorf, Quoted in: Hew Strachan, *European Armies and the Conduct of War* (New York: Routledge, 2001), 2.

²² Admiral Sandy (Sir John) Woodward, *One Hundred Days: The Memoirs of the Falklands Battle Group Commander*, (Annapolis, Maryland: Naval Institute Press, 1992), xi.

²³ General J.M.G. Baril, "Message from the Chief of the Defence Staff," *Canadian Military Journal* 1, No 1, spring 2000: p 4.

²⁴ Chris Argyris, Teaching Smart People How to Learn (*Harvard Business Review* May-June 1991) p. 6.

²⁵ Pope Alexander IV, quoted in Barbara W. Tuchman, *The March of Folly: From Troy To Vietnam* (Alfred A. Knopf, Inc, New York, 1984), p. 85.

²⁶ Judy Pearsall; Bill Trumble, Ed, *The Oxford English Reference Dictionary* (Oxford University Press, Toronto, 1996), p.335

²⁷ Gary Hamel, *Leading the revolution* (Harvard Business School Press, Boston, MA, 2000), p. 10.

²⁸ Frances Horibe, *Creating the Innovation Culture* (John Wiley & Sons Canada Ltd, Etobicoke, 2001), p. 41.

²⁹ Thomas Fogarty, Voices: Inspiring Innovation (*Harvard Business Review*, August 2002) p. 5.

³⁰ Betty Cohen, Voices: Inspiring Innovation (*Harvard Business Review*, August 2002) p. 9.

³¹ Richard Florida, Robert Cushing, Gary Gates, When Social Capital Stifles Innovation (*Harvard Business Review* August 2002) p. 3.

³² Ronald A. Heifetz, Donald L. Laurie, The Work of Leadership (*Best of Harvard Business Review 1997*) p. 11.

³³ Clayton M. Christensen, Michael Overdorf, Meeting the Challenge of Disruptive Change (*Harvard Business Review* March-April 2000) p. 67.

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⁵¹ James A. Baker III, Business Ethics in Sceptical Times. Noel M. Tichy; Andrew R. McGill, Ed, *The Ethical Challenge: How to Lead with Unyielding Integrity* (Jossey-Bass, San Francisco, CA, 2003) p.72.

⁵² In this paper, I do not intend to enter into the debate about what values should and should not be part of the military culture of each country. I will simply say that while I rejoice in the wealth of cultural differences between peoples, I reject that the benefits of diversity extend into the moral realm. Human morality is exactly that; *id est*, ethical standards are the same for all humans. Unlike the moral blank cheque espoused by moral

relativism, I think we must judge others' moral behaviour—and stand ready to be judged ourselves—then act on those judgements. Of course, being careful to distinguish between morality and custom is crucial in this realm. What is important is for the military profession to understand the importance of establishing clear ethical standards for our organizations.

⁵³ For a sample of this type of values set, see Canada's *Statement of Defence Ethics* at http://www.dnd.ca/crs/ethics/pages/statem_e.htm.

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⁵⁶ James Q. Wilson, in David G. Myers, *Psychology, Sixth Edition* (Worth Publisher, New York, NY, 2001), p. 148.

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⁵⁸ The postconventional stage tends to appear most often in the educated of European and North American and hence is claimed by some to be biased against those cultures that don't prize individual rights as highly as this group does.

⁵⁹ David G. Myers, *Psychology, Sixth Edition* (Worth Publisher, New York, NY, 2001), pp. 146-8.

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⁶⁴ Barbara W. Tuchman, *The March of Folly: From Troy To Vietnam* (Alfred A. Knopf, Inc, New York, 1984), p. 387.

⁶⁵ *Enron Annual Report 2000*. <http://www.enron.com/corp/investors/annuals/2000/ourvalues.html> accessed 24 July 2003.

⁶⁶ *Enron Fraud InfoCenter* <http://www.enronfraudinfocenter.com/information.php> accessed 24 July 2003.

⁶⁷ There were numerous complaints that so large a percentage of the 401(k) (a tax deferral retirement savings plan) funds were invested in Enron stock after the bankruptcy announcement. Since the complaints were not so loud when the stock soared through the \$100 mark, they can justifiably be seen as somewhat disingenuous.

⁶⁸ Bela Barner, *Don't Blame Joe Berardino for Arthur Andersen*, (*Virtual Strategist*, Issue 4 Fall 2002, VirtualStrategist.net LLC, 2002) p. 3.

⁶⁹ Barbara Ley Toffler, in John P. Mello Jr. *Fall of Arthur Andersen began long before Enron* (*Boston Globe Online*, 27 July 2003).

⁷⁰ David G. Myers, *Psychology, Sixth Edition* (Worth Publisher, New York, NY, 2001), p. 148.

⁷¹ Several recent examples come to mind, per-

haps exemplified most recently by the actions of Major Harry Schmidt, and, to a lesser extent, his squadron commander Major William Umbach, of the Illinois Air National Guard. Major Schmidt, according to the report of the U.S. Board of Inquiry (BOI), killed four Canadian soldiers by bombing their position after failing to follow existing rules of engagement, not following standard operating procedure, and ignoring an order to hold fire. Notwithstanding the evidence presented to both the BOI and the judge at the Article 51 hearing, the command authority announced that it would not proceed with the charges (four counts of manslaughter, eight counts of assault, and one count of dereliction of duty) laid against Major Schmidt. Of course, some might argue that this seems to say more about the moral compass of the U.S. Air Force's senior leaders than it does about Major Schmidt.

⁷² Hew Strachan, *European Armies and the Conduct of War* (Routledge, New York, 1983), pp. 92-3.

⁷³ For instance the Canadian Airborne's actions in Somalia.

⁷⁴ Kim Cameron, *Ethics, Virtuosity, and Constant Change*; Noel M. Tichy; Andrew R. McGill, Ed, *The Ethical Challenge: How to Lead with Unyielding Integrity* (Jossey-Bass, San Francisco, CA, 2003) pp.191-2.

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⁷⁸ Bruce W. Tuckman in, Zenger Miller, Launching and Refuelling Your Team: Tools and Techniques (Zenger Miller Inc, San Jose, CA, 1992) p. 4.

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⁸⁹ Aerospace Doctrine for the Canadian Forces (B-GA-400-000/AF-000), <http://www.airforce.forces.gc.ca/libradocs/library5-e.htm>, accessed 11 May 2003.

⁹⁰ The Joint Staff Officer's Guide 2000, JFSC PUB 1 (National Defense University, Norfolk, 2000), p. D-2

Ukrainian Armed Forces in Close Co-operation with NATO

By Major Hennadiy Kovalenko*

'...If military threats arise, will Ukraine find itself acting as part of a coalition, or will it need to act alone?'

(Sberr James 2003: 7)

1. Introduction and historical background

It finally seems as if military reorganization in the Ukrainian Armed Forces is no longer only a buzzword. At first glance it seems pretty simple to reorganise a small part of society, but consider the situation ten or twelve years ago. In 1991, Ukraine inherited 30 per cent of the total

military personnel of the former Soviet Union but unfortunately it did not inherit a hierarchical structure with a Ministry of Defence and a General Staff as such. It was some kind of military muscle without a skeleton, a heart and, most importantly, a brain.

Ukraine established its own Armed Forces on 24 September 1991 with more than 780.000 military personnel. The structure of the Armed Forces at the time was exactly like the one of the republics in the big Soviet empire with the centre in Moscow. The Ukrainian Armed Forces consisted of three military districts with their respective headquarters in Kyiv, Lviv

and Odessa. The structure of the Armed Forces of Ukraine was made up of about 6500 tanks, more than 7000 armoured combat vehicles, 1500 combat aircrafts and more than 350 ships. Moreover, there were 1272 strategic nuclear warheads on intercontinental ballistic missiles, and 2500 tactical nuclear missiles. Not necessary to mention here, is how much it cost to maintain this huge force ensuring their high readiness and proper capabilities. The worst thing was that the Armed Forces did not have enough experience or a sufficient ability to act independently. Although Ukraine repatriated more than 12.000 military personnel who refused to

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serve in the new independent country, it absorbed almost 33,000 servicemen from other former republics of the Soviet Union. For instance, the Ukrainian Air Force, which was formed on the basis of the staff of the twenty-fourth Air Army, consisted of four Air Corps, ten Air Divisions, forty-nine Air Regiments, eleven separated squadrons, training centres and special institutions; a total of about 600 military units, 2800 aircraft and helicopters and more than 120,000 military personnel. According to Leonid Polyakov and Anatolij Tkachukés (“Security Sector Expert Formation: Achievements and Needs in South East Europe”):

“In 1991, some 150 colleges and universities were located within Ukraine. One-third were military counterparts. At the same time, a total of over 300 specifically military oriented research institutions and design bureaus existed as well in Ukraine. According to statistical data, a total of 1344 scientific and educational centres carried out military-oriented research work. During the time of the USSR, Ukraine comprised

a 17 per cent share in the military-industrial complex output, while 1840 enterprises and research centres employed 2.7 million people on a permanent basis.”¹

The most important was that the command, control, communications and information (C3I) systems of the Ukrainian Armed Forces were closely linked with the corresponding systems in the Russian Federation. It is understandable that the whole military structure at that time was designed to deal with defensive operations against a military threat posed by NATO as well as with offensive operations led directly from Moscow.

Fortunately, Ukraine was not faced with political difficulties in the process of establishing its independence. The country followed the lead of the Baltic countries, and there was not so much opposition from Moscow at the time. It allowed avoiding bloodshed or repeating the Romanian or Yugoslav scenario. Actually, it was one of the most important facts at the initial stage in the process of developing a new

independent state. So far so good, but the state must not stand still, and the movement should be done in the right direction. The purpose of this article is to elaborate how the Ukraine – NATO relationship has developed and, most importantly, what steps must be taken in order to accelerate the process of cooperation in the near future.

2. Steps taken

Obviously, the Ukrainian Armed Forces needed reforms not in the distant future but as soon as possible. The time factor was significant in order to avoid interference from abroad as well as to minimise meddling of some irresponsible politicians or even criminal elements in its development. Undoubtedly, during that period Ukraine in general, and the Ukrainian Armed Forces in particular, were extremely vulnerable and sensitive.

The first stage of the official reforms of the Armed Forces was between 1991 and 1996. This stage played a significant role because of its impact on the next steps

of the development of the Ukrainian Armed Forces. Someone great said that even the longest trip in the world begins with the first step. In the first stage of the reforms the following steps had been taken:

- The legislative basis was established,
- The institutional basis was created,
- The command and control structures were finally adopted,
- The current executive structures and supporting structures were drafted.

A significant number of the legislative acts in the military sphere were adopted: The Concept for Defence and Organisation of the Armed Forces of Ukraine, Laws "On Defence of Ukraine", "On the Armed Forces of Ukraine", the Military Doctrine of Ukraine, and the resolution "On Security Council of Ukraine".

At the same time, there were significant difficulties concerning leadership and guidance. From 1991 to 1996, three Ministers of Defence and four Chiefs of General Staff changed in office. More than 70 per cent of the staff personnel were rotated, and almost all military district com-

manders, army commanders, corps and division commanders were changed. This happened at the first, the most important, stage of the reforms and development of the Ukrainian Armed Forces.

In 1996, the National Security and Defence Council (NSDC) under the presidency of Volodymyr Horbulin, drafted up a National Security Concept, which was approved in January 1997 by the Ukrainian Parliament (*Verkhovna Rada*). At the same time, the State Programme for the Armed Forces Development until 2005 was adopted in accordance with a Presidential Decree. Between 1997 and 1999, the programme tried to provide a special basis for the development of the modern Armed Forces in order to create effective high readiness and deployable forces, which will be capable of dealing with the full range of conflicts.

Significant changes in the global security situation confronted the Ukrainian Armed Forces with new challenges. Particularly so with respect to the nature of modern warfare and the forms and methods of contemporary military conflicts,

in which the forces could be deeply involved. It is understandable that the State Programme for the Armed Forces Development until 2005 had to be adjusted and improved.

Yevgen Marchuk, Minister of Defence and former Secretary of the National Security and Defence Council said:

"We are faced with a contradictory situation. The economy is not capable to finance security structures the way they should be financed, and because of that, the structures which are supposed to see to internal or external security become sources of additional tension in society themselves. The state of affairs is such that optimisation of the security structures cannot be executed promptly and properly or radically because all such measures must be augmented by the social adaptation programs. That is why we have to find "golden middle" in the future reforms."

The period from 1996 till now could be characterised as a further reorganisation and development of the

Ukrainian Armed Forces. The steps that have already been taken, particularly in the military area, could be evaluated from the current perspective. It was an extremely painful process because of the tradition of a strong military community as well as quite strong support that the military enjoyed in the society. Nevertheless, it was done in order to address the pressing issues and to improve the situation.

First of all, the most important factor is the political decision of the Ukrainian authorities on the non-nuclear status of the state. It was probably one of the most significant events in contemporary history because it was the first time a state rejected nuclear weapons on its own initiative. It seems appropriate to admit here, that Ukraine followed Belarus and Kazakhstan in this particular decision. As a consequence of this process, in the beginning of June 1996 there were no longer any nuclear weapons in Ukraine. Nevertheless, from time to time the idea of having nuclear weapons is raised by some political observers. Furthermore, other important steps were taken and some important decisions

were made. Some of these crucial steps can be elaborated as follows:

Firstly, the number of troops and the equipment of the Armed Forces were substantially reduced in order to improve their capabilities and to cut the expenses of their maintenance. Moreover, a joint approach to military operations by the MoD, the Armed Forces and other force structures was established.

Secondly, the Concept of the Armed Forces 2010 and the State Programme of the Armed Forces Transition Towards Manning on a Contract Basis were adopted.

Thirdly, the Law on the Foundations of National Security was approved by the *Verkhovna Rada* on 19 June 2003.

Finally, the draft Military Doctrine was approved by the Cabinet of Ministers on 8 April 2003. This Doctrine is newly updated and gives the main framework for the future development of the Ukrainian defence policy in general, and the future of the Ukrainian Armed Forces in particular.

All these events certainly reflect that national defence is being planned actively.

It allows for observing the current process and provides the possibility of making necessary corrections and improvements. Obviously, dealing with a huge and inert object such as the Armed Forces is time consuming and requires a sustained and strenuous effort.

3. Ukraine and international organisations

Now it is time to go from the internal current events to the international position of Ukraine in general and of the Ukrainian Armed Forces in particular. As the U.S. President George W Bush stated in his speech in Warsaw in June 2001, "I believe in NATO membership for all of Europe's democracies that seek it and are ready to share the responsibilities that NATO brings." In order to follow up on this statement, some general points concerning the necessity of cooperation should be mentioned here. Refusing participation in the international institutions at the beginning of the twenty-first century simply means exclusion from the

most important processes in the political sphere as well as reducing the impact on the most important regions of the world. In other words, nowadays it is quite easy for a state to put itself in difficult circumstances and in an inconvenient environment by cutting the programmes of international cooperation. On the other hand, active participation in international institutions such as NATO, OSCE etc. as well as in international exercises creates a lot of new opportunities for the state to promote its national interests and derive practical benefits. The rich and powerful countries can advance their interests unilaterally, by using their national power, wealth and their natural resources, but Ukraine has to choose multilateral framework in order to achieve its interests and goals. As Celeste A. Wallander absolutely correctly observed, "NATO is able to cooperate at the international level...therefore, cooperation *with* NATO - while highly desirable - is not the same as cooperation *within* NATO."² In May 2003 in Washington, D.C., there was a NATO-Ukraine defence ministerial conference, named

'Building the Future for the NATO - Ukraine Relations'. At the conference, former U.S. National Security Adviser Zbigniew Brzezinski, one of the most experienced persons in the relationship between the USA and the former Soviet republics, stated:

"NATO is now entering the third phase of its post - Cold War adaptation. The first - the Warsaw phase - involved the strategic enlargement of the Euro-Atlantic space by inclusion in NATO of Poland, the Czech Republic, and Hungary. The second - the Vilnius phase - now underway, involves the political conflation of NATO's as well as the EU's eastern boundaries by the almost simultaneous and overlapping enlargement of both NATO and the EU. The third phase, which in many respects this conference initiates, involves looking beyond, further east, in the ongoing, complex, but historically inevitable, expansion both of the Atlantic community and of Europe's identity. Thus, the third phase points at Kyiv..."³

This vision is reflected in the official position of the Ukrainian government: according to the 23 May 2002 declaration of the Ukrainian National Security and Defence Council, NATO membership is the 'long-term goal'. According to this statement it seems useful to consider the relationship between NATO and Ukraine. Actually, the process of cooperation and partnership began even earlier. Since 1997, Ukraine has been one of the most active participants in the exercises under the Partnership for Peace (PfP) programme. Its troops have participated in more than 80 military exercises since this programme was launched in 1994. Moreover, Ukraine is home for NATO PfP Training Centre at Yavoriv and hosts several military exercises every year. It seems suitable to list here some of the Ukrainian troops which have contributed to NATO's Partnership for Peace programme:

1. 1st Detached Special Forces Battalion, Ukrainian part of the UKRPOLBAT (KFOR)
2. 13th Airmobiled Battalion of 95th Brigade

3. Engineer Company, Ukrainian part of Multinational Battalion "TYSA"

4. 2nd Pontoon-Bridge Battalion of 11th Engineer Regiment

5. U-130 Frigate "Hetman Sahaydachniy"

6. U-402 Assault Ship "Konstantyn Olshanskiy"

7. 2nd Squadron of 7th Helicopter Regiment

8. Four aircraft from 25th Air Group Regiment

9. Detached Transport company of 18th Logistic Regiment

10. More than 30 officers for serving in Multinational Headquarters.

The history of Ukrainian military support for peacekeeping operations dates back to July 15, 1992, when, following the Ukraine Supreme Council decision, the 240th Separate Special Battalion (550 servicemen) was sent to Former Yugoslavia. Since that time, Ukraine has continued to be an active participant in the peacekeeping process and is among the largest contributors to UN peacekeeping operations (as was mentioned above). Since

July 3, 1992, more than 8000 officers, warrant officers, non-commissioned officers and privates have participated in Ukrainian peacekeeping missions. The Ukrainian Armed Forces have suffered 19 killed and 50 wounded during these operations.

It has to be noted here that the relationship which emerged between NATO and Ukraine over time is distinctive and very different from, for example, the relationship between Russia and NATO.⁴ In July 1997, the Charter on a NATO - Ukraine Distinctive Partnership led to the establishment of a NATO - Ukraine Commission. Also, a Joint Working Group on Defence Reform (JWGDR) was finally set up. After that, in 2000, Ukraine joined NATO Planning and Review Process (PARP) and submitted its 'State Programme for the Armed Forces Development until 2005' to NATO in order for NATO to analyse it and comment on it.⁵ By 2001 Ukraine intensified its participation in PARP as well as in the Partnership for Peace (PfP) Programme. Finally, on 22 November 2002, the NATO - Ukraine Action Plan was approved by

the NATO - Ukraine Commission at its meeting at the level of foreign ministers in Prague. It set out jointly agreed principles and objectives which covered political and economical issues as well as security, defence and military issues, the legislative basis and protection of information. The Plan also provided a framework for coherent consultations and cooperation on political, economic, military and defence issues.

4. Lessons learned?

Why was Ukraine not invited to join the Alliance as the other countries from Eastern Europe and the Baltic region and why did Ukraine not even receive a Membership Action Plan (MAP)?⁶ There was a number of reasons, starting with the special geopolitical position of the country and finishing with the existence of certain political difficulties between the Ukrainian government and most NATO governments. In order to illustrate these difficulties, Celeste A. Wallander can be quoted here:

“Relations between Ukraine and the United States have been strained by disagreement over specific issues, such as the potential sale of the Kolchuga radar system to Iraq (but no evidence of it have been found yet). More fundamentally, questions about the treatment of media, opposition, and the conduct of elections have crystallized serious doubts that Ukraine’s political leadership is in fact committed to the path of European and transatlantic democracy required for full membership in the NATO community. It is important not to minimize the importance or depth of this problem, for doing so would prevent the serious understanding and commitment necessary for repairing it.”⁷

Nevertheless, visible progress is still being made in giving more substance to the special partnership. For instance, the NATO – Ukraine Action Plan (AP) was established.⁸ According to the Ukrainian strategic goals, this plan has to be the cornerstone of the whole process of evolu-

tion. The purpose of the Action Plan is to identify clearly Ukraine’s strategic goals as well as prioritise them according to the aspirations of full integration into the Alliance. The Plan was created in order to provide a strategic framework for currently existing as well as future development of NATO – Ukraine cooperation.

The main difference between a MAP, which was issued to aspirant countries at the Washington summit in 1999, and an AP is that the former, according to the Alliance’s definition, “provides for concrete feedback and advice from NATO to aspiring countries on their own preparations directed at achieving future membership. It provides for a range of activities designed to strengthen each aspirant country’s candidacy”.⁹ At the same time, the purpose of the NATO –Ukraine Action Plan is “to identify clearly Ukraine’s strategic objectives and priorities *in pursuit of its aspirations* towards full integration into Euro-Atlantic security structures and to provide a strategic framework for existing and future NATO-Ukraine cooperation under the Charter.”¹⁰

In order to avoid major difficulties in the process of the reorganisation and development of the Ukrainian Armed Forces or in the process of improving the national defence and security capabilities, it seems crucial to analyse some essential points calling for improvement in the NATO – Ukraine Action Plan. It is beyond doubt that NATO carefully evaluates current events in Ukraine and their consequences. Because of this, the Action Plan becomes very important for the country as well as for the Alliance. The Plan consists of the principles and objectives in areas like political and economic issues, security, defence and military issues, information protection etc. In order to support these principles and objectives in general, the Annual Target Plans (ATP) had to be developed (Plan, Section 5). Such a plan has been in place since early 2003. During the recent meeting at the level of Foreign Ministers in December 2003 in Brussels, NATO ministers expressed their appreciation of Ukraine’s efforts over the past year to implement the objectives of the Action Plan and the

activities of the 2003 Annual Target Plan. Furthermore, the ministers were also informed of the status of negotiations on the NATO-Ukraine Annual Target Plan for 2004.¹¹ This plan will include the internal activities Ukraine plans to undertake during the coming year, as well as many of the NATO-Ukraine activities which are foreseen.

Although the Plan is very important as an instrument of managing the relationship and as a reflector of the process of reforms and development, it has some weaknesses which should be addressed. First, the formulation of the steps to be taken leaves much to be cleared. There is a lot of room for misunderstanding and various interpretations, which hampers the progress and creates friction at the Joint Working Group on Defence Reform. Next, in the Plan it is quite difficult to distinguish long-term objectives from short-term ones. Short-term goals should be achieved within a foreseeable time period. Otherwise, a constant postponing of the achievable tasks could give many advantages to political speculators,

which again could lead to mutual distrust and disappointment between Ukraine and NATO. Finally, the partnership activities and implementation of the agreed Action Plan have to become a focus of the public relation effort on the part of the Ukrainian government. Common Ukrainian citizens are still mostly in the dark with respect to what is really going on. The process of negotiation has created a lot of plans and agreements between the state and the Alliance, but almost nobody among the Ukrainian population, particularly the civilians in countryside, has enough relevant information about current events. This situation has already caused some public misperceptions and might become an obstacle to the Ukrainian political and strategic aspirations.

5. Conclusion

Firstly, analysing the NATO - Ukraine relationship in general, and the Action Plan in particular, allows to say that it is not a plan as such, it is rather a declaration of intents. Because of this, there is a

lot of room for improving it. First of all, the Annual Target Plans should be established with much clearer goals. Furthermore, a mechanism for achieving short-term and long-term tasks respectively should be implemented as quickly as possible in order to avoid wasting time and postponing real progress. On top of this, it is not enough to have clear purposes and clear control mechanisms; it is also very important to have the relevant criteria and precise timelines for them. Simply speaking, NATO and Ukraine have to make a clear line from the previous step (Action Plan) to the most probable next step (Membership Action Plan). It will be an additional task for the Joint Working Group on Defence Reform in close cooperation with NATO liaison officers. Lastly, information about current events related to NATO-Ukraine special partnership and its activities must be more widely distributed; not only to the capital of Ukraine but to the other large cities, garrisons and even to the detached units. To ensure broad public support to the defence reforms and to NATO-Ukraine part-

nership, the Action Plan needs to include public relations aspects, which have *de facto* become a constituent part of the MAP that seven nations invited to become members of NATO have so successfully been pursuing.

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⁸ NATO - Ukraine Action Plan

⁹ Membership Action Plan

¹⁰ NATO - Ukraine Action Plan

¹¹ Ukraine finalises 2003 Target Plan

Section IV

Military History

Traditionally, the Baltic Defence Review devotes some space to various aspects of Baltic military history. A comprehensive article by Ivo Juurvee reveals how Estonia was building and using its intelligence gathering capability in the inter-war period. The focus of the author is on radio-intelligence which was a rather novel strand of intelligence activities at the time. Having thoroughly investigated available archives, the author reconstructs, piece by piece, the picture of the Estonian radio-intelligence and offers many valuable facts and inferences.

Estonian Interwar Radio-Intelligence*

By Ivo Juurvee**

1. Estonian radio-intelligence in historiography

The Estonian pre-war military intelligence service - the Second Department of the General Staff - and especially its radio-intelligence¹ branch, Section D, have not been researched much, although it is rather frequently mentioned in historiography. Due to different reasons its significance has probably been overestimated. The first to promote the myth of its influential role were officers of the General Staff who were arrested and interrogated by the NKVD (the Soviet secret service, a predecessor of the KGB).

They were asked about intelligence, and something had to be answered. To speak about the importance of Section D was secure, since its leadership managed to flee the country in time, and its personnel was known to the Soviet authorities.² Therefore, information on radio-intelligence could not cause more arrests, which would have been possible while uncovering other collaborators of the Second Department. For example, the former Chief of the General Staff, General Nikolai Reek, said that he knew very little about intelligence, since the Head of the Second Department had to report directly to the Commander-in-Chief, General Johan Laidoner (which was not true).³ Soon Reek

started to recall, probably due to torture, and one of the first things he confessed was that “radio-intelligence gave a lot.”⁴

Another reason to believe in the power of Section D is less pragmatic but political. Since radio-intelligence against the Soviet Union was most probably organized in co-operation with Germany, it was used to discredit the leadership of the Republic of Estonia and its Armed Forces as pro-Nazi in Soviet Estonian historiography and as an indirect justification for the events of the summer 1940. Investigations of several authors of the partnership between the Second Department and the German military intelligence service *Abwehr* show that special radio

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intelligence equipment and optics were donated to Estonians by their German counterparts.⁵ The same has been confirmed in recent publications.⁶ It has become 'common knowledge', as the original source proving that fact is complicated to detect because of cross-quoting and missing quotes. After some research it was possible to find the original source, which is a book by East-German historian Julius Mader. He writes:

"In June [1936] the Head of the Second Department of the Estonian General Staff, Colonel Maasing, visits Canaris in Berlin. *Abwehr* gets the permission of the Estonian government to use Estonian territory for anti-Soviet espionage. To fulfil the task, the Estonian secret service is equipped with long-distance photo-cameras and radio-intelligence tools to be stationed along the Estonian-Soviet border. Cameras were installed in the lighthouses on the Gulf of Finland in order to photograph Soviet navy ships passing by".⁷

This short excerpt without any citation has been for a long time the basis for all studies on Estonian radio-intelli-

gence. The existence of cameras in the lighthouses could be possible, although so far no documented evidence has been found to support the claim.

2. Radio-intelligence before Section D

Estonians were already eavesdropping on Soviet radio-communication before the formation of Section D in the Second Department. The extent of systematic work is complicated to detect. In the 1920s and 1930s there was no essential difference between conventional radio equipment and equipment used for tasks of radio-intelligence. Almost all military receivers could be used to monitor the enemy's communication. With some simple reconstruction civilian broadcast receivers could also be used for such purposes. The same applies to devices used by radio-amateurs, which in some cases were more sophisticated than the equipment in the Armed Forces.

The Wireless Station of the General Staff in Tallinn intercepted the first ra-

dio messages of the Red Army during the War of Independence (1918-1920).⁸ However, radio-intelligence has not been mentioned among its primary functions.⁹ It was probably just a coincidence, which had to happen while working in a receiving mode for long periods.

There are known some examples of naval radio-intelligence. After the War of Independence a long-wave station was located at the post of Naval Communications of Stenskäri. Among other functions it had to take care of radio-intelligence. By the end of the 1920s the station had lost its importance because the Red Baltic Fleet seldom used long-wave transmissions while at sea.¹⁰

In July 1928, Lieutenant Colonel Karl Laurits, Head of the Second Department at that time, informed the Chief of Staff of the Navy:

"With the consent of the Commander of the Navy ... the radio-station of Island Naissaare, the personnel of which will be reinforced with one civilian hired by the Second Department, is going to be used for radio-intelligence purposes. Actual radio-intelligence work is going to be

organized by the Commander of Radio Station of the General Staff, Lieutenant Lõhmussaar from Communications Battalion, under my supervision.”¹¹

In the same document it was foreseen that until the arrival of the fourth radio-operator the station had to work in a receiving mode for 18 hours per day, and 24 hours a day once the fourth operator had arrived. From here it is possible to conclude that a shift lasted for six hours.

The document “Signals and Working Hours of Army and Navy Radio Stations”, which went into effect on October 1, 1928, stated that the navy radio-stations of Kuressaare, Pärnu and Coastal Fortifications had to monitor the communication of the Soviet naval ships on the Baltic Sea for five minutes every hour, in addition to their routine. No Army station was given duties of the same kind.¹²

In 1925 three long-wave direction-finding stations were purchased for the Army,¹³ i.e. equipment for intelligence purposes. By April 1933 this rather primitive equipment was out of active service and stayed in the storage of the 3rd Com-

munications Company.¹⁴ Although in 1931 the Head of the Second Department Laurits described the theoretical views and importance of direction-finding in the booklet “Intelligence Service in Staffs”, the Estonian Army did not have the modern equipment described at that time.¹⁵

When the staff of the 1st Division moved from Narva (next to the Russian border) to Rakvere (100 km west of Narva) in 1932, the radio-station was left in its previous location to accomplish “special tasks”. It stayed there at least until the end of 1933, when the Inspector of Engineer Troops was asked to leave it there or replace it with a station of the same kind.¹⁶

It is not known if “special tasks” meant radio-intelligence. Nevertheless, during the period from April 1932 until April 1933 the transmitter of the station had worked for 217 hours and the receiver for 7998 hours (which makes 22 hours per day on average), i.e. the receiver worked approx. 37 times longer than the transmitter. The average for all stations of the Communications Battalion was 24.5 times. This allows to argue that the Narva station was

used for intelligence purposes. The four direction-finding stations worked in the period mentioned above altogether for 1350 hours, which makes 3 h 42 min per day on average. (This number is purely theoretical, since for finding a transmitter, at least two stations had to work at the same time. However, it reveals a relatively low intensity of direction-finding.) The most actively used (2 h 20 min per day) *Marconi* direction-finding station was located in Petseri (a town on the Russian border in South-East Estonia), in the same place where the intelligence station was located, monitoring Soviet communication for 9 h 10 min per day.¹⁷

Although the data above proves that Estonians had made some efforts in the field of radio-intelligence, the letter of the Chief of the General Staff General Nikolai Reek addressed to the Chief of Communications of the Army gives the impression that the work was not systematic. Reek writes:

“... Already during peacetime we have to start preparations to carry out radio-intelligence. It means skills in finding [enemy] stations and decipher-

ing intercepted messages. An appropriate plan has to be drawn and several young officers from the Higher Military School included in this task.¹⁸

3. Radio communication in the second half of the 1930s

In the second half of the 1930s three wavebands were mainly used for radio communication: long waves (band width ca 1-10 km, frequency 300-30 kHz), medium waves (ca 100-1000 m, 3000-300 kHz) and short waves (ca 10-100 m, 30000-3000 kHz). Ultra long waves (more than 10 km, less than 30 kHz) were rarely used, but research on ultra short waves was still at a stage that did not allow wide-spread use.

Medium and long waves were more reliable, but due to some peculiarities short waves were more promising for military communication.¹⁹ Since the short waves reflect from ionosphere, transmitters with low power could create communication to distances of thousands of kilometres. Vast shortcomings were low reliability and the 'area of silence' (i.e. that

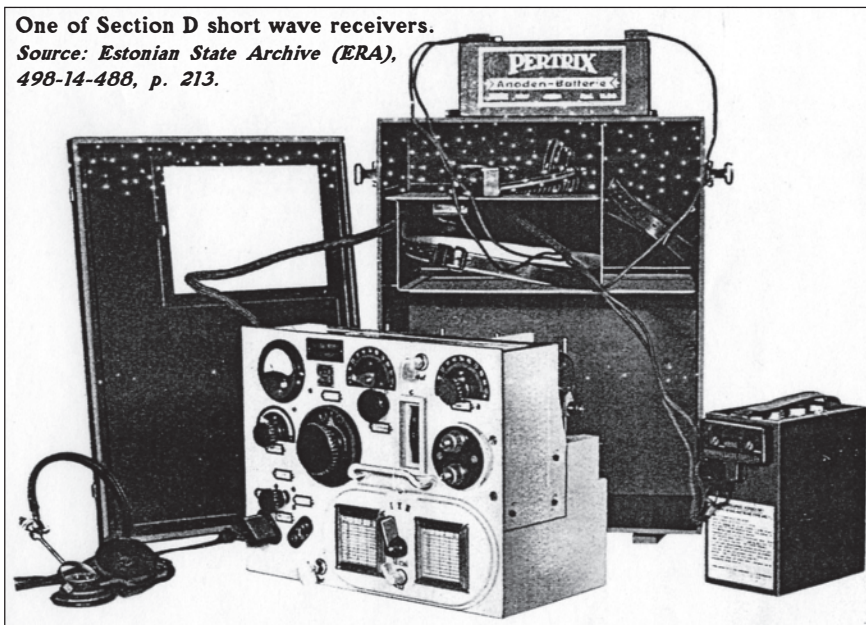
the direct wave cannot be received anymore, and the reflected wave has not reached the surface of earth yet).²⁰

During this period the two receiver brands of "Audion" and "Super" were used. "Super" was more sophisticated and made "Audion" redundant. The number of valves

(vacuum tubes) in it could usually indicate the level of sophistication of the station. Radio amateurism was popular among Estonians. It was the time of "radio romantics". Some equipment built by amateurs was even better than the gear used in the Armed Forces. At the same time they

One of Section D short wave receivers.

Source: Estonian State Archive (ERA), 498-14-488, p. 213.



were a reserve of radio specialists for the military who could be deployed in the case of need, especially by the Defence League.²¹

4. Equipment²²

Data on the equipment of the Estonian radio-intelligence is from the summer 1940, when it had to be handed over to the Red Army. In separate parts Section D handed over all together 25 radio stations, transmitters, receivers, direction-finding stations and several hundred pieces of other equipment (antennas, cables, batteries, valves, etc.). The possibility, that some equipment was missing - hidden, handed over to some other Estonian military unit before or stolen - cannot be completely excluded, although it is implausible. By the summer 1940, there was the following equipment in use:

Radio stations (including both, receiver and transmitter):

- Telefunken Torn. Fu f/24 b211 (1 item)
- Telefunken Torn. Fu B 1 (1 item)

Receivers:

- Telefunken Torn. EB (4 items)

Telefunken Spez. 445 b Bs "Tornister" (3 items)

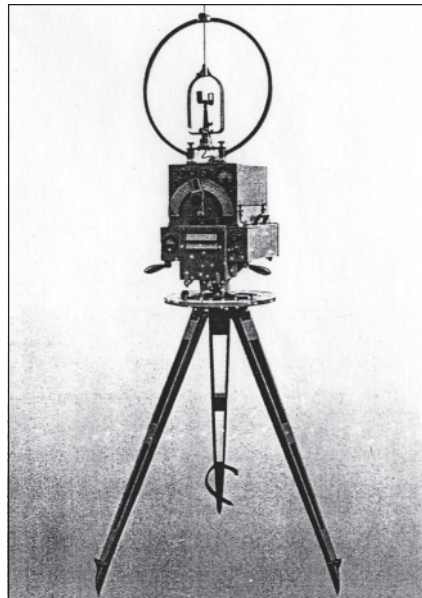
Telefunken D 770 (4 items)

Telefunken E 381 H "Allwellen" (2 items)

Telefunken L.Mw H.E./24b 316 (1 item)

Telefunken 876 WR (1 item)

Kerting-Ultramar 37 SV 8360 (1 item)



Telefunken radio direction finding stations. Source: Estonian State Archive (ERA), 498-14-488, p. 217.

'5-valve' of Communications Battalion (out of date, 1 item)

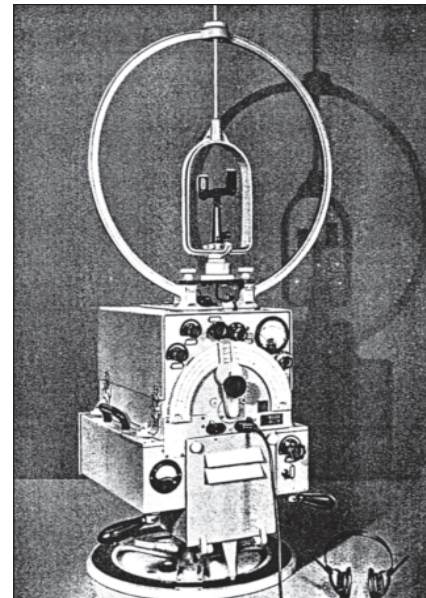
Direction-finding stations:

Telefunken TP/L.M./ 6/315 (3 items)

Transmitters:

Quartz Crystal (out of date, 2 items)

'1-valve' (out of date, 1 item)²³



Out of these 25, 22 had receiver function and only five transmitter function (three of them were out of date). It shows a clear focus on monitoring. Nevertheless, all three radio-intelligence units had their own transmitter and one in the Second Department.²⁴ (The Second Department was located on Pagari Street, in the Old Town of Tallinn in the building of the General Staff. Its radio-station in the same house was probably also available for intelligence officers in case of need, e.g. for contacting the radio-intelligence units.)

"Tornister-Empfänger"²⁵ Spez. 445 b Bs" was a portable 4-valve Audion-receiver that could be carried in a backpack by one man. In the German *Wehrmacht* it was used from 1930 up to 1937. During the period of 1937-1939 it was replaced with more sophisticated "Telefunken Torn. EB" which was used until the end of World War II. These two were also the main receivers used in German tanks and other armoured vehicles.²⁶ Section D possessed three Spez. 445s and four Torn EBs by the summer of 1940. The serial numbers show that all three Spez. 445's used in

Estonia were made in 1936. This may indicate that 1) they had already been used by Germans and handed over to Section D as second-hand receivers during the replacement process of 1937-1939 or 2) the same process had been going on in Estonia, the original number of Spez. 445s was larger, and some of them had already been replaced with Torn EBs or 3) the process had already been completed, and four Torn EBs had replaced three Spez. 445s which were in reserve by then.

The Spez. 445 was a receiver developed especially for field conditions. Therefore, operational reliability was a priority. All four vacuum tubes were of the same type (RE 074). Although four different valves would have provided better receiving quality, German engineers preferred easy replacement – it was obviously much easier to carry only one valve for replacement in the field than four different ones. It was also easier for the Estonians to order only one type of reserve valve from Germany. The primitive design of the receiver is demonstrated by the fact that the bandwidth could not be changed by a switch,

but an operator had to carry three different coils (for short, medium and long waves) with him. Spez. 445 could receive bands of 40-3000 metres and, regardless of several imperfections, could be used for radio-intelligence purposes. Torn EB was an update of Spez. 445. One of the differences was that bandwidth was changed by switching, and there was no need to change coils. This receiver was produced in huge amounts and was the mainstay of German infantry and armour troops radio communication throughout World War II.²⁷

"Telefunken D 770" and "Telefunken 876 WR" were 7- and 6-valve super-receivers. Although their construction was much more sophisticated than Spez. 445, D 770 and 876 WR were only civilian broadcast receivers. After the outbreak of war in September 1939, the Second Department received additional funds to obtain five receivers to monitor foreign public broadcasts (mainly news).²⁸ This explains the purpose of these receivers and gives the approximate date of purchase.

With a simple and cheap reconstruction and a better antenna, D 770 and 876 WR

could be used for much wider purposes than just listening to radio news. The crucial difference between military and civilian equipment was that the latter could not receive text in Morse code. To rebuild these radios to receive Morse code was not complicated, especially compared with various experiments carried out by the Communications Battalion.²⁹ After that they would have been even more useful for the intelligence than Spez. 445 and Torn EB, although it is not known if they were rebuilt. Because of their nature, D 770 and 876 WR did not bear much transportation and especially working conditions in the field.

“Telefunken Torn. Fu f/24 b211” and “Telefunken Torn. Fu B 1” were portable radio-stations (i.e. they included transmitter and receiver) widely used in the German Army from 1937 until the end of World War II.³⁰

“Telefunken TP/L.M./ 6/315” was a portative long and medium wave radio finding station. In addition to an ordinary moving loop-antenna, which appears to be the basic element of every direction-finding station, they were equipped

with an additional stick-antenna, which allowed determining the direction of enemy transmitters more precisely. The set included several other extras up to leather transportation bags.³¹

Bearing in mind the small number of personnel in Section D, the amount of equipment is remarkable. Obviously not all of it was used at the same time but according to need. Some of it could be in reserve, some temporarily out of service. When air was quiet, one operator could monitor several different frequencies using several receivers at the same time.

Twenty items out of twenty-five were made by the German company Telefunken. The documents state that four items made elsewhere were out of date. It is clear that the great majority of technology used by the summer of 1940 was made by Telefunken. The equipment was modern, mostly only a few years old and on the same level as in the German ground forces. On the other hand, it consisted of devices used for communication rather than special radio-intelligence tools, except maybe direction-finding stations.

5. The question of obtaining the equipment

In the second half of the 1930s the Estonian Armed Forces mainly used radio technology of Telefunken. The largest purchases during the period were six division and six brigade radio-stations, ordered from Telefunken in the second half of 1938.³² A competitive tender was announced, and extensive documentation has remained intact.³³ There is no reason to doubt in the quality of the technology, since at least in the field of short-waves Telefunken was one of the (if not the) best in the world. As early as 1912 the company had succeeded, after constant research, in creating short-wave radio connection at a distance of 20,000 km.

No documentation of the purchasing process of the equipment exists. This gives space for historical discussion. One possibility could be that the files were destroyed or lost during World War II. The other possibility is that such documenta-

tion has never existed, which in turn leads to two options.

Firstly, the tender was never announced publicly in order to cover the intentions of the Estonian radio-intelligence. The decision was made by a narrow circle of military radio specialists.³⁴

Secondly, the equipment may have been aid from the German *Abwehr*, as has been argued by East-German historian Julius Mader. This possibility is more realistic, although it cannot be confirmed yet.

6. Personnel of Section D

In contrast to other parts of the Second Department, the personnel of Section D as of summer 1940 is precisely known: it was 26 people - two officers, 23 NCOs and one private. Nobody had been hired before 1936. This confirms the supposition that Section D was formed in 1936-1937.³⁵ The second officer, Olev Õun, was taken to service only in March 1938; so far Andres Kalmus had managed to supervise the section alone.³⁶

Radio-intelligence had gone through two major enlargements. The first of them was at the beginning of 1937, when Section D had just started its work. The second occurred in summer of 1939, when, according to President Konstantin Päts' secret decree from July 10, "due to complex situation [in Europe] naval radio-intelligence has been reinforced". With the order of the Commander-in-Chief General Johan Laidoner from July 22, the radio crew of the Second Department was enlarged "substantially".³⁷

After the entry of the Red Army into Estonia at the end of September of 1939, there is only one known new NCO in Section D.

According to a Commander-in-Chief's top-secret decree No. 223, from 1936 the peacetime personnel of Section D was 33 people.³⁸ It leaves two possibilities: Section D was not staffed to its full strength or some civilian radio-operators were also employed.

7. Training of personnel

Most of the Information NCOs (*informatsiooniallobrutserid* - official name

for NCOs of radio-intelligence) on whom data can be found were graduates from the Radio Class of the Communications Battalion. The two exceptions were the Administrative Sergeant, who was working in the office and did not need training in the radio field, and one NCO, who was trained as a radio-operator in the Navy.

Information NCOs were professionals. Some of them had more than ten years of practice as military or civil radio-operators, many had commendations from their superiors for excellent service.

The two officers were well-educated. In addition to military school, they had graduated from full-time gymnasium, which was not as common in the 1930s as it is now. Both had been instructors at the Joint Military Education Establishment, and were fluent in German and Russian. Captain Kalmus had followed military radio courses abroad.³⁹ Major Reino Hallamaa, the head of Finnish radio-intelligence during World War II, under whose supervision Captain Kalmus and Captain Õun were working after flee-

ing Estonia in 1940, has said that both men were very talented. Olev Õun was especially talented, who was, in Hallamaa's opinion, a "phenomenal decipherer" and had managed to break the latest code of the Red Army during the Polish campaign in September 1939.⁴⁰ Unfortunately, no materials are available to support or argue the words of that high-ranking Finnish intelligence officer.

Taking into consideration the aforesaid, the personnel of Section D could be evaluated as highly professional and experienced. They were the best that Estonia's tiny Army could provide.

8. Positions of radio-intelligence units

In 1939-1940 Section D units were stationed in Merivälja (7 km to the East from the city centre of Tallinn, probably next to the lighthouse of Viimsi, where the post of Naval Communications was situated, or somewhere in the area of nowadays Ranniku Road or Mõisa Road), Narva (probably at Olgino Mason 5 km

to the North-East from city centre)⁴¹ and Tartu (probably in some of the units of the 2nd Division).

By July 1, 1940, fourteen Information NCOs were stationed in Merivälja, five in Tartu and four in Narva.⁴² They had been regrouped recently, and their previous positions are impossible to trace nowadays. Note that for keeping one receiver working 24 hours per day, four radio-operators were needed.

Distribution of equipment between units is not clearly known. There was one direction-finding station in each unit. Other equipment was slowly gathered in Merivälja, as in the summer of 1940 Section D was prepared for closing down. There is no evidence about Section D's unit in Petseri, although it has been mentioned in the literature.⁴³ Possibly it had been closed down earlier, and crew and equipment had been transferred to Merivälja; it would also explain higher concentration of people and equipment there.

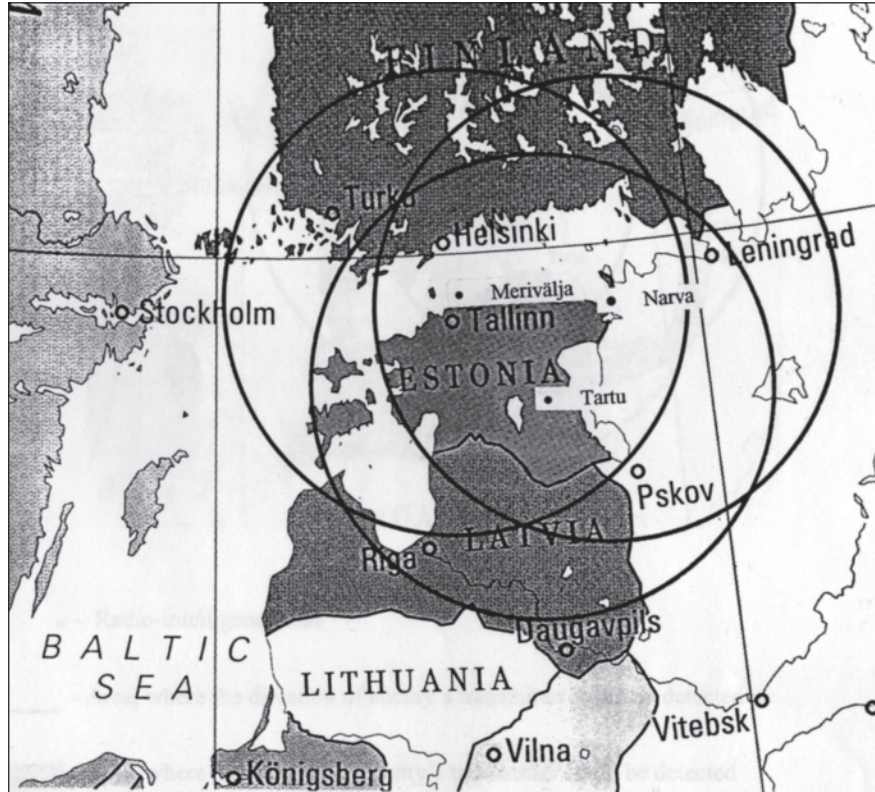
The transfer of crew and devices from Narva to Merivälja started in October

1939.⁴⁴ This was presumably caused by changed priorities of radio-intelligence after establishing the Red Army bases in Estonia according to a bilateral treaty from September 28, 1939 (a precursor to occupation and annexation of Estonia by the Soviet Union). Bases were found in Paldiski (a town 60 km west of Tallinn) and on the Island of Saaremaa (in the Baltic Sea, off western Estonian coast), and concerned the Second Department much more than the Red Army units in the Leningrad Military District. It explains the movement of focus of radio-intelligence work from the Estonian eastern border to Tallinn.

Between January and September 1938 the Head of Section D, Captain Kalmus, had five times "accomplished special tasks" in Võru, once in Tapa and in Narva. These trips lasted for 4-5 days each.⁴⁵ In October Captain Õun was fulfilling the same duties for three days in Tartu.⁴⁶ It can provide ground for speculations (e.g. that there was a radio-intelligence unit in Võru, which permanently had problems and was transferred to Tartu in September-October

ber 1938), but unfortunately not for feasible conclusions.

In 1938 the General Staff had the idea to create a mobile radio-intelligence unit the following year. The action plan of the Staff under the heading "Intelligence" stated: "To develop and expand radio-intelligence. To acquire mobile a radio-intelligence base for radio-intelligence and for eavesdropping telephone communication in the territories near to the border."⁴⁷ There is no evidence on the realisation of this idea, although its implementation should not have been complicated. All military radios of Telefunken were portable and developed with the intention that one or two men on the battlefield could carry all needed equipment, including batteries or a generator. Therefore, some receivers and batteries on a truck could already be named a mobile radio-intelligence unit, as it could easily carry the crew and devices needed. The other side of the coin is whether this was a necessity. Estonia is a small country and there were already at least three permanent radio intelligence units with relatively



Positions of Section D radiofinding stations and their approximate range in 1939-1940.

small distances to each other. (At the same time the Signals Intelligence Service of the United States had only seven permanent units, although most probably staffed and equipped much better.)⁴⁸ One more transportable unit could not give a new qualitative level. Probably the idea was just an attempt to implement the general trend of making communications troops mobile⁴⁹.

9. Telephone eavesdropping

The idea of a mobile unit included eavesdropping of telephones. The Second Department was familiar with this task. In the 1930s the Estonian Armed Forces purchased more than twenty field devices for eavesdropping telephone lines,⁵⁰ and by 1940 Section D had at least one of them (type "LE 36").⁵¹ These were primitive and light and were usable only if the enemy had low quality or single-wire (in that case ground was used as the second wire) communication. In both cases the eavesdropping equipment had to be near the line of the enemy. The system was for tapping field-telephone communications

of the forefront troops of the other side in battle conditions.⁵² During peacetime these devices could not be used, since, due to security concerns, single-wire telephones were mostly abandoned after World War I, and field-phones were not used in peacetime. Furthermore, there was no direct access to the Soviet telephone lines anyway. Tapping the communication lines of the Soviet Embassy in Tallinn was technically possible, but the question whether it was actually conducted requires some further investigations.

10. Direction-finding

There was one direction-finding station in every unit of Section D, which is also the most pragmatic solution. The range of stations was at that time 250-300 km. Therefore, it was theoretically possible to find all transmitters working on long and medium waves in whatever spot in Estonia and also on the Gulf of Finland, in western part of the Leningrad Military District (including the city itself), in Southern Finland and Northern Latvia.

In addition to the finding stations of Section D, some were also located on Navy ships. However, it is not known whether they were used for intelligence or navigation purposes. The location and functions of "Marconi" direction-finding station exploited by the Army in the second half of the 1930s are also not known.

The effectiveness of radio finding remains unknown. When between 1936-1937 several transmitters of 'radio-hooligans' (radio-amateurs who used their sophisticated equipment "to have fun") emerged in the Tallinn area, it took more than half a year before the best known of them, "Kapa-Kohila," which used frequencies reserved for civil air-traffic navigation, was hunted down.⁵³ This does not prove the pitiful state of radio-intelligence. (Former officers of Communications Battalion have told afterwards that they knew perfectly the location of "Kapa-Kohila".)⁵⁴ Fighting radio-hooligans was not a function of Section D. There is a possibility that the Postal Service did not even ask the Armed Forces for help. Nevertheless, only a need to conceal Estonian radio-

intelligence real capabilities from the possible enemies could excuse this almost criminal ignorance.

11. Deciphering

The success of Captain Õun in deciphering soon after the outbreak of World War II was already mentioned. War was a key factor allowing a breakthrough in dismantling enemy military codes. In peacetime ground troops preferred wire connections due to their higher reliability.⁵⁵ In contrast to radio messages, telegrams and telephone conversations did not have to be coded, which made them faster and more user-friendly. In wartime, when large troops had to move and could not stay in their permanent bases, there was no alternative to radio communication. Therefore, the number of broadcast messages increased substantially, providing more data for cryptographic analysis, which is the foundation to break codes.⁵⁶

When the Second Department closed down, it handed 51 items of literature over to the Red Army, including nine

items concerning cryptology, a Russian-Estonian military dictionary and three *Krypto* “ciphering clocks”.⁵⁷ To deal with the own code of the Second Department, these machines were not needed,⁵⁸ which leads to the conclusion that there was some work being done in breaking Soviet ciphers in addition to intercepting radio communications. One can only speculate about the duration and results of this work.

In 1936 a former Head of the Second Department Lieutenant Colonel Artur Normak told to a Swedish intelligence officer, Captain Hallenborg, that there had been a breakthrough in deciphering Soviet codes. The clue to the mystery was obtained after one station of the Red Army repeated its enciphered message in plain text after it had not been understood by the recipient. Both messages were intercepted by the Estonian radio intelligence.⁵⁹

After imprisonment in 1941 a former Chief of the General Staff General Nikolai Reek told NKVD interrogators that the Head of the Second Department Colonel Maasing had reported to him about break-

ing some of the codes of the Red Army.⁶⁰ Probably as a consequence of torture Reek told the NKVD what it wanted to hear, yet it is also possible that it is true.

12. The targets of radio-intelligence

Although the transmitters of the Soviet ground forces were certainly monitored, priority for Section D was supposedly the Red Baltic Fleet, which since 1918 had been pushed to a narrow strip on the eastern coast of the Gulf of Finland, with the main base in Kronstadt.

In the 1930s the ground troops were initially reluctant to use radios, mainly due to their complexity and security concerns. The Red Army was still under-equipped with radio-stations at the time.⁶¹ Therefore, radio communication between the units in the Leningrad Military District could not be very active, while the fleet had no choice and had to use wireless connection.

Secondly, the German *Abwehr* supposedly supported Estonian radio-intelligence, and the main concern to Germany in the

area was the Red Baltic Fleet. Until the battleship *Bismarck* became operational in 1940, there were no ships in the German Navy that would have had as strong armament as the Soviet battleships *Marat* and *Oktyabrskaya Revolutsiya*. These ships were modernized between 1928-1934⁶² and could arrive at the East-Prussian coast only within 24 hours after departure from their base in Kronstadt.

Thirdly, Section D had stationed its two best-equipped units near the sea, while the third one (Tartu) was at some distance from the Soviet border and still had the Gulf of Finland in the range of its direction-finding station (see map).

Fourthly, in the period before and during World War II radio-intelligence had more importance for the navies than for the ground troops.⁶³

In the long run the Germans may have been interested in Estonian radio-intelligence to provide their specialists with more raw data for cryptographic analysis. Nonetheless, some material of operational value might have been obtained. Soviet aid had a great impact on the Span-

ish Civil War (1936-1939). Most of it was delivered from the ports of Sevastopol and Odessa on the Black Sea, while some ships departed from Leningrad (now St. Petersburg), passed through the Danish Straits and the English Channel and delivered their cargo to the ports of Santander and Bilbao on the southern coast of the Gulf of Biscay. These vessels, equipped with short-wave radio-stations, had to pass by Section D units at a close distance. During the journey they tried to keep radio silence as much as possible. Nevertheless, it is worth mentioning that already as early as 1936/1937 there was a possibility that the Estonian radio-intelligence was eavesdropping Soviet communications within the zone of war. One of the main stations exchanging signals with the Soviet instructors was situated in Leningrad,⁶⁴ so most of its transmissions and receiving should have been within the range of the Section D unit in Narva.

By the personnel strength, its training and the equipment used it can be concluded that Estonian radio-intelligence had enough capacity for intercepting Soviet

radio communication in order to lay ground for a successful deciphering process. How Section D actually accomplished the task of transforming the intercepts into useful informations remains a topic for further research.

¹ Radio-intelligence is a process of monitoring (enemy) radio communication, collecting, analyzing, and deciphering the intercepts, and the agency, which deals with this process. Important is a systematic and conscious work, since incidental hearing of other's messages cannot be called intelligence. The field grew rapidly with the development and wider use of radio-communications in the interwar period. Now the term SIGINT (signals intelligence) is also widely used.

² EE ERA, 495-12-121, pp. 21-22; 495-12-277, pp. 16-18.

³ Reports of the military attaches were forwarded from the intelligence service to Reek.

⁴ ERAF, 130-1-9861/3, pp. 52-55.

⁵ Leonid Barkov, *Abwehr Eesti*. [*Abwehr* in Estonia] (Tallinn: Eesti Raamat, 1974) p. 35; Heino Arumäe, *Kabe ilma piiril* [On the Border between Two Worlds] (Tallinn: Eesti Raamat, 1979) p. 111.

⁶ Tiit Noormets, *Eesti sõjaväeluure tegevusest, meetoditest ja vabenditest aastail 1920-1940*, p. 58; Jari Leskinen, *Vendade riigisaladus: Soome ja Eesti salajane sõjaline koostöö Nõukogude Liidu võimaliku rünnaku vastu aastatel 1918-1940* [Secret of the Brothers: The Finnish and Estonian Secret Military Co-

operation Against Possible Soviet Aggression, 1918-1940] (Tallinn: Sinistukk, 2000) p. 49.

⁷ Julius Mader, *Hitlers Spionaggenerale sagen aus: Ein Dokumentarbericht über Aufbau, Struktur und Operationen des OKW-Geheimdienstamtes Ausland/Abwehr mit einer Chronologie seiner Einsätze von 1933 bis 1944* [Hitler's Espionage Generals Speak: A Documental Report on Construction, Structure, and Operations of OKW Secret Service *Ausland/Abwehr* with a Chronology of Its Action from 1933 until 1944] (Berlin: Verlag der Nation, 1970) p. 308.

⁸ Tiit Noormets, *Eesti sõjaväeluure tegevusest, meetoditest ja vahenditest aastail 1920-1940*, pp. 59-60.

⁹ J. Vingisaar, *Raadioside Vabadusõjas*. [Radio Communication in the War of Independence] *Sõdur*, No. 46-47, 1938, p. 1154. The possibility that it was a secret task cannot be excluded.

¹⁰ EE ERA, 527-1-1575, p. 100.

¹¹ EE ERA, 642-1-230, pp. 5-6.

¹² *Ibid.*, p. 18.

¹³ Toe Nõmm, "Eesti kaitsejõudude raadioside" [Radio Communications of Estonian Defense Forces] *Tehnika ja Tootmine*, No 7, 1992, p. 46.

¹⁴ EE ERA, 512-1-268, p. 151. In 1940 Section D used also three radio-finding stations, but these were modern and obtained later.

¹⁵ Karl Laurits, *Luureteenistus staapide*. [Intelligence Service in Staffs] (Tallinn: Kaitsevägede Staabi VI Osakonna Kirjastus, 1931) pp. 18-19.

¹⁶ EE ERA, 512-1-268, p. 28.

¹⁷ *Ibid.*, pp. 151-151 verso.

¹⁸ Tiit Noormets, p. 59.

¹⁹ *Raadiosidemest ja sidepidamise võimalustest lühilainel* [About Communication Possibilities on

Short-Wave Band] *Kaitse Kodu*, No. 2, 1939, pp. 46-48.

²⁰ O. Saarep, "Lühilained maailmaruumis" [Short-Waves in Space] *Kaitse Kodu*, No. 2, 1939, pp. 49-50.

²¹ "Kaitseliit raadioasjandust arendamas" [Defence League is Developing Radio Communication] *Kaitse Kodu*, No. 7, 1936, p. 209. Defence League (*Kaitseliit*) was a voluntary military organization, the Estonian equivalent to the National Guard in the United States. With its 40,000 members it was a considerable military force.

²² All technical data below, if not cited, is from materials obtained from EADS-RACOMS by the author.

²³ EE ERA, 495-12-277, pp. 2-3; 9-10 verso; 49. Indicated number of valves means that equipment was made by the Estonian Armed Forces, probably in Communications Battalion's workshops.

²⁴ EE ERA, 495-12-277, p. 10 verso.

²⁵ Tornister-Empfänger - 'rucksack-receiver.'

²⁶ "Sende- und Empfangsgeräte des Heeres" [Transmitters and Receivers of the Ground Forces.] In: *Lexicon der Wehrmacht*, available in the Internet, <http://www.lexikon-der-wehrmacht.de/Waffen/Funkgeraete.htm>, last accessed in June 2003.

²⁷ Hans-Peter Dohmen, *Torn E.b.*, available in the Internet, <http://home.t-online.de/home/dohmenhapse/tornEb.html>, last accessed in June 2003.

²⁸ EE ERA, 498-9-272, p. 258.

²⁹ H. Jens, "Rahuaegne töö Sidepataljonis" [Peacetime Work in Communications Battalion] *Sõdur*, No. 46-47, 1938, p. 1158.

³⁰ "Sende- und Empfangsgeräte des Heeres."

³¹ EE ERA, 495-12-277, p. 9.

³² In the Estonian Army the power (i.e. range) of radio stations was defined by unit for which they were meant. The five categories were: Commander-in-Chief's Station, Division's Station, Brigade's Station, Regiment's/Battalion's Station, and Company's Station. See: Toe Nõmm, p. 45.

³³ EE ERA, 498-14-486; 498-14-572.

³⁴ Recent study by Craig C. McKay and Bengt Beckman, *Swedish Signal Intelligence* (London: Frank Cass, 2003), supports this possibility. See Craig C. McKay and Bengt Beckman, p. 84.

³⁵ Tiit Noormets, p. 59.

³⁶ EE ERA, 495-12-277 and the personal files of the servicemen.

³⁷ EE ERA, 498-9-272, p. 57.

³⁸ EE ERA, 495-3-16, p. 205.

³⁹ EE ERA, 495-7-1553, p. 13 verso; 28-30; EE ERA, 495-7-6875.

⁴⁰ Jari Leskinen, pp. 303-305. German military attaché in Tallinn, Colonel Horst Rössing, evaluated the Estonian radio-intelligence against the Soviet Union as more successful than the Finnish one (*Ibid.*, p. 50).

⁴¹ Tiit Noormets, p. 60.

⁴² ERA, 495-12-277, p. 9; 18.

⁴³ E.g. Tiit Noormets, p. 59.

⁴⁴ EE ERA, 495-12-277, pp. 32-32 verso.

⁴⁵ EE ERA, 495-7-6875, pages without numbering.

⁴⁶ EE ERA, 495-7-1553, p. 29.

⁴⁷ EE ERA, 495-12-478, pp. 253-254.

⁴⁸ These units were spread over a large area, incomparable with Estonia. They were: Corozal

(Panama Canal Zone), Fort Hancock (N.J.), Fort Hunt (Va.), Fort McKinley (near Manila, Philippines), Fort Sam Houston (Texas), Fort Scott (Presidio San Francisco, Calif.), and Fort Shafter (Hawaii). (Norman Polmar and Thomas B. Allen, *Spy Book: The Encyclopedia of Espionage* (New York: Random House, 1998) p. 514.)

⁴⁹ Richard Tomback, "Sideüksuste motoriseerimine ja mehhaniseerimine" [Making the Communications Units Mobile and Mechanized] *Sõdur*, No. 35-36, 1938, pp. 865-869.

⁵⁰ Toe Nõmm, p. 46.

⁵¹ EE ERA, 495-12-277, p. 10 verso.

⁵² Karl Laurits, *Luureteenistus staapides* [Intelligence Service in Staffs] (Tallinn: Kaitsevägeade Staabi VI Osakonna Kirjastus, 1931) p. 19.

⁵³ Aleksander Lipp, *Miljon kilomeetrit õhus: Lenduri meenutus* [Million Kilometres in Air: Memoirs of a Pilot] (Tallinn: Eesti Raamat, 1982) pp. 18-19.

⁵⁴ Ivo Juurvec, "Wabariigi moodsad salakõrvad" [Modern Secret Ears of the Republic] *Tehnikamaailm*, No. 2, 2003, p. 66.

⁵⁵ Alex Roland, *Science and War*, OSIRIS, 2nd series, Vol. 1, 1985, p. 262; A. Kalm, "Raadioside jalaväerügemendis" [Radio Communication in Infantry Regiment] *Sõdur*, No. 17, 1939, pp. 383-386; *Sõdur*, No. 18, 1939, pp. 406-409.

⁵⁶ Nikolai Liventhal, *Krüptoloogia ja salaluure* [Cryptography and the Secret Intelligence] (Tallinn: S.n., 1994) p. 99.

⁵⁷ EE ERA, 495-12-277, pp. 49-50. It is not clear what these three machines were for. In the Red Army's documents they are called *chasy dlya shifrovki* (ciphering clocks). Most probably they

were tools based on several wheels and meant for encoding and decoding messages. For description of such machines see: Nikolai Liventhal, pp. 29-30.

⁵⁸ See codebooks of the Second Department. EE ERA, 495-12-304; 495-12-902.

⁵⁹ Craig G. McKay and Bengt Beckman, *Swedish Signal Intelligence* (London: Frank Cass, 2003) p. 85.

⁶⁰ EE ERAF, 130-1-9861/3, p. 55. Note that Maasing was the Head of the Second Department only till January 1939.

⁶¹ Toe Nõmm, p. 46.

⁶² Mati Öun, *Labingud kaugetel meredel 2: Labingud Atlandil ja polaarmedel 1939-1945*, [Battles on Distant Seas Vol. 2.: Battles on the Atlantic Ocean and Northern Seas, 1939-1945] (Tallinn: Olion, 1996) pp. 6-8; 164-169; Mati Öun, *Võitlused Läänemere: Suvi 1941*. [Battles on the Baltic Sea: Summer 1941] (Tallinn: S.n., 1996) p. 15. In addition to the mentioned battleships, the Red Baltic Fleet had two brand new cruisers, *Kirov* and *Maxim Gorki*, which in the case of conflict would be difficult to handle for the German Navy. (Ibid.)

⁶³ See: Juergen Rohwer, "The Wireless World at War, 1939-1945," *International History Review*, Vol. 16, No 3, 1994, pp. 536-548; *Codes and Ciphers: Radio Communication and Intelligence*, in: *To Die Gallantly: The Battle of Atlantic* (Boulder: Westview Press, 1994) pp. 38-54.

⁶⁴ M. Boltunov, pp. 30-35.

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