



# Special Issue

for

NATO School  
Oberammergau,  
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# Legal Gazette

## Articles Collection

for the

**NATO Legal Advisor Course**

(M5-34-A16)

and the

**NATO Operational Law Course**

(N5-68-A16)

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## Introduction



Dear Readers of the NATO Legal Gazette,

In this special edition, we bring to you a collection of articles from the thirty-eight published issues of the NATO Legal Gazette so far<sup>1</sup>. These articles were recently referenced, as reading material, at the "NATO Legal Advisor Course" (4-8 April 2016) and "NATO Operational Law Course" (18-22 April 2016), in NATO School Oberammergau, Germany, and are listed here in a thematic order.

The "NATO Legal Advisor Course" and the "NATO Operational Law Course" at the NATO School Oberammergau are the only courses available in NATO that provide education and training tailored to a NATO lawyer's needs[2]. NATO legal advisors and legal personnel, as well as national lawyers working closely with NATO, are introduced to the NATO structure and the role of a NATO legal advisor. They are acquainted with the NATO Treaties and International Agreements and the main issues arising from their implementation. They benefit from the lectures of experienced speakers, all of which are Subject Matter Experts (SMEs) in specific fields of NATO Administrative Law and NATO Operational Law, such as visiting forces jurisdiction, NATO claims, NATO operations and exercises, targeting, rules of engagement, NATO cyber law and others.

To complement the lectures and the material provided during the NATO School legal courses, the NATO Legal Gazette is a very useful tool of reference. Throughout ten years of publication, the NATO Legal Gazette has presented high quality articles and thorough reviews on various issues of concern to NATO. The NATO Legal Gazette authors are highly experienced legal practitioners and scholars with wide knowledge on NATO Legal matters.

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<sup>1</sup> The published issues of the NATO Legal Gazette can be found at the official ACT web page, <http://www.act.nato.int/publications> or upon request by email to [Galateia.gialitaki@shape.nato.int](mailto:Galateia.gialitaki@shape.nato.int). The LAWFAS users can also find the complete Gazette archive on : [LAWFAS-NATO LEGAL GAZETTE ARCHIVE](#)

<sup>[2]</sup> [NATO School Oberammergau - NATO Legal Advisor Course description](#) and [NATO School Oberammergau-NATO Operational Law Course description](#)

Their articles remain valuable as they comprise the expertise of NATO practice and academic research and understanding that a new NATO lawyer could use to build his/her future career. In this way, the NATO Legal Gazette achieves its main goal and reason of existence; to serve as an educational tool in the NATO legal community and beyond.

With this special edition, we, once more, thank all the authors that have contributed their work throughout the past ten years of the NATO Legal Gazette's publication and have happily permitted us to republish their articles.

We hope that you will enjoy this special issue. The next issue, number 37, is already in preparation and will come to you soon after. For our future editions, as always, we welcome articles and short papers (appr. 2000 words) on legal issues of concern to NATO. Please send your submissions by email to [Galateia.gialitaki@shape.nato.int](mailto:Galateia.gialitaki@shape.nato.int) and [sherrod.bumgardner@shape.nato.int](mailto:sherrod.bumgardner@shape.nato.int).

Thank you for your continuous appreciation and interest in the NATO Legal Gazette.

Sincerely

Galateia Gialitaki

ACT SEE Legal Assistant

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Excerpt from NATO Legal Gazette Issue 34 (July 2014), pages 17-30



[www.nato.int](http://www.nato.int)

## Article 5 of The North Atlantic Treaty: The Cornerstone of the Alliance

By Sylvain Fournier and Sherrod Lewis Bumgardner<sup>2</sup>

### Introduction

Russia's illegal<sup>3</sup> military intervention in Ukraine in February 2014 has invigorated consideration of NATO's collective defence measures<sup>4</sup> and the meaning of Article 5 of the North Atlantic Treaty<sup>5</sup> of 1949. The North Atlantic Treaty is a short document. Just 30 sentences using 1144 words create its 14 articles. Of these, Article 5 is proclaimed as the, "cornerstone of our Alliance,"<sup>6</sup> from which the indivisibility of Allied security arises and is, "...its core."<sup>7</sup>

<sup>2</sup>Sylvain Fournier, Lieutenant Colonel, Canadian Army (Retired), is a lawyer and former JAG officer whose last assignment was at the International Military Staff Legal Office, NATO Headquarters, Brussels. Sherrod Lewis Bumgardner is Legal Adviser, Allied Command Transformation Staff Element Europe, in Mons, Belgium. The views expressed in this paper are the responsibility of both authors in their personal capacity and are neither approved nor to be attributed to NATO, the International Military Staff or Allied Command Transformation.

<sup>3</sup> See "Secretary General sets out NATO's position on Russia-Ukraine crisis" at [http://www.nato.int/cps/en/natolive/opinions\\_110643.htm](http://www.nato.int/cps/en/natolive/opinions_110643.htm). For English language legal arguments regarding the public international law (and some domestic constitutional law) aspects of the use of force in Ukraine, see <http://opil.ouplaw.com/page/ukraine-use-of-force-debate-map>. (visited on 8 May 2014).

<sup>4</sup> NATO's Enhanced Collective Defence measures in the wake of Ukraine crisis are described at [http://www.nato.int/cps/en/natolive/topics\\_110496.htm](http://www.nato.int/cps/en/natolive/topics_110496.htm). (visited on 8 May 2014).

<sup>5</sup> The full text of the North Atlantic Treaty is available at: [http://www.nato.int/cps/en/natolive/official\\_texts\\_17120.htm](http://www.nato.int/cps/en/natolive/official_texts_17120.htm). It is also called the Washington Treaty for the city where it was negotiated and signed. (visited on 8 May 2014).

<sup>6</sup>Declaration on Alliance Security, 4 April 2009. See [http://www.nato.int/cps/en/natolive/news\\_52838.htm](http://www.nato.int/cps/en/natolive/news_52838.htm). (visited on 8 May 2014).

<sup>7</sup>Lionel Hastings Ismay, NATO The First Five Years, 1949-1954, Bosch-Utrecht, Netherlands, 1955, p. 13 at

With the purpose of contributing to discussions about NATO's 21<sup>st</sup> century role in collective defence, this essay offers a review of the historical events surrounding the drafting of the North Atlantic Treaty. Comments follow about word choices and factors influencing the drafters that produced the freighted construction of Article 5. We conclude with observations about how the invocation of Article 5 following the 11 September 2001 attacks confirmed the supporting relationship between the North Atlantic Treaty and United Nations security system that is declared by the text of the North Atlantic Treaty.

### **Historical background**

With victory in Europe accomplished and defeat of Japan imminent, the peoples of the world hoped that the signing of the Charter of the United Nations in June 1945 would, "save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."<sup>8</sup> Regrettably, fear, instability, ideology, and geo-political enmity dashed this aspiration almost immediately.

Apparent at the Tehran and Yalta Conferences to plan WWII held by Stalin, Roosevelt, and Churchill in November 1943 and February 1945, and confirmed at the Potsdam Conference that followed in July 1945, the post-World War II strategy of the Soviet Union sought, at the least, to absorb the countries of Eastern Europe.<sup>9</sup> By 1946, the chilling rhetoric of the Cold War commenced. In February 1946, at the Bolshoi Theatre in Moscow, Joseph Stalin declared to the Soviet people the inevitability of conflict between communist and capitalist ideologies.<sup>10</sup> Describing the nationalistic and ideological anchoring of the post-war Soviet outlook, the American charge d'affaires in Moscow, George Kennan, authored an 8,000-word telegram to the United States Department of State declaring, "[The][p]roblem of how to cope with this force [is] undoubtedly greatest task our diplomacy has ever faced and probably greatest it will ever have to face... It should be approached with same thoroughness and care as solution of major strategic

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<http://www.nato.int/archives/1st5years/chapters/2.htm>. Lord Ismay served as NATO's first Secretary General from 1952-1957. (visited on 8 May 2014)

<sup>8</sup> Preamble, Charter of the United Nations, San Francisco, 26 June 1945. See <http://www.un.org/en/documents/charter/preamble.shtml>. (visited on 8 May 2014)

<sup>9</sup> "The nature of Stalin's foreign policy may be described as cautious expansionism in those areas that Stalin and his advisors defined as Soviet 'natural' spheres of influence." V. M. Zubok and K. Pleshakov, *Inside the Kremlin's Cold War: From Stalin to Khrushchev*, Cambridge: Harvard University Press, 1996, p. 74; John Lewis Gaddis, *The Cold War*, Allen Lane, Penguin Books, Ltd, London, 2005, p. 11; Timothy J. White, 'Cold War Historiography: New Evidence Behind Traditional Typographies,' *International Social Science Review*, Vol. 75, No.3/4, 2000, p. 37; See also the comment of Charles Bohlen who served as the Russian translator for the President of the United States at Tehran, Yalta, and Potsdam: "While Potsdam reached a number of decisions, some of which lasted, many of which did not, it cannot be regarded as a vital conference. Most of the policy lines on both sides had been laid down before the meeting." Charles E. Bohlen, *Witness to History, 1929-1969*, New York: W. W. Norton, 1973, p. 240.

<sup>10</sup> J.V. Stalin, 'Speech Delivered at an Election Meeting in the Stalin Election District, Moscow', 9 February 1946. Moscow: Foreign Languages Publishing House at <http://www.marx2mao.com/Stalin/SS46.html>. (visited on 28 May 2014)

problem in war...."<sup>11</sup> In March 1946, less than 30 days after Stalin's words and six months from the end of World War II hostilities, Winston Churchill eulogised that, "...an iron curtain has descended across the Continent."<sup>12</sup>

In 1947, while the Soviet Army continued its occupation of Hungary, Bulgaria, Romania, and Poland, the Communist Party seized power. Through armed insurrection Soviet-backed Communist fighters sought to gain control in Greece. To aid Greece and support Turkey, President Truman announced in March of 1947, "the policy of the United States to support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures."<sup>13</sup> In June 1947, with what became known as the Marshall Plan, the United States proposed an economic recovery effort for Europe.<sup>14</sup> The Soviet Union and the recently installed communist governments of Eastern Europe declined to participate. Concurrently, UN Military Staff discussions that had started in 1946 with the Permanent Five members of the Security Council to create the United Nations armed forces envisioned in Articles 43 to 48 of the UN Charter ceased.<sup>15</sup> The year ended with the collapse of the Four-Powers (France, Great Britain, United States, and the Soviet Union) Council of Foreign Ministers who had been directed at the Potsdam Conference to reach post-war political settlements on the status of Germany.

The arrival of 1948 hastened more dire developments. February brought the forced capitulation of the democratic government of Czechoslovakia to the Soviet-backed Communists. In March, the United States Commander in Berlin, General Lucius Clay, warned that war with the Soviet Union, "...may come with dramatic suddenness."<sup>16</sup> In June, after months of preparatory actions, Stalin ordered the complete land blockade of Berlin. By September, Paul-Henri Spaak, Prime Minister of Belgium, and future Secretary General of NATO denounced the ambitions of the Soviet Union on the floor of the General Assembly of the United Nations in his *Discours de la Peur* (Speech of Fear) declaring, "...the basis of our policy (in the West) is fear...It is fear of

<sup>11</sup> Kennan to State Department, February 22, 1946, U.S. Department of State, Foreign Relations of the United States: 1946, VI, p. 707 at <http://digitallibrary.wisc.edu/1711.dl/FRUS.FRUS1946v06>. (visited on 28 May 2014). In 1947, Kennan, writing as Mr. X, famously publicized his view that, "...the main element of any United States policy toward the Soviet Union must be that of a long-term, patient but firm and vigilant containment of Russian expansive tendencies." In the 'The Sources of Soviet Conduct', Foreign Affairs, Volume 25, Number 4, July 1947, pp. 566-82.

<sup>12</sup> Robert Rhodes James, Winston S. Churchill: His Complete Speeches 1897-1963, Chelsea House Publishers: New York and London, 1974, vol. VII, 1943-1949, pp.7285-93 at <http://www.hpol.org/churchill/peace>. (visited on 8 May 2014).

<sup>13</sup> This policy statement became known as the Truman Doctrine. See President Harry S. Truman, Address Before a Joint Session of Congress, 12 March 1947, <http://www.fordham.edu/halsall/mod/1947truman.html>. (visited on 8 May 2014).

<sup>14</sup> Address Given by George C. Marshall, 5 June 1947, at [http://www.ena.lu/address\\_given\\_george\\_marshall\\_harvard\\_june\\_1947-020000339.html](http://www.ena.lu/address_given_george_marshall_harvard_june_1947-020000339.html). (visited on 8 May 2014).

<sup>15</sup> A. Roberts, 'Proposals for UN Standing Forces: A Critical History' in V. Lowe, A. Roberts, J. Welsh, and D. Zaum (eds), The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945, Oxford University Press, Oxford, 2008, p.100-1.

<sup>16</sup> J. Forrestal, The Forrestal Diaries ed. Millis, Forrestal, arthor, New York: Viking Press, 1951, p. 387.



you...because you are the one power emerging from the war with territorial conquest and you speak much of imperialism."<sup>17</sup>

Devastated from the war, European states were justifiably threatened by the proven might of the still fully mobilised, combat ready, massive Soviet Army.<sup>18</sup> Before this danger, the armed forces of the old continent were in such a condition that they could no longer carry on the fight. The only military deterrent to the Soviet Union taking over Western Europe was material support offered by North America and the sole ownership of the atomic bomb by the United States.<sup>19</sup>

To face the menace of Soviet aggression—be it by military attack or subterfuge—and address the uncertainty about the future of Germany, in March of 1948 five European States (Belgium, France, Luxembourg, the Netherlands, and the United Kingdom) signed the Brussels Treaty, establishing the Western European Union with a regional obligation for collective self-defence.<sup>20</sup> Immediately after the signing of the Brussels Treaty, secret tripartite talks among the United Kingdom, Canada, and the United States began in Washington to encourage American participation in this collective defence effort. Quickly the parties to these talks regarding the creation of a North Atlantic defence organisation broadened to include Belgium, France, Luxembourg, and the Netherlands.<sup>21</sup>

From the outset of these discussions, the mandatory provisions of the Brussels Treaty were unacceptable to the North Americans. For the United States, an axiomatic aversion to treaties with European nations reached back to 1796 and the last official words of its first President, George Washington.<sup>22</sup> Simply, the domestic politics of the United States "...would never allow incidents in Europe to automatically commit the nation"<sup>23</sup> to an armed conflict as required by the Brussels Treaty. For Canada, the possibility of going to war before the United States, as it had done twice before, made the

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<sup>17</sup> For the full speech, see Paul F. Smets (ed.), 'La pensée européenne et atlantique' de Paul-Henri Spaak (1942-1972). Book 1. Bruxelles: Goemaere, 1980, p. 148-60; see also excerpts at <http://www.newspapers.com/21587244>. (visited on 8 May 2014).

<sup>18</sup> See, for instance, Prime Minister Churchill's telegram to President Truman on 12th May 1945, expressing his immense anxiety about the growing Soviet threat while the Allied forces demobilized. W.S. Churchill, *Triumph and Tragedy*, New York: Houghton-Mifflin Books, 1953, p. 679.

<sup>19</sup> *Supra* 6, *Ismay* 7.

<sup>20</sup> The Brussels Treaty, 17 March 1948. Art. IV provides: "If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power."

<sup>21</sup> Richard D. McKinzie, 'Oral History Interview with Theodore Achilles', Washington, D.C. November 13, 1972, p.27. See <http://www.trumanlibrary.org/oralhist/achilles.htm>. (visited on 8 May 2014).

<sup>22</sup> "Why quit our own to stand upon foreign ground? Why, by interweaving our destiny with that of any part of Europe, entangle our peace and prosperity in the toils of European ambition, rivalry, interest, humor or caprice? It is our true policy to steer clear of permanent alliances with any portion of the foreign world;" Washington's Farewell Address To The People of the United States, 1796. <http://www.access.gpo.gov/congress/senate/farewell/sd106-21.pdf>. (visited on 8 May 2014).

<sup>23</sup> L. S. Kaplan, *NATO 1948 – The Birth of the Transatlantic Alliance*, Lanham: Rowman & Littlefield, 2007, p. 95.

immediate commitment to defensive action contained in the Brussels Treaty fatally unappealing.<sup>24</sup>



[www.aco.nato.int](http://www.aco.nato.int)

Collectively, the North Americans favoured the language of the Rio Pact<sup>25</sup> of 1947, in which an attack against any American country was an attack against all, with the measures taken in response to that attack determined individually by each country. The Europeans, however, found the ambiguity contained in the Rio Pact as unappealing as the North Americans found the close commitment of the Brussels Treaty. Adding to the difficulty for both the Europeans and the North Americans were fundamental questions concerning their responsibilities to the still new United Nations and its role in the maintenance of international peace, security, and the pacific settlement of disputes between nations.<sup>26</sup>

Resolving this conflict and building a Euro-Atlantic security relationship required forging a link that connected the North Americans and the Brussels Treaty nations and acknowledged the structures embodied by the creation of the United Nations. As a bridge, the United States offered a political declaration. In June of 1948, the United States affirmed as national policy the importance of the Charter of the United Nations. This statement of policy, known as the Vandenberg Resolution,<sup>27</sup> said nothing about Europe. It asserted that American assistance and the development of collective arrangements for potential self-defence would be subject to domestic

<sup>24</sup> Documents on Canadian External Relations, Vol. 15, Ch. IV at <http://epe.lac-bac.gc.ca/100/206/301/faitc-aecic/history/2013-05-03/www.international.gc.ca/departement/history-histoire/dcer/detaile-en.asp@intRefid=8875>. (visited on 8 May 2014).

<sup>25</sup> Inter-American Treaty of Reciprocal Assistance (Rio de Janeiro, 2 September 1947) called the Rio Pact of 1947 at [www.oas.org/juridico/english/Treaties/b-29.html](http://www.oas.org/juridico/english/Treaties/b-29.html). (visited on 8 May 2014). Article 3: "The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations."

<sup>26</sup> See the Charter of the United Nations, generally: Chapter I, Purposes and Principles, Chapter VI, Pacific Settlement of Disputes, and Chapter VII, Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression at <http://www.un.org/en/documents/charter/>. (visited on 8 May 2014).

<sup>27</sup> U.S. Senate Resolution 239, 80th Congress, 2nd Session, 11th June 1948 (The Vandenberg Resolution) at [http://avalon.law.yale.edu/20th\\_century/decad040.asp](http://avalon.law.yale.edu/20th_century/decad040.asp). (visited on 28 May 2014).

constitutional processes and outside the veto authority of the four other permanent members of the Security Council. This formulation resolved the question of whether a possible Euro-Atlantic Alliance would be treated as a Regional Organisation under Article VIII of the United Nations Charter whose actions would be overseen by the Security Council which was subject to frequently wielded vetoes by the Soviet Union.<sup>28</sup> It would not.

Many benefits arose from closely aligning the North Atlantic Treaty with the Charter of the United Nations. All prospective members of the North Atlantic Alliance could correctly assert that their efforts were aimed at no nation in particular but rather were only intended to deter aggression, no matter from where it may come. Furthermore, the United Kingdom<sup>29</sup> and France could, in good faith, declare their support of the defensive North Atlantic Treaty consistent with their treaties of alliance with the Soviet Union.<sup>30</sup> Accepting the American legerdemain, Canada and the European nations plunged into what became a tedious drafting process that started in the hot summer of 1948 while simultaneously pursuing members whose participation would offer mutual assistance to their collective defence.

Iceland, Denmark, Norway, and Portugal were encouraged to join the five Brussels Treaty states because the geographic location of the combined territories of these four nations offered control of the Norwegian Sea and actual or potential locations for airbases to better link North America to Europe.<sup>31</sup> Although it did not border the Atlantic, Italy was included because the United States considered it essential to the defence of the European continent and France thought Italy's membership advantageous because of geographic proximity and southern European perspective. Bargaining and negotiation extended until March 1949. Virtually every word contained in the North Atlantic Treaty became essential.

To address the imbalance of military power on the European continent, the North Atlantic Treaty set forth imperatives for immediate fulfillment. Preceding the pledge of assistance in the case of armed attack found in Article 5, the nations "[r]esolved to unite their efforts for collective defence and for the preservation of peace and security<sup>32</sup>...The Parties will...seek to eliminate conflict in their international economic policies and will encourage

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<sup>28</sup> Paul-Henri Spaak served as the second Secretary-General of NATO from 1957-1961.

P.H. Spaak, *Why NATO?*, Middlesex: Penguin Books, 1959, p.12.

<sup>29</sup> W. Eric Beckett, *The North Atlantic Treaty, The Brussels Treaty, and The Charter of the United Nations*, Stevens & Sons Limited, London, 1950, p. 32-33.

<sup>30</sup> Twenty-Year Mutual Assistance Agreement Between the United Kingdom and the Union of Soviet Socialist Republics, May 26, 1942 [at http://avalon.law.yale.edu/wwii/brsov42.asp](http://avalon.law.yale.edu/wwii/brsov42.asp). (visited on 28 May 2014). Treaty of Alliance and Mutual Assistance between the U.S.S.R. and the French Republic, 10 December 1944. *The American Journal of International Law*, Vol. 39, No. 2, Supplement: Official Documents, April 1945, pp. 81-157.

<sup>31</sup> Lawrence S. Kaplan, *NATO Before the Korean War April 1949 – June 1950*, The Kent State University Press, 2013, p. 7-8.

<sup>32</sup> Preamble, *The North Atlantic Treaty*, signed on 4 April 1949, at [http://www.nato.int/cps/en/natolive/official\\_texts\\_17120.htm](http://www.nato.int/cps/en/natolive/official_texts_17120.htm). (visited on 28 May 2014).

economic collaboration between any or all of them<sup>33</sup>....by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack<sup>34</sup>....will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened."<sup>35</sup> A Council was created,<sup>36</sup> the possibility for other European states - by invitation - to join the alliance established,<sup>37</sup> sovereign ratification processes pursued,<sup>38</sup> review of the Treaty after 10 years promised,<sup>39</sup> and for a minimum of 20 years loyalty to the terms of the Treaty affirmed.<sup>40</sup> Signed on 4 April 1949, after the deposition of the ratifications by all signatory states with the archives of the United States government,<sup>41</sup> the North Atlantic Treaty came into force on Wednesday, 24 August 1949. On Monday, 29 August 1949, the Soviet Union detonated its first atomic bomb.

### **Article 5 – Analysis**

The three sentences that compose Article 5<sup>42</sup> were accepted by twelve states as an agreement governed by international law. Unlike domestic law that offers the comfort of rules ordered and enforced by a sovereign, international law exists as the continuous process of authoritative decision-making by states and international organisations.<sup>43</sup> Meaningful understanding of Article 5 requires acknowledgment of the dynamic interaction of politics, law,<sup>44</sup> and governments that has occurred constantly and simultaneously

<sup>33</sup> Ibid, Art. 2.

<sup>34</sup> Ibid, Art. 3.

<sup>35</sup> Ibid, Art. 4.

<sup>36</sup> Ibid, Art. 9.

<sup>37</sup> Ibid, Art. 10.

<sup>38</sup> Ibid, Art. 11.

<sup>39</sup> Ibid, Art. 12.

<sup>40</sup> Ibid, Art. 13.

<sup>41</sup> Ibid, Art. 14.

<sup>42</sup> Ibid, Art. 5: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all, and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security."

<sup>43</sup> R. Higgins, 'Policy Considerations and the International Judicial Process' , p. 17, *International and Comparative Law Quarterly* 58, 1968, at pp. 58-59; M. S. McDougal and F. P. Feliciano, 'Law and Minimum World Public Order', in *The Legal Regulation of International Coercion*, Yale University Press, New Haven, 1961, vii.

<sup>44</sup> Within this process, the Vienna Convention on the Law of Treaties (VCLT) provides the accepted methodology for treaty interpretation. The primary rule is straightforward: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Context may be determined by consulting additional agreements made by the parties relating to the treaty application of the treaty that establishes agreement of the parties, and relevant international law. Resort to the preparatory work of the treaty and the circumstances of its conclusion may be made when the conclusions drawn by application of the primary rule leaves the meaning ambiguous, obscure or, leads to a result that is which is manifestly



since 1949 by the now twenty-eight allied nations who control the use of the North Atlantic Treaty for collective action. A close reading of Article 5 yields the following observations:

**a. The Parties agree...**

Two of the basic principles in international law are that treaties bind only parties to them and that these parties must fulfil the terms of the agreement in good faith.<sup>45</sup> Consistent with these principles, the North Atlantic Treaty creates neither obligations nor rights for third party states.

**b. that an armed attack against one or more of them in Europe or North America...**

Consistent with Article 51 of the Charter of the United Nations, Article 5 offers no definition of the term "armed attack."<sup>46</sup> The only definition the North Atlantic Treaty offers is a convoluted description of the geographic area and military forces against which an armed attack would be considered, "...[f]or the purpose of Article 5..." contained in Article 6.<sup>47</sup> In addition to the continental identifications contained in Article 5, this formulation in Article 6 is referenced as "the North Atlantic area" in the treaty's Preamble, Article 10,

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absurd or unreasonable."Vienna Convention on the Law of Treaties, adopted on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331 at [https://treaties.un.org/doc/Treaties/1986/03/19860321%2008-45%20AM/Ch\\_XXIII\\_03p.pdf](https://treaties.un.org/doc/Treaties/1986/03/19860321%2008-45%20AM/Ch_XXIII_03p.pdf) ((visited on 28 May 2014).

<sup>45</sup> See Ibid, Art. 26, Pacta sunt servanda: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". On this point Sir Robert Jennings and Sir Arthur Watts commented: "The question why international treaties have binding force is much disputed. The correct answer is probably that treaties are legally binding because there exists a customary rule of international law that treaties are binding. The binding effect of that rule rest in the last resort on the fundamental assumption, which is neither consensual nor necessarily legal, of the objectively binding force of international law." R. Jennings and A. Watts (eds), *Oppenheim's International Law*, vol 1, London: Longman, 9<sup>th</sup> edition, 1996, p. 1206.

<sup>46</sup> UN Charter, Art.51: "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, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

<sup>47</sup> The 1949 text of the Article 6 of the North Atlantic Treaty stated: "For the purpose of Article 5 an armed attack on one or more of the Parties is deemed to include an armed attack on the territory of any of the Parties in Europe or North America, on the Algerian Department of France, on the occupation forces of any Party in Europe, on the islands under the jurisdiction of any Party in the North Atlantic area north of the Tropic of Cancer or on the vessels or aircraft in this area of any of the Parties." Note the changes in Article 6 as modified by Article 2 of the Protocol to the North Atlantic Treaty on the Accession of Greece and Turkey of 1951: "For the purpose of Article 5, an armed attack on one or more of the Parties is deemed to include an armed attack:1. on the territory of any of the Parties in Europe or North America, on the Algerian Departments of France, on the territory of or on the Islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer; 2. on the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer." (Italics added).



and Article 12. Fulfilling a policy goal of the United States and Canada to keep the North Atlantic Alliance from being used in colonial conflicts, this location excluded the colonial territories of the member nations except for the Algerian Department of France.<sup>48</sup> Following the Berlin Blockade in 1948 and the accession of Greece and Turkey to the Alliance in 1951, a second sentence was added to Article 6<sup>49</sup> that explicitly expanded the reach of Article 5 to protect the occupation forces of the signatories stationed in what had become the Federal Republic of Germany and West Berlin.

**c. shall be considered an attack against them all...**

While less lyrical than French author Alexandre Dumas's description of unity, "*all for one and one for all*," the imperative passage of Article 5 may be what animated the Russian Minister of Foreign Affairs, Sergey Lavrov in 2010 to assert that for the member nations of the North Atlantic Alliance, "the indivisibility of security is an obligatory, legally confirmed norm."<sup>50</sup> The multilateral model of an armed attack against one member of an Alliance constituting an attack against all the other member states is found in several international instruments formulated before the conclusion of the North Atlantic Treaty,<sup>51</sup> of which the Charter of the United Nations is the most prominent. The direct mutuality of this phrase achieved a primary policy goal of Canada, geographically the second largest country in the world, which gained the commitment of the United States and the Treaty's ten European Parties to its protection.<sup>52</sup>

**d. and consequently they agree that, if such an armed attack occurs each of them in exercise of the right of individual or collective self-defence recognised by article 51 of the Charter of the United Nations,...**

<sup>48</sup> On January 16, 1963, the North Atlantic Council modified this Treaty in its decision C-R(63)2, point V, on the independence of the Algerian departments of France. [http://www.nato.int/cps/en/natolive/topics\\_110496.htm](http://www.nato.int/cps/en/natolive/topics_110496.htm). (visited on 28 May 2014).

<sup>49</sup> Supra 46.

<sup>50</sup> Transcript of Speech by Russian Minister of Foreign Affairs Sergey Lavrov at the 46<sup>th</sup> Munich Security Conference, 6 February 2010 at [http://www.mid.ru/brp\\_4.nsf/0/49F4C4EB6473C1E5C32576C500311EB4](http://www.mid.ru/brp_4.nsf/0/49F4C4EB6473C1E5C32576C500311EB4). (visited on 28 May 2014).

<sup>51</sup> Richard H. Heindel, Thorsten V. Kalijarvi and Francis O. Wilcox, 'The North Atlantic Treaty in the United States Senate', *The American Journal of International Law*, Vol. 43, No. 4, October 1949, p. 645. These include the 1940 Declaration XV of the Meeting of the Ministers of Foreign Affairs in Habana, Cuba, in the Declaration on Reciprocal Assistance and Cooperation for the Defense of the Nations of the Americas at [http://avalon.law.yale.edu/20th\\_century/decad058.asp](http://avalon.law.yale.edu/20th_century/decad058.asp); the 1945 Resolution approved by the Inter-American Conference on Problems of War and Peace at Mexico of 6 March, (Act of Chapultepec) at [http://avalon.law.yale.edu/20th\\_century/chapul.asp](http://avalon.law.yale.edu/20th_century/chapul.asp); Article 3 of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) of 1947 at <http://www.oas.org/juridico/english/Treaties/b-29.html>; the Brussels Treaty, 17 March 1948 at [http://www.cvce.eu/obj/the\\_brussels\\_treaty\\_17\\_march\\_1948-en-3467de5e-9802-4b65-8076-778bc7d164d3.html](http://www.cvce.eu/obj/the_brussels_treaty_17_march_1948-en-3467de5e-9802-4b65-8076-778bc7d164d3.html). The Charter of the Organization of American States signed at the Bogota Conference of American States, 30 March-2 May, 1948 at [http://avalon.law.yale.edu/20th\\_century/decad062.asp](http://avalon.law.yale.edu/20th_century/decad062.asp). (visited on 28 May 2014).

<sup>52</sup> A.K. Henrikson, 'The North American Perspective: A Continent Apart or a Continent Joint?' in L. S. Kaplan, S. V. Papacosma, M.R. Rubin and R.V. Young (eds), *NATO after Forty Years*, SR Books, Wilmington, 1990, pp. 13-14.



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Textually, the argument can be made that the individual or collective right of self-defence described in Article 5 is narrower than the inherent right of self-defence found in pre-UN Charter customary international law mentioned by the wording of Article 51. By not including of the word, "inherent" when describing the exercise of the right of individual or collective self-defence the drafters of the North Atlantic Treaty limit the invocation of Article 5 until after an armed attack. Each NATO member may carry out independent actions consistent with its rights recognised by Article 51 and obligations under Chapter VII and the whole of the Charter of the United Nations including the restriction contained in Article 2.4 that prohibits, "...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."<sup>53</sup>

***e. will assist the Party or Parties so attacked...***

This part of Article 5 is the important pledge and promise of assistance. Parties have an obligation to assist but the nature of their commitment remains undefined. Article 11 further declares that provisions of the Treaty, such as Article 5, will be, "...carried out by the Parties in accordance with their respective constitutional processes."<sup>54</sup> The United States alone required the purposefully vague wording of Article 5 and buttressed it with the wording of Article 11 to overcome domestic objections that events in Europe would automatically thrust it into an international conflict without the approval of the legislative branch of its federal government.<sup>55</sup>

***f. by taking forthwith individually and in concert with other Parties...***

<sup>53</sup> See M.N. Shaw, *International Law*, 5th ed. Cambridge University Press, 2005, p. 1017.

<sup>54</sup> The North Atlantic Treaty Art. 11.

<sup>55</sup> D. Acherson, *Present At The Creation My Years In The State Department*, W.W. Norton & Company, Inc. New York, 1969, pp. 281-82.

The archaic Middle English adverb “forthwith” declares urgent action by member states. Its plain meaning, “*immediately, at once, without delay*”<sup>56</sup> commands no hesitancy. The United States inserted this rhetorical flourish to sanctify an intention of action if an armed attack occurred, even though the next phrase in the sentence purposely left the fulfilment of this promise unspecified.<sup>57</sup>

**g. such action as it deems necessary, including the use of armed force...**

The expression “*such action*” gives each nation of the Alliance the opportunity to determine, “*as it deems necessary*,” its response to a minor incident or a major attack. The United States proposed this phrase<sup>58</sup> for two reasons. The first was to ensure consistency with legislative prerogatives contained within its domestic federal government. The second was to respond to an armed attack according to strategic concepts rather than directing armed forces towards a battle chosen by the attacker.<sup>59</sup> “[I]n other words, to beat the hell out of the aggressor wherever and however seemed best.”<sup>60</sup> The expression “armed force” was added to stiffen the martial sense of the sentence although this formulation was less robust than desired by the Canadian and European negotiators because of its separation by a comma from the words “such action” made clear there would be no automatic commitment to the use of force.<sup>61</sup> The European and Canadian negotiators did successfully persuade the Americans to include the phrase, “including the use of armed force,” to strengthened the martial promise of the sentence.<sup>62</sup> The nations knew, however, that by committing themselves in principle if an armed attack on any of them did occur, the line between their moral commitment and the legal obligation could quickly fade.<sup>63</sup>

**h. to restore and maintain the security of the North Atlantic area.**

Underscoring both the defensive nature of the North Atlantic Alliance and the consistency of the North Atlantic Treaty with the UN Charter, this final clause of the long first sentence of Article 5 reverses the sequence of international actions contained in Articles 39<sup>64</sup> and 42<sup>65</sup> of Chapter VII of the

<sup>56</sup> The New Shorter Oxford English Dictionary On Historical Principles, ed. Lesley Brown Volume 1, Clarendon Press, Oxford, 1993, p. 1010.

<sup>57</sup> T.C. Achilles, ‘The Omaha Milkman: The Role of the United States’ in NATO’s Anxious Birth, The Prophetic Vision Of the 1940s, ed. Nicholas Sherwen, St Martin’s Press, New York, 1985, p. 36.

<sup>58</sup> Reid, 155.

<sup>59</sup> Ibid, 147.

<sup>60</sup> Acheson, 21.

<sup>61</sup> Reid, 155; M.A. Goldberg, ‘Mirage of Defense: Reexamining article five of the North Atlantic Treaty after the terrorist attacks on the United States’, in Boston College International and Comparative Law Review, Vol 26, Iss 1, 2003, p. 6.

<sup>62</sup> Acheson, 281.

<sup>63</sup> L.S.Kaplan, ‘Nato Enlargement: The Article 5 Angle’, February 2001, Vol. XII, No. 2, The Atlantic Council of the United States Bulletin, at p. 2.

<sup>64</sup> See Article 39: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and

Charter of the United Nations. In those articles the Security Council makes recommendations, decides measures, or takes actions "to maintain or restore" international peace and security. By inverting the order of these words in Article 5 to "restore and maintain," this final clause of the first sentence of Article 5 describes the actions the members of the Alliance commit to undertaking following an armed attack against territory within the NATO area or military personnel.

***i. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council.***

This second sentence of Article 5 continues the explicit alignment of the defensive purpose of the North Atlantic Alliance with the responsibilities of the Security Council to take action with respect to threats to the peace, breaches of the peace and acts of aggression. The extraordinary: "...any such armed attack... shall be immediately reported...", places a requirement on the Alliance not found in the Charter of the United Nations. On behalf of the member nations of the Alliance, the North Atlantic Treaty Organization fulfilled the notification requirement to the Security Council contained in Article 51 and repeated in Article 5 on 12 September 2001 when its Secretary-General, George Robertson, officially informed the UN Secretary-General Kofi Annan of the attack against the United States and that NATO would undertake collective security measures following the 9/11 attacks.<sup>66</sup>

***j. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.***

This provision primarily quotes from the first sentence of Article 51 of the UN Charter. This provision again<sup>67</sup> displays the deference of the North Atlantic Treaty to the collective security system of the UN and acknowledges the primary responsibility of the Security Council to re-establish peace and security.<sup>68</sup>

### **Article 5 Invocation After 11 September Attacks**

The invocation of Article 5 by the North Atlantic Council on 12 September is a historic fact. Considering the immense energy invested in

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security." Emphasis added.

<sup>65</sup> See Article 42: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." Emphasis added.

<sup>66</sup> SG(2001)1043, Letter to the UN Secretary General, 12 September 2001.

<sup>67</sup> The North Atlantic Treaty, which reaffirmed in the Preamble their faith in the purposes and principles of the Charter of the United Nations.

<sup>68</sup> See Chapter V, Article 24 of the UN Charter in the in B. Simma, D.E. Khan, G. Nolte, and A. Paulus (eds), *The Charter of the United Nations*, Oxford University Press, Oxford, 3<sup>rd</sup> edition, 2012.



precisely negotiating its three sentences, it is striking how its requirements were dealt with in quick bold strokes. Senior Members of NATO's International Staff prepared the memorandum for Council approval during the evening of September 11<sup>th</sup>. They conducted a plain reading of the North Atlantic Treaty, untrammelled by reference to the judgments of the International Court of Justice<sup>69</sup> or the 1974 UN General Assembly Resolution 3314 on the Definition of Aggression.<sup>70</sup> They concluded that a plane used as a missile constituted an armed attack. They reached a common sense conclusion about the importance of the scale of the attack "because the Washington Treaty had been written to deal with threats to peace and security in the North Atlantic area."<sup>71</sup> To distinguish the 9/11 attacks from domestic terrorism, prior Council decisions were researched to reach the conclusion that external guidance was necessary to place the Alliance's response within the goals of the treaty.

Lord Robertson liked the staff work presented to him on the morning of 13 September. With the support and approval of the United States, he called the Council into session to invoke Article 5. A pause in the proceedings occurred when a few nations requested the opinion of Dr. B. DeVidts the NATO Legal Adviser to confirm that Article 5 did indeed mean that each nation individually determined what action it would take and whether collective action by the Alliance would be undertaken only after further consultation.

While the full text of Dr. DeVidts' memorandum remain classified, he reassured that it was up to each state to judge what should be done adding, "*(whatever actions states were to take) should be appropriate to the scale of the attack, the means of each country and the steps necessary to restore peace and security.*"<sup>72</sup> and that consultation was necessary for collective Alliance action.<sup>73</sup> Upon recall of the Council to session and the legal memorandum provided to all national representatives, the Council reached consensus, without a break of silence, to invoke Article 5 so long as the attack against the United States had been directed from abroad.<sup>74</sup>

## **Conclusion**

As a subject and creation of public international law by the North Atlantic Treaty, NATO, "...is rules and institutions but it is also a tradition and a

<sup>69</sup> Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)[1984]; Oil Platforms (Iran v. US)[1996]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)[2004]; and Case Concerning Armed Activities on the Territory of the Congo, Case Concerning (Congo v. Uganda)[2005].

<sup>70</sup> UNGA Res 3314 (XXIX) (14 December 1974) (Definition of Aggression).

<sup>71</sup> E. Buckley, 'Invocation of Article 5; Five Years On (Invoking Article 5),' NATO Review, Summer 2006, p.1. <http://www.nato.int/docu/review/2006/issue2/english/art2.html>. (visited on 28 May 2014).

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Invocation of Article 5 was confirmed on 2 October 2001 following a briefing to the Council by Frank Taylor, the U.S. Ambassador at Large and Coordinator for Counter-Terrorism. See <http://www.nato.int/docu/update/2001/1001/e1002a.htm>. (visited on 28 May 2014).



*political project.*"<sup>75</sup> When the North Atlantic Council met on 12 September 2001 to consider invoking Article 5, its decision entailed a factual and political judgment, not a legal pronouncement. Despite the irony of Article 5 being envisaged by the signatories to the NATO Treaty as a mechanism by which the USA would come assist its European allies, it was the Europeans who offered their help to Washington on the first time the article was ever invoked, and the Treaty's goals were achieved.

Properly, the Security Council was notified as the Alliance chose to subscribe to the fundamental processes and values of the UN Charter security system. In addition to the strategic value gained by the display of solidarity of the NATO nations by the invocation of Article 5, it also demonstrated that, despite the UN prohibition to the resort to force to settle differences between states, force and violence in international relations, albeit illegal, remains a means available to non-state actors as well as nations. As a political and legal matter Article 5 did not, and does not, justify the use of force in response to threats to security below the threshold of individual or collective self-defence to an armed attack by a Member of the United Nations as described in Article 51.

There is no doubt that Article 5 and its invocation has had an astonishing effect on NATO. Over the years its pledge obligated its member States to demonstrate their commitment to cooperate by contributing to create a solid integrated military structure. Without it, the Alliance would have neither the political will to remain in existence and the capability to conduct non-Article 5 operations when the threat of armed attack against its States appeared low, nor the structures and capacities to protect its member nations in a world where threats remain. Overall, those, *"...who composed this seemingly timeless document would be surprised by how effectively it has served as a continuing basis for Euro-Atlantic security cooperation."*<sup>76</sup> We are persuaded that it will continue to do so.

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<sup>75</sup> M. Koskeniemi, *The Politics of International Law*, Hart Publishing, Oxford, 2011, p.330.

<sup>76</sup> Stanley R Sloan, 'Invocation of Article 5; Five Years On (Invoking Article 5),' *NATO Review*, Summer 2006, p.3. <http://www.nato.int/docu/review/2006/issue2/english/art4.html> (visited on 28 May 2014).

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### What is NATO HQ?

by Antoaneta Boeva<sup>1</sup>  
NATO HQ Legal Office

NATO is a political-military Alliance, and NATO Headquarters (NATO HQ) is the home of the North Atlantic Council and the most "political" part of NATO. In essence, then, talking about NATO HQ Brussels means talking about how the political side of NATO works. It is there that Allied representatives, supported by the NATO Secretary General and the International Staff, participate in a continuous, complex interaction aimed at identifying areas of agreement and disagreement; explaining, understanding and overcoming difficulties; identifying bases for consensus; leading in the end to Alliance policy decisions built on the elements identified through that complex interaction.

Located in a rather out-of-the way part of Brussels, NATO HQ thus accommodates not only the continual interaction of the 28 Allies' Permanent Representatives and their missions (as well as those of many of the Partners for

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Peace), but also for the intensive involvement of Allies in the day-to-day executive decision-making role at NATO.

The North Atlantic Council (the “Council” or, more informally, the “NAC”) -- sometimes called “the alpha and the omega of NATO” -- is the only NATO institution established by the Washington Treaty, under Article 9 of which:

***“The Parties ... establish a Council on which each of them shall be represented, to consider matters concerning the implementation of the Treaty (...).”***

The central and most important institution at NATO HQ – in NATO as a whole, in fact – is the Council. How NATO is organized and operates – and in a very real sense everything done in NATO – comes back, one way or the other, to the NAC and the decisions it makes. Article 9 carries on to set, in simple but powerful words, the framework for getting that work done:

***“(...) The Council shall be organized so as to be able to meet at any time. The Council shall set up such subsidiary bodies as may be necessary; in particular it shall establish immediately a defense committee which shall recommend measures for the implementation of articles 3 and 5.”***

Article 9 of the Washington Treaty provides for the Council's continuous existence, authorizes it to set up subsidiary bodies, and provides that every member of the Alliance is represented, without any differentiation, on the Council. Iceland and the United States, for example, may be unequal in their military contributions to the Alliance, but they are legally fully equal members of the Alliance. An additional point of interest is that all the Council configurations (in permanent session at Ambassadorial (PermRep) level, at ministerial level or at level of Heads of State and Government), represent the same body. Legally, it makes no difference what level the Council meets at. Regardless of the level, all decisions taken by the Council are equally valid, and equally binding on Allies.

What is also interesting, though, is that the Washington Treaty says almost nothing about the specific competences of the Council. In effect, it can do just about anything the Allies authorize it to do, limited only by the very broad political-military subject matter of the Alliance itself. And the subject matter of Council decisions is vast: The NAC establishes and sets the terms of reference for all NATO entities, including its military commands and agencies, and the NAC must approve their leadership, their staffing and their budgets. All NATO military operations begin with a NAC decision in principle to undertake the activity, followed by a NAC decision to ask the NATO military authorities to begin the planning for that operation. Later, the CONOPS (concept of operations), OPLAN (operational plan) and ROE (rules of engagement) must be approved by the NAC before it gives the final order

to execute the operation. The NAC also approves the NATO Strategic Concept and other basic policy documents, including rules and procedures applicable NATO-wide. The NAC also approves agreements and partnership frameworks entered into by NATO and non-NATO states and international organizations. It is noteworthy how many of these decisions are quite concrete: they are decisions to DO things, as befits an organization that, at its core, is and always has been an operational one.

### **What is the legal character of a Council decision?**

Perhaps the place to start is to say what it is **not**: a Council decision is not an international agreement – not a treaty, a convention, a memorandum of understanding or a memorandum of agreement – even though it is made by the authorized plenipotentiaries of the sovereign members of the Alliance. Council decisions are not signed by the members of the Council and they are not coordinated individual decisions by 28 separate Nations. There are no votes, and only rarely do Nations offer explanations of their individual reasons for joining consensus. Rather, they are a collective decision of the Alliance itself. Once taken, they are binding on the members of the Alliance. And since they are binding, this means that members States are expected to ensure that there are no domestic legal barriers to implementing those decisions.

The binding character of Council decisions also derives, in a very real sense, from the way those decisions are taken. One of the most important characteristics of NATO, and of the North Atlantic Council in particular, is the requirement of consensus to make any decision. It is the practice of consensus – with its critical corollary that any Ally has the power to block the taking of any decision – combined with the right of every Ally to participate in the Council, that makes it **politically** as well as **legally** possible for NAC decisions to be binding on every member of the Alliance.

The Council agreed its terms of reference at his very first session in 1949. However, just like the Washington Treaty, these TORs did not foresee many of the needs and situations that the Councils would be encountering almost daily. In fact for an institution exercising such power, the Council is remarkably reliant on a multitude of accepted "practices".

### **What is the role of the Secretary General and the International Staff?**

The two other NATO elements located in HQ Brussels – the Secretary General and the International Staff -- are not even mentioned in the Organization's founding document, the Washington Treaty. In 1949, the Allies had not yet realized the need for a permanent secretariat and staff for the Alliance. Unlike other international or intergovernmental organizations such as the UN or the EU, there is no "NATO Charter" which sets forth tasks to be performed by the International Staff or executive authorities assigned to the



Secretary General. The Secretary General is an essential part of the functioning of Headquarters and of the Alliance as a whole, but the position of Secretary General was created only later, in the 1951 Ottawa Agreement, and almost all of the Secretary General's authorities, have been created through a series of subsequent NAC decisions and practice.

The Secretary General is both the Chair of the NAC and Head of a NATO Body -- the International Staff (the IS). In the former capacity, he both defines the Council's agenda and is its spokesperson vis-a-vis the outside world. As a Head of the International Staff he provides policy and administrative support not only to the NAC, but also to the Political and Partnerships Committee (PPC), Operations Policy Committee (OPC) and almost all of the Council's other subordinate committees. As head of the IS, the Secretary General exercises authorities given him by the Council, and ensures that the Council's decisions are carried out. NATO HQ is in practice the hub of the consultative and decision-making processes of the Alliance, and reforms and other key decisions are staffed and decided in NATO HQ Brussels.

Thus, even though he has no formal authority over the Heads of other NATO bodies (whether Supreme Commands or the civilian agencies), as the spokesperson for the Council to which they all report his views and guidance are central to determining a wide range of policies of NATO-wide interest and significance.

The IS numbers something over a thousand civilians, all but a handful of whom are located at NATO HQ. IS functions include what one would expect from central offices of a ministry -- planning, setting and implementing of policy, central HR functions and the like.

The IS is only part of the NATO International Civilian Structure. But the IS is roughly 1/5 of the total international civilian establishment. It is also only part of the overall Headquarters staff, which also includes the International Military Staff.

### **What is the role of International Military Staff?**

NATO Headquarters in Brussels also hosts the national Military Representatives of all Member States. The International Military Staff (IMS) is the executive body of the Military Committee (MC), NATO's senior military authority.

It is responsible for preparing the assessments, evaluations and reports on all NATO military matters, which form the basis of discussion and decisions in the MC. The IMS also ensures that decisions and policies on military matters taken by the NAC and the MC are implemented by the appropriate NATO military bodies.



The IMS represents the essential link between the political decision-making bodies of the Alliance and NATO's Strategic Commanders (the Supreme Allied Commander Europe – SACEUR - and the Supreme Allied Commander, Transformation - SACT) and their staffs, liaising closely with NATO's civilian International Staff located in the same building in Brussels. The IMS is divided into five functional divisions and several branches and support offices.

In fact, a recent "collocation" exercise brought colleagues from the IS and IMS, who work on similar issues even closer together within the NATO HQ building. Officially part of an overarching "HQ Reform", collocation is directed as streamlining the coordination of cross-cutting knowledge and resources, directed at the same issues. The mandates of the various staffs did not change, nor did their formal ways of working. With collocation the IS and IMS have access to the same information and data, which they separately study and report on to their respective chiefs, thus ensuring timely and professional input and preserving the independent and unfettered aspect of the military advice.

### **What is NATO HQ's legal regime?**

As noted above, the Washington Treaty founded NATO and the Council, but otherwise contains almost nothing of concrete relevance to the Organization's governance.

On the highest level, the essential elements for the civilian side in HQ Brussels are found in the 1951 Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, signed in Ottawa on 20 September 1951. The "Ottawa Agreement" defines NATO as a legal entity under international law and specifies the privileges and immunities to be granted to NATO, to the International Staff and to the National Representations (Delegations and Missions) to NATO. On a second level, NATO has a Host Nation Agreement with Belgium, as is usually the case between other NATO entities and NATO countries welcoming them on their soil.

In 1994, an Agreement on the Missions and Representatives of Third States to the North Atlantic Treaty Organisation entered into force, affording to the missions of third States to the Organization and their staffs the immunities and privileges accorded to diplomatic missions and staffs by Belgium, as the Host Nation of NATO Headquarters. It is under this authority that the Council may invite Partners and other non-Allies to be present on the compound of NATO HQ or to open a mission to NATO.

### **How does NATO HQ Brussels relate to other HQs?**

Other than being physically home to the NAC , to whom all civilian entities, as well as the two Strategic Commands are directly accountable, there is no hierarchy between NATO HQ and other HQs. As mentioned above, NATO Secretary General does not have formal authority over the Heads of other NATO bodies, and similarly, there is absence of a single hierarchy between offices in NATO HQ and offices in similar functions at other NATO bodies and agencies. For example the Legal Adviser at NATO Headquarters has no authority over the legal offices of any NATO body other than the IS in Brussels.

On the other hand, NATO HQ is practically the hub of the consultative and decision making process of the Alliance, and a multitude of important reforms are born in NATO HQ Brussels and/or the guidance on their detailed implementation is agreed there.

### **Some current reforms of interest:**

NATO HQ is, of course, at the heart of reforms touching upon NATO's functioning, and this whether such reforms concern HQ Brussels only, or the Alliance as a whole. The NATO Secretary General would also be in charge of implementing a series of decisions taken over the past couple of years having to do with management and structural reform of both the military and civilian sides of the NATO bureaucracy, that reach far beyond the NATO HQ Brussels compound. He has proposed and gained (or is on the verge of gaining) NAC consent to major reforms including:

- Streamlining the military command structure;
- Radically reforming the structure of the NATO civilian agencies, consolidating over a dozen autonomous agencies into three consolidated "super-agencies";
- Amending regulations concerning staff salaries and allowances;
- Reforming the dispute resolution process to include a more structured administrative review process, with the possibility of mediation, and created a new NATO Administrative Tribunal.

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Excerpt from NATO Legal Gazette Issue 9 (November 2007), pages 2-4

## Command Responsibility

By Andrés B. Muñoz Mosquera<sup>1</sup>

### **Introduction**

Accountability of Commanders is a vital requirement for nations that have integrated in their government institutions - the Armed Forces included - reliance on the Rule of Law, adherence to universal principles of human rights, and the importance of the application of International Humanitarian Law.

When conducting military operations, civilian leaders and military officers have an abiding responsibility for the actions and omissions that occur during the planning and execution of military missions. When both civilian leaders and military officers direct the planning and control of military efforts, the modern trend increasingly holds both accountable for success or legal failure. Most discussions of Command Responsibility focus on the lawfulness of strategic decision to use military force (*jus ad bellum*) or its tactical applications (*jus in bello*). This short article invites consideration of the accountability of the operational level field Commander who intrinsically serves as a quasi-regulator of military and civilian issues.

Historically, military matters alone filled the sphere of responsibility of a field Commander. In the communication hampered days before quad-band cell phones, video teleconferences, and the deluge of daily emails, some national colonial systems dispatched viceroys to provide immediate civilian guidance to remote military field Commanders. But in the main, military, diplomatic, economic, and civil society issues received treatment as separate realms, devoid of complementary policies or a comprehensive approach.

To remedy this deficiency, in recent multinational military actions a hybrid civilian-military organization was created that gave civilian representatives direct influence or control over the military commander. Examples include the High Representative and EU Special Representative (EUSR) in Bosnia and Herzegovina who continues to oversee the implementation of the 1995 Dayton Peace Agreement, Special Representatives of the Secretary General who direct and administer the

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peacekeeping missions of the United Nations, and the Civilian Administrator of Iraq who led the Coalition Provisional Authority in that country from May 2003 until June 2004.

The expressions "mission-specific law" or "mission-made law" neatly describe the intrinsic quasi-regulatory regime created by these hybrid organizations. The modern field Commander or civilian head-of-mission and staff translate strategic objectives into operational plans. Within the operation's legal framework<sup>2</sup>, these plans, with their branches and sequels, are further developed through orders, guidelines, directives, regulations, and standard operating procedures (SOPs). This guidance, the authoritative detritus of the mission, is tangible evidence of the Commander's quasi-regulatory decisions on a host of sophisticated topics. They include, *inter alia*, the use of force, detention, treatment of civilians, interaction with the receiving state's military and police forces, and the myriad other details attendant to military maneuvers and operations such as controlling airspace, territorial waters, roads, rail lines, ports, airfields, communication networks, electrical power grids, and the protection of cultural property.

The importance of these orders becomes crucial if, and when, a Court is called to examine allegations of internationally illicit acts committed during the operation.

Referencing this mass of authority, sub-unit Commanders enforce the field Commander's quasi-regulatory guidance in their functional or geographical areas of responsibility. In this dynamic *ad hoc*, dangerous, multi-national environment, commanders and their forces are to accomplish their mission using correct means. Governments worry about conducting operations insider the margins of the universally accepted principle of human rights and humanitarian law basics. They want their armed forces to ready and capable to fulfill this political goal. To address this complexity and prevent illegal actions or omissions requires effective training and insight. In simplest words, providing this training is a preeminent national responsibility; ensuring its effective application is the Commander's.

## **Historical Background**

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<sup>2</sup> The **legal framework** of an operation is made of:

- a) International Law materials: UN Charter, North Atlantic Treaty and SOFA and subsidiary documents, HR treaties and conventions, LOAC/IHL, customary law and jurisprudence from international tribunals;
- b) Receiving-state national laws when not a failed state;
- c) Sending state or Troop Contributing Nations laws, caveats, ROE caveats, and;
- d) Mission specific instruments:
  - (1) Authority or Status stemmed from the UNSCRs, NAC decisions, EU Joint Actions, Peace settlements, SOFA/SOMA/Military Technical Arrangements, etc., and
  - (2) Guidelines and procedures: OPLAN, FRAGOs/OPORDs, ROE, SOPs, Directives, etc.



Nearly 2,500 years ago Sun Tzu described the obligation of Commanders to control their army and officers and assure disciplined behavior during battle.<sup>3</sup> At the Second Peace Conference at the Hague, Netherlands, in 1907 the delegates produced the Laws and Customs of War on Land (Hague IV), the first multinational description of the responsibility of a Commander for his subordinate.<sup>4</sup> The trials of Nuremberg<sup>5</sup> and Tokyo, Additional Protocol I of 1977 to the Geneva Conventions of 1949<sup>6</sup>, rulings by the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the General Principles of Criminal Law codified by Article 28 of the Rome Statute of the International Criminal Court are the contemporary developments and contributions to the concept of Command Responsibility.

The difference between the pre-WWII and post-WWII concept is one of expectations. In addition to being responsible for their own actions, modern commanders are responsible for acts of their subordinates that they should have known. This expanded view of Command responsibility adds to the positive perception of the military when implementing peace support operations. Through the mechanism of the Commander's active oversight to ensure the application of the highest standards, the "Armed forces can be successfully integrated into a system of good governance based on human rights and the rule of law."<sup>7</sup>

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<sup>3</sup> Eugenia Levine, Command Responsibility, Global Policy Forum, [www.globalpolicy.org](http://www.globalpolicy.org), 2005. "There are other examples as in 1439 when Charles VII of France issued the Ordinance of Orleans, which imposed blanket responsibility on Commander for all unlawful acts of their subordinates, without requiring any standard of knowledge. The first international recognition of Commanders' obligation to act lawfully occurred during the trial of Peter Von Hagenbach by an ad hoc tribunal in the Holy Roman Empire who convicted Von Hagenbach of murder, rape, other crimes which "he as a knight deemed to have a duty to prevent". The General Orders no 100 passed during the United States Civil War set up the "Lieber Code" that imposed criminal responsibility on Commanders for ordering or encouraging soldiers to wound or fill already disabled enemies. Convention (IV) 1907 was the first attempt to codify this embryonic practice.

<sup>4</sup> "The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions : To be commanded by a person responsible for his subordinates." Annex to the Convention, The Qualifications of Belligerents. Section 1, Chapter 1, Article 1 <http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm>

<sup>5</sup> Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries, Yearbook of the International Law Commission, 1950, vol. II. [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7\\_1\\_1950.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_1_1950.pdf)

<sup>6</sup> Additional Protocol I of 1977 to the Geneva Conventions of 1949 was the first international treaty to codify the doctrine of Command Responsibility. Article 86.2 states that "the fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from [...] responsibility [...] if they know, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or about to commit such a breach if they did not take all feasible measures within their power to prevent or repress the breach.

<http://www.yale.edu/lawweb/avalon/diana/undocs/war-01.htm>

<sup>7</sup> Ulf Haussler, Ensuring and Enforcing Human Security – The Practice of International Peace Mission. Wolf Legal Publishers, Nijmegen, The Netherlands, 2007, p.51.



## **Knowledge**

Legal scholars and practitioners have formed two visions of the Commander's knowledge ante to illegal acts of subordinates or troops. In one view, Commanders should have known about the crimes committed by their subordinates or troops maneuvering in their AOR; in the second, Commanders may be derelict if they fail to discover the crimes. The first approach stresses the criminal intent, or *mens rea*, of the Commander. The latter considers a strict liability standard that finds accountability without looking at the Commander's criminal intent.

Because jurisprudence and customary law have not agreed on the role of *mens rea* in the concept of Command Responsibility, the question remains unresolved and with a casuist appearance.

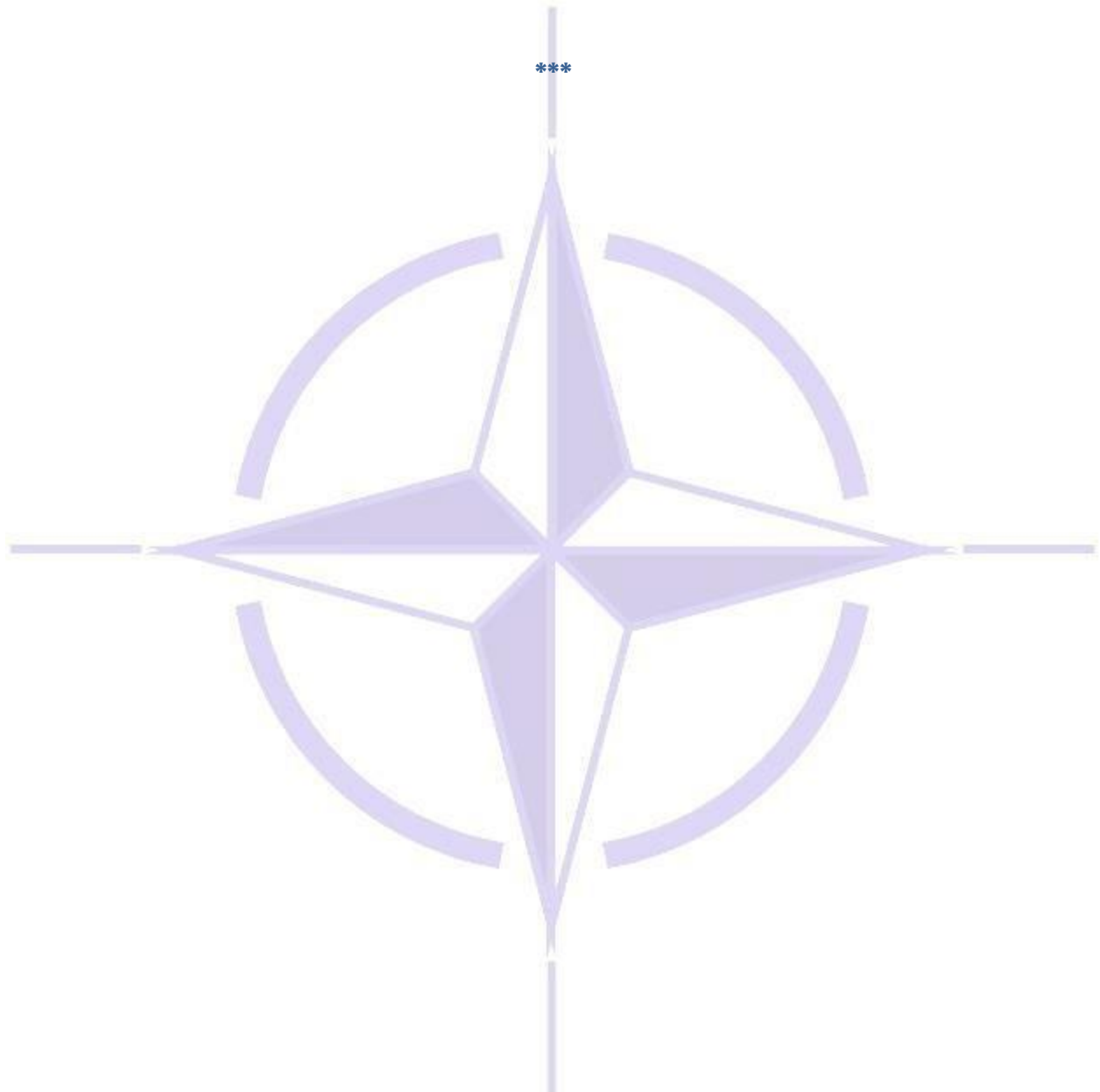
## **The Role of the LEGADs**

While this discussion continues, NATO is more-than-ever under a heavy scrutiny, not only by individuals, non-government organizations, international institutions, and governments that oblige the Alliance to be extremely scrupulous in dealing with the controversial question of Command Responsibility. NATO has no choice but to seek the higher standard, i.e., "Commanders should have known". This, instead of being seen as an obstacle, must be accepted as an incentive for the Alliance and its Troop Contributing Nations to better plan and conduct operations.

Is it "legal-fiction" to think that it is a question of time before we see an international court accepting as admissible claims brought against NATO as an international organization and not against the individual member nations or all together? This possibility compels Civilian Representatives and Commanders to be proactive bottom-up and top-bottom in every phase of the operation. Their dialogue must be constant with the political part of the operation, (the Secretary General, the Military Committee, and the North Atlantic Council) and with subordinates (TCN contingents) and other troops operating in his AOR (Receiving State government and armed forces). In the NATO realm, the planning process and the conduct of operations must be done with reference to the line drawn in the horizon by the mission-tailored Command and Control and the mission's legal framework.

NATO Legal Advisors are not expected to disguise wrongdoings by anyone, Civilian Representatives or Commanders included. Rather, Legal Advisors have an affirmative obligation to participate in the mission planning process and through good staff action encourage Civilian Representatives and Commanders to take wise decisions during the execution of the mission. The Legal Advisor's awareness of all NATO-related issues at international and national levels will positively contribute to the operation, particularly by offering legal transparency to important external observers like non-

governmental organizations and other international organizations such as the United Nations and the International Committee of the Red Cross. Based on these foundations, Civilian Representatives and Commanders can build their actions to reach the end-state defined at the highest political level of the Alliance annulling or at least minimizing the risk of crimes under their Command.



Excerpt from NATO Legal Gazette Issue 15 (July 2008), pag. 2-4



**17 March 2008 in Mitrovica North, Kosovo**

by Col Gilles Castel<sup>1</sup>

This article will focus on the events that took place on 17 March 2008, highlighting the use of force in accordance with KFOR Rules of Engagement, showing the procedure for Hand-over/Take-over of mission between UNMIK-P and KFOR forces and showing the type of events that KFOR has to face in Kosovo.

On 17 February 2008, the Government of Kosovo unilaterally declared its independence. The following days, some violent incidents occurred at the Kosovo gates, opposing United Mission in Kosovo-Police (UNMIK-P) and KFOR forces to Serbian demonstrators. Despite a lot of degradation, those incidents ended only with minor casualties. On 14 March 2008, Kosovo's Serbs (KOS) radicals occupied the Mitrovica courthouse, symbol of the Kosovo institutions in the North.

On 16 March 2008, UNMIK-P decided to hold an operation on Monday 17 March 2008 with the support of Kosovo Police Service (KPS) for the reclamation of Mitrovica Court House. They regained control of the courthouse and detained approximately 53 KOS who occupied the building. Demonstrators arrived in front of the courthouse within a short time after the arrival of UNMIK-P troops, as well as of the first KFOR troops. A few moments later, the first stones were thrown to UNMIK-P and KFOR troops while they were assuring the security of the transfer of the detainees. The escalation continued and Molotov cocktails were thrown against UNMIK and KFOR vehicles. Rapidly the convoys transporting the detainees were blocked by the

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demonstrators and UNMIK-P and KFOR troops suffered their first wounded early in the morning. At this point, the tension quickly increased and the first defensive hand grenades were thrown against the troops, causing several casualties among the forces. During all morning, the troops deployed on the spot were under attack by demonstrators using stones, Molotov cocktails, hand grenades and fire arms like AK 47. At noon, KFOR troops assumed the police primacy in Mitrovica North due to the withdrawal of UNMIK-P forces that had suffered such a number of wounded troops that they were not able to continue their mission any longer.

The situation calmed down after KFOR troops answered the demonstrators' fire by using force with individual fire arms or snipers shots. At the end of the day, both UNMIK-P and KFOR troops had 90 wounded, among them one UNMIK-P officer who died during his medical treatment.

What can we learn from a legal point of view about this demonstration that turned into a violent riot ?

At first, all the procedures set at KFOR level or between UNMIK and KFOR worked well, even if we had to adapt some of them after these events. Pursuant to United Nations Security Council Resolution (UNSCR) 1244 dated 10 June 1999 and according to the Note of Understanding (NOU) signed by the Special Representative of the Secretary General (SRSG) and the COMKFOR, the police primacy (all operations related to law enforcement measure) is an UNMIK responsibility while the tactical primacy (use of KFOR forces during limited scope operations as defined by unit, location, mission, or time) is shared between UNMIK and KFOR. It is also planned that if UNMIK is no more able to perform its police primacy, SRSG may request COMKFOR to take the lead of the police operation. That was the case when UNMIK-P was so overwhelmed by the violence that they had to withdraw from the spot. SRSG then requested COMKFOR to assume the police primacy.

The events from 17 March 2008 also highlighted some weaknesses in the NOU relating to the handover procedures between UNMIK and KFOR troops in case of emergency. In order to solve this problem KFOR issued a specific directive describing the procedure to be followed in emergency situations. Still, according to the NOU, COMKFOR gave back this police primacy to SRSG a few days after, when the situation in Mitrovica North had calmed down. KFOR also noticed that the procedure set in the NOU does not give a proper answer to emergency situation. Therefore, KFOR issued a directive in which the hand-over procedure to be followed in case of emergency is described.

Second, the question is asked whether KFOR Rules of Engagement were efficient enough. Thus, during this CRC operation KFOR had to use force in accordance with its Rules of Engagement. According to the Law of Armed Conflict, use of minimum force may include the use of lethal force. But, in



accordance with the principles of the Rules of Engagement and in order to take into consideration the current political situation in Kosovo, COMKFOR decided, through a fragmental order, to restrict the right to use lethal force only where there is an imminent threat to a human life. Notwithstanding this restriction, nothing during the events from 17 March hampered the action of the KFOR forces.

In respect of the principle of proportionality, KFOR forces used a large scope of RCMs, from tear gas to sniper's shoot, including the use of rubber bullets and of live ammunition.

Three interesting points can be highlighted :

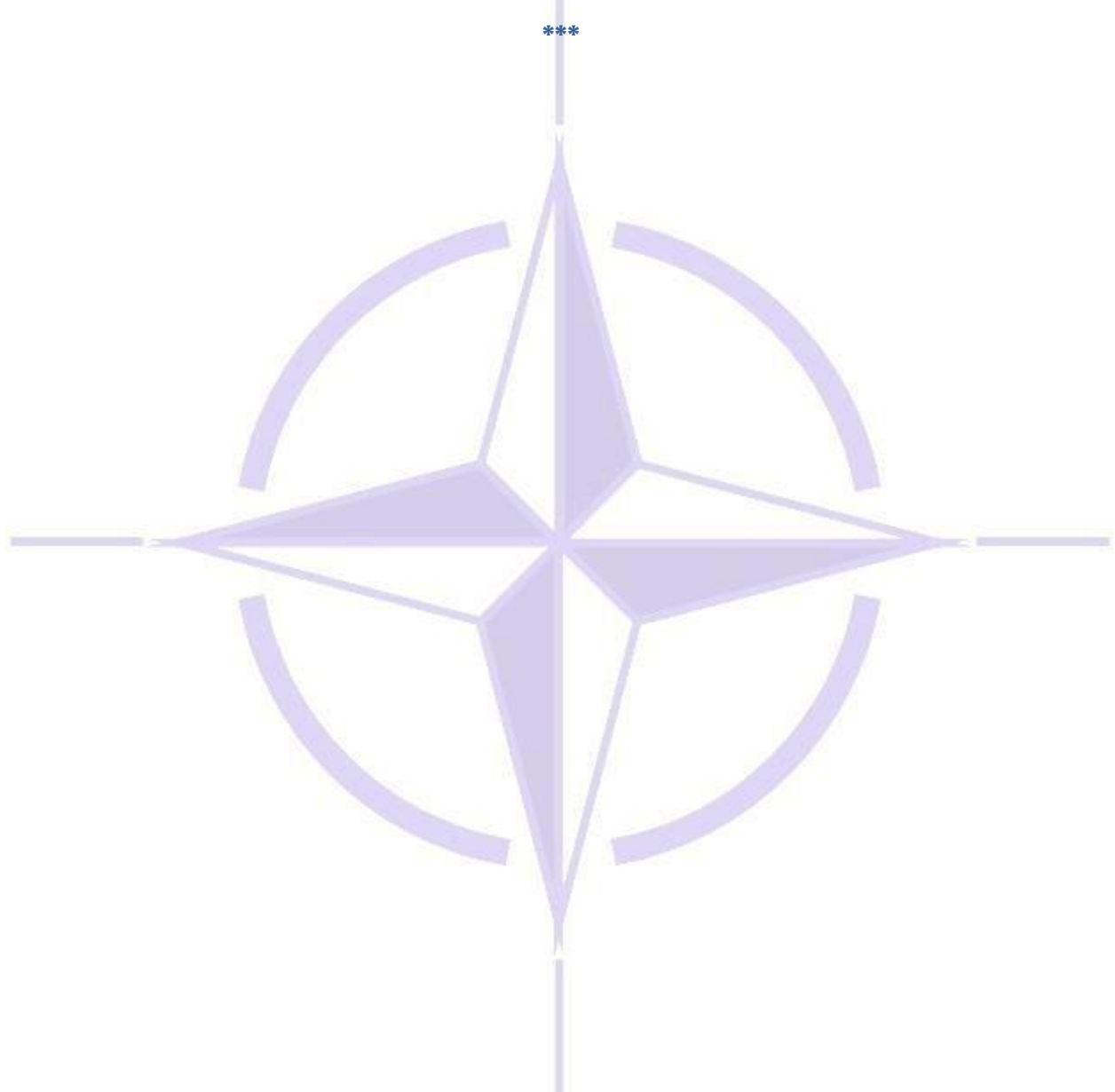
- COMKFOR received from COMJFC Naples the permanent delegation to use RCMs in CRC operation. COMKFOR sub delegated this authorization to its Task Forces Commander, without limitation of duration and without limitation about the means, except for the use of rubber bullets that still remain under the direct authorization of COMKFOR. The use of rubber bullets was submitted to a specific KFOR procedure and was also subject to limitation (rubber bullets should only be shot in rebound shot). In the early morning of 17 March, Task Force North Commander requested from COMKFOR the authorization to use rubber bullets to face the situation. This authorization was first given orally. A short time after, Task Force North Commander also requested to be able to shoot rubber bullets in straight shot. This authorization was also given immediately orally and confirmed later with a written order. After the action, the procedure has been reviewed and all limitations to the use of rubber bullets removed to allow KFOR forces to use all the scope of the RCM means in the conduct of their operations.

- The use by the rioters of fire arms and hand grenades was clearly an imminent threat to human life. The use of Molotov cocktails is a very sensitive issue because the applicable rules on this matter are subject to vastly different national interpretation and regulation. The only certainty was when the Molotov cocktails were deliberately thrown on wounded soldiers... Thus, the use of lethal force against the launcher of Molotov cocktails will remain submitted to the appreciation of the on-scene Commander.

- Despite this uncertainty about when we may use lethal force against the Molotov cocktail launcher it is sure that the use of snipers in such operations perfectly answers the principle of proportionality. Indeed, the use of snipers on 17 March permitted to immediately cease the violence against KFOR troops. Because the crowd was not only constituted of violent people but also of "normal" demonstrators, the use of other riot control means like hand grenades was very sensitive. This way, the systematic deployment of snipers in CRC operation and their use in a discriminate and proportional way is one of the main lessons learned of this day.

Even if the events that occurred at the Kosovo gates have shown a certain level of violence, the demonstration in Mitrovica North is significant of the type of action that KFOR may have to face : a peaceful demonstration that very quickly escalates to a real riot. KFOR Rules of Engagement are robust enough and the lessons learned, both after the events at the gates and in Mitrovica North, provided KFOR with the necessary experience and procedure to be able to face such future events.

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Excerpt from NATO Legal Gazette Issue 28 (July 2012), pag. 28-40

## **The Evolving Role of the Legal Advisor in Support of Military Operations<sup>1</sup>**

by Thomas E. Randall <sup>2</sup>

### **Introduction**

This brief contribution is meant to address the theme of the 2011 Military Law and the Law of War Review's celebrative panel, titled 'The Role and Responsibilities of Legal Advisers in the Armed Forces: Evolution and Present Trends.' In this respect, I will begin by making some comments regarding the role of legal advisers to military commanders, in particular the trends I have observed during thirty years of practice, both as a U.S. Navy Judge Advocate, and as a civilian legal adviser to U.S. and NATO commanders. I will then take the liberty of offering some 'pointers' to the up-and-coming legal advisors in military headquarters today, and will focus on some of the unique challenges faced by legal advisors to NATO commanders, based upon the experiences I have had, and what I see as ways in which to increase our effectiveness and value to our commanders.

### **The Evolution of the Legal Adviser's Role**

Like many readers of this article as well as the members of the International Society for Military Law and the Law of War, I 'cut my teeth' as a young judge advocate on the practice of military justice. This was in the late 1970's when the practice of 'operational law,'<sup>3</sup> was clearly in its infancy within the U.S. military. Initial training for aspiring judge advocates focused, in addition to military justice, on administrative law, claims, and legal assistance. For most commanders, these areas were those in which they expected their lawyers to render assistance. In those days, having a lawyer involved in operations, or better, as one would say in the Navy, having a lawyer 'on the bridge,' was a rare phenomenon.

In the mid-1980's, this began to change rapidly, as all the U.S. armed services began to offer funded educational opportunities at civilian universities, and within service legal schools, to study international law and obtain a masters degree in this field. I was one of those fortunate enough to have been selected for such training. After I obtained my masters degree,

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<sup>1</sup> In Print 50/1-2 *MILITARY LAW AND THE LAW OF WAR REVIEW* (2011), pp. 17-36. Will be and available on Hein Online as of 31 August, 2012

<sup>2</sup> Former Allied Command Operations (ACO) Legal Adviser (still active at the time this article was published). The views presented in this article are solely those of the author and may not represent the views of NATO, SHAPE, or SACEUR.

<sup>3</sup> In using the term 'operational law,' I am referring to that area of legal practice that encompasses the law of armed conflict (LOAC), both conventional and customary, as well as all other legal matters that relate to conducting a military operation consistent with legal principles.

the Navy Judge Advocate Corps assigned me a special code that identified me as qualified for international law positions. Many of these entailed providing legal advice to military commanders regarding such topics as Law of the Sea, Law of Armed Conflict, and national security law. My overseas duties as an international law attorney all took place within Europe, where I developed specialized experience in the European theatre and NATO environment.

During this time, U.S. military commanders also began to take a different view towards their legal advisers, or staff judge advocates, as they are known in military parlance. No longer were they seen as part of the support division, primarily addressing matters of discipline, legal assistance, and claims. More and more the legal advisers came to be regarded by their commanders as essential members of their operations teams. The lawyer now was 'on the bridge,' or in the battle staff, privy to the same intelligence reports, operational plans, and command decisions as were the 'operators.' They were consulted as important members of the team regarding the planning and execution of operations.

### **My First 'Operational' Experience – U.S. European Command**

I experienced this evolution in the legal adviser's role first hand during my initial overseas tour as a newly designated international law attorney. I was assigned to the U.S. European Command (USEUCOM) in Stuttgart, Germany, one of the joint combatant commands for the U.S. forces overseas. These commands take their orders from the President, as Commander-in-Chief, through the Secretary of Defence, to carry out military operations. The military services (Army, Navy, and Air Force) are charged with providing forces, land, sea, and air, to the combatant commanders to execute these military operations.

In 1988, when I began my duty with Headquarters, USEUCOM, the Cold War was still in full swing. The Berlin Wall was intact, and most of our military planning was devoted to defending the Fulda Gap and Western Europe from an all-out assault by the forces of the Warsaw Pact. Every year our exercise program included the 'Wintex-Cimex', a two-week, worldwide Command Post Exercise in which allied forces simulated fighting World War III. Our role at Headquarters EUCOM was to first make an inglorious, but probably sensible, retreat from Stuttgart to an underground bunker in England, from which we would direct the efforts of the U.S. European Forces to fight the war.

I was the only legal representative in the bunker from the EUCOM Legal Office, and managed, after some persuasion, to obtain a small workstation with computer and secure phone, in the operations centre. I was also an attendee at the daily morning and evening OPS and INTEL updates for the commander, and therefore had full access to all essential information regarding the exercise. I will always recall, however, a visit made to our three-



story underground facility by our Deputy Commander, a seasoned four-star Air Force General. After taking about an hour-long guided tour of the complete bunker, he finished in the OPS centre where I was located with my colleagues. The General, who was being shepherded on the tour by our two-star Director of Operations, was asked if he had any questions about the facility or our operation. He had only a single question: 'Why is there a lawyer in the OPS centre?'

As it can be imagined, I was crestfallen by his inquiry, wondering why he could not see the value legal advice could play in carrying out such a major exercise (or operation). I was quickly heartened, however, in that I did not have to say a word on my behalf regarding the lawyer's role. The Rear Admiral Director of Operations immediately responded to the four star, explaining how essential it was to have on-the-spot legal advice regarding use of force, Law of Armed Conflict, air and sea operations, chemical weapons, prisoners, and so forth. Consequently, the lawyer needed to have access to the moment-by-moment flow of information that being in the OPS Centre would provide.

Thus what I witnessed, over twenty years ago, was, in essence, a 'passing of the baton.' And the understanding of the lawyer's role in military operations, from the older generation of military leadership, to a newer and, I would like to think, a more enlightened up-and-coming military leadership. Legal advisers were no longer to be relegated to the back room support cell, ready to draw up a power of attorney, or prepare a disciplinary proceeding when summoned to do so. They would be front-line players in advising the commander in the conduct of operations.

### **New Types of Conflicts – Rapid Evolution of the Legal Adviser's Role**

If there was any doubt, however, regarding the lawyer's role in providing operational law advice to the U.S. European Commander, that was definitively resolved about three years later, in early April 1991. At that time, I was nearing the end of my three-year military tour of duty in the USEUCOM Legal Office, and, as a newly promoted Navy Captain Judge Advocate, was serving as the acting Legal Adviser to USCINCEUR, as he was known back then. The Berlin Wall was now gone, the Cold War ended, but other areas of conflict now loomed.

In the first 'Gulf War,' the U.S.-led coalition, commanded by General Schwarzkopf, had just defeated the Iraqi forces, driving them out of Kuwait and back into Iraq. A cease-fire was negotiated, which, among other things, established one of the first no-fly zones, this one over Iraq, applicable to fixed-wing aircraft. Although the combat had been led by the U.S. Central Command (USCENTCOM), our command had provided support, from our bases in Ramstein, Germany, and elsewhere from within the European Theatre. So it had been a busy time for us as well, and when the war

concluded in March 1991, we all thought we could stand down and take a break. Unfortunately, it was not so.

On 6th April 1991, a Saturday, I received a call at 6 a.m. summoning me to the EUCOM Battle Staff. We were standing up a new operation, and in this one, our command would have the lead. Saddam Hussein, who remained in power after the conflict, was mercilessly attacking the Kurdish population of northern Iraq, using primarily his helicopters, which were not prohibited from flying under the CENTCOM-negotiated no-fly zone. The Kurds faced death from above, and starvation on the ground, as they were driven north from their homes across the border into the Turkish mountains, where they faced an uncertain fate. In the media it was suggested that the Kurds had risen up in revolt against the Hussein Regime at the instigation of U.S. President Bush (the first), who had reportedly encouraged the people of Iraq to rebel, and, implicitly, if they did, they would receive support from the U.S.<sup>4</sup> Nonetheless, for various reasons, the Kurdish population did rise up against Saddam Hussein and were now suffering horrendous consequences as a result of their brief and failed rebellion. A massive humanitarian disaster was unfolding.

So, at the beginning of April 1991, the President, through the Secretary of Defence, directed my commander, USCINCEUR, to commence an operation to provide security and humanitarian relief to the Iraqi Kurds, who were fleeing north into Turkey. The operation would be conducted out of south-eastern Turkey (with the consent of the Turkish Government), and at first would be carried out completely from the air. Most importantly, it was critical for both political and humanitarian reasons that the operation could commence immediately, i.e. within 24 hours. The mode of providing relief in the initial stage, would be to parachute food, water, and tents from low-flying C-130 Aircraft over northern Iraq to Kurdish refugees on the ground. This had to be carried out in a secure environment, not threatened by Iraqi aircraft, including helicopters or ground fire.

Within this context, I was summoned to the battle staff in the Operations Centre. I was teamed up with a Navy aviation officer and directed to work out the rules of engagement that would allow this operation to proceed safely and as soon as possible. These ROE, and the skeletal OPLAN we would have time to develop, would need to be blessed by the Joint Chiefs of Staff and Secretary of Defence, on behalf of the President.

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<sup>4</sup> On February 15, 1991, before the conclusion of the first Gulf War, President Bush made the following announcement on Voice of America Radio: 'There is another way for the bloodshed to stop: And that is, for the Iraqi military and the Iraqi people to take matters into their own hands and force Saddam Hussein, the dictator, to step aside and then comply with the United Nations' resolutions and rejoin the family of peace-loving nations' (See Reuters, 'War in the Gulf: Bush Statement; Excerpts From 2 Statements by Bush on Iraq's Proposal for Ending Conflict', The New York Times, 16 February 1991, <http://www.nytimes.com/1991/02/16/world/war-gulf-bush-statement-excerpts-2-statements-bush-iraq-s-proposal-for-ending.html>). See also J.F. Burns, 'Uncovering Iraq's Horrors in Desert Graves', The New York Times, 5 June 2006, <http://www.nytimes.com/2006/06/05/world/middleeast/05grave.html> (unless indicated otherwise, all urls cited were last accessed on 26 January 2012).

My naval aviator colleague and I hit upon the only solution that seemed feasible under these extreme circumstances. We needed to establish a no fly zone of our own, over northern Iraq, and this one had to encompass rotary, as well as fixed-wing, aircraft. This was the only effective means we could devise that would ensure the safety of our slow moving C-130s as they dropped pallets of supplies with parachutes to the Kurds below. I will always remember the two of us sliding a ruler up and down the map of Iraq until we found a suitable parallel of latitude on which to establish the NFZ. 37 degrees was too high, 35 too low ... So 36, which seemed about right, was it. We also drafted rules of engagement to attack any Iraqi anti-aircraft batteries above 36 degrees north that proved to be a threat.

So with that, the two of us, a lawyer and an operator, without the benefit of any overarching UN Security Council Resolution<sup>5</sup> and within about three hours, created a 'legal regime' under which to initiate and execute this humanitarian relief operation, which was designated as 'Operation Provide Comfort.' The operation began with the first few flights taking place before the conclusion of that day, April 6th, and continued to run a number of years thereafter<sup>6</sup>. Other nations<sup>7</sup> and a number of humanitarian relief organizations joined in the effort, which at its peak, included the construction of 'tent cities,' i.e. large temporary camps, in southern Turkey and northern Iraq, to shelter and care for the Kurdish families. The No Fly Zone remained in effect throughout the operation to continue to provide security over northern Iraq.

Significantly, no longer were there any generals asking why the lawyer was in the operations centre. Indeed, since establishing a legal regime for Operation Provide Comfort was critical for its immediate execution and ultimate success, the role of the legal adviser proved to be essential in that undertaking.

### **The Legal Adviser's Role Today**

Now let's fast-forward the calendar twenty years to the present. What is the legal advisor's role today?

For six months in 2011, during NATO's operation to enforce an arms embargo, a no-fly zone, and to protect civilians in Libya, my legal team at SHAPE, as well as lawyers throughout the operational chain of command (including the Task Force Unified Protector, the Combined Air Operations Centre, and the NATO Air and Maritime Component Commands), conferred

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<sup>5</sup> While the UN Security Council had passed a Resolution (UNSC Res. 688, 5 April 1991) calling upon Iraq to end repression, and respect the human rights of its population, and to allow access by international humanitarian organisations to the affected areas, it contained no enforcement mechanisms authorizing intervention by other nations.

<sup>6</sup> The operation, which morphed into 'Provide Comfort II' in July 1991, officially ended on 31 December 1996.

<sup>7</sup> i.e. United Kingdom, Italy, France, Australia, The Netherlands, and Turkey.

daily through all available channels: e-mail, phone, VTC, and even occasional face-to-face meetings. We discussed, debated, and sought consensus on a plethora of challenging legal issues of critical importance to the operation. The commanders, i.e., Supreme Allied Commander Europe (SACEUR), Commander Joint Forces Command Naples, and Commander Operation Unified Protector (OUP), as well as the NATO Secretary General, relied extensively on their legal advisers to resolve questions concerning interpretation of the U.N. Security Council Resolutions, the arms embargo, enforcement of the no fly zone, and use of force to protect civilians from attack or threat of attack.

Even now, at the time of writing (September 2011), as a Strategic Operations Planning Group at SHAPE prepares for NATO's future role in the post-OUP operation, most likely to be in support of a UN operation to stabilize and restore key functions within Libya, legal advisers will play an essential part in interpreting and applying any new Security Council Resolutions and in developing new Concepts of Operations, Operational Plans, and Rules of Engagement for NATO forces.

In my thirty-year career as a judge advocate and legal advisor, I have witnessed, and experienced, not so much of an evolution, but rather a 'revolution' in the role of the attorney in advising the operational commander. This process was perhaps summed up best by one of my former USEUCOM Commanders who told me that as a young Army Captain, he relied primarily on his operations officer, intelligence officer, and logistician in carrying out his duties. As a general and Combatant Commander, however, he now relied almost exclusively on the advice of his Political Adviser, Public Affairs Officer, and the Legal Adviser.

### **Some Tips for 'Up-and-Coming' Legal Advisers**

On the whole, there are several 'tips' based on my experience that I am pleased to offer to the many talented judge advocates and civilian legal advisers who have worked for me, both at SHAPE and at U.S. military headquarters.

First, however, I would recommend all the legal professionals serving in a military organization to read an excellent article<sup>8</sup> authored by Mr. Stephen Tully in which he discusses the dilemma faced by legal advisers to military commanders, who are confronted with a choice between 'getting it wrong,' i.e., giving the commander the advice (s)he would like to hear, albeit advice which is not in conformity with the law, versus 'being ignored,' i.e., giving the correct legal advice, contrary to the commander's desires, with the result that the commander may ignore it, or avoid consulting with the legal adviser in

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<sup>8</sup> S.R. Tully, 'Getting it Wrong or Being Ignored: Ten Words on Advice for Government Lawyers', Vol. 7 *New Zealand Yearbook of International Law* 2009, pp. 51-83.



future. Mr. Tully's thought-provoking article reminds me of the old joke about the lawyer whose client asks him: 'What time is it?' The lawyer responds with his own question: 'What time would you like it to be?'

As the article points out, a lawyer should not be merely an apologist for the actions of his client. While we have seen this occur at higher levels of government, where the lawyers are dispatched to come up with, i.e., invent, legal arguments, no matter how far-fetched, to support questionable actions that have already occurred, this is a practice that should be strictly avoided in the field of advising military commanders. It is far preferable that we build confidence between ourselves and our 'clients', be they the commander or other staff officers who influence the commander's actions, so that they consult with us *before* they take or recommend an action that must later be explained or justified to the public or outside organizations. Our role should be to help the commander shape his/her orders and guidance to conform to legal principles while still allowing mission accomplishment. To achieve this goal, I often encourage my supporting attorneys to follow a few suggestions.

First, they should not see themselves merely as 'judges,' as if sitting on some international court, passing down rulings on the legal propriety of actions or direction contemplated by our commanders or fellow staff officers. I have known a few legal advisors who thought their duties ended by simply opining, with some legal justification, that a certain proposed action was legal or not legal. Then it was on to the next case. This approach caused the legal advisor to be seen mostly as an obstacle, someone to avoid if possible, and not someone whom a staff officer, or a commander, could turn to for help.

My view of the role of legal advisers is that they must be seen as part of the team, whose ultimate goal is to accomplish a mission in a legally supportable way. Therefore, if the initial proposal does not pass legal muster, a good LEGAD should work with the proponent to reshape it as necessary, so that it can be accomplished and legally defended. Admittedly this may not always be possible, but in many cases a different approach is the key to success.

Further, the legal adviser should not see his or her role as merely giving advice. While they cannot take on the duties that are the responsibility of others, lawyers have certain skills that are invaluable in assisting beleaguered staff officers who may not have a good sense of how to achieve their goal or that of the command. Legal advisers, with their special skills in drafting and organizing, can often help an action officer devise and implement a plan to move their task or project along to completion.

In the SHAPE Legal Office, we have been fortunate in being able to set up within our office spaces a conference room, with an electronic Smart Board, which allows us to coordinate meetings among staff officers, to

brainstorm projects, or refine draft memos, agreements, OPLAN's, ROE, etc., where we, as the lawyers, coordinate (but not replicate) the efforts of our non-legal colleagues. This results in creating the confidence and trust that I alluded to earlier, which encourages the staff to consult the legal office at the inception of any staff project. They see us as part of the solution, not part of the problem.

Attorneys on operational staffs, in giving advice, oral or written, must always keep in mind that we are advising busy clients, general and flag officers who have much on their plates to contend with, and decisions to make that can have momentous consequences. In assisting them we must be frugal in consumption of their time and attention, and deliver succinct, unambiguous advice. In addition, as I often explain to my younger legal colleagues, we must use a different writing style when advising a general, than when writing to another lawyer. Extensive footnotes, legal citations, and Latin phrases may be effective in the law reviews but not so in the written memos, point papers, and other communications we send to the 'front office.' In this respect, I advise my legal partners and assistants to follow two simple rules: a) put the bottom line up front (BLUF), so there is no mistake regarding what you recommend; and, b) resorting again to a time metaphor, tell the boss what time it is, not how the clock works. If he or she needs more elaboration, they will let you know.

Additionally, if a legal adviser recommends that a further action is taken by the commander, (s)he should include the implementing correspondence. For example, if I recommend that SACEUR write to the NATO Secretary General to advise that fuel destined for areas controlled by pro-Gaddafi forces may be intercepted at sea under UNSC Resolution 1973<sup>9</sup> as a measure designed to protect civilians from threat of attack, then I should include a draft memo for his signature that implements my recommendation. Too many times I have seen point papers proposing a certain course of action, with nothing accompanying them to implement the proposal. This is a waste of the commander's time and is simply incomplete staff work.

In my long career as a legal advisor to both U.S. and NATO forces, I have seen a remarkable change, for the better, in the role of the lawyer in influencing the course of military operations, to ensure they are executed in conformity with national and international law. This is consistent with what we now call the 'Comprehensive Approach to Operations,'<sup>10</sup> and to the

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<sup>9</sup> UNSC Res. 1973, 17 March 2011.

<sup>10</sup> The 'Comprehensive Approach' to operations was included as a part of NATO's new Strategic Concept, adopted on 20 November 2010 at the Lisbon Summit. According to this new Strategic Concept, '[t]he lessons learned from NATO operations, in particular in Afghanistan and the Western Balkans, make it clear that a comprehensive political, civilian and military approach is necessary for effective crisis management (NATO, 'Active Engagement, Modern Defence: Strategic Concept for the Defence and Security of The Members of the North Atlantic Treaty Organization', Lisbon, 20 November 2010, <http://www.nato.int/lisbon2010/strategic-concept-2010-eng.pdf>, § 21.

implementation of the 'rule of law' in the way we conduct operations. This is an opportunity that should not be wasted or jeopardized by careless, ineffective, or inflexible legal practice. Legal advisers should always see themselves and conduct themselves as important members of a headquarters team who work to assist in the accomplishment of the mission, while, at the same time, ensuring compliance with legal principles.

### **The Legal Adviser's Access to Information and the Commander**

While I have presented a positive picture of how the role of legal advisers has evolved to the point where they are now inserted into operations teams, planning cells, and anywhere they need to be to remain abreast of unfolding events in military operations, I should also point out that this 'battle' – if we choose to call it that – is never completely won. Even today at SHAPE, and throughout NATO's two strategic commands<sup>11</sup>, our attorneys must remain vigilant to guard against well-intentioned, but misguided, efforts to reorganize headquarters' staffs and to relocate the lawyers, placing them deep in the organizational tier, under a Director of Support, Personnel, or some other non-lawyer intermediate officer. The rationale of such a move is that 'Legal' belongs under 'Support.' Proponents of this shift argue, as well, that if the lawyer needs to see the commander, they may always submit a request through the chain of command to do so.

This view, however, misses the main point: The legal adviser must have daily access to the flow of information that takes place in the operational arena, as well as at the top level of the headquarters, i.e., within the 'Command Group.' Even during those rare periods in which there is no operation in progress, military headquarters' staffs are always involved in planning or policy-making that has some legal implications. The legal adviser must be in a position to influence these policies at the highest level within the headquarters. Furthermore, the legal adviser must also have direct access to the commander, whenever required, not through an intermediary.<sup>12</sup> Further, it cannot be left to the non-lawyers to decide when there is a legal issue requiring consultation with the legal adviser. We all know the perils of this approach, given the legal adviser's unique ability to spot legal issues that non-lawyers would miss.

Ensuring that the commander has access to a competent legal adviser is not a new concept. It was codified nearly thirty-five years ago in Additional Protocol I to the Geneva Conventions.<sup>13</sup> At SHAPE, in an 'effort to reinforce

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<sup>11</sup> Allied Command Operations (ACO) and Allied Command Transformation (ACT).

<sup>12</sup> At SHAPE, as in many staffs, the legal adviser reports on a day-to-day basis to our four-star Chief of Staff (COS). This is a normal and perfectly satisfactory arrangement, given that it is well understood by the COS that on some occasions it may be necessary for the legal adviser to deal directly with the commander whenever he or the commander deems it necessary to do so.

<sup>13</sup> AP I, Art. 82 - Legal advisers in armed forces: 'The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary,

our efforts' to ensure that proper access is maintained for legal advisers, we issued – in partnership with Headquarters, Supreme Allied Commander Transformation – a Bi-Strategic Command Directive.<sup>14</sup> Such a directive emphasizes the requirement of ensuring that legal advisers throughout the NATO Command Structure have direct access to their commanders, and to the information they require to fulfill their duties of providing day-to-day advice concerning the Law of Armed Conflict and all other relevant international law. The Directive also highlights the legal adviser's role in working closely with the other divisions of their headquarters' staffs, encouraging them to be engaged in a supportive or coordinating role, as I alluded to above. While conventions and directives alone cannot guarantee that the legal adviser's proper role and access will be maintained, they provide relevant policies we can rely upon in presenting our case to our commanders and other officers of our staffs who are responsible for organizational matters, tasking, and flow of information.

At the end of the day, perhaps the most persuasive argument is that if commanders do not consult and rely upon the lawyers at the inception of a military operation, they may ultimately be compelled to work with us at the conclusion. This is why legal advisers should never completely divorce themselves from their military justice roots. As a popular TV commercial once stated, 'you can pay us now, or you can pay us later!'

### **Unique Challenges of Serving as a NATO Legal Adviser**

Finally, I cannot avoid adding a few words regarding the unique challenges of serving as a legal adviser to a NATO Commander. I would imagine these comments would similarly pertain to legal advisers serving the commanders of any multinational force, such as an EU or UN force.

Again, like many of the readers of this Journal, I have spent the great majority of my career as a legal adviser serving national commanders and national defense officials. Until six years ago, when I began serving as the legal adviser to SACEUR and to SHAPE, my sole experience was advising U.S. national authorities. Although I had worked for many years in Europe, including in coordination with the SHAPE Legal Office and NATO, I had never worked directly for a NATO military commander. Somewhat naively, perhaps, I expected the practice of advising NATO commanders to be quite similar to advising U.S. commanders, especially so since my chief client, SACEUR, was 'double-hatted,' serving simultaneously as both a NATO commander and a U.S. commander (Commander, U.S. European Command). It turned out that I was quite mistaken in this expectation.

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to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.'

<sup>14</sup> 'NATO Policy on Legal Support', NATO Bi-SC Directive 15-23, 23 July 2009.



In the past six years, I have frequently dealt with issues that have arisen from the tension or conflict that can often exist between national laws and policies versus those of NATO. Additionally, in advising SACEUR and other NATO commanders, I needed to adapt to the reality that their legal authority is limited when compared to that of their national counterparts. When I advise SACEUR, it is important to point out that when he acts in his NATO hat, his authority is substantially different from when he gives an order as a U.S. commander. Although this should be obvious to lawyers and commander alike, it is often easy to revert to our past practice as legal advisers to our national legal service and fail to remind ourselves of the key legal distinction between nations and NATO. I have portrayed this distinction in the following chart:

#### **NATIONS v. NATO**

<b>NATIONS</b>	<b>NATO</b>
<b>SOVEREIGNTY</b>	<b>NO SOVEREIGNTY</b>
<b>PARLIAMENTS/CONGRESS</b>	<b>NO PARLIAMENTS/CONGRESS</b>
<b>ENACT LAWS</b>	<b>NO LAWS</b>
<b>ENFORCE LAWS</b>	<b>NO ENFORCEMENT</b>
<b>PUNISH VIOLATIONS</b>	<b>NO PUNISHMENT</b>

(Diagram provided by author)

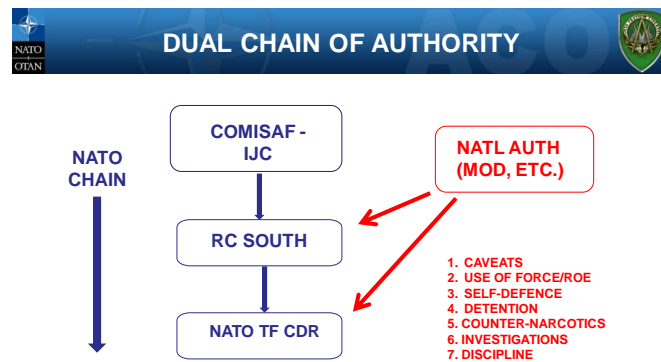
In essence, it all boils down to a single word: 'Sovereignty.' Whilst nations have it, NATO does not. NATO is an alliance of 29 sovereign nations, but none of the sovereignties owned by its member states 'rubs off' onto the Organization. Therefore NATO commanders, such as SACEUR, have no enforcement powers, neither themselves, nor in the hands of senior NATO civilian officials, to enforce any orders.

Perhaps the most celebrated example of this lack of enforcement power was the order from General Clark, the SACEUR, in June 1999 to British Lieutenant General Mike Jackson, the Commander of the Allied Rapid Reaction Corps (ARRC) and of NATO's forces in Kosovo (COMKFOR), to stop the Russians from landing at Pristina Airport. The reply from COMKFOR to SACEUR was: 'I am not starting World War III for you, sir!'<sup>15</sup> SACEUR was powerless to do anything in the face of this refusal by his subordinate officer to carry out his order. It is difficult to conceive a situation like this with a comparable result in a national military setting.

Further, the NATO commander faces another challenge. He has some

<sup>15</sup> The Daily Telegraph, 'Gen Sir Mike Jackson: My Clash with Nato Chief', 4 September 2007, <http://www.telegraph.co.uk/news/worldnews/1562161/Gen-Sir-Mike-Jackson-My-clash-with-Nato-chief.html>.

'competition' from national authorities that can clearly limit his prerogatives and even his ability to execute his mission. This competition stems from national laws and policies that 'trump' or override NATO direction, even when such direction derives from Operational Plans or Rules of Engagement that have been approved by the 28 nations sitting in the North Atlantic Council (NAC). The graphic below depicts this phenomenon:



(Diagram provided by author)

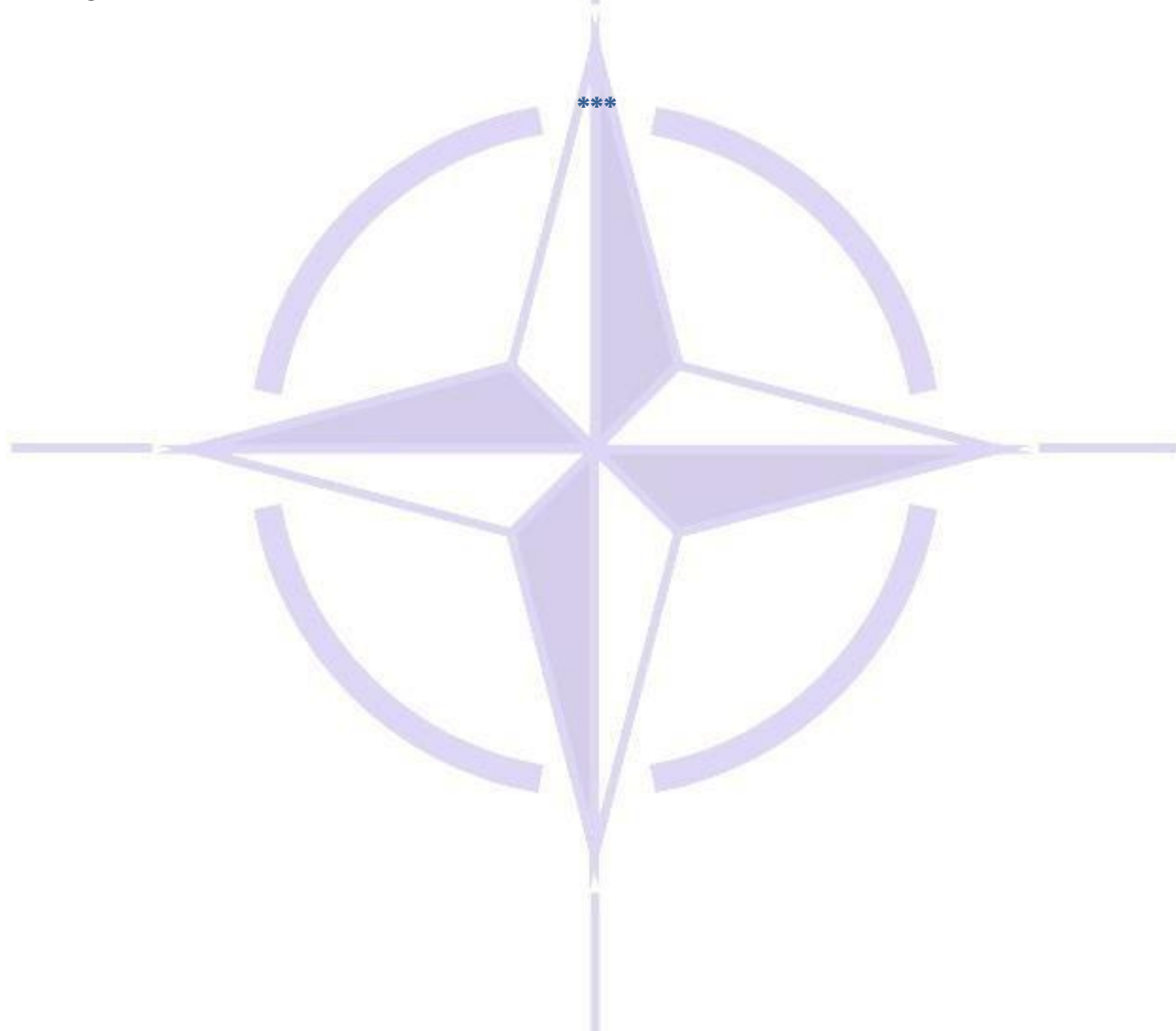
The diagram above uses the Commander ISAF chain as an example, but it could apply just as well to the military chain emanating from SACEUR down through any of his operational commanders. It must be kept in mind that a NATO force is not truly an international contingent. Rather it is composed of national units, land, sea, and air that nations have agreed to place under the temporary operational control of a NATO commander. These national contingents, even when placed under NATO command, are never divorced from national control. Thus, the important point to bear in mind is that the 'red line' above always trumps the 'blue line'. The red line, which represents national direction to commanders, is backed up by laws and enforcement powers, whereas the NATO blue line is not.

Thus, for example, if there is a clash between national direction regarding detained personnel in Afghanistan versus what is provided in the North Atlantic Council (NAC)-approved operational plan and rules of engagement for the ISAF operation, the national rules will control the actions of a national commander, even of one who is under the operational command and control of COMISAF. Similarly, nearly all nations that contribute forces to a NATO operation, such as ISAF, KFOR, or Unified Protector (Libya), provide those forces subject to certain 'caveats' that may restrict where the force may operate, when lethal force may or may not be used, and the types of operations in which their national forces may participate. One or two nations even limit their pilots' reliance on forward air controllers to only those personnel who come from nations which have ratified Additional Protocol One to the Geneva Conventions.

The list in red, above, reflects other areas in which NATO commanders and their legal advisers must address and work around the conflict that

frequently exists between national authority and NATO rules and policies in key operational areas. At the end of the day, the NATO commander and his legal adviser must bear in mind that the commander's authority is limited in comparison with that enjoyed by a national commander. And, as mentioned above, a NATO commander's direction is not backed up by any possibility of discipline or other enforcement.

As my colleagues in the Strategic Communications Office often say, in the NATO world: 'We must give up the illusion of control in favor of the reality of persuasion.' Perhaps therein lays the key to having a successful practice as a legal adviser to a NATO commander!



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### Legal Authority of NATO Commanders

by Thomas E. Randall<sup>1</sup>

At the request of our hard-working, irrepressible editor of the NATO Legal Gazette, I have agreed to prepare this summary of remarks I have delivered on several occasions to the NATO School Senior Officers' Course regarding the legal authority of NATO Commanders. These remarks are based upon my experience as the Legal Advisor to SACEUR (Supreme Allied Commander Europe), as well as my prior experience as a legal adviser to senior national (USA) commanders. As I have witnessed over the past nine years at SHAPE (Supreme Headquarters Allied Powers Europe), there are some notable differences in the legal authority of a NATO Commander as compared to the legal authority of our national Commanders.

So why, you might ask, would there be any difference between NATO and national Commanders' authorities? When the four-star orders the three-star to carry out certain actions, typically the latter is bound to obey and fails to do so at his or her peril. In the US military, where I "grew up" as a judge advocate (legal advisor), subordinate officers who deliberately failed to carry out the orders of their senior Commanders normally found themselves on the



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<sup>1</sup> Former Allied Command Operations (ACO) Legal Adviser (still active at the time this article was published). The views presented in this article are solely those of the author and may not represent the views of NATO, SHAPE, or SACEUR.



retirement rolls shortly thereafter. Some wound up as "talking heads" on CNN, or ran for public office, but the price of disobedience was the abrupt end to their military careers. Why would things be any different in the NATO world?

If I could sum up my answer to this question in a single word, it would be "sovereignty." The table below illuminates my point:

 <b>NATIONS VERSUS NATO</b> 	
<b>NATIONS</b>	<b>NATO</b>
<b>SOVEREIGNTY</b>	<b>NO SOVEREIGNTY</b>
<b>PARLIAMENTS/CONGRESS</b>	<b>NO PARLIAMENTS/CONGRESS</b>
<b>ENACT LAWS</b>	<b>NO LAWS</b>
<b>ENFORCE LAWS</b>	<b>NO ENFORCEMENT</b>
<b>PUNISH VIOLATIONS</b>	<b>NO PUNISHMENT</b>

(Diagram provided by author)

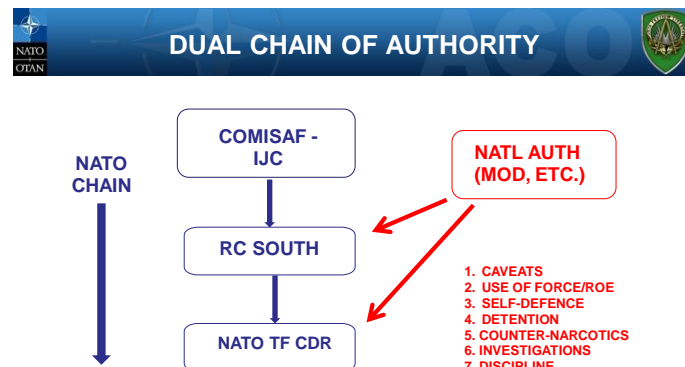
NATO is an alliance of 28 sovereign nations, but not one drop of their individual sovereignty spills over onto the Alliance itself. Not only do nations have sovereignty, they, of course, have all the trappings that go with it: parliaments, laws, enforcement, and the power to punish. NATO has none of these aspects, which consequently limits the power and authority of a NATO Commander.

The orders of national Commanders are backed by law, and the powers of enforcement and punishment. In the US military, a federal law, known as the "Uniform Code of Military Justice,"<sup>2</sup> affords Commanders the power to impose non-judicial punishment and to convene courts-martial to address offenses such as "failure to obey a lawful order," "dereliction of duty" and "disrespect to a senior officer," among others. Even those nations who lack such a military criminal code afford Commanders a means of enforcing their orders through their national civilian authorities and civilian criminal codes. So already we can see the contrast between the more limited powers of the NATO Commander when compared to his national counterparts.

But, the difference between NATO and national Commanders goes even beyond this basic point. In giving his orders, a NATO Commander

<sup>2</sup> 64 Stat. 109, 10 U.S.C. Chapter 47, available at <http://www.law.cornell.edu/uscode/text/10/subtitle-A/part-II/chapter-47>.

frequently faces competition or constraints not encountered by the national Commander. The following diagram illustrates this point:



\* IJC – ISAF Joint Command; RC – Regional Command; TF CDR – Task Force Commander  
(Diagram provided by author)

Just like their national counterparts, NATO Commanders issue orders down a chain of command, and, like national Commanders, expect them to be obeyed. The above diagram uses COMISAF (Commander International Security Assistance Force) as an example. Based on both political and military direction, emanating from the North Atlantic Council (NAC), and decided unanimously (through consensus) by the 28 NATO member nations, COMISAF issues orders to his subordinate Commanders in the form of OPLANS (Operational Plans), OPORDERS (Operational Orders), tactical direction, FRAGOs (Fragmental Orders), etc. This NATO chain of command is represented by the "blue line" depicted above.

COMISAF, however, must also take into account the "red lines" – the policies, direction, and constraints imposed upon the forces provided to him by their nations. A NATO or NATO-led operation, like ISAF, is, after all, nothing more than a collection of national units, e.g., battalions, air squadrons, ships, etc., which remain under national command but have been transferred temporarily to NATO. Although these national units, through the formal process of "transfer of authority," have been placed under the operational command and control (C2) of a NATO Commander, they never lose their national character, nor do they ever "escape" from being subject to their national laws, policies, and constraints.

So, what happens when an order coming down the NATO (blue) chain conflicts with contrary direction coming down a national (red) chain? If you will recall from my comments above, national direction is backed up by the powers of law, enforcement, and punishment. Not so with the NATO chain. Thus, as you may imagine, national direction always "trumps" NATO orders, even when those orders are based upon the NAC-approved OPLAN,

Strategic Direction, or Rules of Engagement (ROE), which all NATO nations have agreed unanimously through consensus!

In fact, in many NATO operations centres, such as Combined Air Operations Centres (CAOC's), Task Force headquarters, and similar NATO command posts, there are senior national representatives who are designated as so-called "red-card" holders. They are empowered by their nations to intervene at any time to halt or prevent their nation's forces from conducting action that has been directed, or is under consideration, by the NATO Commander, when they believe such action contravenes national laws, policies, or constraints. This provides unique challenges for the NATO Commander and those of us who advise him. In contrast, the Commander of a purely national operation has nothing comparable to deal with in directing his forces.

The red-line, blue-line interface manifests itself in a number of different areas, some of which are listed in the diagram above. One example, perhaps the most direct form of competition between national constraints and NATO orders, is the phenomenon known as "caveats."<sup>3</sup> These are formal restrictions placed by a nation on its forces when they are transferred to the authority of a NATO Commander. There are many of these compiled and published semi-annually in a classified SHAPE Caveat Report. This provides matrices, for each NATO operation (e.g., ISAF, KFOR (Kosovo Force), Ocean Shield, etc.), that list, nation by nation, the many national restrictions that NATO Commanders of each of these operations must take into account.

Caveats can be limitations on the geographic area in which a nation's forces may be employed (e.g., no operations in the south of Afghanistan or across the border into Pakistan), or when lethal force may not be applied (e.g., no use of lethal force to prevent escapes, protect property, etc.), or on what mission may be supported (e.g., no use of a nation's forces to support Operation XYZ). One of the most extraordinary examples, however, is a caveat previously imposed by two NATO nations, perhaps without benefit of sufficient common-sense review by operators. It indicated that close air support could not be provided to friendly troops in enemy contact in situations where the forward air controller was from a nation that had not ratified Additional Protocol I to the Geneva Conventions!

Some NATO officers regard caveats as a hindrance, but others see them as a matter of necessity. Their view is that without the ability to declare

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<sup>3</sup> In AAP-06(2012)(2), "NATO Glossary of Terms and Definitions" (NATO UNCLASSIFIED), "caveat" is defined as: "In NATO operations, any limitation, restriction or constraint by a nation on its military forces or civilian elements under NATO command and control or otherwise available to NATO, that does not permit NATO commanders to deploy and employ these assets fully in line with the approved operation plan. Note: A caveat may apply inter alia to freedom of movement within the joint operations area and/or to compliance with the approved rules of engagement."

such limitations, some nations might be unable to participate at all in many NATO operations. Caveats afford nations the ability to approve an OPLAN, and all its associated ROE, at the political level in the NAC, while at the same time retaining their sovereign prerogative to ensure that the use of their land, sea, and air forces remains consistent with their domestic laws and policies. For the NATO Commander, unlike his national counterpart, they are a potentially complicating factor that he must always take into account when planning and executing his NAC-directed military missions.

But caveats are only one example of the red-line, blue-line interface. I have encountered a number of others in my nine years of providing legal advice to SACEUR. Again, some of these are listed on the diagram above.

Perhaps one of the most difficult issues that NATO has confronted in the ISAF operation is the matter of "detention," that is, the temporary holding of persons on the basis that they present a threat to a Commander's force, or for the accomplishment of a NATO operational mission. When the ISAF operation expanded to include all of Afghanistan in 2006,<sup>4</sup> the number of individuals detained by troop-contributing nations (national forces under NATO command) in Afghanistan increased exponentially. NATO needed a common policy to address how to handle these detainees.

In my first year as the SHAPE Legal Adviser<sup>5</sup>, I accompanied General Jones, the SACEUR, on a mission to Afghanistan, where we met with President Karzai and other senior Afghan officials to obtain their agreement, in principle, to the handling and turnover of detainees to Afghan authorities. During our visit, the Afghan leadership readily agreed on a set of principles that could be formalised into a Memorandum of Understanding (MOU) with NATO, and which would establish a common detention policy for all nations participating in the ISAF operation.

When I returned to SHAPE, I submitted a proposed text capturing these principles to NATO HQ. The text was then put before the nations in the NAC for their approval. After months of discussion and bitter disagreement among the national representatives regarding the proposed rules for the handling of detainees, the effort to obtain a NATO agreement with Afghanistan ultimately had to be abandoned. There were just too many strong national prerogatives at stake to have any hope of reaching a common agreement among the NATO nations.

As a fallback, provisions regarding detainees were eventually inserted into the NAC-approved OPLAN for the expanded ISAF mission, including ROE to address criteria for turnover of detainees to Afghan authorities. These were agreed unanimously, through consensus, by the nations in the NAC. These

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<sup>4</sup> As authorized by UNSC Resolution 1707 (2005), S/RES/1707 (2006), 12 Sept. 2006.

<sup>5</sup> My job title was later changed to "Allied Command Operations (ACO) Legal Adviser."



provisions regarding detainees provided the political and military direction for SACEUR and his subordinate Commanders, such as COMISAF, to follow with regard to the handling of detainees in Afghanistan. In essence, the OPLAN, ROE, and amplifying guidance sent down the NATO chain of command established the "blue line" with respect to handling of detainees in the ISAF operation.



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(some rights reserved)

Almost immediately, however, the "red lines" began to intervene with regard to detainees. Perhaps the most vivid example I can recall occurred when, at SACEUR's direction, our four-star Chief of Staff and I met with a National Military Representative (NMR) of a NATO nation to question him regarding why his nation refused to follow the NAC-directed guidance on detainees. In fact, his nation, for a period of weeks, had not turned over any detainees to Afghanistan as was directed in the NATO OPLAN and ROE. The answer from the NMR, a colonel, was that he was not authorised to answer any questions, even from SACEUR, on this issue, and any "complaints" from NATO, so to speak, would have to be referred to his nation's capital. Once again, in a most direct and graphic way, the "red line" had trumped the "blue line." Such tension between NATO and nations is a fact of life for those charged with carrying out the will of the NAC and executing NATO military operations.

If space and level of classification permitted here, I could describe many other examples of "clashes" between NATO guidance, either political or military, versus national laws, policies, and constraints in the context of NATO operations. In a classified setting, for example, I could relate how a senior officer, backed by his nation's policies and subordinate to a former SACEUR,

refused to carry out NATO direction regarding counter-narcotics operations in Afghanistan. I could also recount how a senior NATO officer who deliberately disobeyed direction from the NATO Secretary General, but who again had the support of his nation, was impervious to any removal or "punishment" by NATO military or civilian authorities. Or I could describe the consequences that resulted from two simultaneous investigations into an incident of civilian casualties arising in Afghanistan, where the NATO and national investigations reached opposite conclusions regarding whether a national Commander's actions complied with the Law of Armed Conflict and NATO direction.

In all of the above incidents, and others like them involving clashes between NATO authority and national authority, the solutions required more in the way of negotiation and compromise, rather than direction, enforcement, and any threat of punishment. Most importantly, in resolving these difficult situations, the role of the NATO legal advisors involved was paramount!

My own Commander, SACEUR, is ultimately accountable to the NAC - the NATO political authorities - for the success or failure of the missions the nations direct him to carry out. He always, however, faces the challenge of executing these missions with full regard to the limitations imposed on him by individual nations who provide him with the forces necessary to conduct the mission. The NATO Commander, unlike his national counterpart, must always tread a path between these two competing concerns: accomplishing the NAC-directed military mission versus honouring the limitations imposed by individual troop-contributing nations.

The business of being in command, even in a purely national setting, is challenging enough as it is. But, the business of commanding a multinational force, such as a NATO force, may require the Commander to rely less on the illusion of control over his subordinates, and much more on the necessity of persuasion and even negotiation in convincing them to undertake actions desired. Those of us who advise NATO Commanders must assist them in carrying out these tasks and dealing with the challenges presented by operating in a multinational environment.

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[Excerpt from NATO Legal Gazette Issue 34 \(July 2014\), pag. 46-54](#)



[www.nato.int](http://www.nato.int)

## NATO Status Agreements

By Mette Prassé Hartov<sup>1</sup>

Peacetime stationing of troops abroad and the standing up of International Military Headquarters are more recent developments that coincided with the adoption of the United Nations Charter and its limitations on the right of States to use force. Whereas friendly transit has been applied throughout history,<sup>2</sup> the stationing of foreign troops has normally been associated with occupation. With the establishment of NATO and other military alliances, the stationing of military forces is no longer associated with occupation but rather with cooperation. As such, stationed forces have evolved into invited guests and partners in military cooperation. With the consent to peacetime stationing comes the need to determine the status of these forces.

The immunities and privileges of foreign forces are rooted in the concept of state immunity. Soldiers and forces are state agents or state representatives. Common practice under Public International Law has varied from providing absolute immunity to recognising functional immunity only.<sup>3</sup> As such, while customary international law does provide for certain immunities, they appear to be limited in scope, and, where they were sufficient to cater for transiting or a closed garrison environment in past times, the modern and more complexly regulated society requires a more nuanced approach.

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<sup>1</sup> Deputy Legal Adviser at Headquarters, Supreme Allied Commander Transformation, Office of the Legal Adviser. The opinions expressed in the article are entirely those of the author, and are not necessarily those of HQ SACT, SACT, or of NATO Member nations.

<sup>2</sup> Serge Lazareff, *Status of Military Forces under Current International Law* (Sijthoff/Leyden, 1971), pp. 7-8.

<sup>3</sup> For a more recent commentary on customary international law, see Ian Brownlie, *Principles of Public International Law*, 5<sup>th</sup> Edition, Oxford, pp. 372-375.

States conclude Status of Forces Agreements (SOFAs) to overcome these complexities and to effectively facilitate and enable the presence of foreign visiting forces. Status of Forces Agreements provide a common agreement on the terms of the stationing. This trend may, in part, be inspired by the NATO Status of Forces Agreement (NATO SOFA)<sup>4</sup> and its extended application as NATO has expanded and the Partnership for Peace SOFA (PfP SOFA)<sup>5</sup> was introduced. However, this practice of concluding SOFAs is not specific to NATO, and it predates the NATO SOFA.<sup>6</sup>

Per its provisions, the NATO SOFA is only open to accession by States who are also parties to the North Atlantic Treaty. Moreover, it only applies to the (metropolitan<sup>7</sup>) territories of the contracting Parties. These embedded restrictions led to the drafting and conclusion of the PfP SOFA in 1995.

The PfP SOFA is, by and large, a transition document that extends the NATO SOFA to PfP States, with the exception of the disputes settlement clause. It is signed by both NATO member States and by Partners in order to provide status to Partners participating in activities within a NATO member State and to NATO member States conducting activities within, or transiting through, a Partner State.

In the context of NATO, the cooperation between Allies is set in Article 3 of the North Atlantic Treaty; it includes both events that are scheduled and conducted under the NATO flag and those activities undertaken by Allies “...separately and jointly, by means of continuous and effective self-help and mutual aid, [to] develop their individual and collective capacity to resist armed attack”.<sup>8</sup> The NATO SOFA applies to all activities without distinction,

<sup>4</sup> Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, done in London, June 19, 1951.

<sup>5</sup> 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, done in Brussels June 19, 1995.

<sup>6</sup> CRS Report for Congress, Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized? R. Chuck Mason, Legislative Attorney, March 15, 2012 (<http://www.fas.org/sgp/crs/natsec/RL34531.pdf>).

<sup>7</sup> The North Atlantic Treaty, Article 6, States that the North Atlantic Treaty area consists of the territories of the NATO States in Europe and North America, the territory of Turkey and the islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer. Forces, vessels and aircraft of the NATO States are also representing “a territory” in so far they are stationed in or over the said territories or in the Mediterranean Sea added in 1952, when Turkey (and Greece) joined the Alliance and the definition was further modified in 1963, when the French departments of Algeria were excluded). NATO SOFA, however, only applies to the metropolitan territory of the Contracting Parties (Article XX). The NATO SOFA does not define “metropolitan areas”, but it is assumed that it means the mother territories of the Parties, and that only colonies are excluded from the definition. The NATO SOFA has several contradictions regarding the geographical application (compare Article I, paragraph 1 (a), Article I, paragraph 1(e), Article VIII, paragraphs 2 and paragraph 5). In order to bridge between the definition in the North Atlantic Treaty and the wording in the SOFA, the drafters included paragraph 2, whereby parties unilaterally can extend the geographical area of application. Likewise, geographical reservations have been made to the application of the NATO SOFA as well as the PfP SOFA (see <http://www.state.gov/documents/organization/85630.pdf> and <http://www.state.gov/documents/organization/91332.pdf>).

<sup>8</sup> The North Atlantic Treaty, done in Washington on April 4, 1949 (Article 3).



unless the parties agree otherwise. The drafters of the NATO SOFA deliberately refrained from referring to “NATO” duties in order not to limit its functional application. Looking at the preparatory works, it is evident that the drafters did not intend to limit the scope of application. In fact, their discussion clearly states the contrary.<sup>9</sup>

In a more current perspective, this approach remains valid. Extensive military activities are conducted as bilateral or multilateral initiatives amongst Alliance members and often involve PfP States. Bilateral agreements, or agreements initiated by a group of nations, form the basis of these activities. These activities are a result of general military co-operation and thus promote the co-operation and defensibility of the Alliance in accordance with Article 3 of the North Atlantic Treaty. Given the language of the NATO SOFA and the clear directions provided by the drafters, it is suggested that the NATO SOFA always apply by “default” to such activities. Accordingly, when Parties to the NATO SOFA send or receive forces, including individual members of a force, it is assumed that the NATO SOFA applies, regardless of the nature of the visit or stationing, unless the status is defined by other arrangements and thereby accepted by the receiving State (e.g. through a diplomatic accreditation). As the activity is subject to the consent of the receiving State, that Party must object to this default clause if it disagrees with the assumption.

Article 3 of the North Atlantic Treaty is not replicated in the context of Partnership for Peace, but there is no general (legal) argument against applying the PfP SOFA in the same manner. This provides a well-tested and long-standing legal framework, and any nation may freely identify that the NATO/PfP SOFA will not be used for a given event.

Whereas the NATO SOFA regulates the status of visiting forces, the Paris Protocol defines the terms enjoyed by “International Military Headquarters set up pursuant to the North Atlantic Treaty”.<sup>10</sup> The Paris Protocol was concluded in 1952. It was negotiated in parallel with the drafting of the Ottawa Agreement,<sup>11</sup> which defines the status of NATO, its international staff and the national representatives to NATO (missions established at NATO Headquarters). Furthermore, the first host agreement (or *accord de siege*) between France and SHAPE was also being developed at this time. As the subject of status for military headquarters is seemingly closer to the NATO SOFA than to the Ottawa Agreement, the Paris Protocol was formed as a protocol to the NATO SOFA. In this, two strings of status and juridical personality were created. The North Atlantic Council, however, holds the key to granting either within the limitations agreed upon in the two treaties.

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<sup>9</sup> For references and summary of the drafting history, see Mette Prassé Hartov: NATO Status of Forces Agreement: Background and a Suggestion for the Scope of Application; Baltic Defence Review No. 10, Vol. 2/2005.

<sup>10</sup> Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty, done in Paris on August 28, 1952.

<sup>11</sup> The Agreement on the Status of the North Atlantic Treaty Organization, National Representatives, and international Staff, done in Ottawa on September 20, 1951.

In practical terms this has worked well, but when comparing the Paris Protocol and the Ottawa Agreement, there are quite apparent differences. These differences are likely to originate from the context of their negotiations. Both were developed in 1950-51, just after the adoption of the UN Charter. But, while the Ottawa Agreement draws clear lines back to the UN Charter, the Paris Protocol seems to be of a more unique character (or, if one is less kind to the Paris Protocol, a cross-breed between the law of state sovereignty and the evolving concept of the status of international organisations). This has led some to suggest that international military headquarters are *sui generis*. In light of more than 50 years of practice, it seems more appropriate to recognise that International Military Headquarters are not so, but rather are international organisations with an unusual (or distinct) function and an equally unique composition of staff members, as the majority belongs to the armed forces of a NATO member state. Both features may have led the drafters to emphasise the connection to the NATO SOFA rather than to the Ottawa Agreement. However, just like other international organisations, Paris Protocol entities enjoy those immunities and privileges that are necessary for their effective functioning. The Paris Protocol, when applied in conjunction with international law and with NATO regulations (such as those applicable to NATO International Civilians) and implemented in NATO member states through Supplementary Agreements, provides such an effective and functional footing for International Military Headquarters.

The nexus between the NATO SOFA and the Paris Protocol is obvious and essential; the Paris Protocol cannot be applied without the NATO SOFA. Yet, it is important to recall that the NATO SOFA regulates the relations between sovereigns while the Paris Protocol, on the other hand, provides status to International Military Headquarters that are created as international organisations. As such, in principle the NATO SOFA and the Paris Protocol represent two different bodies of law. More specifically, the NATO SOFA regulates the relations between sovereigns whereas the Paris Protocol provides status to an international organisation; it does so by applying the NATO SOFA and by designating an international Headquarters as a 'force', with the exceptions of the functions retained by the sending States. For instance, the Paris Protocol recognises that certain matters remain within the national domain of sending States.<sup>12</sup> This applies to the exercise of jurisdiction and to the handling of matters regarding repatriation of personnel. It also applies to the use of ID cards upon border crossing: Members of an International Military Headquarters are to present their national ID cards upon crossing border to another NATO member State, travelling on orders from an International Military Headquarters or when issued by the sending State. Nothing implies that the drafters considered an International Military Headquarters to be granted status similar to that of a sovereign State, and the Paris Protocol upholds a clear balance between the international

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<sup>12</sup> See for example the Paris Protocol, Article 4.

organisation and the States sponsoring its personnel.

One of the variances between the Paris Protocol and the NATO SOFA is the different categories of persons enjoying status under the two agreements. The Paris Protocol applies to all members who fall within the definitions of the Protocol and are attached by NATO nations; it is not a condition that the sending State is a party to the Paris Protocol, but the sending State has to be a party to the North Atlantic Treaty. Another condition is that the personnel must be in the receiving (host) State in connection with their official duties. The State hosting an International Military Headquarters is both a receiving State in terms of the Headquarters and its personnel, and a sending State with regard to the personnel it assigns to the Headquarters. The following table illustrates the differences:

NATO SOFA	Paris Protocol
<p>The NATO SOFA defines the status afforded to the <u>parties</u> to NATO SOFA and their <u>forces</u>, and to be enjoyed by the <u>individual members</u> and <u>their dependents</u>.</p> <p>The NATO SOFA provides status to the forces of sending States when in the territory of another NATO nation in connection with their official duties, unless otherwise agreed (e.g. defence attachés are accredited as diplomats). It defines the different categories of personnel:</p> <ul style="list-style-type: none"> <li>• <u>Members of the force</u> are the uniformed members of the sending State's armed forces (uniformed);</li> <li>• <u>Members of the civilian component</u> have to be civilians in the employ of the sending State's armed forces, accompanying the armed forces and fulfil certain requirements with regard to nationality and non-residency in the receiving State. The definition, accordingly, does not include persons who are self-employed or otherwise</li> </ul>	<p>The Paris Protocol defines the status enjoyed by <u>International Military Headquarters</u> and by assigned or employed international <u>personnel</u> and <u>their dependents</u>.</p> <p>The Paris Protocol uses the definitions of the NATO SOFA with the necessary changes, and provides additional definitions of Supreme Headquarters, and of an Allied Headquarters (subordinated directly to a Supreme Headquarters):</p> <ul style="list-style-type: none"> <li>• <u>'Force'</u> is defined as the uniformed members attached to the Headquarters by sending nations (including the state hosting the Headquarters).</li> <li>• <u>The members of a civilian component</u> consist of civilians (1) in the employ of the armed forces of a sending Nation, or (2) in the employ of a Headquarters in the categories determined by the NAC (NATO international Civilians), and (3) who are not nationals of the receiving State and (4) otherwise fulfil the nationality requirements set out in</li> </ul>

<p>employed by a commercial company;</p> <ul style="list-style-type: none"> <li>• <u>Dependents</u> are the spouse of a member (as defined above) and the children depending on their support, as defined by the sending State.</li> </ul>	<p>the Paris Protocol. Nationals of the State hosting an Allied Headquarters, who are employed as NATO International Civilians are as such not included in this definition, but are assumed to enjoy full status when attached to another Allied Headquarters (on duty travel).</p> <ul style="list-style-type: none"> <li>• <u>Dependents</u> – as defined in the NATO SOFA.</li> </ul>
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Supreme Allied Commander Europe, United States Air Force General Philip M. Breedlove; Portugal's Minister of Foreign Affairs, Rui Machete; Supreme Allied Commander Transformation (SACT), French Air Force General Jean-Paul Palomeros., signing the Supplementary Agreement to the 1952 (Paris) Protocol  
[www.act.nato.int](http://www.act.nato.int)

Looking closer at the nexus between the Ottawa Agreement and the Paris Protocol, one finds both distinct differences and some similarities. This may be due, in part, to the Protocol being built on the NATO SOFA, which again is a reflection of the status of sovereigns and thus of the immunities enjoyed by sovereign States in their mutual relations. This was identified in a question made by Canada in the drafting of the Protocol: "it can be understood that a sending State would have sovereign immunities but not, normally, a Supreme Headquarters. How is this to be reconciled?"<sup>13</sup>

<sup>13</sup> See p. 616 in NATO Agreements on Status: Travaux Préparatoires, edited and annotated by Professor Joseph M. Snee, 1961, International Law Studies, Naval War College, Newport Rhode



No answer to the Canadian question is found in the Travaux Préparatoires, but it is reasonable to suggest that the Paris Protocol was being drafted at a point in time when concept of status enjoyed by International Organisations was developing. The UN Charter provided codification of "the law" and the Ottawa Agreement is, in many places, a copy-and-paste of the UN Charter in this regard. These specific provisions, however, were not repeated in the Paris Protocol, because of (and here the author is providing a qualified guess only) the Protocol's nexus with the NATO SOFA. At the time, the concept of immunities and privileges of International Organisations (and their staffs) and those of Sovereigns seem to be somewhat blurred. This fact may equally have influenced the drafting of the Paris Protocol, which stands between the NATO SOFA and the Ottawa Agreement, both in terms of how it was developed and the areas covered by it.

The idea to introduce the same language on immunities in the Paris Protocol as was adopted in the Ottawa Agreement was briefly discussed in 1951-52, but the discussion appears to relate predominantly to taxes and to the status of Flag and General Officers. This latter discussion was continuously tabled by the USA and fully addressed in subsequent Supplementary Agreements. In some areas the correlation between International Military Headquarters and NATO Headquarters (and specifically the funding allocation) compelled the drafters to provide identity in status.<sup>14</sup> At some point, it was suggested to let all NATO International Civilians derive status from the Ottawa Agreement to ensure equal treatment across NATO for taxation purposes. Instead, Article 7 (the exemption from income tax) of the Paris Protocol was inserted, and Articles 10 (juridical personality) and 11 (legal proceedings related to claims settlement; immunity from execution and attachment) remained. The definition of international staff members and their corresponding status is found in the Ottawa Agreement (Part IV). This approach is not repeated in the Paris Protocol, which again matches up with the terms introduced in the NATO SOFA. International Civilians are, as illustrated above, folded into the definition of the civilian component. Likewise, national military missions, such as the National Liaison Representatives to Supreme Allied Commander Transformation (SACT) and National Support Elements, assigned to various NATO International Military Headquarters, function in the receiving State under the NATO SOFA (and thus with the additional status identified in agreements supplementing the NATO SOFA and the Paris Protocol), whereas the Ottawa Agreement in Part III defines the status of representatives of Member States.<sup>15</sup>

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Island.

<sup>14</sup> See in particular pp. 273-276 and 284-286 (tax-exemption, inviolability of archives and documents) in NATO Agreements on Status: Travaux Préparatoires.

<sup>15</sup> The status of the PfP missions to NATO Headquarters and their staff is found in the Agreement on the Status of Missions and Representatives of Third States to the North Atlantic Treaty Organisation, done in Brussels on September 14, 1994.

This system of status agreements has served the Alliance effectively since 1951-52, and there have been no attempts made to change the status agreements. Serge Lazareff concludes that the NATO SOFA is an imperfect document, yet it is so in order to balance the interests of sending and receiving States and, at the time of drafting, of opposing concepts. Mr. Lazareff points out that, "... the gravest error one could commit is to consider SOFA as a self-sufficient text. In fact, this Treaty, as most treaties, can only be judged through its practical and daily application and to that extent the Preamble authorizing the conclusion of separate agreements is of the utmost importance."<sup>16</sup>



Mrs. Mimi Kodheli, the Albanian Minister of Defence and Supreme Allied Commander Europe, United States Air Force General Philip M. Breedlove, shake hands after the signing protocol.

Photo courtesy of SHAPE Public Affairs Office SGT Emily Langer DEU A.  
[www.aco.nato.int](http://www.aco.nato.int)

The Paris Protocol also depends on and recognises the need for supplementation. NATO Headquarters and the Supreme Headquarters are not parties to the three main NATO status agreements (or their PfP equivalents), yet Article 16 in the Paris Protocol authorises the Supreme Headquarters to conclude Supplementary Agreements with the States parties to the Paris Protocol. The need for complementing arrangements had been identified during the negotiations of the Paris Protocol and at least two areas were named as subject to further agreements: (1) functional immunities to be granted to Flag and General Officers and (2) the operation of post offices either by nations or an International Military Headquarters. Over the years, Supreme Headquarters Allied Powers Europe (SHAPE) and Headquarters, Supreme Allied Commander Transformation (HQ SACT) have separately and, more recently, jointly concluded Supplementary Agreements with several

<sup>16</sup> Serge Lazareff, *Status of Military Forces under Current International Law* (Sijthoff/Leyden, 1971), p. 445.

NATO member States. The Supplementary Agreements principally accord the same status and entitlements to be enjoyed by International Military Headquarters, but some are worded differently as they occurred over a period of nearly 50 years. In recent years, legal advisors in Allied Command Transformation (ACT) and Allied Command Operation (ACO) have developed a template Supplementary Agreement representing a synthesis of NATO practice, agreements in effect, and NATO regulations and policy (where such apply). Currently three Supplementary Agreements have been signed using this template.

Generally, the Supplementary Agreements confirm and complement the status granted under the Paris Protocol/Further Additional Protocol<sup>17</sup> and thus the NATO SOFA/PfP SOFA. They elaborate on the immunity enjoyed by an International Military Headquarters, the inviolability of its premises, archives, documents, and the functional immunities to be afforded to flag and general officers. The Supplementary Agreements also address allocation and operation of facilities, security and force protection. They direct reporting of assigned personnel, operation, registration and licensing of vehicles, carrying and storage of arms, access to banking facilities, and measures to be considered with regard to public hygiene, environmental protection and health and safety. They serve to confirm tax exemptions enjoyed by an International Military Headquarters and the right to operate canteens and other facilities. They also identify fiscal entitlements of the members. Of equal importance, they elaborate on definitions, extend entitlements and waivers, for example, on visa and residency requirements for civilians and dependents. In general, they supplement and detail the status to be afforded to the International Military Headquarters and their personnel.

To conclude, Mr. Serge Lazareff's acknowledgment of the value of the will of the Alliance, both collectively and individually among its member States, to make the SOFA work in practise remains valid and relevant. In the daily application of these agreements, and this extends particularly to the Paris Protocol, it is equally important that this practise is consistent with the norms in public international law as they relate to international organisations. This approach is reflected in the Supplementary Agreements concluded to implement and complement the Paris Protocol. In turn, International Military Headquarters must provide good management and stewardship of the entitlements granted to them and their staff by virtue of the Paris Protocol and the Supplementary Agreement. This will serve to facilitate coordination and the necessary partnership with the host State to ensure the effective functioning of NATO International Military Headquarters.

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<sup>17</sup> 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, done in Brussels on December 19, 1997.

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SACEUR Eisenhower signing the activation order for SHAPE  
[www.aco.nato.int](http://www.aco.nato.int)

## **Memorandum Of Understanding (MOU): A Philosophical and Empirical Approach (Part I)**

By Andrés B. Muñoz Mosquera<sup>1</sup>  
*Dedicated to Thomas E. Randall*

### **Introduction**

The increased use of MOUs and the alleged uncertainty surrounding their relation with international law is, without a doubt, a quite stimulating debate among the ranks of practitioners and academia. The MOU's status, as well as its foundational principles, normativity, characterisation and legal effects, inter alia, are topics that internationalists have a duty to analyse under philosophical and empirical terms. States have developed a practice

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\* This article is a summary of a thirty-page manuscript submitted to the *European Journal of International Law* titled: "Memorandum of Understanding (MOU). The Law of the Partner-Specific Community", which can be made available per request.



in cross-border cooperation that relies more heavily on MOUs. On the other hand, international institutions, in the exercise of their legal personality, have fostered, by means of their implied powers, an intra- and inter-institutional practice that uses MOUs as a prominent instrument. This situation takes place at a time when official commitments can trigger unexpected legal effects regardless of the existence of specific international instruments in either a universal or a partner-specific community context. Be that as it may, and without questioning the non-binding nature of MOUs, any argument predicated on their exclusion from (the practice of) international law takes a reductive view. This view, in principle, denies the reality of an international relations phenomenon that is the product of the creative natural dynamics of treaty law and international institutional law.

A notable number of commentators, from an epistemological standpoint, have already assessed MOU as non-binding agreements. Some of them have analyzed this instrument<sup>2</sup> as an informal agreement, others as a gentlemen's agreement, and others yet as informal law<sup>3</sup> (IN-LAW),<sup>4</sup> etc. All the commentators have analysed MOUs with the understanding that this phenomenon has increased exponentially since the end of WWII, with major peaks after the fall of the Berlin Wall. Until very recently, most international lawyers, especially in academia, have denied that MOUs have a legal reality. They asserted MOUs to have only political effects. On the other hand, publicists have not approached MOUs from an international institutional law standpoint. Thus, MOUs' role as rules (internal and external) of international institutions has been left unexplored. This paper intends to address the apparent dichotomy between the political and legal reality of MOUs as well as their place within institutions' rules. The prophets of said dichotomy seem to have found sanctuary in the cosy haven of voluntarily ignoring the dynamics of international law and its malleability. The "new"<sup>5</sup> emerging forms of international cooperation cannot be strange to international law; otherwise this discipline has to be considered defunct awaiting a royal and pompous

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<sup>2</sup> The word "instrument" has been used in this study as a useful term to denote every written type of treaty or international agreement, without regard as to whether, in any particular case, such an "instrument" is a "treaty" or 'international agreement' within the meaning of Art. 102 of the Charter. Michael Brandon, 'Analysis of the Terms "Treaty" and "International Agreement" for Purposes of Registration under Article 102 of the United Nations Charter', 47 AJIL (1953), at 49.

<sup>3</sup> "Cross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (*process informality*), and/or as between actors other than traditionally diplomatic actors (such as regulators or agencies) (*actor informality*) and/or which does not result in a formal treaty or other traditional source of international law (*output informality*)" in Joost Pauwely, 'International Law Lawmaking: Framing the Concepts', in Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds), *Informal International Law Making* (2012), at 22.

<sup>4</sup> The Global Administrative Law Research Project at New York University School of Law (GAL) has not been analyzed in this paper as its scope covers legally binding instruments as GAL systematizes studies in diverse national, transnational, and international situations related to the administrative law of global governance.

<sup>5</sup> "What has been will be again, what has been done will be done again; there is nothing new under the sun." Koelech/Ecclesiastes 1:9.

burial. There is a mistake in this short-sighted appraisal: some internationalists tend to look at international law from the formalist approach and lead international law, with discouraging and somehow despairing arguments, to a certain paralysis. Lurking behind a combination of international relations and international law arguments regarding the legal nature of MOUs and their effects, one finds a reflection of the fundamental divides over the nature of international law itself. Finally, the MOUs' function in international institutional law needs to be incorporated in this debate. As an indication of the approach of this paper, it is worth quoting Ingo Venzke: "International law opens up spaces in which particular normative convictions and political projects can compete."<sup>6</sup>

### **Current Status of MOUs**

MOUs are, in the context of this paper, non-binding agreements, which is not the same as affirming that they do not have a legal effect whatsoever. The reason for using the term MOU in this paper is not for purposes of categorising or naming all other sorts of non-binding agreements, but rather out of a personal conviction that this topic needs to be approached following the *lex parsimoniae* and because most international organisations (including NATO) have developed an extensive practice in the last fifteen years for instruments that create legitimate expectations among their participants. Moreover, the term MOU should not be construed as reflecting an epistemological study of international agreements addressing differences between MOUs and treaties, but simply as a pragmatic and functional approach.<sup>7</sup> MOUs are used by states in their cross-border relations, within or outside international organisations, when dealing with the development of technical questions that permit to fulfil international obligations established by previous treaties or conventions.

On the other hand, determining the status of an MOU is clearly not just a matter of the term itself. We can say upfront that MOUs are not treaties if the parties clearly intended that it would not be legally binding on them. This does not detract the existence of good faith<sup>8</sup> or, in spite of some commentators' arguments, the principle of *pacta sunt servanda*, as this is a basic variable in the equation of the existence of international law that permits that states be the judges in disputes with other states. This raises the question if the signatories<sup>9</sup> consider the MOU provisions to be *sans portée*

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<sup>6</sup> Ingo Venzke, *How Interpretation Makes International Law. On Semantic Change and Normative Twists* (2012), at 223.

<sup>7</sup> Andres B. Munoz Mosquera, *International Law and International Relations, the Stepsisters* (2007), at 61-64.

<sup>8</sup> Michele Virally, 'Textes internationaux ayant une portée juridique dans les relations mutuelles entre leurs auteurs et textes qui en sont dépourvus', 60 *Annuaire de l'Institut de Droit International* (1984) II, at 228.

<sup>9</sup> The terms signatories and participants are used interchangeably for indicating the constituents of an MOU. It is true that in certain situations the signatories are not exactly as the participants, for the latter carry responsibilities related to providing resources (mainly budget and personnel), something a

juridique (have any legal effect) or if concluding a non-binding agreement “means simply that non-compliance by a party would not be a ground for a claim for reparation or for judicial remedies.”<sup>10</sup> Stated differently, if an international agreement, such as an MOU, is concluded, the participating state, as represented by the signing agency, is generally undertaking commitments with a potential legal effect.<sup>11</sup> In this regard, reputed internationalists have insisted on the legal status of non-binding agreements because “... any agreement that creates an obligation must, by definition, be legal” (Reuter, 1972: 44); “... if a document that is not a treaty nonetheless commits the parties involved, the all texts may constitute agreements” (Chayet, 1957: 5-6); “... it is meaningful to speak of politics and not just legal obligations” (Fawcett, 1954; Schachter, 1977).<sup>12</sup>



[www.nato.int](http://www.nato.int)

In the case of NATO, where the cooperative relationship is the glue of its collective defence maxim, MOUs could be considered key enablers for reaching the joint objectives and commitments set up on 4 April 1949.<sup>13</sup> On this note, it is necessary to say that, while there is much voluntariness in the implementation of MOUs, it is also true that the principle of reciprocity applies equally with a strength not seen in other contexts; this principle links the future actions of the MOU participants indicating that “a greater degree of commitment is intended.”<sup>14</sup> To establish the status of an MOU, it is critical to

signatory may not.

<sup>10</sup> Oscar Schachter, ‘The Twilight Existence of Nonbinding International Agreements’, 71 AJIL (1977), at 296.

<sup>11</sup> Note that since the North Atlantic Treaty was signed in 1949, NATO has updated its Strategic Concept by means of summits, which have led the organization to several reorganizations since 1999. These reorganizations have required the creation of new concepts for NATO members’ collective defense, which have in turn necessitated the conclusion of more than 500 non-binding agreements in areas subordinated to the command of the Supreme Allied Commander Europe, most of them in the form of MOUs. These NATO non-binding agreements have all created political commitments that have provoked among the participants either “... an internal or administrative response.” (this quote on ‘response’ is from Schachter, 303).

<sup>12</sup> Raymond Cohen, ‘Rules of the Game in International Politics’, 24 International Studies Quarterly (1980) 1, at 135.

<sup>13</sup> North Atlantic Treaty, also known as the Washington Treaty. Eventually the Charter of the United Nations as the North Atlantic Treaty is established based on it, in particular on its Article 51.

<sup>14</sup> Paraphrasing Hartmut Hillgenberg, ‘A Fresh Look at Soft Law’, 10 EJIL (1999) 3, at 507.

examine the intention, the circumstances of negotiations, and the conclusion of an MOU, together with the behaviour of the signatories during and after its conclusion. It is very common to encounter contending positions between MOU negotiators with respect to incorporating a clause explicitly stating that the MOU is not subject to international law. There is not a peaceful practice addressing this issue and it is normally solved by attaching "statements of interpretation"<sup>15</sup> to the MOU or by quoting domestic law references in the signature block of the state wishing to include such a reference. This occurs vice versa when a state considers MOUs ruled by international law.<sup>16</sup> In the MOUs governing the nation-provided NATO Centres of Excellence, the following pro-forma provision is used with respect to notification: "The Participants whose national laws or obligations under international law are affected will notify the other Participants in writing, including HQ SACT."<sup>17</sup>

MOUs are not exempt from certain and non-immediate<sup>18</sup> legal effects. In order to address the question of MOUs and responsibility derived from them, it is necessary to recall what Aust states<sup>19</sup> on the fact that an MOU is considered, in many occasions, a subsidiary or subsequent agreement per Article 31(2)(a)<sup>20</sup> of the 1969 Vienna Convention of the Law of Treaties (VCLT). In these cases, the authority that approved the specific MOU, and the surrounding circumstances such as the purpose and scope of the MOU, along with the overall objectives and commitments defined in the MOU and in the framework agreements will all be key to study its potential legal effects with respect to the legitimate expectations created among the MOU participants.

Using Guzman's pattern of his definition of soft law,<sup>21</sup> with the clear understanding that it is not the intention to argue for or against considering MOUs as soft-law, we can define them as those non-binding rules or instruments based on the principle of good faith that interpret, inform, implement or supplement binding legal rules or represent assurances that in turn create expectations about future conduct or behaviour.

<sup>15</sup> These "statements of interpretation" usually make reference to the domestic law or by-laws of the signatory providing it.

<sup>16</sup> Many European countries have constitutional and/or law mandate to have parliamentary approval for agreements, including MOUs, when they imply financial liabilities for the Public Treasury.

<sup>17</sup> Section 8.2 "Legal Considerations" of the MOU Among the Ministry of Defence of The Republic of Bulgaria as well as Headquarters, Supreme Allied Commander Transformation concerning the Functional Relationship regarding the NATO Crisis Management and Disaster Response Centre of Excellence.

<sup>18</sup> This idea of "non-immediate obligations" is taken from Eisemann. Pierre M. Eisemann, 'Le Gentlemen's agreement comme source du droit international', 106 *Journal du droit international* (1979), at 347.

<sup>19</sup> Anthony Aust, *Alternatives to Treaty Making: MOUs as Political Commitments*, at 62.

<sup>20</sup> "... any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty ... "; and Article 31(3)(a): " ... any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions the conclusion of the treaty."

<sup>21</sup> Andrew T. Guzman and Timothy L. Meyer, 'International Soft Law', 2 *JLA* (2010) 1.



On the other hand, we can also list a series of features that also help understanding MOU's characterisation:

- a) Contrary to treaties, MOUs are not ruled by "traditional" international law in all its extension, and are still a "primitive option"<sup>22</sup> of international law;<sup>23</sup>
- b) they create legal commitments with non-immediate legal effects in the form of internal and administrative acts within the states' administration(s), while conserving their status as non-binding agreements;
- c) MOUs tend to use a different language than that normally used within treaties;
- d) they are as valid for bilateral undertakings as for multilateral ones;
- e) they have a legal form;
- f) they may provoke changes in the internal legal bodies of their participants;
- g) MOUs may be internal and external rules of international institutions;
- h) they may be internal rules with external effects;
- i) they can be very explicit on the responsibilities of the signatories or extremely ambiguous;
- j) they are the result of formal negotiations among appointed officials and it is impossible to differentiate them from treaty negotiations;
- k) internal ratifications is an independent prerogative of the participants;
- l) notifications take place more often than expected;
- m) MOUs are concluded by properly delegated authorities of recognized subjects of international law; etc.

### **Bona Fides MOU Fundamentum Est**

In international law the principle that good faith prevails is paramount, and is described in international relations as "... idea[s] of community, tolerance, and trust, the basic prerequisites for the development of international law."<sup>24</sup> Since there is not an "international treaty-compliance

<sup>22</sup> "idea of community, tolerance, and trust, the basic prerequisites for the development of international law." In David Bederman, *International Law in Antiquity* (2001), at 137.

<sup>23</sup> " ... Hart regards ....[i]nternational law which, in his opinion, is primitive requires only individual recognition of each norm as a legal norm. Gidon Gottlieb and Friedrich V. Kratochwil find evidence of such acceptance in the fact that international actors feel bound by such norms or have recourse to them without questioning them or giving reasons for their validity." References made to these authors are: H.L.A. Hart, *The Concept of Law* (1961), at 229; Gootlieb, *The Nature of International Law: Towards a Second Concept of Law*, in CE. Black. ILA. Falk (eds), *The Future of At International Legal Order* (1972), at 365; and Kratochwil, *Is International Law, "Proper" Law*", LXIX *Archiv. fur Rechts – und Sozialphilosophie* (1983), 13, at 38 et seq. This has been taken from Ulrich Fastenrath, 'Relative Normativity in International Law', *EJIL* (1993) 4, at 308.

<sup>24</sup> David Bederman, *International Law in Atiquity* (2001), at 137.

police", good faith<sup>25</sup> underpins all cross-border relations among states or international organisations. Consequently, good faith becomes an important feature for MOUs as it is for treaties, which requires an understanding of why it is a key element in international relations.

Yet, even if they place an "element of non-commitment into the commitment",<sup>26</sup> MOUs permit the transformation of the non-commitment into a de facto commitment. This can apparently be seen outside of the principle of *pacta sunt servanda*, but legal effects may be created out of expectations. Therefore, it is easy to appreciate that de jure or de facto commitments are rooted in the principle of good faith, with moral and positive legal obligations for the signatories when contextualised in the framework of treaties.<sup>27</sup> There are also consecutive individual and collective political decisions in the form of statements<sup>28</sup> or conduct. In this manner, the *rebus sic stantibus* principle,<sup>29</sup> with respect to the framework instrument(s), remains safe and leads to a proper and clean implementation of international law. Consequently, a different understanding from that which is explained above would make MOUs non-functional and pointless; this is clearly not the case, as states and international organisations resort to them when framework treaties need to be developed or implemented, and they carry the essential message of their drafters.

In any case, the legal effects,<sup>30</sup> in terms of rights and obligations, will depend on the principle of immediacy; i.e., the international obligation of the MOU signatories will not be immediate, as they have not signed a treaty. If they had, all existing customary and positive mechanisms would have immediately come into effect to satisfy an impugning signatory. Therefore, participants to an MOU would have to either use the autonomous mechanisms expressed on the MOU provisions to satisfy a signatory's discontent or require specific discussions [consultations] among the signatories to address a breach of the MOU and potential repercussions on

<sup>25</sup> In this regard, Michel Virally reflects the following in results of the 7<sup>th</sup> session of the International Law Commission at Cambridge 1983 (Section 6): '*L'État ayant souscrit un engagement purement politique est soumis à l'obligation générale de bonne foi qui régit le comportement des sujets du droit international dans leurs rapports mutuels.*' at 228.

<sup>26</sup> M. Glennon, *Constitutional Diplomacy*, (Princeton: Princeton University Press, 1990), at 214.

<sup>27</sup> See footnote 12

<sup>28</sup> Note North Atlantic Council Summits' declarations and its Strategic Concept(s) together with collective decisions taken at 28 at the Military Committee that develop means for running activities, developing procedures, disposing military units and assets (transfer of authority) in support of Article 5 and non-Article 5 operations.

<sup>29</sup> The principle in international law that where there has been a fundamental change of circumstances, a party may withdraw from or terminate a treaty.

<sup>30</sup> The principle of estoppel is reminded; it is superior to that of *pacta sunt servanda*, " ... which flow[s] from the same paramount principle—good faith." (Yearbook of the International Law Commission 1966, Vol. I, Part I., 95). On the other hand, Anthony Aust states that "[t]he exact scope of the international law doctrine is far from settled, but in general it may be said that where clear statements (or conduct) of one government lead another government bona fide and reasonably to act to its own detriment, or to the benefit of the first government, then the first government is estopped from going back on its statements or conduct."

framework treaties. Thus, the breach of MOU provisions would not immediately and necessarily be a breach of state responsibility.

The Charter of the United Nations has recognised the principle of good faith as a key principle in positive law. Its Article 2(2)<sup>31</sup> explicitly shows that good faith is of relevant importance in international relations. As discussed at the International Law Commission: "In the absence of good faith, no procedural safeguards could ensure the observance of international law, and force would dominate international relations."<sup>32</sup> This explains the necessary relation between both paragraphs of Article 2 and the need to understand that MOUs may have legal effects. Thus, contrary to Kelsen's theory, and in spite of his postulations claiming that the Charter does not establish any kind of sanction for breaching good faith, good faith<sup>33</sup> is more than a moral principle in MOUs.

On the other hand, we cannot disregard that the above leads us to question if MOUs are or are not part of international public law. Alleging that MOUs are not part of the international public law whatsoever is reckless, given the empirical evidence of state practice. Pauwelyn sheds light on this idea, announcing that informal law "dispenses with certain formalities traditionally linked to international law",<sup>34</sup> but definitely without "[being] legally binding under international law that it does not constrain or affect individual [state's] freedom ... [t]raditional international law, based on state consent, does not have a monopoly on legitimate cooperation."<sup>35</sup> Be that as it may, MOUs present the evolving dynamics of international law and its underdeveloped character. Even so, MOUs are not intended to enter in conflict with treaties, nor do they take their place in international relations. MOUs simply represent new options for international relations and international law. This brings us to the debate opened by the newly-developed concept of 'international common law', which helps to describe how international law evolves, and clarifies the doctrinal distinction between binding and non-binding agreements. In spite of this, we cannot disregard the significant role the norms resulting from the development of non-binding agreements play in understanding of how norms and rules are created.<sup>36</sup> In fact, MOUs bring

<sup>31</sup> "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter." Note also, with respect to NATO, the reference made to Article 2(2) and Article 51 in Andres B. Munoz Mosquera, 'Respect versus Obey: When the longstanding debate needs to be seen under the Receiving State's International Law Obligations,' NATO Legal Gazette (2012) 29, at 32.

<sup>32</sup> Yearbook of the International Law Commission 1966, Vol. I, Part I., 83. Accessed July 22, 2013.

<sup>33</sup> Tariq Hassan, 'Good Faith in Treaty Interpretation', Virginia Journal of International Law (1980-1981) 21, at 445.

<sup>34</sup> Joost Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions' in Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds), *Informal International Law Making* (2012), at 15.

<sup>35</sup> Joost Pauwelyn, Ramses A. Wessel and Jan Wouters, 'Informal International Lawmaking: An Assessment and Template to Keep it Both Effective and Accountable', in Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds), *Informal International Law Making* (2012), at 509-512.

<sup>36</sup> Andrew T. Guzman and Timothy L. Meyer, 'International Soft Law', 2 JLA (2010) 1, at 212.

flexibility or actually grease the unmovable rigidity of international law within the context of state responsibility.

Finally, the development of international law is historically based on the ideas of community, tolerance and trust. Bederman affirms, we suggest, that MOUs are more in line with the way Egyptians, Hittites, Greeks, Romans and others approached cross-border relations via the simple understanding of international relations mechanics. Thus, MOUs would simply be a 'back-to-the-future' option for post-Westphalia international law practitioners and this at a time when the Vienna Law of Treaties Convention concepts seem to have reached, at least in an interim manner, Fukuyama's *The End of History* [and the Last Man]. Currently, MOUs present themselves either as a practical alternative continuing cross-border engagement without aspiring to replace treaties and as a legitimate and effective option contributing to the inherent dynamism of 'an' international law that enjoys still a primitive taste.

### **International Norms and MOUs**

Cross-border relations have, since ancient history, required a minimum set of principles that, in accordance with Dworkin, are more standards than actual precise rules.<sup>37</sup> These principles and conventions are inherent to all systems, and international relations cannot escape these standards.

We need to recognise that an ad-hoc spirit is the dominating norm, and that norms have an intangible nature that necessitates observing their existence through different instruments. Regardless of whether we choose vertical or horizontal typologies, the empirical reality of MOUs is that legal positivism does not exclusively produce norms and rules. MOUs play an increasingly significant role in the creation of partner-specific norms as instruments providing, via written international agreements, principles, understandings, formulations and interpretations of rules. Therefore, we can affirm that MOUs, as technical agreements, are enablers that permit the fulfilment of specific actions.<sup>38</sup> As Cohen states, "norms are more frequently partnership-specific than actor-universal",<sup>39</sup> which is a key dimension of the domain of the applicability of norms. This phenomenon is easy to observe due to the significant number of bilateral, regional and international organisations. Each of these are developing their own partner-specific norms and have the potential to surpass the partner-specific realm, thus allowing them to be considered by the other members of the international community<sup>40</sup> as

<sup>37</sup> Ronald Dworkin, *Taking Rights Seriously* (1977), at 78.

<sup>38</sup> John Rawls, 'Two Concepts of Rules', 64 *The Philosophical Review* (1955) 1, at 19-23.

<sup>39</sup> Raymond Cohen, Raymond Cohen, 'Rules of the Game in International Politics', 24 *International Studies Quarterly* (1980) 1, at 130-131.

<sup>40</sup> *Ibid.* Note that "the international community" taken from Prosper Weil, at 441, who cites De Visscher from Dupuy (*Leçon Inaugurale*, Paris: college de France, 1980), has to be understood as: "...est un ordre en puissance dans l'esprit des hommes; dans les réalités de la vie internationale elle en est encore à se chercher, elle ne correspond pas à un ordre effectivement établi."



peremptory norms or super-norms, albeit in small numbers. This appears to be the case of NATO Host Nation Support MOUs.<sup>41</sup> One may argue, however, that this happens at the price of major instability, and by differentiating “norms belonging to the elite in comparison with ordinary norms.”<sup>42</sup>

NATO's multilateral MOUs, for example, confirm that the MOU participants seek to execute an idea or a concept in harmony with the principles found in the framework treaties. This situation turns MOUs into standards of expected behaviour and, consequently, they become rules. In Dworkin's terminology, rules are either standards or nothing.<sup>43</sup> Be that as it may, when a valid rule applies, it is conclusive. This allows us to affirm that two valid and conclusive rules cannot conflict. Therefore, states and international organisations concluding MOUs will maintain coherence between primary and secondary rules, ensuring that they do not come into conflict with framework treaties. As a result, MOUs become normative standards with a defined scope and purpose, within which states manifest their interests and specific responsibilities. This philosophical approach proves itself valid only if we understand international norms as generalised standards carrying reasonable expectations, as rules do, and which therefore create the duty of obligation among “observants”, which eventually becomes normative. Consequently, treaties and MOUs are intended to create reciprocal behaviour that carries a gravitational normative nucleus.

Do we have to consider MOUs as “the law of the community” in a positivist manner? The answer is no, so long as we understand them as a “set of special rules used by the community directly or indirectly for the purpose of determining which behavior will be punished or coerced by the public power ... [t]hese special rules can be identified and distinguished by specific criteria, by tests...of pedigree...to distinguish valid legal rules from spurious legal rules... and also from other sorts of social rules that the community follows but does not enforce through public power.”<sup>44</sup>

Dworkin affirms that the law of a community, in the form of legal obligation, “might be imposed by a constellation of principles as well as by an established rule.”<sup>45</sup> The empirical case of NATO shows that MOUs are “operational arrangements under a framework international agreement...also used for the regulation of technical or detailed matters.”<sup>46</sup>

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<sup>41</sup> It is not difficult to identify NATO's MOUs construct established in the Host Nation Support Policy approved by the North Atlantic Council in that of the EU Battlegroups' Host Nation Support MOUs and follow-on documents, see paragraph 6 as well as in the EU Commission staff working document (SWD(2012) 169 final) on “EU Host Nation Support Guidelines” of 1 June 2012, see paragraph 9 and annex 11.

<sup>42</sup> Proper Weil, ‘Towards Relative Normativity in International Law’, AJIL (1983) 77, at 421-422, at 428.

<sup>43</sup> Ronald M. Dworkin, ‘The Model of Rules’, Yale Law School Legal Scholarship Repository (1967), at 24-25.

<sup>44</sup> Ronald M. Dworkin, ‘The Model of Rules’, Yale Law School Legal Scholarship Repository (1967), at 17.

<sup>45</sup> Ronald M. Dworkin, ‘The Model of Rules’, Yale Law School Legal Scholarship Repository (1967), at 45.

<sup>46</sup> NATO Legal Deskbook, 2nd edition, 2010, at 127.

Hoffmann's "law of the community" suggests that this type of law is related to "administrative rules States use to manage technical problems that cross their national boundaries."<sup>47</sup> Therefore, we could affirm, within a very narrow margin of error, that MOUs are "modest rules" in the normative system and create the expectation of certain behaviour among partner-specific actors (MOU participants). These actors cannot deny the existence of legal effects or obligations, and have individual responsibilities proportional to the MOUs' Gemeinschaftsgeist as well as to their inter-relational obligations derived from the treaty objectives they supplement or support. We need to insist that most non-binding MOUs are still strongly linked to framework treaties that permit the state or organisation to carry out their treaty goals and missions. These treaty goals and missions are continuously reinforced by decisions taken by the governing bodies.<sup>48</sup> Yet we need to agree with Dworkin that "a legal obligation exists whenever the case supporting such an obligation, in terms of binding legal principles of different sorts, is stronger than the case against it,"<sup>49</sup> something that it is difficult to deny if we take into consideration that which is explained above.

### **Potential Legal Effects of MOUs**

MOUs concluded within the NATO community are considered non-binding instruments. Within the framework of NATO treaties' privileges and immunities, however, they establish legal and financial responsibilities in support of the objective of the MOU by, inter alia, exempting the MOU agreed activities from taxes as well as duties and by enabling mechanisms to measure contributions proportionate to the MOU required budget in accordance with specific cost-shared formulas. In NATO practice, a Senior Committee usually governs the organisation created by an MOU in order to authorise and enable the activities of the MOU organisation and prepare the organisation's programme of work, plan and execute the budget, manage personnel, etc. The participants to an MOU agree to commit budget and personnel in order to fulfil the organisation's purpose and scope. This document originates from a "concept" developed by the NATO bodies in order to contribute to the goals of the organisation, and which ultimately honours the provisions of the North Atlantic Treaty and the Charter of the United Nations.

What would occur, in terms of legal effects, if one or more participants

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<sup>47</sup> Stanley Hoffmann, at 96-98.

<sup>48</sup> In NATO, MOUs are often used to execute or implement a concept issued by the Military Committee and the North Atlantic Council. It is also relevant to know that after the MOU is approved ad referendum among its participants, the Council may eventually grant the MOU organization international status per the relevant NATO treaties (Article 14 of the 1952 Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty). This does not allow for international funding, nor does it create any funder relations between the MOU organization and NATO Command Structure entities.

<sup>49</sup> Ronald M. Dworkin, 'The Model of Rules', Yale Law School Legal Scholarship Repository (1967), at 45.

decide not to contribute in accordance with the provisions of an MOU? If the decision to stop the contribution was done in accordance with the provisions of the withdrawal section of the specific MOU in question, nothing would happen. However, if the withdrawal is done contrary to the provisions of the MOU and, thus, dismantles the expectations of the other participants, the previously discussed *ut supra* principle of good faith is relevant to the possible legal effects. Aust reminds us<sup>50</sup> that paragraph 51 of the ICJ judgment of the Nuclear Tests case between France and Australia,<sup>51</sup> in which the Court states in which situations the behaviour of a state implies the intention to enter into legal obligations. In this case, the statements of France were “conveyed to the world at large ... “and”[i]t was bound to assume that other States might take note of these statements and rely on their being effective.” Besides, “... the actual substance of these statements, and ... circumstances attending their making” are elements that shed light on the legal effects of France’s statements. The judgment established that “[t]he objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effects.”

In light of the foregoing we can say that the participants of an MOU form a partner-specific community. Thus, their “statements” made via the MOU negotiations and its provisions relating to “responsibilities” are addressed to this community which have agreed to participate in the MOU. In this regard, the provisions of the MOU delineate responsibilities and constitute an undertaking having potential legal effects. Aust argues that “[t]he position may be that much stronger when a declaration is contained in a bilateral or multilateral instrument .... ,”<sup>52</sup> which is the case for MOUs. Along these lines, in the Frontier Dispute case between Burkina Faso and Mali,<sup>53</sup> the International Court of Justice stated that the mere existence of an agreement, regardless its form,<sup>54</sup> shows the clear intent of the participants to be bound by its provisions. We could even speak of MOUs as creating partner-specific norms that institute “*erga partner-specific-omnes*” rules, *omnes* understood here as restricted application only to the partners of the specific community. In other words, it is solely for the group of states that participate in the MOU to

<sup>50</sup> Anthony Aust, *The Theory and Practice of Informal International Instruments*, at 808.

<sup>51</sup> Eric Heinze and Malgosia Fitzmaurice, *Landmark Cases in Public International Law (1998)*, at 610.

<sup>52</sup> Anthony Aust, *The Theory and Practice of Informal International Instruments*, at 809.

<sup>53</sup> “The circumstances of the present are radically different. Here, there was nothing to hinder the Parties from manifesting an intention to accept the binding character of the conclusions of the Organization of African Unity Mediation Commission by the normal method: a formal agreement on the basis of reciprocity.” *Frontier Dispute case (1986)*, ICJ Reports (1986) 40, at 574.

<sup>54</sup> There is not an specific sentence addressed by the Court about the form of an agreement, but it is implicit in the judgment as the Court did not only gave consideration to the circumstances in which the Doha minutes were drafted, but also to other previous interaction between the two states that led the Court to approach the minutes as autonomous, which was considered an agreement between the parties by its own merits. See mainly of judgment 15 February 1995 of the case *Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (1995)*, ICJ Reports (1995) 24, 25, 29, 31 and 34, at 12 – 16.

formulate the legal effects of the agreed provisions within that restricted community.

Non-compliance of “*erga partner-specific-omnes*” rules do not cause direct legal effects in the case of non-observance. These effects are eventually manifested in the loss of opportunities for future initiatives, loss of prestige or reputation, loss of political trust, and also loss of international legitimacy. Therefore, if a situation arises in which a “sanction” could be imposed for breach of MOU provisions, the most realistic consequence would be related to the reputation of the ‘breaching’ participant, which is normally costless to enforce. Expectations created by the MOU are re-evaluated with respect to the state that has not honoured the MOU commitments; and, consequently, the situation in turn reinforces the value the remainder states’ place on compliance and encourages them to enter into future MOUs to ensure proper cooperation. Such formulas include stronger commitment mechanisms with major financial commitments, explicit legal effects, or, at minimum, higher expectations that the provisions will be honoured.

No treaty-like “sanctions” of any kind will be applied in response to a breach of MOU provisions; rather, this would be addressed at the lowest level possible. Ultimately, we could affirm that international responsibility operates “softly” for MOUs because, in principle, the MOU participants are already parties to the MOU framework treaties. Thus, any breach of a major treaty obligation would then entail the implementation of the classic responsibility mechanisms. Doubtlessly, this affects participants’ behaviour with respect to MOU commitments and, in turn, creates norms that become the rule of the partner-specific community. If we put the potential legal effects of MOUs in moral terms, Dupuy’s observations on the ICJ and the Corfu Channel case are illuminating. Therein, he refers to the ICJ’s affirmations since the Corfu Channel case where judges seem to reason from standards of the social morality of public order and less from observance of state practice.<sup>55</sup>

The legal effects, however, still remain unclear when a specific MOU develops capabilities that anticipate fulfilment of international obligations established by previous treaties or conventions.

## **Conclusion**

Typifying MOUs may be seen as a quest against treaties, but, as indicated supra, this paper’s intention is neither to distinguish between a treaty and an MOU nor to demonstrate that MOUs are binding agreements. The ultimate goal is to demonstrate empirically that MOUs have found their place within both international relations and international law.

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<sup>55</sup> Pierre Marie Dupuy, ‘L’Unité de l’Ordre Juridique International’, Cours général de droit international public (2000) taken from the recueil des cours, tome 297 (2002), Leiden: Martinus Nijhoff, 2003, at 184-185.



On the status of MOUs, we can affirm that their soul is the principle of good faith, which helps to create responsibilities and legitimate expectations among the MOU participants. Yet MOUs are non-binding instruments based on the principle of good faith: they still interpret, inform, implement or supplement binding legal rules or represent promises that in turn create expectations about future conduct or behaviour. In light of the above, MOUs are nothing more than a practical alternative that international relations can count on to continue supporting cross-border engagements. They are a legitimate and effective option in the dynamics of international law.

MOUs further provide principles, understandings, formulation and interpretation of rules, all of which bring them to the level of normative standards among the MOU participants, i.e., among those who are part of the partner-specific community. Moreover, since legal positivism does not have the exclusive role of creating partner-specific norms, MOUs play an increasing role in creating them. In some cases, they may surpass the partner-specific realm and become peremptory norms. Furthermore, considering MOUs as creators of partner-specific norms leads to their characterisation as 'erga partner-specific omnes' rules; i.e., those solely for the group of states that decided to join the MOU. These participants could claim within that restricted community the legal effects of the agreed provisions and consider MOUs internal and/or external rules of that community as well.

The legal consequences of breaching the provisions of an MOU and the legitimate expectations created are taboo topics. We cannot disregard, for due process' sake, that a court will consider the non-binding MOU as a de facto binding instrument in order to produce a judgement structured in a space-time from where substance and facts are ontologically related in a cause-effect manner. If a court does not take such a Kantian approach, it will deny justice a chance, as this is as much a part of a coherent system as that built by Dworkin in "Justice for Hedgehogs" where he integrates philosophical values, morals, ethics, politics and justice.<sup>56</sup>

In conclusion, MOUs are non-binding agreements that can only be approached from a functionalist standpoint, though always within the international law realm. On the other hand, although mainly focussed on technical questions, MOUs still require the satisfaction of legitimately created expectations whose breach may lead to legal effects. This may, in turn, lead down the path to an indirect breach of international obligations already established in framework treaties or conventions. This approach puts MOUs outside the positivist orthodoxy, which does not mean they are automatically excluded from international law. Rather, international relations would be short of a transformative, evolving and necessary "new international law" tool<sup>57</sup>, as

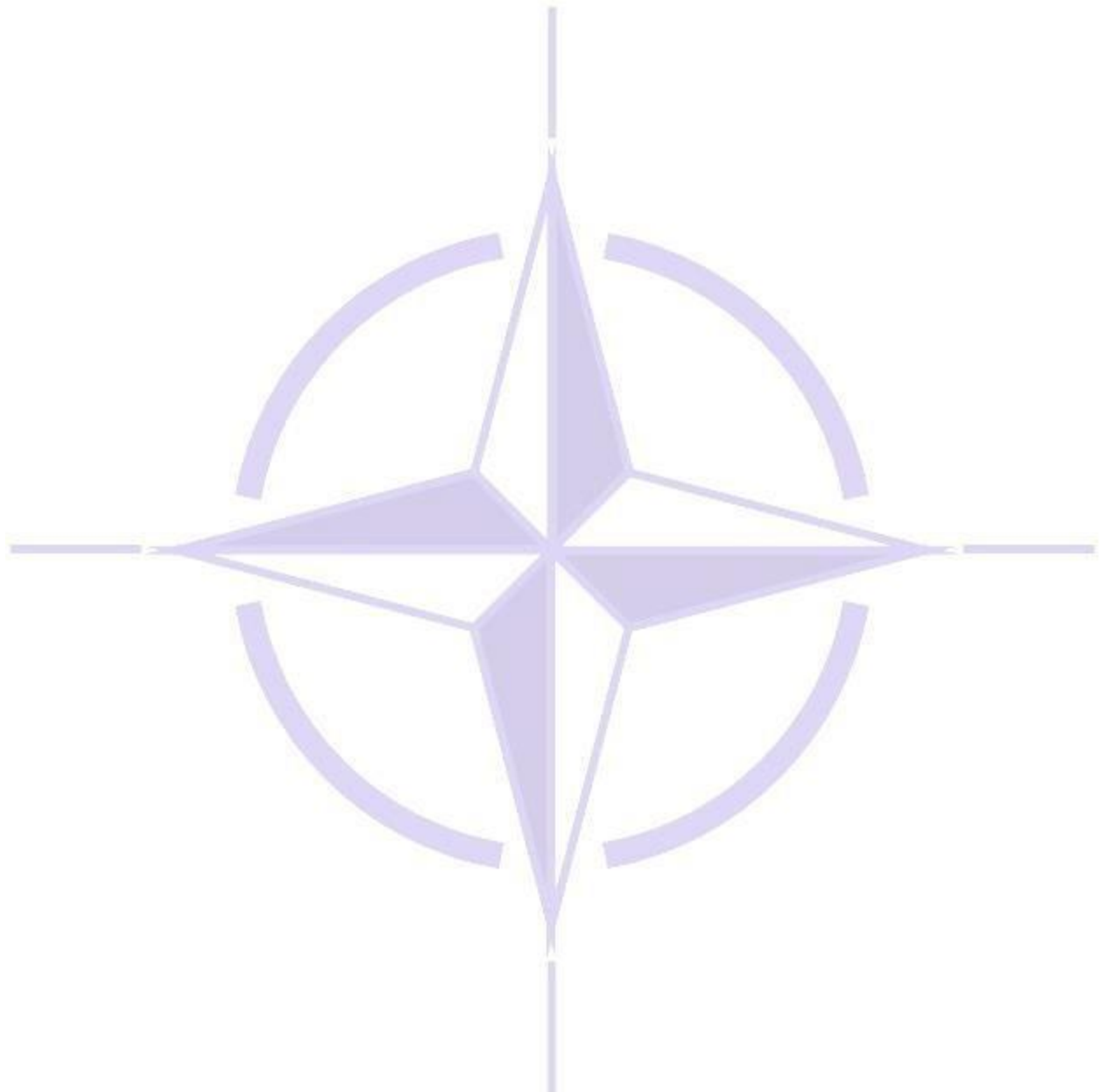
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<sup>56</sup> Ronald Dworkin, *Justice for Hedgehogs* (2011), at 1-15.

<sup>57</sup> Jack Goldsmith and Eric A. Posner, 'The New International Law Scholarship', 34 *GA.J.INT'L & COMP.L.* (2006) 126, at 482.

MOUs permit political commitments and legal effects to be created through partner-specific community normative standards. This would result in a dialogue that is naturally integrated in an easily recognisable coherent system.

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Excerpt from NATO Legal Gazette Issue 30 (May 2013), pag. 11-17

## **ALLEGATIONS, DENIALS AND INVESTIGATIONS – PREPARING FOR THE INEVITABLE–**

by Prof. Charles Garraway<sup>1</sup>

Many years ago as a very junior military legal officer, I assisted in the prosecution at a court martial of a case involving injuries to a child. The case was difficult but careful attention to detail led to a conviction. Towards the end of my military career, I was informed that the accused had filed an appeal based on 'new evidence' which suggested the possibility that the injuries had been caused during treatment of the child in a foreign hospital. I knew that we had investigated this possibility at the time, had obtained statements from doctors to the effect that this could not have occurred and that we had a signed admission from the accused accepting that evidence. The file was called for – only for it to be discovered that it had been destroyed some months before. It was impossible to trace – or even identify – the doctors and so the appeal was allowed, and the conviction was overturned.

Around the same time that this occurred, Tony Blair, Prime Minister of the United Kingdom, created the Saville Inquiry in 1998 to establish a definitive version of the events in Northern Ireland of Sunday 30 January 1972, otherwise known as 'Bloody Sunday'. On that day, 13 civilians were killed after British soldiers opened fire on demonstrators.<sup>2</sup> A frantic plea went round the Ministry of Defence for any files relating to that period in Northern Ireland. My office, like many legal offices, kept old files and so I was able to produce a few (though I am not sure that any were directly relevant to the events of 'Bloody Sunday'). However, soon afterwards, my office moved into the new 'paperless' Ministry of Defence Building and all our paper files were sent to be archived. Now everything was to be electronic. I am not sure whether those Northern Ireland files could ever have been recovered from an electronic archive because that would have required a better recording system than then existed – and the abilities to ask the right questions to identify the files.

We live in an age of inquiries, both national and international. I have to declare an interest here as a Vice President of the International Humanitarian Fact Finding Commission (IHFFC) established under Article 90 of the 1977 Additional Protocol I to the 1949 Geneva Conventions. In 1977, the need for an independent body to investigate violations of the law of armed conflict

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<sup>1</sup> Charles Garraway is a Vice President of the International Humanitarian Fact Finding Commission. As a Lieutenant Colonel in the UK Armed Forces, he served at SHAPE from 1984 to 1987 as Assistant Legal Advisor.

<sup>2</sup> For the website of the Saville Inquiry, see <http://webarchive.nationalarchives.gov.uk/20101103103930/http://bloody-sunday-inquiry.org/>

was recognised and the Commission was finally established in 1991 after the necessary number of States had accepted its competence. Unfortunately, the somewhat complicated method by which States can activate the Commission appears to have discouraged such activation and it has never been used.<sup>3</sup> Does that mean that there has been no need for factfinding? Au contraire! Particularly since the end of the Cold War, inquiries have become commonplace.

The United Nations, often through the Human Rights Council (formerly Human Rights Commission), has established numerous *ad hoc* inquiries into such diverse situations as Darfur, Lebanon, Gaza and Libya. Even the European Union has joined in with the "Tagliavini Report" into the Russia-Georgia conflict.<sup>4</sup> In addition, we are observing an unprecedented development of international criminal law with the establishment of the various "ad hoc" international criminal tribunals and the International Criminal Court itself. Fact finding has become almost flavour of the month. NATO, as one of the major players on the international scene, naturally has not been immune from this trend. As NATO's role has changed, so it has become increasingly involved in operations. It was a surprise to many – though not to the lawyers – when the then Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Carla del Ponte, confirmed that the Tribunal had jurisdiction over the actions of NATO during the 1999 Kosovo air campaign, Operation Allied Force, and established a committee to review the NATO bombing campaign. That committee duly reported and recommended that no investigation be commenced by the Office of the Prosecutor in relation to the NATO bombing campaign or incidents occurring during the campaign.<sup>5</sup> However, a more detailed reading of the report indicates that this was not the complete exoneration that some may have hoped for. The Committee looked at five specific incidents which in their view were the 'most problematic'. The Committee decided that none of these required detailed investigation by the Office of the Prosecutor. However, in the recommendations<sup>6</sup>, the Committee noted that when the Office of the Prosecutor requested NATO to answer specific questions about specific incidents, the NATO reply was couched in general terms and failed to address the incidents themselves. There the matter rested although Amnesty International publicly stated that some of the NATO actions amounted to war crimes.<sup>7</sup> Indeed, the Independent International Commission on Kosovo in The Kosovo Report stated:

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<sup>3</sup> For an outline of the role and history of the IHFFC, see Charles Garraway, 'The International Humanitarian Fact-Finding Commission', *Commonwealth Law Bulletin*, Vol.34, No.4, December 2008, 813-816.

<sup>4</sup> The full report can be accessed at <http://www.ceiig.ch/Report.html>

<sup>5</sup> See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, accessed at <http://www.icty.org/sid/10052>.

<sup>6</sup> *Ibid*, para.90.

<sup>7</sup> See Amnesty Report 'NATO/Federal Republic of Yugoslavia, "Collateral Damage" or Unlawful Killings?



'The Commission accepts the view of the Final Report of the ICTY that there is no basis in the available evidence for charging specific individuals with criminal violations of the Laws of the War during the NATO campaign. Nevertheless some practices do seem vulnerable to the allegation that violations might have occurred and depend, for final assessment, on the availability of further evidence.'<sup>8</sup>

The door was left invitingly open.

Again, in relation to Libya, Operation Unified Protector led by NATO, the United Nations established an Inquiry headed by three eminent jurists, Cherif Bassiouni, a leading Egyptian human rights expert who teaches law at DePaul University in Chicago, Asma Khader, a former Jordanian Minister of Culture who founded a local human rights group and Philippe Kirsch, a Canadian who was the first President of the international Criminal Court. The Commission interpreted its mandate to include the actions of NATO and, in its report dated 8 March 2012, stated:

'The Commission concluded that North Atlantic Treaty Organization (NATO) conducted a highly precise campaign with a demonstrable determination to avoid civilian casualties. On limited occasions, the Commission confirmed civilian casualties and found targets that showed no evidence of military utility. The Commission was unable to draw conclusions in such instances on the basis of the information provided by NATO and recommends further investigations.'<sup>9</sup>

The Commission had looked in particular at five airstrikes where a total of 60 civilians were killed and 55 injured.<sup>10</sup> The Commission also investigated two NATO airstrikes which damaged civilian infrastructure and where no military target could be identified.<sup>11</sup> They found:

'The Commission is unable to conclude, barring additional explanation, whether these strikes are consistent with NATO's objective to avoid civilian casualties entirely, or whether NATO took all necessary precautions to that effect. NATO's characterization of four of five targets where the Commission found civilian casualties as "command and control nodes" or "troop staging areas" is not reflected in evidence at the scene and witness testimony. The Commission is unable to determine, for lack of sufficient information, whether

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Violations of the Laws of War by NATO during Operation Allied Force', dated June 2000, accessed at <http://www.amnesty.org/en/library/asset/EUR70/018/2000/en/e7037dbb-df56-11dd-89a6-e712e728ac9e/eur700182000en.pdf>

<sup>8</sup> See Independent International Commission on Kosovo: The Kosovo Report, page 2, accessed at [http://sitemaker.umich.edu/drwcasebook/files/the\\_kosovo\\_report\\_and\\_update.pdf](http://sitemaker.umich.edu/drwcasebook/files/the_kosovo_report_and_update.pdf)

<sup>9</sup> Para.122 (p.21), Report of the International Commission of Inquiry on Libya, A/HRC/19/68, dated 8 March 2012, accessed at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A.HRC.19.68.pdf>

<sup>10</sup> Ibid, para.86 (p.16).

<sup>11</sup> Ibid.

these strikes were based on incorrect or out-dated intelligence and, therefore, whether they were consistent with NATO's objective to take all necessary precautions to avoid civilian casualties entirely.'<sup>12</sup>

Again the door was left invitingly open.

The two letters sent by the NATO Legal Adviser, Peter Olson, to the inquiry are attached at Annex II to the Report. Both make one very pertinent observation. In his letter of 20 December 2011, Mr Olson stated:

'Allow me to note that many of the queries in the 11 November letter, and all or virtually all of those in the Annexure of your letter of 15 December, appear to involve issues of international humanitarian law. The mandate of the ICIL is to investigate violations of international human rights law.'<sup>13</sup>

In his letter dated 23 January, which provided substantive tactical information, Mr. Olson repeated this point. However, after accepting that NATO did not have the ability to carry out investigations on the ground in Libya, whereas other organisations did, he concluded by saying:

'If as a result serious questions arise with respect to NATO's conduct or understanding of the effects of its strikes, NATO is fully prepared to evaluate those questions and any new evidence that may be adduced.'<sup>14</sup>

Perhaps the door has now been deliberately fixed as open.

What conclusions can we draw from this? I think there are a number.

The first is that nothing is completed until everything is completed. As we saw from the national example that I gave at the beginning of this article relating to 'Bloody Sunday' in Northern Ireland, in politics and law, time is of little meaning. The trials at the ICTY continue decades after the wars in the Former Yugoslavia ended. Cases in national courts, and even international courts, continue to surface, even in NATO countries, where alleged victims seek compensation for actions taken (or in some cases, such as Srebrenica, not taken) by national forces, sometimes whilst under NATO command. An example of such a case before the European Court of Human Rights is of course that of *Bankovic*.<sup>15</sup> As NATO is an international organisation with concurrent privileges and immunities, it is far easier to target individual States whether in civil suits or under human rights legislation. However, one cannot rule out the possibility of suits against NATO, or certainly of further inquiries involving NATO, possibly years down the line.

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<sup>12</sup> Ibid, para.89 (p.17).

<sup>13</sup> Ibid, Annex II (p.26).

<sup>14</sup> Ibid, Annex II (p.36).

<sup>15</sup> *Bankovic v Belgium et al.*, (2007) 41 ILM 517.

This raises issues both for national Governments and for NATO itself. In order to defend such claims, as the United Kingdom Ministry of Defence found in relation to 'Bloody Sunday', it is necessary to have the relevant documents available for examination and analysis. This means an adequate and accurate archive system. Not only must documents and other archival material be properly stored but they must also be capable of retrieval. In some ways this is easier in an electronic age but the sheer amount of material available provides a challenge in itself. I am not an expert in computers and computer systems and therefore can only point out the need – not how this can be achieved.

A further issue is that there is a marked – and often unappreciated distinction – between law of armed conflict fact finding and that conducted under human rights auspices. Perhaps I can give an example from an experience of my own during a fact finding commission of which I was a member (not, in this case, the IHFFC).

In country A, there were a number of civilian factories that had been attacked from the air by the forces of country B. A number of human rights bodies looked at the factories, could find no military link and therefore pronounced that these were 'indiscriminate attacks' and thus as such, constituted war crimes. My Commission also examined these factories and found the same facts. In human rights terms, the position seemed clear. However, we also found that the relevant factories had been attacked at night (indicating that precautions had been taken to protect the civilian work force and minimise civilian casualties). In addition, country B had used very expensive precision guided munitions, not 'dumb' bombs. This indicated that these were high value targets and not 'indiscriminate attacks' – unless they fell afoul of the proportionality rule. But the test there is to balance the **expected** incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof against the **anticipated** concrete and direct military advantage from the attack considered as a whole.<sup>16</sup> This could only be viewed from the perspective of country B. The result was to a certain extent irrelevant. Even if there had been substantial civilian casualties, if these could not have been foreseen or the anticipated military advantage was sufficiently high, that might not have been a breach of the law of armed conflict.

My point is that fact finding in law of armed conflict terms is different from human rights fact finding. In human rights law, one identifies the breach of the right and there is then an onus on the state to justify that breach. However, in the factory situation, without having further evidence, we could not even guess at whether there had been a breach of the law of armed

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<sup>16</sup> See Article 51(5), Additional Protocol I. The principle of proportionality lies at the heart of the law of armed conflict. For an interesting analysis of how it works in practice, see Michael Schmitt, Targeting and International Humanitarian Law in Afghanistan, 85 International Law Studies 307-339.

conflict and indeed the evidence that we had gathered tended to indicate otherwise. The vast majority of fact finding today is carried out under human rights principles. Whilst many seek to say that human rights law and the law of armed conflict are 'complementary', there are significant differences, particularly in the interpretation of proportionality and over issues relating to detention.<sup>17</sup>

My final point could be seen as self-serving but I make it nevertheless. Both the Kosovo Report and the Libya Report referred to the possibility of further investigations being carried out. In controversial circumstances, self-investigation will not be accepted. To date, both in the cases of Kosovo and Libya, NATO has been seen as, in the words of the Libya Inquiry, having conducted "a highly precise campaign with a demonstrable determination to avoid civilian casualties". Despite this, in both operations, there were individual incidents that caused disquiet. NATO may need to look at a way in which they can introduce a degree of independent oversight into such cases so that they can answer such criticisms. Whether this would be by using an *ad hoc* body of experts or by using in some form an existing international body such as the IHFFC is a matter for discussion. Nevertheless, sooner or later, a case will arise where, regardless of legal niceties over whether particular incidents are the responsibility of nation States or NATO as an international organisation, NATO will be accused before the bar of public opinion.

When looking back over the last twenty years and the new operational and legal environment, there is no doubt that the actions both of States and of international organisations such as NATO are coming under increasing scrutiny. Furthermore, some of the new operations are like slow-burning fuses and the full impact may not become apparent for years to come. It follows that two key areas need to be addressed by NATO. The first is the need to have an electronic record system in place, with a standardisation of electronic documents which would enable them to be recalled when needed. The second is to have a policy in place to deal with calls for external investigation into individual incidents occurring during operations.

I conclude with the admonition of Lord Baden-Powell, founder of the Boy Scout Movement, over one hundred years ago, but as apposite today as it was then, "Be prepared!"

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<sup>17</sup> See, for example on detention, Jelena Pejic, 'The European Court of Human Rights' *Al-Jedda Judgment: The Oversight of International Humanitarian Law*, *International Review of the Red Cross*, Vol 93, No.883 (September 2011) 837-851.



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## **Capturing NATO Knowledge through Information Management: Policy, Process, and Procedure**

by Catherine Gerth<sup>1</sup>  
Ineke Deserno<sup>2</sup>  
Dr. Petra Ochmannova<sup>3</sup>

### **Introduction**

Ensuring that the right information gets to the right people at the righttime is a challenge as old as mankind. As our communications technologies have developed, this mission has become both simpler and morechallenging.

The introduction of computers to the workplace also introduced a “Wild West” era of information and records. The more we decentralized our information creation, storage, and circulation (aka email), the less we controlled our holdings. Concurrent with this loosening of control over information holdings was a parallel demand for increased accountability, transparency, and access to information.

This brought significant financial and legal risk to organizations and impacted their ability to exploit their own information for their own benefit. As Lew Platt, former CEO of Hewlett-Packard, said: “If only HP knew what HP knows, we would be three times more productive.”

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<sup>1</sup> Catherine Gerth is the Head, Archives and Information Management (AIM), at NATO Headquarters, Brussels, and responsible for the on-going development and implementation of NATO's policy framework in the areas of records management and transparency. Prior to joining NATO in 2005, Ms. Gerth spent 15 years providing archives and records management support to war crimes prosecutions. Starting her career with the Department of Justice in Ottawa, Ms. Gerth moved to the International Criminal Tribunal for the former Yugoslavia in The Hague in 1995 where she managed information exploitation and archival projects in support of the investigation and prosecution of alleged war criminals. Ms. Gerth continues to provide ad hoc support to various human rights and humanitarian law efforts.

<sup>2</sup> Ineke Deserno is a professional archivist and records manager. She is the NATO Archivist. She has over 18 years of professional experience as an archivist and/or records manager at international organisations including World Health Organisation (WHO), International Olympic Committee (IOC) and the United Nations High Commissioner for Refugees (UNHCR). Through education at three leading schools of archival and information management studies, she obtained a strong theoretical background in archives and records management. She is currently completing a PhD study at Monash University, Australia.

<sup>3</sup> Dr. Petra Ditrichova (née Ochmannova) is a Legal Advisor in the International Law Department of the Ministry of Defence of the Czech Republic. At the time this article was published, she was posted as VNC at ACT SEE located in Mons, where she was working as Deputy Legal Advisor.

## **NATO and Information Management**

Information management is the discipline of marrying people, process, and technology to regain and maintain control of our information. It allows an organization to simultaneously exploit its information and comply with regulations that require accurate information. Correctly executed information management can save time, money, effort and embarrassment.

NATO did not begin to address its information management issues until 2005 when the Alliance embraced the NATO Network-Enabled Capability (NNEC), a networking and information infrastructure. At that point, it was discovered that NATO had only a rudimentary, security-centric information management framework that was out of step with legislation and practice in NATO nations.

Work began on information management policies, directives, and guidelines with three drivers: operations, partnerships and the need for interoperability. Today the main policies and directives are in place but implementation remains challenging.

### **Information Management Framework 2008-2013**

The centerpiece for NATO's approach to information management is the **NATO Information Management Policy (the NIMP)**.<sup>4</sup> Approved by North Atlantic Council in January 2008, the NIMP establishes the objectives of information management within NATO, the principles which govern it, and assigns responsibilities to a wide range of subjects.

From an organizational accountability perspective, the key principle in the NIMP is that information is a corporate resource. This means that it should be managed as such to support NATO's missions, consultations, decision making processes, and operational requirements by organizing and controlling information throughout its life-cycle regardless of the medium and format in which the information is held. For Heads of NATO civil and military bodies this means, that under this policy in particular, they are to identify and protect essential information to ensure the continuity of key services and operations.<sup>5</sup>

For practical operability, the NIMP is naturally supported by a number of policies, directives and guidelines that deal either with specific aspects of information management or with how information management will be executed within NATO. The majority of these documents are aimed at information management practitioners; however, there are several that are significant for the legal community:

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<sup>4</sup> C-M(2007)0118. NATO UNCLASSIFIED

<sup>5</sup> Ibid, Para 12, subpara e (2). NATO UNCLASSIFIED.

1. The NATO Records Policy<sup>6</sup>
2. Directive on the Management of Records Generated on Operational Deployment<sup>7</sup>
3. Directive on the Handling of Records during the Closure of a NATO Civil or Military Body<sup>8</sup>
4. Policy on Retention and Disposition of NATO Information<sup>9</sup>

The NATO Records Policy and two Directives came into effect as late as in 2011 and 2012, respectively. Unfortunately, prior to 2011 NATO had no policy that required NATO civil and military bodies to maintain records although there were a number of policies which presumed that records were being maintained. The Alliance implemented these policy frameworks in response to growing concern by NATO Nations about the potential negative consequences of information mismanagement.

### **NATO Records Policy**

The **NATO Records Policy**<sup>10</sup> establishes an essential framework for creating, managing and handling all documents related to NATO, including electronic documents such as videos, emails, etc. With rapid increases in technology, proper management and preservation of records is vital to ensure the ability of NATO and NATO nations to understand, learn from and account for Alliance actions.

The NATO Records Policy requires that NATO record and officially documents the actions and decisions of the Organisation.<sup>11</sup> The key goals of creating and keeping records are to document decisions, actions and operations; to provide accountability; to facilitate planning and decision making; to support policy formation; to protect the interests of the Alliance; and to preserve the organizational memory.<sup>12</sup> After reading this ambitious goal, one is not surprised that the definition of the “NATO record” is articulated so broadly to include *“information created, received, and/or maintained as evidence and information by NATO, in pursuance of legal obligations, NATO missions or in the transaction of business.”*<sup>13</sup>

To be able to fulfill such demanding goals, the Alliance had to be very clear about information ownership. For the first time the NATO policy expressly recognizes that the Alliance maintains ownership and authority over its holdings: *“All NATO records, regardless of form, medium or classification level,*

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<sup>6</sup> C-M(2011)0043. NATO UNCLASSIFIED.

<sup>7</sup> C-M(2012)0014. NATO UNCLASSIFIED.

<sup>8</sup> AC/324-D(2011)0002. NATO UNCLASSIFIED

<sup>9</sup> C-M(2009)0021. NATO UNCLASSIFIED

<sup>10</sup> C-M(2011)0043. This document is based upon the ISO Records Management Standard 15489. NATO UNCLASSIFIED.

<sup>11</sup> C-M(2011)0043, para 1 at 1-1 and definitions at 1-7. NATO UNCLASSIFIED

<sup>12</sup> C-M(2011)0043, para 9 at 1-2. NATO UNCLASSIFIED.

<sup>13</sup> C-M(2011)0043, para 1 at 1-1 and definitions at 1-7. NATO UNCLASSIFIED

are the property of the Alliance and are subject to the provisions of Articles VI and VII of the Ottawa Agreement and/or of Article 13 of the Paris Protocol".<sup>14</sup> This means that all NATO records are the property of the Organization and are included in the inviolable Archives of NATO HQ and the international military headquarters (IMHQ) of its two Supreme (Strategic) Commands.<sup>15</sup> At the NATO HQ level, the pertinent provisions are Article VI and VII of the Ottawa Agreement.<sup>16</sup> At the IMHQ level of SHAPE and HQ SACT and its subordinate commands, the pertinent provision defining the Archives as inviolable is Article 13<sup>17</sup> of the Paris Protocol. However, the scope of this article does not begin and end only at this level. One must be aware that inviolability extends beyond the Supreme Commands to the subordinate entities because of their derived legal personalities. Thus for example documents in paper or electronic form from the NATO Communication and Information Agency or the Joint Force Command Headquarters in Brunssum are all subject to the same records management and protection.

What does the inviolability of NATO records mean in practice? Inviolability is usually described as the total sanctity of documents.<sup>18</sup> It means that the authorities of the receiving State (the state where the inviolable archives are located) not only has no right to access them, but moreover that the State is actually obliged to protect such premises against unauthorized interference by others.<sup>19</sup> In plain words, all the documents related to these legal affairs are considered as NATO records, thus inviolable and exempt from any pertinent legal proceeding. This is absolutely valid for documents contained in the archives of NATO HQ. The inviolability of the records of the Supreme Headquarters is similarly protected in 13 of the Paris Protocol.

In terms of the protection of documents and archives the Ottawa Agreement and Paris Protocol are consistent with the traditional view of the legal establishment of international organizations. This inviolable immunity of NATO Archives is well accepted. However, it is important to recognize that international and national judicial bodies are more and more turning their attention to the immunities of international organizations. Although nowhere has the immunity of documents at Archives been challenged.

If fact, only the terms of employment and the treatment of international civilians by international organizations have been considered. At an international level, the pioneer questioning of the immunity of NATO occurred at the European Court of Human Rights (ECrHR) in its 2009 case *Gasparini v.*

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<sup>14</sup> C-M(2011)0043, para 11 (a) at 1-2. NATO UNCLASSIFIED.

<sup>15</sup> C-M(2011)0043, para 11. NATO UNCLASSIFIED

<sup>16</sup> Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, done in Ottawa on September 20, 1951

<sup>17</sup> Protocol on the Status of International Military Headquarters Set up Pursuant to the North Atlantic Treaty, done in Paris, August 28, 1952.

<sup>18</sup> D. Fleck ed., *The Handbook of the Law of Visiting Forces*, Oxford University Press, 2001, p.311.

<sup>19</sup> Amerasinghe – *Principles of the Institutional Law of International Organisations*, pp. 383 ff.



*Italy and Belgium*.<sup>20</sup> At the national level, in 2009 the Belgium Supreme Court (the Court of Cassation of Belgium) challenged the immunity of the Western European Union and then dealt with two cases involving General Secretariat of the African, Caribbean and Pacific Group of States.<sup>21</sup> In all three cases the Belgian Court of Cassation examined the question of immunity of international organization from legal proceedings.

Again, even though these proceedings did not challenge the inviolability of archives of the WEU or NATO they do serve as a cautionary precedent regarding international organizations' when primary issues are raised such as the right to a fair trial as established in Article 6 para 1 of the European Convention of Human Rights<sup>22</sup> and Article 14 para 1 of the International Covenant on Civil and Political Rights.<sup>23</sup>

### **NATO and Records Generated During Operational Deployment**

Since NATO's first major operation in the Balkans in the early 1990s (IFOR and SFOR), the number and diversity of NATO operations have increased. Currently 110,000 military personnel are operating in NATO-led operations in Afghanistan (ISAF), Kosovo (KFOR), the Mediterranean (Active Endeavour), and off the Horn of Africa (Operation Allied Protector). Moreover, NATO is a partner to AMISON, the African Union mission in Somalia.

Information generated during an operation is critical not only for a reliable assessment of the operation, both during the conduct and after the completion of the operation, but also to provide and support accountability at all levels. The operational records<sup>24</sup>, if properly maintained, are the only source that provides the required knowledge and allows for the protection of the Organizations' interests related to operations.

Similar to the general policy framework on NATO Records, the **Directive on the Management of Records Generated on Operational Deployment**<sup>25</sup> regarding operational records was not in place until 2012. The management of these records had been carried out in an ad-hoc fashion.<sup>26</sup> The significant

<sup>20</sup> ECrHR, application No. 10750/03, 12 May 2009, [www.rtdh.eu/pdf/20090512\\_gasparini\\_c\\_italie.pdf](http://www.rtdh.eu/pdf/20090512_gasparini_c_italie.pdf).

<sup>21</sup> More info at J. Wouters, C. Ryngaert, P. Schmitt, *Western European Union v. Siedler; General Secretariat of the ACP Group v. Lutchmaya; General Secretariat of the ACP Group v. B.D.*, ASIL, Vol. 105, No.3, 2011, pp.560-567.

<sup>22</sup> Convention for the protection of human rights and fundamental freedoms, as amended by protocols 11 and 14, 14 November 1950,

<sup>23</sup> International Covenant of Civil and Political Rights, 16 December 1966

<sup>24</sup> Operational records are defined in the Directive C-M(2012)0014 as "information created or received in the course of a NATO operation and maintained as evidence and information by NATO in pursuance of legal obligations, and the conduct of military or civil emergency operations"

<sup>25</sup> C-M(2012)0014, para 3. NATO UNCLASSIFIED.

<sup>26</sup> The IFOR and SFOR records for example were collected and managed by the IFOR/SFOR Historian. However this collection was not comprehensive and did not include all records generated during the deployment. At the end of the SFOR operation however the SFOR records were securely transferred to SHAPE, but the increasing complexity of the operations and the rapid improvements in technology demand a more comprehensive and sophisticated approach to the management of these records.

drive for developing this Directive was the wake of the Operation Unified Protector (OUP) and the anticipation of the transition of the ISAF operation.

Every nation has experienced a loss of operational records. Add multinational coalitions into the mix—where everyone thinks the others are keeping records—and you have the perfect opportunity to lose all traces of actions. The Directive seeks to prevent this scenario from happening in NATO-led operations.

From a legal perspective, the Directive makes it clear that records created by NATO and the NATO bodies governed by either Ottawa Agreement or Paris Protocol NATO bodies in the context of a NATO operations belong to NATO.<sup>27</sup> Whenever NATO is the originator of the information, the information owner, or the information custodian, that information shall be managed and preserved by NATO. Moreover, this Directive implements a similar approach for records created by Member nations during operations. An example of this is air operations where nations are providing NATO with information about their planes, flights, and operational requirements. In this case, even though NATO is not the proprietor of such operational records, it is still considered to be its custodian. This means that NATO is responsible [or has responsibility] for vis-a-vis the owner (originator of the information) to safe-keep and control. ISAF, where 50 different countries participated in NATO-led operations and 22 of them were Non-NATO Nations, showed the importance of the clear determination and description of ownership and custody. Moreover, establishing ownership is not only relevant to determine where the records reside post 2014, but also to control the classification and release of the information.

Another challenging issue is the long term access to digital records created during an operation. The Directive indicates that digital information needs to be kept accessible and readable throughout and after the conduct of an operation.<sup>28</sup> For example, in a digital environment, information is stored but its metadata and location is not always recorded, making discovery and proving the authenticity of a record (as evidence of an operational activity or decision) very difficult. For example, in ISAF, the most wide-spread form of communication is emails. Thus the value of emails in providing evidence of actions taken at the level of operational commanders and decisions taken as part of ISAF missions is significant. For that reason there are arrangements to ensure that even emails are properly stored and preserved.

### **Handling Records in the Event of Office Closure**

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See also: Ineke Deserno and Gregory Pedlow: NATO in the Balkans: Collecting and Managing the Operational Records of a Coalition, Auftrag Auslandseinsatz. Neueste Militargeschichte an der Schnittstelle von Geschichtswissenschaft, Politik, Öffentlichkeit und Streitkräften, ed: Bernhard Chiari (Freiburg, 2012)

<sup>27</sup> C-M(2012)0014, Para 11 subpara a), 1-3. NATO UNCLASSIFIED

<sup>28</sup> C-M(2012)0014. NATO UNCLASSIFIED

NATO—and every other organization, nation or corporation—has a long tradition of closing an office and throwing out the “old” files. This can lead to innumerable complications, particularly when it comes to legal and financial obligations. Decisions need to be taken on the disposition of information generated by the closing body. **The Directive on the handling of NATO records during the closure of a NATO Civil or Military Body**<sup>29</sup> was developed in response to lessons learned following the closure of the NATO Hawk Agency and in the anticipation of the NATO Command and Agency Reform. The directive applies to all NATO civil bodies and to the entities in NATO Command Structure and aims to ensure business continuity; smooth transition to successor organisations of active information; and appropriate end-of-lifecycle disposition of information which is no longer needed by the successor organisation. This directive also establishes criteria for distinguishing between NATO Records and personal papers.

### **Retention and Disposition**

So we know why we keep records and who is responsible for making it happen, but we cannot keep everything forever. **The Policy on Retention and Disposition of NATO Information**<sup>30</sup> provides guidance on retention and disposition by identifying which categories of information have permanent value to the Organization. In this regard, it applies to information in any medium or form which records:

- Significant consultations, decisions, policies, events, missions and activities;
- The structure and evolution of the Organization;
- The Organization's legal and financial status, obligations and accountability;
- The impact of the Organization's decisions on the rights, health and safety of NATO personnel and/or other persons;
- The Organization's impact on the physical environment; or
- Informs public knowledge and understanding of the Organization's purposes, principles and achievements

is considered to be of permanent value to NATO and must be retained by NATO. The Policy is supported by implementing directives and by retention schedules that define the retention periods to keep NATO information. These schedules also establish permanent or temporary value of particular types of NATO information.

### **Getting It Done: Conclusion**

A great policy framework is just that, policy. If it is not promulgated, implemented and enforced, it serves no purpose. In the case of information

<sup>29</sup> AC/324-D(2011)0002. NATO UNCLASSIFIED.

<sup>30</sup> C-M(2009)0021. NATO UNCLASSIFIED.

management policies, doing nothing with good policy can do more harm than having no policy at all. For that reason the **Primary Directive on Information Management (PDIM)**<sup>31</sup> has been developed with the aim to provide guidance on how to implement information management within NATO and established the **NATO Information Management Authority (NIMA)**<sup>32</sup> to coordinate and monitor progress.

This year the NATO Joint Analysis and Lessons Learned Centre (JALLC) in Lisbon conducted a study to map the implementation of the records policies related to keeping operational records. Preliminary results of the study show that the policy framework has been well received but that more work is needed to develop working practices and procedures to implement these policies.

For future NATO operations it is important that the information and recordkeeping framework is put in place at the planning stage of the operation. This requires that recordkeeping procedures are incorporated in Standard Operating Procedures. Both the Strategic and the Operational level must strive to implement tools and procedures to manage and preserve operational records from the start of an operation. In addition to implementing procedures and processes, ensuring adequate recordkeeping cannot be effectively accomplished without the allocation of necessary resources as well.

Finally, from a truly practical point of view, one must emphasize NATO records policies and directives creating an information management regime are of little use if the records are not easily accessible. In 2010 NATO introduced **CLOVIS** (Comprehensive Legal Overview Virtual Information System)<sup>33</sup> as one of the critical tools that helps to facilitate ready access to information.

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<sup>31</sup> C-M(2008)0113. NATO UNCLASSIFIED.

<sup>32</sup> C-M(2009)0035. NATO UNCLASSIFIED

<sup>33</sup> Since January 2015, CLOVIS has been renamed to LAWFAS (Legal Advisors Worktop Functional Area System).

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Excerpt from NATO Legal Gazette Issue 28 (July 2012), pag. 13-19

## General Principles of the NATO Claims Policy

by Pierre Degezelle  
Legal Advisor, Belgian Claims Office

### **Introduction**

The purpose of this article is to outline the basic principles of the claims practices within NATO. There are several texts which are applicable in different situations. Each Member State has ratified the Agreements in a different way with their own reservations. Furthermore, each Member State has to observe its own national legislation and has its own administrative practices. Consequently, it is impossible to cover all claims practices within NATO. There are as many claims practices as there are Member States or NATO partners.

However, it is possible to present the basic principles concerning claims. The first part of the article concerns claims practices on NATO territory or that of its partners<sup>1</sup>, where article VIII of NATO SOFA is applicable. The second part deals with the out-of-area claims practices, in the theatre of operations.

### **Article VIII of the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces signed in London on 19 June 1951 (NATO SOFA)**

In order for NATO to be able to fulfil its collective defence duty, the Member States have adopted an Agreement that incorporates all necessary legal and administrative tools. In this respect, it is essential that the armed forces can travel unhindered from one Member State to another and that the relations with the authorities of the receiving States are regulated in a uniform way. To allow the armed forces of the Member States to carry out their missions in the best possible conditions, agreements have had to be made on matters regarding, among others, travelling between states, the wearing of uniforms, the possession of weapons, the tax status of members of the armed forces, the relationships with the criminal courts, and finally, a system concerning claims settlements, either for damages between States or for damages to third parties.

Article VIII deals with damage caused on NATO territory or that of its partners. Article VIII is based on the basic public international law principle of jurisdictional immunity of states. A state is responsible for damage caused by its organs or its employees in the execution of their duties. When the damage

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<sup>1</sup> Partners must be understood as the countries that within the Partnership for Peace framework have adhered to the NATO SOFA by way of the PfP SOFA.

is caused on its own territory, this does not pose any particular problems with regard to contentious jurisdiction. However, things get more complicated when an organ or an employee of a sending state causes damage to a third party who is a national of the receiving state. If the latter starts legal proceedings against the sending State before the local civil courts in order to obtain compensation for the damage caused by the sending State's organ or employee, the action could be declared inadmissible because of the jurisdictional immunity of States. The same goes for damage caused between Member States. Member States will not summon each other before the local courts of a receiving State.

Article VIII offers a solution to third parties so that they do not hit against the wall of jurisdictional immunity. It also settles any disputes between Member States. Paragraphs 1, 2, 3 and 4 of Article VIII provide for a waiver of claims between Member States for any damage caused between armed forces. The Member States thus waive all claims against any Member State for damage to any property used by the armed forces (with some nuances with regard to vessels) or for injury or death suffered by any member of its armed forces while such member was engaged in the performance of his official duties. It occurs quite often that during a joint exercise a vehicle of the armed forces of a sending State damages a vehicle of the receiving State or that of another sending State. In this case, any claim for the damage suffered is out of the question. On the basis of the same principle, a Member State cannot, for instance, demand compensation from another Member State for medical costs that it had to pay to treat a member of its personnel.

Paragraph 2 provides for a kind of mini-waiver for damage below a certain amount caused to property owned by a Member State that is not used by the armed forces. According to paragraph 2, an arbitrator shall determine liability and assess the amount of damage. As far as I know, this has never occurred. What types of claims can be involved? For instance, in Belgium a US serviceman working at the entrance gate to the US embassy in Brussels had operated the security poles incorrectly and he damaged the vehicle of the Minister of Justice who was visiting the embassy. The Belgian claims office had a hard time explaining to the Belgian Ministry of Justice that, since the repair costs for the vehicle were below \$ 1,400, the US was not going to reimburse the costs.

The waiver principle might be frustrating to some but it is very practical as far as operational capability and interoperability are concerned. Moreover, this principle has also been used for out-of-area damage (see point 3).

Paragraph 5 determines the procedure in case of third party claims. It applies to acts and omissions *"of members of a force or civilian component*

*done in the performance of official duty, or any other act, omission or occurrence for which a force or civilian component is legally responsible”.*

Paragraph 5 allows the receiving State to be substituted to the sending State in its relations with the injured third party. On the basis of paragraph 5, in some receiving States according to national law, the third party can go as far as to file legal action before its national courts against the receiving State instead of against the sending State. How does this happen in practice? The third party sends its claim to the receiving State, which deals with the claim, indemnifies the third party, and recovers 75% of the amount paid from the sending State. But the receiving State could also consider that the sending State cannot be held liable in which case it will refuse to pay. There are certain advantages to this procedure.

First, the injured third party can apply to a national authority to file his claim, i.e. to the claims office of the state of which he is a national or in which he resides. The claims office of the receiving State is much more accessible than the sending State which is by definition located abroad.

Secondly, the sending State is generally not familiar with local law nor with the practices in the field of tort law, insurances, etc. The fact that the receiving State can be substituted to the sending state ensures that the compensation procedure can proceed smoothly. Article VIII provides that *“claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving State [...]”*. Thus it is definitely local law that needs to be applied. The Agreement reflects the general principle of *lex loci delicti*.

When the third party has been paid compensation, the receiving State recovers 75% of the amount paid to the third party from the sending State. 25% of the amount remains at the expense of the receiving State. Because of the fact that it has to pay part of the amount, the receiving State is obliged to deal with the claim as diligently as possible while best defending the interests of the sending State.

The “Article VIII system” is based on trust and reciprocity. The receiving State sovereignly decides on any liability of the sending State and fixes the amount of compensation. The receiving State does not have to submit the matter to the sending State nor ask for its prior authorisation. Indeed, according to Article VIII, paragraph 5 (b)(c): *“[...] the receiving State may settle any such claims, and payment of the amount agreed upon or determined by adjudication shall be made by the receiving State in its currency; such payment [...] shall be binding and conclusive upon the Contracting Parties [...]”*. In practice, the receiving State will ask the sending State for the “on duty attest” in order to know if the member of the force was on duty at the time of the facts or, more precisely, if the damage was caused in the performance of official duty. The nuance is important. For instance, a

Belgian serviceman on exercise in Sweden can administratively be considered to be on duty 24/7. If he injures someone in a fight in a disco the night before he returns to Belgium it will be difficult to maintain that the damage was caused *in the performance of official duty*.

It is quite important to know whether an element of a force was on duty at the time of the facts. In the event that the element of the force is considered as being on duty at the time of the facts, the procedure described in paragraph 5 applies. Otherwise, paragraph 6, which is a procedure known as *ex gratia*, needs to be applied. As mentioned above, in principle, the sending State determines if its personnel member was on duty, even if in practice this is challenged by some Member States. When there is a dispute and the case is brought before the courts, the judicial authorities of the receiving State shall at the end determine whether or not the damage has been caused in the performance of official duty.

Connected with the issue regarding the performance of official duty, is the concept of the NATO mission. Is article VIII only applicable to damage that has been caused within the framework of a NATO mission? There are not many legal precedents concerning this issue. However, the Luxembourg courts have made a very broad interpretation of the concept of the NATO mission<sup>2</sup>. The Agreement would only be applicable to NATO missions, but these have to be interpreted very broadly. A comment of the judgment in question even stated that it is not specified anywhere in the Agreement that it would only apply to NATO missions.<sup>3</sup>

Paragraph 6 concerns damage arising out of acts or omissions not done in the performance of official duty. If there is no link to the performance of official duty, the sending State as employer cannot be held responsible for the damage. In this case, the third party has to confront the person liable alone. However, paragraph 6 offers a solution by proposing an *ex gratia* compensation procedure. The third party can file a claim in the receiving State who will consider the claim and assess compensation. The receiving State informs the sending State of the compensation amount which according to paragraph 6 should be considered as a full satisfaction of the claim. The sending State decides whether or not it will offer an *ex gratia* payment. If the sending State decides to pay the third party "*in full satisfaction of the claim*" it will do it directly to the claimant. This procedure does not prevent the third party from starting proceedings against the member of the force before the civil courts of the receiving state if he finds that he has not been fully compensated. In this case and in accordance with paragraph 9, the sending State shall not claim immunity from the jurisdiction of the courts of the receiving State for a member of the force who committed

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<sup>2</sup> This involved a case brought before the Luxembourg courts due to an accident in the Grand Duchy of Luxembourg where a Belgian military aircraft had hit an antenna used for television broadcasts.

<sup>3</sup> Jean-Claude Meyer, *Revue Belge de droit International* 1990/2, Ed. Bruylant, Brussels, p 504.



a tortuous act outside of the performance of his official duties. Paragraph 9 should be read in conjunction with paragraph 5(g) which states that “a member of a force or civilian component shall not be subject to any proceedings for the enforcement of any judgment given against him in the receiving State in a matter arising from the performance of his official duties”. Reading paragraphs 5(g) and 9 together clearly shows that the immunity from the jurisdiction of the Member States and the concept of acts arising from the performance of official duty are the cornerstones of Article VIII.

By way of conclusion of this part with regard to Article VIII, I would like to make two observations. The first one involves the concept of interoperability of the armed forces. It happens more and more that the equipment of one Member State is used by another Member State, that a Spanish vehicle, for instance, is driven by a Belgian driver. This might complicate the compensation system of third parties. Who will be responsible and have to pay the compensation, the user or the owner? In these cases paragraph 5 (ii) and (iii) can offer a satisfying solution.

Secondly, whereas Article VIII paragraph 5 of the NATO SOFA proposes a compensation procedure for third parties when a member of a force or a civilian component is responsible for tortuous acts, no provision is made for recoveries payable by third parties who are responsible for damage to sending States. It could be considered that the Member States help each other when a third party causes damage to the sending State. The receiving State could also play a part in these cases, since it is this state that has the necessary expertise to consider the settlement of a claim against a third party who is its national or resident.

### **Operational Claims**

*Operational claims* must be understood here as claims that are connected with the stationing of troops in a host state and not as claims connected to war damage or claims arising out of breaches of international humanitarian law.

The founding text of operational claims is the “NATO Claims Policy for Designated Crisis Response Operations”. This document does not have any binding legal force and is described as the “General Claims Policy Non-Paper” (hereafter Non-Paper). The text has been drawn up by the *Ad Hoc Working Group of Legal Experts* and has been approved by the Political Committee.

Apart from the *Non-Paper*, there are also provisions concerning claims in each SOFA concluded with the host states on theatre of operations.

The *Non-Paper* reflects the general principles of the NATO policy with regard to claims on theatre of operations. According to these principles, the

TCNs and the NATO Operational Headquarters should settle the claims from third parties. Furthermore, they determine a waiver between TCNs and between TCNs and the operational headquarters for material damage and for injury or death.

However, some claims cannot be considered for compensation:

1. Claims arising from combat, combat-related activity, or operational necessity,
2. Contractual claims, which are dealt with by the TCN that has concluded the contract in question,
3. Claims from the receiving State for damage to members of its forces.

Each TCN is responsible for settling its own claims, i.e. claims for damage for which it is responsible on the basis of local law or local customs. It is not always easy to determine responsibility or fix the compensation amount on the basis of local customs. It is then up to the Claims Officer or LEGAD to use their imagination to find clues in the local laws or customs of the host nations.

An efficient claims policy offers several advantages. It can have a positive impact as far as *force protection* is concerned. When the compensation is delayed, the third party usually comes to the gate "very regularly" to demand his payment. This could cause a security problem in the long term. A fair claims policy can have positive effects on image and can calm down the local population that could be hostile. However, attention must be drawn to the importance of having a relatively uniform claims policy between TCNs in order to avoid discrepancy between the practices of the various nations. It can be useful that the TCNs communicate with one another on this subject.

Finally, a good claims policy is only fair. On the basis of the SOFA with the host state the international force generally enjoys jurisdictional immunity both on a criminal law and a civil law level. Consequently, the host State has a right to expect that the members of the force respect the local laws and customs and that any damage will be fairly compensated.

### **Conclusion**

Questions with regard to claims are an integral part of NATO activities. Each MOU, TA, SOFA includes, or should include, claims clauses, if only to point out the application of Article VIII if the activity takes place on NATO territory.

In the absence of such a clause the question of the application of Article VIII should in any case be put forward. As treaty Article VIII offers an essential and strong solution to the problems related to the settlement of damage.

It is even more important to insert clauses on claims in agreements with regard to out-of-area activities since in these cases Article VIII does not apply. This should not pose many problems for damage regarding third parties because we can assume that the Member States will fulfil their obligations in accordance with international law. On the other hand, for damage between Member States it can be useful to refer to the *General NATO Claims Policy Non-Paper* in MOU's or TA's. Even though the document does not have any real legal force, it establishes the principle of the waiver as an administrative practice, even as a custom.

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[www.jwc.nato.int](http://www.jwc.nato.int)

## Operational level exercises as preparation for NATO operations

by CPT Audun Westgaard and David Nauta<sup>1</sup>

### Introduction

In the 1990s NATO conducted its first peace-keeping mission in Bosnia, and since then the "tempo and diversity" of missions have rapidly increased. Today NATO has 18,000 military personnel engaged in operations world-wide involving, "complex ground, air and naval operations in all types of environment."<sup>2</sup> The increasing complexities of these operations as well as their diverse goals create many challenges for a legal advisor. A legal advisor working on a NATO operation must first and foremost be familiar with NATO as an organization and its approach to exercises. Courses at the NATO School in Oberammergau and participation in exercises conducted by NATO's Joint Warfare Centre (JWC) are essential training activities for a legal advisor working at the operational-level at NATO.

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<sup>1</sup> CPT Audun Westgaard is the Joint Warfare Centre (Stavanger) Legal Advisor and Mr. David Nauta is the Deputy Legal Advisor.

<sup>2</sup> NATO Website: NATO Operations and Missions, [http://www.nato.int/cps/en/natohq/topics\\_52060.htm](http://www.nato.int/cps/en/natohq/topics_52060.htm) Accessed 26 May 2015. "They are currently operating in Afghanistan, Kosovo, the Mediterranean and off the Horn of Africa. NATO is also assisting the African Union, conducting air policing missions on the request of NATO member countries and supporting Turkey's air defence system with the deployment of Patriot missiles."



JWC's objective is to create exercises that train personnel in the collective planning and execution of an operation at the joint operational-level. The exercises planned by JWC reflect this objective with exceptional attention to detail and realism. An exercise will provide a complex scenario for either an Article 5 Collective Defense or Non-Article 5 Crisis Response Operation. The aim of the exercises is to prepare and train the audience through modern challenges such as cyber-attacks, hybrid warfare, and terrorism. This article describes the legal aspects of operational-level NATO exercises and how these exercises are used as a training platform for operational level HQs.

An introductory overview will be given on how NATO exercises are programmed and designed. Then there will be an in-depth look at JWC and its activities. This article will conclude with observations on the role of the legal advisor during these exercises and how to prepare for exercises in order to get maximum training value. It is essential to remember that the overall aim of exercises is to prepare the audience for a role during NATO's real life operations.

### **Policy Basis for Exercises**

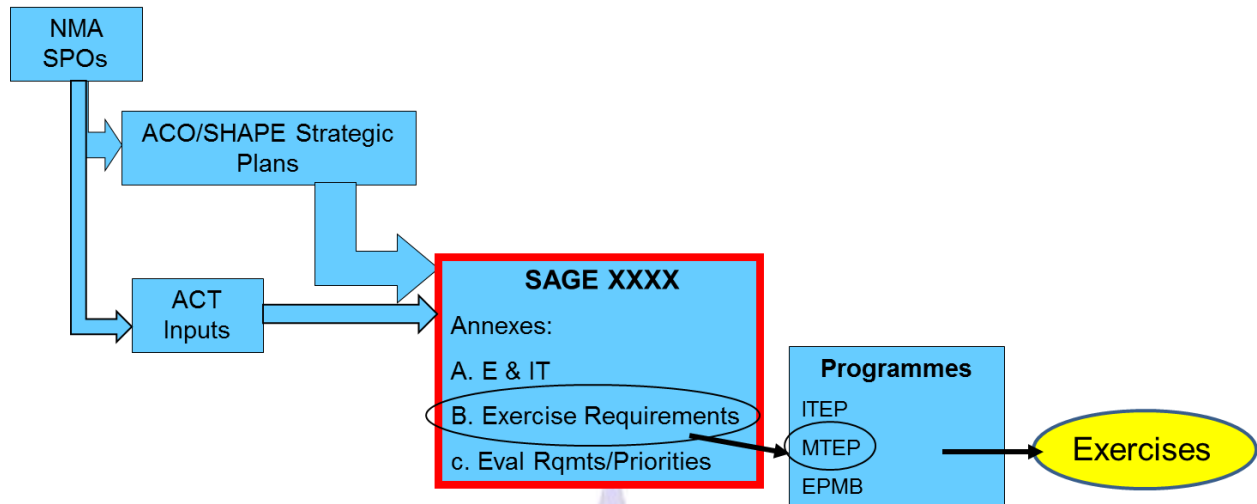
NATO's military structure develops its exercise program based on guidance from NATO's political level, namely the North Atlantic Council (NAC) and follows a thoroughly prescribed process.

Based on NATO's strategic policies set out by the NAC, Supreme Allied Commander Europe (SACEUR) sets out NATO's military exercise requirements in his so-called "Annual Guidance on Training and Exercise" (SAGE). This guidance forms the basis of a subsequent programming process resulting in a Military Training and Exercise Program (MTEP), which broadly sets out the goals of the exercises for the next five years. The program formulates the design, aims and objectives of the exercises, and also identifies the NATO Headquarters to be trained. Currently there are 17 High Readiness Forces and Headquarters in the NATO Force Structure, which are designated to face current and future challenges posed by ballistic missiles, extremism, and cyber warfare<sup>3</sup>. Moreover, NATO's collective defense commitment requires training in exercises for Article 5 operations.<sup>4</sup>

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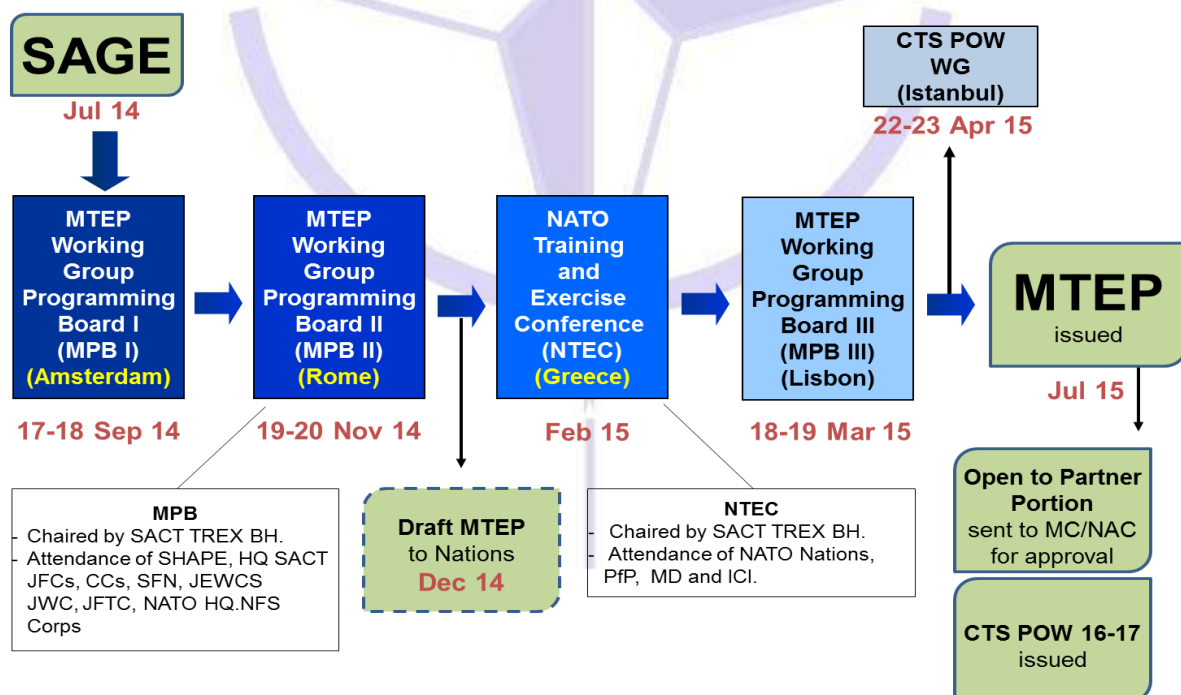
<sup>3</sup> Currently there are 17 High Readiness Forces and Headquarters in the NATO Force Structure. See <http://www.aco.nato.int/page134134653.aspx>.

<sup>4</sup>Strategic Concept "Active Engagement, Modern Defence" for the Defence and Security of the Members of the North Atlantic Treaty Organisation, adopted by the Heads of State and Government in Lisbon, 19 November 2010.



(Diagram provided by author)

While NATO's full exercise program provides a broad range of scenarios of events within the Alliance, this article will focus on the Trident-Series exercises. These are the operational-level exercises funded and delivered by the NATO Command Structure. Once they are programmed, the Trident-Series exercises will be delivered under the so-called "Exercise Process", which is a complex process that covers both the planning process for an exercise as well as the scenario developed for the exercise.



(Diagram provided by author)

## **The Joint Warfare Centre (JWC)**



JWC is located in Stavanger, Norway and was established in 2004 as part of Allied Command Transformation (ACT) under NATO's new command structure. Other subordinate commands are the Joint Force Training Centre (JFTC) in Bydgoszcz, Poland and the Joint Allied Lessons Learned Centre (JALLC) in Lisbon, Portugal. JWC is NATO's center for delivering military *operational* level exercises and pre-deployment training. Similarly, the JFTC delivers *tactical* level exercises and pre-deployment training.

JWC's mission also includes concept development and integration, experimentation, doctrine development and scenario production. The Centre holds approximately 250 personnel, as well as sending nation support-units. It can accommodate visiting training audiences of up to 650 personnel and has two Joint Operations Centres. Since its establishment, more than 40,000 personnel from various locations have been trained by JWC. Every year, JWC delivers six exercises for the five NATO operational headquarters<sup>5</sup> as well as for the various headquarters of the NATO force structure.

### **Exercise Programming: Scenario Development for Exercises**

Within the guidance provided by SACEUR and SACT, the commander of the Operational Headquarters to be trained defines the training objectives of the exercise.<sup>6</sup> SACT then directs JWC to facilitate the exercise with an appropriate scenario and storyline.<sup>7</sup> The scenarios are developed with detailed information, and may include fictitious countries. Not only are details provided on the military structure, economic strength, and political alliances of the countries, but also information on details like the terrain, climate, infrastructure – important for *inter alia* Logistic Planners and Intelligence, Surveillance and Reconnaissance assets – are provided.

<sup>5</sup> The five NATO Operational Headquarters in the NATO Command Structure are the two Joint Force Commands: Joint Force Command HQ Brunssum and Joint Force Command HQ Naples; and the three Component Commands: HQ Land Command Izmir, HQ Airforce Command Ramstein and HQ Maritime Command Northwood.

<sup>6</sup>The Operational Headquarters that is designated by SACEUR as the training audience is also called the Officer Conducting the Exercise or OCE.

<sup>7</sup>SACT is the Officer Scheduling the Exercise or OSE. The OSE sets out the period in which the headquarters will be trained and helps them to define the objectives.. The JWC is the Officer Directing the Exercise or ODE.

Delivering NATO exercises is a complicated business. While the real life aspects of making an exercise happen is a demanding operation in itself, the task of planning and delivering the scenario-based virtual crisis is no less demanding. Developing sufficiently challenging and realistic scenarios requires a broad base of expertise and an immense complexity of information, including geo-data, fictitious states with fact-books and everything else required in order for a training audience to conduct an operational planning and execution process. While the baseline scenario sets the stage, it is further developed during the exercise process as the training objectives become more defined and the scripting is done.

The storyline is the narrative of the crisis and describes the alleged root causes of the conflict. The story may describe an invasion or threat of an armed attack or focus on an evolving humanitarian crisis. The narrative creates a scenario that is the backbone for the exercise and allows the Operational Headquarters to come up with an adequate response in the form of an operational plan and necessary rules of engagement.

After the Operational Headquarters has developed its concept of operations, described its military response options, drafted an operational plan for the baseline scenario, the work is still far from over. The JWC will further challenge the headquarters by introducing events that require an urgent response. For example, JWC could complicate the baseline scenario with an event that would require the Operational Headquarters to react, either with strategic messaging, kinetic force, or by other means.<sup>8</sup> These types of events presented throughout the exercise provide excellent learning opportunities for the headquarters and for the Legal Advisor in the training audience– to become acquainted with NATO doctrine and policy. More generally, there are also opportunities for the NATO community to learn to work collectively under immense pressure and time-constraints.

### **Exercise Process**

Once an Exercise is programmed, a detailed Exercise Process is initiated, to include the following stages:

1. Exercise Concept and Specification Development
2. Exercise Planning and Product Development
3. Exercise Execution
4. Post Exercise Analysis and Reporting

Stage 3, Exercise Execution, is where the Training Audience, i.e. the HQ being trained, is introduced to the details of the scenario. The NATO Crisis Response Planning (CRP) concept is used and an Operational Plan (OPLAN) is produced based on joint operational planning using doctrines, such as MC

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<sup>8</sup> An example of a type of event is: State A uses militants in State B as proxy forces.



133/4 and the Comprehensive Operations Planning Directive (COPD). The Exercise Execution Stage culminates, unless it is a live exercise, in a Command Post Exercise (CPX) where the assigned joint headquarters is in operational mode and is thrown into the virtual reality of the exercise-play for one to two weeks. During this time the Training Audience will have all necessary boards, working groups and other staff processes up and running. Scripted events and incidents will be injected as part of the exercise-play to allow the Training Audience to work through all staff procedures as well as handling a complex environment of governments, IO's and NGO's. This virtual reality is provided by the exercise control (EXCON) organization, which delivers not only the scenario, storylines and scripted injects, but also the response cells simulating opposing forces, higher and lower commands, governments, various organizations and so forth. EXCON also provides the Computer Assisted Exercise concept (CAX), where modeling and simulation technology is used for creating and updating an artificial environment to support decision making.

The business of delivering an exercise has a real life dimension to be held aside from the simulated reality of the virtual crisis being played out. Distinction may not always be that obvious, for instance when an allied state is host nation both in real life and in the exercise scenario. This was the case during exercises Steadfast Jazz and Trident Jaguar in which in the scenario Estonia (also host-country) was attacked by a fictitious country "Bothnia".

### **Preparing for NATO exercise participation**

NATO legal advisors arrive to the organization without uniform, legal training and experience. In fact, the diversity of legal advisers appointed to Alliance positions is pretty wide. Not all newcomers have specialized knowledge, NATO familiarity, military training or operational experience in mission areas. However, they have all either been appointed by their nations or employed by NATO with a duty to fulfill NATO's mission and objectives. With the right introduction to the NATO environment, on-the-job training and support from the NATO legal community, they are expected to be able to fulfill their duties. A combined effort at both the unit level and within the broader legal community is essential.

Preparing for exercises includes a thorough understanding of the exercise documentation. Knowledge development takes time and requires some effort considering the complexity of exercises and the vast amount of information provided, but this is essential to increase the training value.

Operational level exercises are collective and not individual training events. Collective training is directed at the Headquarters designated as the Training Audience, their staff processes, and interaction between the Headquarters and the outside world. Though there will be opportunities for the individual legal advisors to develop their expertise as lawyers during an

exercise, this is not the primary objective of the exercise. The collective training that occurs in an exercise is meant to test the processes of the collective procedures of the Operational Headquarters, in accordance with doctrine and standard operating procedures (SOP), making sure the necessary agreements are in place or in process, and making sure that critical legal issues are brought to the commander's attention. The *operational* level legal advisor also has an obligation to coordinate with the *strategic* level legal advisor on prescribed legal issues. While timely, relevant, and quality legal advice always is the standard to meet, during exercises meeting the overall training objectives within a compressed timeline is the ultimate objective.

### **Conclusions**

Being part of a NATO exercise is a challenging experience. Participation as a legal advisor in an exercise provides training specifically in the application of many aspects of international law, with particular emphasis on operational topics, such as the use of force, international agreements and human rights questions; more importantly it provides invaluable experience for legal advisor to better understand and fulfill their role within NATO. A legal advisor can provide the HQ essential advice on the status of forces, targeting procedures, detention operations, as well as future challenges such as hybrid warfare, space and cyber operations.

JWC provides exercises that are relevant to current and future operations. There are many opportunities for legal advisors to receive individual training on operations through courses at the NATO School in Oberammergau as well as the E-Learning platform provided by ACT. In order to be prepared for such exercises, JWC recommends that legal advisors are acquainted with the relevant policy and doctrine on operational planning, as well as the scenarios provided for the exercises at hand. This ensures that legal advisors come to exercises prepared to get the best out of the experience, and will provide the most valuable legal advice and expertise.



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### **Training a Combat Legal Advisor: Tactical Level Observations and Lessons Identified from Trainings and Exercises**

by CDR Wiesław Goździewicz, Polish Navy<sup>1</sup>

The Joint Force Training Centre (JFTC) is one two NATO training centres. With its sister institution – the Joint Warfare Centre (JWC) in Stavanger, Norway it forms the training wing of a broad transformation network under the command of Headquarters, Supreme Allied Commander Transformation (HQ SACT).

The JFTC's mission is to provide combined and joint training for tactical level headquarters, command posts and units up to and including component commands. This is even the case if particular single-service or component command assumes the role of Joint Task Force (JTF) HQ in a smaller joint operation (SJO). During JFTC's ten years of existence, more than 40,000 soldiers, air personnel and sailors have been trained for both current and future operations and missions.

Since 2008 and up until the end of the International Security Assistance Force (ISAF) mission, JFTC's main focus was to provide pre-deployment

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training (PDT) to tactical level units and HQs in support of ISAF in Afghanistan. JFTC has trained Operational Mentoring and Liaison Teams (OMLTs)<sup>2</sup> and Regional Commands (RCs), as well as provided support to JWC-run training events for ISAF HQ and ISAF Joint Command (IJC) HQ. This does not mean that the JFTC has only trained personnel designated to deploy to Afghanistan.

Our “customers” included, for instance, the HQ Land Command Izmir, the Multinational Corps North-East (MNC NE) and the Polish Special Operations Centre (POL SOC) as the core of the NATO Special Operations Component Command (SOCC) for the 2015 NATO Response Force (NRF) stand-by. A variety of customers, training events and exercises have resulted in many interesting observations and lessons also in the legal arena. The purpose of this short article is to share some of these relevant observations.

The JFTC Legal Advisor (LEGAD) is responsible not only for providing routine on-site legal advice to JFTC and its personnel, but also for acting as a subject matter expert (SME), legal observer/ trainer, and participant in other parts of Exercise Control (EXCON). The JFTC LEGAD mainly specializes in areas of law, such as operational law (Law of armed conflict, NATO/national Rules of Engagement, targeting, information operations) and national security law (terrorism, maritime interdiction, asylum, and intelligence collection). During exercises in order to stimulate certain training aspects, JFTC LEGAD replicates LEGADs in higher (HICON) or lower (LOCON) echelons of command in response to the needs of the training audience. Therefore, there is a high level of interaction between the training audience LEGAD and JFTC LEGAD during training events and exercises. Depending on the exercise design and construct, a LEGAD trainer might focus on his/her counterpart in the training audience, or be responsible for providing legal training to the entire HQ or staff being trained. In both cases, it is crucial to achieve a mutual understanding of the LEGAD's role in operations conducted by a military HQ or command.

Although the legal issues faced at the tactical-level might seem less complicated than at operational or strategic-level, the dynamics and tempo of operations at the tactical-level is usually significantly higher. This keeps the LEGAD busy, especially while dealing with special operations and/or asymmetrical warfare in a counterinsurgency environment. The next portion of the article will discuss the overall role of the LEGAD at the tactical-level as well as present some observations from training events and exercises JFTC has recently conducted. First some generic observations will be presented regarding the tactical-level LEGAD role in operations, and then a more in

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<sup>2</sup> Later on renamed Military/Police Advisory Teams MATs/PATs. At present, after the transition from the ISAF mission to the Resolute Support (RS) mission, MATs or PATs have been replaced by Ministerial Advisory Groups (MAGs)



depth analysis will be made regarding specific roles of the LEGAD during training events and exercises. There will also be real-life examples from various training events and exercises JFTC has conducted.

### **Generic Observations of the Legal Role in Operations**

LEGADs have several important roles to play regardless of the command to which they are assigned. They are counsellors, advocates, and trusted advisors to commanders and to military leaders and staff. They are also soldiers, leaders, and subject matter experts in all of the core legal disciplines.<sup>3</sup> Similarly, NATO doctrine requires the LEGAD to play the roles of a Subject Matter Expert (SME), an advocate and a counsellor. Fulfilling these three roles requires a much broader perspective and more flexible approach than just providing legal advice or sticking to black-letter rules, regulations, or laws.<sup>4</sup>

Flexibility is a must, especially in combined (multinational, coalition) operations. These types of operations, apart from presenting many advantages, also bring significant challenges. Some of these challenges can be found in the areas of interoperability (both human and technical), applicability of international and domestic laws and regulations, policies and procedures, interpretations of mandates, ROE and caveats, etc.<sup>5</sup>

Quoting a senior military legal advisor it is worthwhile to reiterate that, "a good LEGAD cannot act like a dentist and wait until his 'patient' comes with a problem". LEGADs should be proactive and prevent problems from occurring rather than trying to find the solution once a problem pops up. This requires the LEGAD to fully integrate with the Staff. During dynamic situations, such as Troops in Contact (TIC) or in the course of a special operation, it might be necessary for the LEGAD to be present in the Joint Operations Centre (JOC) or Tactical Operations Centre (TOC). This is necessary for the LEGAD to observe the development of the situation on the ground and provide rapid advice to the JOC Staff on recommended actions to maintain lawful conduct of the operation or prevent potential violations of the Law of Armed Conflict (LOAC) or mission-specific regulations, such as Standing Operating Procedures (SOPs).

An operational law LEGAD has to be both a generalist and a specialist in the field, in order to be efficient and capable of providing the Commander and Staff with relevant and valuable advice. Operational Law (OPLAW) is

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<sup>3</sup>Field Manual 27-100, *Legal Operations*, Headquarters, Department of the Army, Washington, DC, 3 September 1991, pp. 1-5

<sup>4</sup>Bi-SC Directive 15-23 - *Policy on Legal Support*, 23 July 2009, pp. 6-7

<sup>5</sup>For a comprehensive overview of possible legal challenges in coalition operations, see: *Forged in the Fire. Legal Lessons Learned during Military Operations 1994-2006*, Center for Law and Military Operations, The Judge Advocate General's Legal Center & School, Charlottesville, Virginia, September 2006, pp. 305-354.

interdisciplinary – it embeds a whole panoply of legal areas to be covered: *jus ad bellum*, *jus in bello* (LOAC), Human Rights Law,<sup>6</sup> status of forces and host nation support agreements/arrangements, claims, fiscal law, contracting and procurement, criminal and disciplinary jurisdiction, and many others. From one perspective, a LEGAD has to be a generalist to be able to manoeuvre through the maze (not to use the word “minefield”) of all the legal issues that might occur during an operation, exercise or training event. On the other hand, some of the issues may require the LEGAD to delve into details of a particular legal discipline and eventually become a specialist in that discipline. Since a legal office usually consists of only one or two people, it is not realistic to expect a single LEGAD to become a specialist in all areas, especially at the tactical-level. Therefore, as stated in Bi-SC Directive 15-23, “[...] all NATO legal advisers and legal support staff personnel are expected to have effective working relationships and good means of communication with higher, lower, and adjacent legal offices [...]”.<sup>7</sup>

Establishing working-level relations and links with other legal offices becomes particularly important in joint and/or combined operations, as other nations or components (services) might have already dealt with the same or similar issue that a LEGAD is tasked to resolve. Information and knowledge sharing is a key process in establishing good working relations and cooperation between all LEGADs and legal offices participating in the operation/exercise. Communication should be bi-directional and mutual, as “[...] informal legal chain of command is invaluable to convey clear and consistent legal advice throughout the chain of command [...]”,<sup>8</sup> so that all the echelons of command legal offices have the same awareness of the legal issues being worked on. It is the role of a LEGAD trainer or a Subject Matter Expert (SME) to ensure that the trainees realise the importance of information exchanges and knowledge sharing amongst LEGADs and Legal Offices throughout the chain of command. There should be more than just the subordinate-superior relationship between the LEGADs: partnership and collaboration are essential for the efficient delivery of consistent and uniform legal advice to commanders and staff at all levels.

### **JFTC Training events and Exercises**

Moving on to specific observations from training events and exercises conducted by the JFTC. As it was stated above, the JFTC’s mission is to provide joint tactical-level training and exercises. The design and construct of training events and exercises, will differ depending on whether it is a Pre-Deployment Training (PDT) in support of current operations<sup>9</sup> or a Command

<sup>6</sup>In regards to Human Rights Law this is especially relevant in non-international armed conflicts and law enforcement operations executed by the military, e.g. counter-piracy

<sup>7</sup>Bi-SC Directive 15-23, *op. cit.*, p. 7

<sup>8</sup>Exercise Trident Juncture 14 (TRJE14) Officer Directing the Exercise JFC Naples First Impression Report (FIR) Phase II, dated 9 July 2014, p. 6

<sup>9</sup> Such as ISAF (2001-2014), followed by Resolute Support Mission (RSM) in 2015

Post Exercise (CPX)/Computer Assisted Exercise (CAX) in support of a NATO Response Force (NRF) preparation.

Pre-deployment training (PDT) is one of the primary types of training that JFTC provides. JFTC has designed and provided training events for ISAF Regional Commands, OMLTs/POMLTs<sup>10</sup> and personnel designated to man positions within ISAF's command structure. The main customer for PDT used to be the Regional Command North (RC (N))<sup>11</sup>. However, starting from July 2015, JFTC has taken over training responsibility for the whole Resolute Support (RS) Mission, which has succeeded the ISAF mission in Afghanistan, conducting an experimental, combined TAAC (N)/TAAT training event. The training events for RC (N) have proven to be effective, shortening by half the required period of in-theatre training preceding the handover/takeover of duties in RC (N) HQ.<sup>12</sup>

### **Pre-deployment Training (PDT): Example of Regional Command North (RC(N)) Training Components**

Many lessons can be drawn from the type of Pre-Deployment Training provided for RC(N) in regards to the ISAF mission. A typical training event for RC (N) is comprised of three blocks: Mission Specific Training (MST), Battle Staff Training (BST) and culminated in Mission Rehearsal Exercise (MRE).

The purpose of Mission Specific Training (MST) was to provide the training audience with the most current information possible on the mission framework, the situation in the theatre of operations, etc. The information was provided to the training audience mainly through lectures, round tables, and panel discussions. The LEGAD-related parts of the MST, used to cover the legal framework for ISAF operations, and – during the period of mostly kinetic engagements of ISAF – indirect fires, targeting (both deliberate and dynamic) and offensive ROEs (32-33 and 42 series). During RC training events, the LEGAD SME should in principle be someone who recently redeployed from an ISAF RC. During the RC (N) training events, JFTC LEGAD had to perform different tasks depending on the participation of higher echelons. More specifically, the JFTC LEGAD filled the HICON LEGAD slot (replicating ISAF Joint Command – IJC or ISAF HQ Legal Office) and also acted as a LEGAD observer/trainer. The current JFTC LEGAD, due to lack of recent deployment experience, had to rely on documents and information provided by the IJC Legal Office and working-level contacts with IJC Legal Office personnel, in order to provide the training audience with current information. This created some artificiality, which was partially overcome by allowing IJC HQ personnel to take part in portions of the MST via VTCs.

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<sup>10</sup>Later on called MATs or PATs and recently renamed Train, Advise, Assist Teams (TAATs) under the Resolute Support Mission framework.

<sup>11</sup> transitioning into Train, Advise, Assist Command North – TAAC (N)

<sup>12</sup>ISAF Regional Command North Pre-Deployment Training Event Report, Joint Analysis and Lessons Learned Centre, 31 May 2010 (JALLC/CG/10/126), p. 3



During the Battle Staff Training (BST) block of RC (N) training, individual trainees were divided into cells (functional areas) to learn how to cooperate as a team. This block of training was stimulated by vignettes (case studies) encouraging the training audience to collectively work out the solutions and provide recommendations to the Command Group. In this block, SMEs were playing the role of “co-pilots” assisting and mentoring the training audience in executing the duties in their respective functional areas. The lack of SMEs for a particular functional area during this block of training has always been detrimental to the quality of training, therefore the importance of providing SMEs for the key functional areas continues to be stressed in after action reviews and event reports.

The final block of a typical RC (N) training event was Mission Rehearsal Exercise (MRE), during which the training audience had to form a fully functional staff and react to incidents and events that have actually occurred in the theatre. Trainees were tasked to respond to the scripted “surprise” events that occur during the training replicating past events, sent from response cells replicating subordinated units (LOCON), other units operating in the area (SIDECON), such as Afghan National Security forces (ANSF), and higher echelons of command (HICON). During this block, SMEs were supposed to step down and observe the actions taken independently by the training audience, intervening only if actions taken by the training audience were obviously incorrect. There have been a small number of instances when the training audience LEGAD has come up with recommendations that were not in line with procedures in force, especially in the area of detention operations, due to national caveats or policy constraints. For instance, releasing the insurgents immediately after disarming, without collecting evidence, Intel or biometrical data had no grounds and was not reflected in ISAF ROE, caveat matrix or Transfer of Authority (TOA) message. When a LEGAD proposed this solution based on national policy, the Exercise Director decided to replay the event and the LEGAD had to come up with a satisfying solution to allow ANSF unit operating in close vicinity to “formally” detain the disarmed insurgents.





Another legal-related problematic issue that came up during the RC(N) training, but not exclusively within the LEGAD's job description, was the question of whether employing indirect fires in situations other than self-defence was valid. For security reasons (procedures for employing indirect fire were and remain classified), no details can be shared, however there were ambiguities as to authorities and competences held at particular echelons of command to either request or approve employment of indirect fire support. LEGADs – alongside with targeting experts and the Current OPS staff played a vital role in advising the Command Group on implications and constraints related to use of indirect fire assets, especially Close Air Support (CAS).

One lesson learned from the RC(N) trainings is that during PDTs, SMEs play a crucial role in providing the training audience, including LEGAD's, with recent and up-to-date information and experience from theatre, including expertise on performing duties in particular joint functional areas. SMEs give the training audience current situational awareness, thus increasing the quality of the training provided. The availability of SMEs is key to an efficient and successful training.<sup>13</sup>

**Command Post Exercise (CPX)/Computer Assisted Exercise (CAX) in Support of NATO Response Force (NRF) Preparation: Example of HQ Land Command Izmir Exercise for Battle Staff Training (BST)**

In 2013, JFTC ran a Battle Staff Training (BST) for HQ Land Command Izmir based on the Skolkan scenario which was modified to allow this undermanned and newly established HQ to exercise the conduct of land-heavy joint operations in low-intensity warfare environment. The scenario envisaged a shift from a non-Article 5 deterrence operation to an Article 5 collective defence situation in response to a Bothnian invasion of the Estonian islands Hiiumaa and Saremaa.

One of the biggest challenges in the exercise script was tasking the training audience with developing an ROE Request Message (ROEREQ) in reaction to a shift from deterrence to collective defence. The ROE profile had to become more permissive to allow the forces to effectively conduct more kinetic operations to repel the invasion and restore the territorial integrity of Estonia. Initially, the training audience LEGAD accepted the vast majority of the burden related to the development of the ROEREQ, with little support from the rest of the Staff.

This approach was in line with the national policy of the Sending Nation of the training audience LEGAD, however this did not reflect NATO's approach to ROE development, which requires cross-staff engagement with basically all the functional areas involved, and operations (J-3) and plans (J-5) sections in lead, supported by intelligence section (J-2) as well as SMEs in

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<sup>13</sup>*ibidem*, pp. 3-4

different functional areas and relevant warfare sub-specialties. Convening an ROE Planning Cell is recommended in some publications,<sup>14</sup> because in certain areas the LEGADs are not SMES, (e.g. electronic warfare or information operations).

The JFTC LEGAD took part in the exercise as the HICON LEGAD, replicating the Joint Force Command LEGAD, and after a fruitful discussion with the DCOS OPS of the HQ Land Command Izmir (acting as Training Audience Deputy Commander), it was decided to replay the event in a manner ensuring full engagement of the whole Staff in conformity with NATO policy. This was to ensure that the commander was eventually presented with a comprehensive, carefully drafted and thorough ROEREQ for approval.

### **Special Operations Overview**

Special operations require a specific approach to providing legal advice. Special Operations Forces (SOF) are “joint force in a small scale” – they combine capabilities of land, air and sea warfare, yet without support from other components, they are unable to conduct long-term sustained operations. The majority of special operations are conducted at night, with planning and preparations taking place during the day. This requires 24/7 access to legal advice with significant differences between the duties performed by the LEGAD during day and night shifts. Day shift LEGADs are mainly involved in planning, preparations, target nominations, and attending boards and the boards' working groups. They deal with the whole spectrum of legal advice from LOAC, through discipline, claims and host nation support. Night shift LEGADs are more involved with the “kinetics” of an operation. This requires sitting in the Joint Operations Centre (JOC) or Tactical Operations Centre (TOC), observing the conduct of operations and intervening whenever something goes wrong or when a legal issue arises during the operation.

Integration of the LEGAD with the rest of the staff, especially JOC personnel is particularly important in SOF. Mutual trust, respect and confidence are essential, as the dynamics of special operations may require legal advice to be provided ad-hoc in delicate and risky situations. As stated by a former US Special Operations Command Europe (SOCEUR) Judge Advocate, a SOF LEGAD (or JA) must have a firm grasp of the details regarding special operations, therefore it might even be necessary for him/her to undergo similar tactical training as SOF operators.

On the other hand, SOF personnel are usually very independent, proactive and willing to react immediately. SOF LEGADs must have charisma

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<sup>14</sup>*Rules of Engagement (ROE) Handbook for Judge Advocates*, ed. by David E. Graham, Center For Law and Military Operations (CLAMO), 2000, pp. 1-31-1-32; *Rules of Engagement Handbook*, ed. by Dennis Mandsager, International Institute of Humanitarian Law, Sanremo, 2009, pp. 10-11

and authority to be able to influence their partners and commanders when necessary. Such a trusting relationship takes time to build, however without it, the LEGAD bears the risk of being undermined or even ignored. This is also valid for all other armed services and commands/HQs.

### **Special Operations Training: Example of Polish Special Operations Command (POL SOC) Training for NATO RESPONSE FORCE (NRF) Certification**

There is no standing Special Operations Component Command (SOCC) within the NATO Command Structure. Most often, it is the national Special Operations Commands (SOCs) that are declared to form the core of the SOCC for NATO Response Force (NRF). JFTC has conducted several Special Forces-related training events, to include a few closely related to the certification process as a NATO SOCC in the NRF. To illustrate the points above an example will be given of one of the SOC's field training exercises supported by the JFTC.<sup>15</sup> In this exercise the following scenario was presented:

*A Maritime Special Operations Task Group (SOTG) had been ordered to board and search a maritime vessel on the high seas. The vessel was suspected of carrying contraband and an unknown number of members of an organised armed group. There was no reliable intelligence on whether the crew was comprised of members of this armed group or forced to compel. There was also no information on whether innocent passengers were aboard or not. The SOTG deployed from a naval vessel with three Special Operations Task Units (SOTUs) on RHIB-type fast boats supported by a helicopter with side-mounted machine guns and a sniper. Upon approaching the suspected vessel, SOTUs received small arms fire and requested close air support with the intent to sink the vessel.*

The Commander of the SOCC was willing to forward this request to the Air Component Command and grant the SOTG commander the authority to strike once he identified the target. The SOCC LEGAD correctly argued that sinking the vessel would be a disproportionate response, since there was a significant risk of collateral damage, due to insufficient INTEL. Thus this would go beyond the boundaries of self-defence, as the SOTUs were able to break contact and the gunner and sniper aboard the helicopter were able to provide direct fire support eliminating particular targets. The JFC Commander's guidance required minimising the risk of civilian casualties, even at the price of not accomplishing the mission. However, due to the relatively limited experience of the SOCC LEGAD in the area of Operational Law and his short tour of duty with the SOCC, his recommendations were not followed.

Observing the development of the situation, Exercise Control decided to "press pause" on the exercise and organised a quick huddle with SOCC key personnel:

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<sup>15</sup>JFTC LEGAD yet again acted as HICON LEGAD replicating JFC Legal Office

It was explained that employing such grave actions when there was a possibility to either break contact or provide direct fire support would go beyond the boundaries of proportionate response in self-defence and cause a shift from a self-defence situation to a de facto offensive engagement. Also in accordance with Annex II (Joint Fires and Targeting)<sup>16</sup> due to a Collateral Damage Estimation (CDE) assessed at Level 5 High,<sup>17</sup> the Target Engagement Authority would be vested at high levels in the NATO Command Chain. Moreover, as organic direct fire assets (helicopter gunner and sniper) were available and the naval vessel operating in the vicinity was capable of providing both non-disabling and disabling fire to stop the vessel, Joint Fires procedures would not allow employment of indirect fire assets in this situation.

This case study proves that insufficient integration of the LEGAD into the staff and lack of established working relations with other cells and functional areas may have a detrimental impact on the conduct of operations by the whole HQ. The SOCC LEGAD, though correct in his recommendations, was overlooked because of his limited experience which resulted in the Commander of the SOCC potentially breaking the legal boundaries of the operation.

Another challenge was drafting the ROEREQ for the training audience. SOCC staff had the tendency to place the majority of the burden on their LEGADs, and it required JFTC LEGAD's intervention, as well as a separate briefing for the training audience on the process of ROE development to change this approach. As mentioned above, LEGADs don't have sufficient expertise to cover all the areas ROEs have to deal with and – given the structure of NATO ROE<sup>18</sup> – there is almost no functional area, or cell, in a joint HQ that would not have "its own" series of ROE, or at least a single rule in the whole set. The JFTC LEGAD used the example of ROE series 36 – Information Operations (INFOOPS), which contain a wide range of possible means and methods from electronic warfare, through computer network operations and psychological operations (PSYOPS), to physical destruction of the enemy command and control or communication and information systems. Without input from at least the representatives of INFOOPS, Information Security (INFOSEC), force protection, J-6, PSYOPS and targeting cells, it would be almost impossible to draft proper, comprehensive and exhaustive ROE dealing with the broad INFOOPS area.

### **Concluding Key Principles for Legal Advisors in Operations**

There is a saying: *"the more sweat and tears shed on the training ground, the less blood will be spilled on the battlefield"*. It is important to remember that some key principles of LEGAD interaction with the rest of the Staff are

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<sup>16</sup>For the OPLAN used in the exercise.

<sup>17</sup> Because of the potential for causing civilian casualties.

<sup>18</sup> MC 362/1 – NATO Rules of Engagement



equally applicable during training and in real operations:

- 1) LEGADs need excellent relationships with many staff branches;
- 2) Trust in the relationship between Commanders and their LEGAD is crucial;
- 3) The Commander is looking for permissions, not prohibitions, but at the same time needs to know when there is a “no-go” from a legal perspective;
- 4) LEGADs need to be accessible to all staff branches, as proactive team players;
- 5) LEGADs need to provide clear and concise recommendations;
- 6) LEGADs cannot be afraid to say “I’m not sure and I need 5 minutes to clarify”.

JFTC’s motto “Transformation Through Training” is reflected in its efforts to transform groups of individual trainees into fully functional Staffs and HQs at the tactical-level.

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## **NATO: Evolution and Legal Framework for the Conduct of Operations**

By Dr. Petra Ochmannova<sup>1</sup>

### **Introduction**

The attempts of nation-states to establish security pacts constitute a motif of human history. Looking back to the 20<sup>th</sup> Century the creation of multinational security arrangements represents a particularly defining characteristic of those 100 years.<sup>2</sup> The formation of the North Atlantic Alliance and its integrated defence system, well known as the North Atlantic Treaty Organisation<sup>3</sup> (NATO), is a worthy example of an organisation established by states to obtain closer international cooperation in matters of defence.

Because the structure, function, and decision-making processes of existing international organisations vary significantly, drawing conclusions about their actions should be based on an informed, case-by-case evaluation, rather than analogical findings with other international organisations that may be imprecise. To better explain the unique relationship between NATO and its member nations during NATO operations this article will discuss: 1) NATO Strategic Concepts since 1991; 2) NATO and peacekeeping; 3) the NATO legal basis for the conduct of operations; and 4) the translation of a NATO mandate into a national mandate.

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<sup>2</sup> H. G. Schermers & N. M. Blocker, *International Institutional Law*, 5<sup>th</sup> Revised Edition, 2011.

<sup>3</sup> E. Reid, *Time of Fear and Hope: The Making of The North Atlantic Treaty 1947 – 1949*, 1977, p. 228.

## **NATO Strategic Concepts since 1991**

NATO may be characterised in many ways. One that best matches NATO's founding principles and current mode of operation is "*what we can do alone is not as important as what we can do together*".<sup>4</sup>

As a product of the post-World War II era, the North Atlantic Alliance began its existence primarily focused on the preparation of effective collective defence.<sup>5</sup> This was based on the necessity of a collective defence by all twelve original members of the North Atlantic Alliance in the event of an attack by the Soviet Union and, later, the Warsaw Pact. Thankfully this capability of NATO was never tested during the Cold War, despite a number of international crises that could have resulted in the activation of NATO's collective defence system. These events include the 1961 Berlin crisis, the 1962 Cuban missile crisis, or the 1986 Berlin bombing attack in against United States military personnel which was attributed to Libya.

Yet, ten years after the dissolution of the Soviet Union as a reaction to the terrorist attacks against the United States, the Alliance did activate its collective defence system.<sup>6</sup> On 12 September 2001, for the first time in the history of NATO, the Washington Treaty's most prominent Article, Article 5, was invoked.<sup>7</sup>

As reflected clearly in the strategic documents written during the Cold War, the Alliance's aim was deterrence because neither the NATO nations nor the Soviet Union could accept the massive assured destruction that a major military conflict would produce.<sup>8</sup> Thus, from 1949 to 1991, NATO

<sup>4</sup> Lord Ashdown of Norton-sub-Hampden GCMG KBE PC Ex ARRCAD FUSION, 2008, reference used from General Sir Richard Shirreff, chapter "Conducting Joint Operations" contained in The Oxford Handbook of War, ed. By J. Lindley-French and Y. Boyer, Oxford University Press, 2012, p. 375.

<sup>5</sup> Preamble, The North Atlantic Treaty, signed on 4 April 1949 in Washington, D.C.

<sup>6</sup> NATO's reaction to an armed attack against one of its members (the United States) and subsequent contribution to the fight against terrorism conducted its practical response by launching two military operations. Initially, on the request of the United States, NATO agreed to deploy its military assets in the form of NATO Airborne Warning and Control System (AWACS), launching the anti-terror Operation Eagle Assist with the aim to defend US airspace and prevent further attacks similar to 9/11. This operation lasted approximately seven months (from 9 October 2001 to 15 May 2002) and consisted of support to the US Operation Noble Eagle. Subsequently, the Alliance launched the anti-terrorist Operation Active Endeavour, which consisted of NATO's Naval Forces patrolling the Mediterranean Sea in order to detect and deter any possible terrorist activity in this area.

<sup>7</sup> Article 5 "*The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area*". The North Atlantic Treaty, signed on 4 April 1949 in Washington, D.C.

<sup>8</sup> Strategic Concept for the Defense of the North Atlantic Area (DC6/1), 6 January 1950; The Strategic Concept for the Defense of the North Atlantic Area (MC 3/5(Final)); Overall Strategic Concept for the Defence of the NATO Area (MC 14/2), 23 May 1957; Overall Strategic Concept for the Defence of the North Atlantic Treaty Organisation Area (MC 14/3)m 16 January 1968.

conducted many exercises but zero military operations. Ironically, it was the collapse of the threat posed by the Soviet Union—the North Atlantic Alliance's *raison d'être*—that propelled NATO into a new era of existence.

This new era is characterised by the adoption of a broader approach to the security of Alliance. New capabilities to prevent conflicts have been introduced and NATO is actively responding to current security threats. In other words, in addition to NATO's ongoing commitment to the collective defence of its member states,<sup>9</sup> the Alliance actually conducts a wide range of operations.<sup>10</sup> NATO entered into regular dialogue with countries that were interested in cooperating with NATO, established a framework for co-operation with them on a bilateral or multilateral basis, and also introduced concepts of crisis management and conflict prevention.<sup>11</sup>

In 1999, this new operational remit of the the Alliance was further expanded. For the first time NATO committed itself to active engagement outside the territory of its member countries with the aim of responding to new security threats such as terrorism, ethnic conflicts, and human rights abuses.<sup>12</sup> In order to effectively respond to international crises, whether political, military, or humanitarian in nature, the concept of crisis management was further elaborated with the introduction of a new concept for conducting crisis response operations.<sup>13</sup>

Following this conceptual development, all NATO/NATO-led operations are now internally classified as either an "Article 5 Operation" (collective defence) or a "Non-Article 5 Crisis Response Operation" (NA5CRO). Since 1990, NATO has conducted a total of forty-one operations. Only two of these have been classified as Article 5 Operations.<sup>14</sup> The remaining thirty-nine have all been within the NA5CRO concept. A detailed description of the NA5CRO doctrine is contained in Allied Joint Publication (AJP-3.4). AJP-3.4 defines NA5CRO as "multifunctional operations, falling outside the scope of Article 5, contributing to conflict prevention and resolution, and crisis management in

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<sup>9</sup> Para 30 of The Alliance's New Strategic Concept agreed by the Heads of State and Government participating in the Meeting of the North Atlantic Council, 1991; [http://www.nato.int/cps/en/natolive/official\\_texts\\_23847.htm](http://www.nato.int/cps/en/natolive/official_texts_23847.htm) (visited on 15 April 2014).

<sup>10</sup> 1991 Strategic Concept (first unclassified and officially published), 1999 Strategic Concept. For more information about NATO Strategic Concepts see [http://www.nato.int/cps/en/SID-6E131029-8691CB2B/natolive/topics\\_56626.htm](http://www.nato.int/cps/en/SID-6E131029-8691CB2B/natolive/topics_56626.htm) (visited 15 April 2014).

<sup>11</sup> Para 28 - 33 of The Alliance's New Strategic Concept agreed by the Heads of State and Government participating in the Meeting of the North Atlantic Council, 1991; [http://www.nato.int/cps/en/natolive/official\\_texts\\_23847.htm](http://www.nato.int/cps/en/natolive/official_texts_23847.htm) (visited on 15 April 2014).

<sup>12</sup> The Alliance's Strategic Concept, 1999, [http://www.nato.int/cps/en/natolive/official\\_texts\\_27433.htm?selectedLocale=en](http://www.nato.int/cps/en/natolive/official_texts_27433.htm?selectedLocale=en) (visited on 15 April 2014).

<sup>13</sup> See for instance, the 1999 NATO's Strategic Concept, as well as current NATO Strategic Concept adopted at the NATO Summit in Lisbon, 2010. [http://www.nato.int/cps/en/SID-CC8B074A-FB3FFB42/natolive/topics\\_56626.htm](http://www.nato.int/cps/en/SID-CC8B074A-FB3FFB42/natolive/topics_56626.htm) (visited on 15 April 2014).

<sup>14</sup> Operation Eagle Assist (2001 – 2002) and Operation Active Endeavour (2001 – present).



the pursuit of declared Alliance objectives.”<sup>15</sup>

This standardised concept of NA5CRO could be practically illustrated through the following examples of NATO/NATO-led operations: the conduct of combat and counterinsurgency operations such as in Afghanistan through the ISAF mission,<sup>16</sup> disaster relief and humanitarian assistance provided to USA after Hurricane Kathrina<sup>17</sup> or to Pakistan after the earthquake and massive flooding,<sup>18</sup> the security mission to secure the delivery of humanitarian relief supplies to Somalia (Operation Allied Provider),<sup>19</sup> or maritime interdiction operations, embargoes, and no-fly zones seen in the case of Libya.<sup>20</sup>

### **NATO and Peacekeeping**

As the Cold War, collective-defence model disappeared,<sup>21</sup> NATO re-oriented itself towards a greater organisational presence on the international scene. With the 1991 Strategic Concept, NATO declared its readiness to enhance its cooperation with the United Nations (UN) and agreed to support UN peacekeeping efforts as well as other operations within the Euro-Atlantic region on a case-by-case basis.<sup>22</sup>

In 1995, NATO deployed the Implementation Force (IFOR) in Bosnia and Hercegovina. While NATO generally considers IFOR to be its first peacekeeping operation,<sup>23</sup> this operation differed considerably from Lester B. Pearson and Dag Hammarskjöld's “invented” concepts of peacekeeping missions based on Chapter VI of the UN Charter.<sup>24</sup> For instance, this general term, “peacekeeping,” tell us very little about an actual mandate and the law applicable to the operation. Does it mean that the use of force is allowed in self-defence only? Or does it mean that an offensive use of force was authorised?

<sup>15</sup> Allied Joint Doctrine for Non-Article 5 Crisis Response Operations (AJP-3.4(A)), 2010, LEX-3, NATO UNCLASSIFIED.

<sup>16</sup> UNSCR 1386, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1386\(2001\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1386(2001)) (visited on 22 April 2014).

<sup>17</sup> NATO Relief Mission to the United States after Hurricane Kathrina (2005).

<sup>18</sup> NATO Humanitarian Assistance to Pakistan from 2005 to 2006, due to the devastating earthquake and in 2010 because of massive flooding.

<sup>19</sup> In response to the UN SG, NATO escorted World Food Program ships carrying relief supplies to Somalia, protecting them against pirates.

<sup>20</sup> NATO maritime and air operations in support of the UN SC Resolution 1970 (2011) and Operation Unified Protector, enforcing the UN arms embargo and protection of civilians based on the UN SC Resolution 1973 (2011), <http://www.un.org/en/sc/documents/resolutions/index.shtml> (visited on 15 April 2014).

<sup>21</sup> P. Olson, 'Introductory comments – 2013 Tallinn NATO Legal Adviser's Conference', NATO Legal Gazette #32, 2013, p. 25.

<sup>22</sup> Statement issued at the Ministerial Meeting of the North Atlantic Council, Oslo, 4 June 1992, <http://www.nato.int/docu/comm/49-95/c920604a.htm> (visited on 15 April 2014).

<sup>23</sup> [http://www.nato.int/cps/en/natolive/topics\\_50321.htm?selectedLocale=en](http://www.nato.int/cps/en/natolive/topics_50321.htm?selectedLocale=en) (visited on 22 April 2014).

<sup>24</sup> Lester B. Pearson, Force for UN, Foreign Affairs 35:3, April 1957, p. 395-404.



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This lack of clarity is further demonstrated when examining NATO's internal separation of concepts of operations (Article 5 Operations or NA5CRO). Such categorisation is unique to NATO and should not be confused with nomenclature used by other international organisations. For example, there is no conceptual relation between NATO and the technical classification for operations used by the European Union (crisis management operations conducted under common security and defence policy framework),<sup>25</sup> or the United Nations (such as peace-keeping, peace-enforcement or peace-building).<sup>26</sup> The designation of IFOR as a "peacekeeping" operation does not indicate whether it was classically conducted under Chapter VI of the UN Charter or, as it was under Chapter VII. Nor does the term "peacekeeping" indicate that IFOR represented a peacetime operation where international human rights law applied or an armed conflict situation where international humanitarian law prevailed in application.

The UN emphasizes rightfully that "linking UN peacekeeping with a particular Chapter of the Charter [UN] can be misleading for the purposes of operational planning, training and mandate implementation."<sup>27</sup>

Thus, in practice one must always analyse the legal nature of the conflict, the given mandate, and the related policy issues in order to understand the legal basis for use of force in NATO operations.

### **NATO: Legal Basis for the Conduct of Operations**

The legal basis NATO relies upon for conducting NA5CROs is either: 1) a United Nation Security Council Resolution (UNSCR) to undertake actions (e.g. the cases of ISAF or Libya); 2) the request of a State for NATO support (e.g. the

<sup>25</sup> Art. 42 (1) EU Treaty [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2012.326.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2012.326.01.0001.01.ENG) (visited on 15 April 2014).

<sup>26</sup> An Agenda for Peace, Preventive diplomacy, peacemaking and peace-keeping, A/47/277-S/24111, [http://unrol.org/files/A\\_47\\_277.pdf](http://unrol.org/files/A_47_277.pdf) (visited on 15 April 2014).

<sup>27</sup> UN Peacekeeping Operations – Principles and Guidelines, 2008, the so called "Capstone Doctrine", p. 13-14, [http://pbpu.unlb.org/pbps/Library/Capstone\\_Doctrine\\_ENG.pdf](http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf) (visited on 22 April 2014).

request from Greece in 2004 for AWACs coverage during the Athens Olympic Games or Pakistan's request to NATO for disaster relief following the 2005 earthquake and the 2010 flooding); or 3) regional mandates from international organisations based on principles of the UN Charter.<sup>28</sup>

Irrespective of the underlying authority for NATO action — a UNSCR, sovereign consent, or the regional mandates — the necessary predicate for legally valid North Atlantic Alliance operations is approval by the NAC which is achieved through the consensus of its member states.<sup>29</sup>

Consequently, there is no difference, in terms of NATO procedure, as to whether the NAC issues a decision under an Article 5 operation or an NA5CRO. In both cases member nations are exercising their sovereign authority to bind themselves to obligations made through their acts and decisions.<sup>30</sup> The only distinction is the level of support required by the Washington Treaty from the NATO nations. For collective defence action taken under Article 5 of the Washington Treaty,<sup>31</sup> NATO nations have a binding obligation to support the NATO state under armed attack, although this support could be political, moral, or financial rather than military in nature. For NA5CRO which is factually founded upon Articles 2, 3 and/or 4 of the Washington Treaty, there is neither a legal nor a formal obligation for nations to provide support.<sup>32</sup>

### **Translation of NATO Mandate into National Mandate**

As every operation has a different strategic goal, it requires different assets and can prescribe different levels of involvement from each NATO nation. Therefore, within NATO, it is the approved NAC mandate that provides the purpose and scope of each operation. This mandate is subsequently implemented by: 1) NATO and partner nations who decide to participate and contribute to the specific NATO operation; and 2) the Supreme Allied Commander Europe (SACEUR), through the NATO command and force structure. With respect to the NATO nations, all are required to implement the NATO mandate via their respective national procedures in order to ensure

<sup>28</sup> The issue of Kosovo within NATO represents a specific case and is outside the scope of this paper.

<sup>29</sup> Because of the nature of the consensus rule, the current 28 Allies do not manifestly vote. The decisions are not made by majority or unanimity, but rather through a NATO-specific procedure called the "silence procedure." Here, all decisions are made only if the "silence procedure" is not broken (no objection is raised during the given period of time), as silence indicates affirmation.

<sup>30</sup> See *The Wimbledon (1923)*, PCIJ, p.25, "... any convention creating an obligation ...places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty."

<sup>31</sup> Article 5, The North Atlantic Treaty, signed on 4 April 1949 in Washington, D.C.

<sup>32</sup> See Allied Joint Doctrine for Non-Article 5 Crisis Response Operations (AJP-3.4(A)), NATO UNCLASSIFIED, 2010, para 0104, p. 1-3, "one principal difference between Article 5 operations and NA5CRO is that there is no formal obligation for NATO nations to take part in a NA5CRO".

the lawful use of their national military assets.<sup>33</sup>

For SACEUR, the NAC approval is a green light. Based on such approval, SACEUR may direct his staff to develop a mission operational plan (OPLAN)<sup>34</sup> that contains detailed information on the mission objectives and how they should be reached. NATO nations have many opportunities, during the OPLAN development and approval process, to comment on the OPLAN draft. When SACEUR determines that the OPLAN contains his best military recommendations for mission accomplishment, it is finalised and forwarded through the Military Committee for approval by the NAC. Only after the NAC approves the OPLAN may the specific NATO/NATO-led operation actually commence.

This process for initiation of NATO operations through the OPLAN development displays the high degree of interconnectivity between NATO (as an international organisation) and its member states. Decisions related to the conduct of operations are not taken by any NATO body or military headquarter independently. The twenty-eight NATO nations sitting collectively in the NAC, partner nations participating in NATO operations, and the NATO military command structure directed by SACEUR constantly interact. Thus, NATO obtains proactive participation of its member states during all phases of the conduct of its operations. Each step in the decision-making process involves the nations' considerations and approval. As a result, they are wholly involved in this process and can either reaffirm their initial intent to execute an operation or halt the planning process at any step, thereby changing NATO's course of action.

## **Conclusion**

The aim of this article was to briefly describe the evolution and transformation of NATO from an organisation focused solely on the collective defence of its members into a modern security and defence organisation capable of conducting a wide variety of missions. As NATO became very active on the international scene after 1991, the complexity of the organisation and the similar terminology used by other international organisations have caused numerous misunderstandings concerning the actual functioning of the Alliance.

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<sup>33</sup> Confirmation of this basic principle is found in Para 31 of The Alliance's Strategic Concept, 1999, [http://www.nato.int/cps/en/natolive/official\\_texts\\_27433.htm?selectedLocale=en](http://www.nato.int/cps/en/natolive/official_texts_27433.htm?selectedLocale=en) (visited on 15 April 2014).

<sup>34</sup> OPLAN means "a plan for a single or series of connected operations to be carried out simultaneously or in succession. It is usually based upon stated assumptions and is the form of directive employed by higher authority to permit subordinate commanders to prepare supporting plans and orders. The designation "plan" is usually used instead of "order" in preparing for operations well in advance. An operation plan may be put into effect at a prescribed time, or on signal, and then becomes the operation order." AAP-06 (2012(2)) NATO Glossary Term. NATO UNCLASSIFIED.



Given the explained establishment and functioning of NATO, NATO nations are clearly involved at every stage of the decision-making process as they exercise their full sovereignty and control over their level of involvement within the Alliance. Although it is usually emphasised that "*the legal hierarchy between international organisations and their member states is interestingly unclear*",<sup>35</sup> such a premise does not apply to the close degree of interaction between the Alliance and its member states in their conduct of operations.



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<sup>35</sup> Ian Hurd, *International Organizations, Politics, Law, Practice*, 2011, p. 267.

Excerpt from NATO Legal Gazette Issue 20 (July 2009), pag 6-11

## **Self-Defence during Military Operations: a Human Rights Perspective**

by Capt Federico Sperotto<sup>1</sup>

### **Introduction**

Governments regulate troops serving abroad through a set of Rules of Engagement (ROE)—directives issued by competent military authorities which delineate the circumstances and limitations under which troops will initiate and/or continue combat engagement—which cover domestic and international law. The ROE governing the use of lethal force are normally the subject of guidance or aide-mémoires contained in a card issued to individuals.

Further limitations in operational matters depend on caveats stemming from national policies or regulations. Mandates to foreign troops supporting the host nation in its effort to normalisation include the power to arrest and detain individuals, as well as to search houses and seize properties.

The focus of this article is specifically on self-defence as a defence to homicide. The perspective is a rights perspective, which is the most productive route to establishing the permissibility of self-defensive killing, as Fiona Leverick suggests<sup>2</sup>. The primary interest is the substantial implications of Article 2 of the European Convention on Human Rights on the correct interpretation of the rule permitting soldiers to kill in self-defence.

### **Rules of Engagement and the Use of Force**

ROE governing the use of lethal force by British troops in Iraq in 2004 were the subject of a guidance contained in a card issued to every soldier, known as “Card Alpha” (Card A – Guidance for opening fire for service personnel authorised to carry arms and ammunition on duty).

Card Alpha statements were as follows:

#### **General guidance**

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<sup>2</sup> Leverick Killing in Self-Defence (2006), at 2.

1. This guidance does not affect your inherent right to self-defence. However, in all situations you are to use no more force than absolutely necessary.

#### Firearms must only be used as a last resort

2. When guarding property, you must not use lethal force other than for the protection of human life.

#### Protection of human life

3. You may only open fire against a person if he/she is committing or about to commit an act likely to endanger life and there is no other way to prevent the danger.

#### Challenging

4. A challenge MUST be given before opening fire unless: (a) to do this would increase the risk of death or grave injury to you or any other persons other than the attacker(s), or (b) you or others in the immediate vicinity are under armed attack.
5. You are to challenge by shouting: 'NAVY, ARMY, AIR FORCE, STOP OR I FIRE.' Or words to that effect

#### Opening fire

6. If you have to open fire you are to:
  - (a) fire only aimed shots,
  - (b) fire no more rounds than are necessary, and
  - (c) take all reasonable precautions not to injure anyone other than your target<sup>3</sup>.

The first consideration is that ROE do not affect the soldier's inherent right to self-defence. It means that whatever is written in the ROE, any soldier is able to use the force that the relevant law—normally his/her own national criminal law—permits, and the degree of force necessary and proportionate to counter the aggression. A second element concerns the issue of necessity and proportionality. A third point relates to the nature of the rights and values under protection. Finally, the Card issues precautions and limits in the choice of means and methods. Each aspect will be discussed below.

#### **Self Defence**

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<sup>3</sup>Al-Skeini and Others v the United Kingdom, ECHR (2007) No. 55721/07.

### A. General Principles

The justification of self-defensive killing depends on the right to life, in the sense that the defendant protects his right to life while the aggressor forfeits his right unjustly threatening the life of another. Nevertheless, self-defence suffers fundamental limitations, the right to life being the most fundamental of individual rights. According to William Blackstone, "it is an untrue position, when taken generally, that, by the law of nature or nations, a man may kill his enemy: he has only a right to kill him, in particular cases; in cases of absolute necessity, for self-defence; and it is plain this absolute necessity did not subsist, since the victor did not actually kill him, but made him prisoner."<sup>4</sup> This formulation is similar to that contained in the 1950 European Convention, which refers to the use of force, absolutely necessary in defence of any person.

Under common law, self-defence allows a person to use reasonable force to defend himself from attack. The authority for self-defence includes the use of reasonable force to assist another person who is under threat of attack. As far as the criminal law is concerned, self-defence is a defence if the agent reasonably believes that he/she was going to be attacked and reacted with proportionate force<sup>5</sup>. In England, the common law principles have been partially codified by the Criminal Law Act 1967, and, recently, by the Criminal Justice and Immigration Act 2008<sup>6</sup>. According to section 3 (1) of the Criminal Law Act 1967 (the statutory defence): "A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

The Criminal Justice and Immigration Act 2008 states that in deciding the question of the defence of self-defence the following considerations are to be taken into account:

- a. that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and
- b. that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by

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<sup>4</sup> W. Blackstone, *Commentaries on the Laws of England* (1765-1769) Book 1. Chapter 14. Section 43.

<sup>5</sup> *R v Palmer* (1971) 55 Cr App R 223 (P.C.).

<sup>6</sup> I. Turner, "Suicide Terrorism, Article 2 of the ECHR and the Shooting of Jean Charles de Menezes", [2008] 4 Web JCLI, at URL <http://webjcli.ncl.ac.uk/2008/issue4/turner4.html>.



that person for that purpose. In this regard, the defence must be considered from the offender's own viewpoint. If he acted under an honest mistake of fact the judge should direct a jury on whether his response was commensurate with the attack which he believed he faced<sup>7</sup>.

Generally speaking, in the continental or civil law systems, self-defence—as intended in the relevant law and doctrine, corroborated by judicial decisions—is the action which is permitted in order to prevent a present unlawful attack. An attack is considered present if it is happening or about to happen. A reaction to an attack which will happen—namely a pre-emptive reaction—is unlawful. The action in self-defence must be necessary to ward the attack and must be proportionate. This essentially requires that any action in self-defence (or defence of another) be proportionate to the nature and intensity of the attack and reasonable given the circumstances. Proportionality requires a comparison between the object of the protection—which can be life or limb but also other recognized legal interests—and the object which has to be sacrificed<sup>8</sup>. The judgment on proportionality must be objective. However, the individual under attack *non habet stateram in manu* (he is not holding a balance).

## B. The ECHR System

### The European Court of Human Rights



[www.echr.coe.int](http://www.echr.coe.int)

EU member states are also part of the European Convention on Human Rights (ECHR). The ECHR and the jurisprudence developed are persuasive authority which may be of assistance in interpreting the significance of the rules on self-defence.

In the ECHR system, the acceptable use of force is the one that is absolutely necessary and the admissible degree of force is the one that is strictly proportionate<sup>9</sup>. To better clarify the position of the Court it is useful to recall *Bubbins v the UK*, in which the Court assessed that “the use of lethal force [...] was not disproportionate and did not exceed what was absolutely necessary to avert what was honestly perceived by

<sup>7</sup> Oatridge [1991] 94 Cr App Rep 367

<sup>8</sup> Italian Court of Cassation, First Criminal Division, 10 November 2004, n. 45407.

<sup>9</sup> *McCann and Others v the United Kingdom*, ECHR (1995) Series A, No. 324, 149.

Officer B to be a real and immediate risk to his life and the lives of his colleagues (emphasis added)."<sup>10</sup>The case is also useful to ascertain the issue of mistaken perception about the need to use lethal force, which will be discussed below.

Requisites for self-defence under the Convention are thus proportionality, absolute necessity and an imminent threat to human life. Self-defence includes situations in which agents have a genuine and honest belief in the need to fatally shoot, as the Court explained in *McCann*<sup>11</sup>. In the recent *Usta and Others v Turkey*, the Court reaffirmed its jurisprudence—in particular the cases of *Andronicou and Constantinou*<sup>12</sup> and *Perk and Others*—to point out that it could not substitute its own assessment of the situation for that of the officers who were required to react in the heat of the moment<sup>13</sup>. In particular, in *Andronicou*, the Court assessed that it could not substitute its own assessment of situation with the one of officers confronted with the agonising dilemma between the need to neutralise any risk caused by young men to lives of others. The Court concluded that the fact that officers used as much fire power as they did was clearly regrettable, but not unlawful<sup>14</sup>.

In case of an operation, *Bubbins v the UK* is also useful to prevent arbitrary use of lethal force. The Court observed that the conduct of the operation had at all times been under the control of senior officers and that the deployment of the armed officers had been reviewed and approved by tactical firearms advisers.

### *C. Mistake about the Need to Use Lethal Force*

In *McCann* cited above, the military option might expressly include the use of lethal force for the preservation of life. According to the Rules of Engagement issued by the Ministry of Defence (Rules of Engagement for the Military Commander in Operation Flavius), soldiers could only open fire against a person if they had reasonable grounds for believing that terrorists were currently committing, or were about to commit, an action which was likely to endanger human life of soldiers or passers-by, i.e. against an

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<sup>10</sup> *Bubbins v the United Kingdom*, ECHR (2005) No. 50196, 140.

<sup>11</sup> *McCann*, *supra* at note 8, 200.

<sup>12</sup> In *Andronicou and Constantinou* a rescue operation resulted in the killing of both the assaulter, a young man known to be armed and the hostage, his fiancée. *Andronicou and Constantinou v. Cyprus*, ECHR (1997) No. 25052.

<sup>13</sup> *Usta and Others v Turkey*, ECHR (2008) No. 57084, 59.

<sup>14</sup> *Andronicou and Constantinou*, *supra* at note 40, 192.

occurring or imminent attack<sup>15</sup>. In that occasion, the Court was satisfied that the soldiers honestly believed, in the light of the information that they had been given, that it was necessary to shoot the suspects in order to prevent serious loss of life<sup>16</sup>. The Court also stated that to hold otherwise would be to impose an unrealistic burden on law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others<sup>17</sup>. In *McCann* the minority judges noted that “[t]he authorities had at the time to plan and make decisions on the basis of incomplete information [...] It would be wrong to conclude in retrospect that a particular course would, as things later transpired, have been better than one adopted at the time under the pressures of an ongoing anti-terrorist operation and that the latter course must therefore be regarded as culpably mistaken.”<sup>18</sup>

These conclusions were anticipated by the Commission in *Kelly v the UK*. In that incident a 17-year-old joy rider was shot, killed at a checkpoint on the wrong assumption that he was a terrorist. At the domestic level, the High Court of Northern Ireland had concluded that the serviceman acted in the reasonable belief that the occupants of the car were terrorists. In espousing the same findings, the Commission specified the points to be considered: an overall climate of terrorism and violence, a stolen car belonging to a security officer and the effort made by the victim to escape the checkpoint<sup>19</sup>.

It is worth noting that, in the European Court of Human Rights view, a standard of justification such as “reasonably justifiable,” although less compelling than the Convention standard “absolutely necessary,” is not sufficient to entail a violation of Article 2<sup>20</sup>.

#### *D. The Use of Force in Defence of Property*

While the concept of self-defence in the European legal systems seems to be consistent with Article 2 of the European Convention, the use of lethal force to protect property—formally permitted in the major parts of the domestic legal systems—may violate Article 2 of the Convention. According to Article 2, deprivation of life is not regarded as inflicted in contravention to the right to life when it results from use of force absolutely necessary to

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<sup>15</sup> *McCann*, supra at note 8, 15-18

<sup>16</sup> *R v Palmer* (1971) 55 Cr App R 223 (P.C.).

<sup>17</sup> *McCann*, supra at note 8, 200.

<sup>18</sup> *Ibid.*, dissenting opinion, 8.

<sup>19</sup> *Kelly v the UK*, (1993) 16 EHRR CD20, 22.

<sup>20</sup> *Ibid.*, 155.

defend any person against unlawful violence. The Court stressed on numerous occasions that the rules enshrined in Article 2—which rank as one of the most fundamental provisions in the Convention—must be strictly construed. In the second paragraph there is no reference to the defence of property<sup>21</sup>. Clearly, the use of deadly force to merely defend possessions is considered unacceptable.

On this point, the Rules of Engagement for the British personnel deployed in Iraq in 2004 significantly prescribed that a soldier may open fire against a person only if he/she is committing or about to commit an act likely to endanger life and there is no other way to prevent the danger, while adding that when guarding property, a soldier must not use lethal force other than for the protection of human life<sup>22</sup>.

This matter remains highly controversial, as the courts in different states consider the proportionality of the reaction to be pivotal. For example, killing a thief who is stealing an item of minor value—lacking the requisite of proportionality—should not be considered to be a lawful form of defence. In this respect, for example, the Italian Court of Cassation held recently that the use of arms in defence of possessions is lawful only when the defender acts to prevent a credible prejudice to his/her physical integrity<sup>23</sup>.

#### *E. Self-Defence during Military Operations*

Self-defence is at the core of the use of force regulations in current operations. As a general rule, individuals belonging to forces deployed abroad retain the right of self-defence, under their domestic law—as usually, a status of forces agreement<sup>24</sup> prescribes that personnel deployed is subject to the exclusive jurisdiction of the sending State<sup>25</sup>. The use of lethal force in preventing loss of life or serious bodily harm is accepted as a general form of self-defence—regardless of the minor differences—in the various national laws and also under international human rights and international humanitarian law.

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<sup>21</sup> *Leverik* supra at note 1, at 181.

<sup>22</sup> *Al Skeini and Others v U.K.*, ECHR (2007) No. 55721.

<sup>23</sup> Italian Court of Cassation, First Criminal Division, 8 March 2007 no. 16677.

<sup>24</sup> A comprehensive analysis in D. Fleck, *The Handbook of the Law of Visiting Forces* (2001).

<sup>25</sup> See, e. g., Regulation No. 2000/47 (UNMIK/REG/2000/47) on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, at section 2, or the Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan-Arrangements Regarding the Status of the International Security Assistance Force (Annex A).



Self-defence includes the right to react to an imminent threat. In official documents released by the military authorities "imminent" means a necessity of self-defence against a threat which is instant, manifest and overwhelming, in accordance with the so-called Webster's doctrine of anticipatory self-defence (normally referred to State-to-State relations)<sup>26</sup>.

A threat is imminent when the situation has reached a point where it is unlikely that it will be possible to save both parties' life. The imminence requirement ensures that deadly force will be used only when it is necessary and as a last resort in the exercise of the inherent right of self-preservation. It also ensures that before a homicide is justified and, as a result, does not constitute a legal wrong, it will be reliably determined that the defendant reasonably believed that absent the use of deadly force, not only would an unlawful attack have occurred, but also that the attack would have caused death or great bodily harm<sup>27</sup>. This connects imminence with necessity and proportionality. Necessity refers to the need of use force at all, i. e. if an attack could be avoided by, for example, withdrawing<sup>28</sup> (however, a military unit is not required to withdraw or surrender its position in order to avoid the authorized use of force). Proportionality refers to the degree of force, "once it has been established that it is necessary to use at least some force to avoid an attack"<sup>29</sup>.

### **Concluding Remarks**

In modern warfare, human rights principles act alongside the laws of war to regulate the scope of military action. Operations involving potential use of lethal force have to be planned and controlled by the authorities so as to minimise the risk to life threat for peaceful civilians. The jurisprudence of the European Court of Human Rights contributes to the interpretation of specific rules on the use of force normally issued to national authorities, without affecting the inherent right to use lethal force in situations when soldiers have a genuine and honest belief in the need to fatally shoot.

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<sup>26</sup> The criteria for this right of anticipatory self-defence were enunciated in a statement issued in 1837 by the US Secretary of State Webster as a necessity of self-defence instant, overwhelming, leaving no choice of means and no moment for deliberation. See L. Rouillard, *The Caroline Case: Anticipatory Self-Defence in Contemporary International Law* (2004) Miskolc J. of Int'l Law 1, No. 2, p. 104-120.

<sup>27</sup> *State v. Watkins*, 283 No. C. 504, 196 S.E. 2d 750 (1973).

<sup>28</sup> F. Leverick, *supra* at note 1, at 5.

<sup>29</sup> *Ibid.*

Excerpt from NATO Legal Gazette Issue 36 (November 2015), pag 41-46



(French soldier on a peacekeeping mission)

[www.nato.int](http://www.nato.int)

## Self-Defence: a French Perspective

by Col Gilles Castel<sup>1</sup>

“Rules of Engagement (ROE) are the authorisation for, or limits on, the use of force during military operations. ROE do not limit the inherent right of self-defence.”<sup>2</sup>The concept of “use of force” is more or less understood by the nations, but when subjected to national regulations, “self-defence” can relate to various concepts and definitions during a NATO operation. The various definitions of “self-defence” can have a debilitating impact on the conduct of military operations, thus hampering the mission itself. Even when ACT succeeded in leading the work on issuing an ROE Training Standardization Agreement (STANAG), which was approved by the nations for promulgation and is now an agreed upon NATO training standard, establishing a common understanding of self-defence remains one of the main challenges commanders face during a NATO led operation. This article will describe how France deals with issues of self-defence, and the challenges French soldiers face in this area.

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<sup>2</sup>MC 362/1 NATO RULES OF ENGAGEMENT, 30 June 2003.

## **Perception of Self-Defence in France**

Self-defence in France is based on a dual-conception, which establishes a difference in its application between self-defence within the territory of France and self-defence outside of France. Since French self-defence is based on a dual-concept there will be a brief explanation of how France regulates self-defence domestically. Then there will be an examination of the application of self-defence to military operations. The article will conclude by examining how these duelling views impact the use of force by French troops.

### **Self-Defence in French Domestic Law**

In the French criminal code<sup>3</sup> there is no criminal liability for a person who uses force to protect him or herself or to protect someone else who is facing an unjustified use of force. Under French criminal law, self-defence is justified under the following circumstances:

- Unjustified attack
- Only as an immediate response to the attack (and this includes the necessary element that the attacker is clearly identified)
- Proportionality between the means used to defend and the gravity of the attack (the French Supreme Criminal Court applies a rule of "strict proportionality").

Until recently (2005) the French army was restricted in its use of self-defence, because it was operating under the French domestic law in regards to self-defence no matter where the military action occurred. Because of the very restrictive scope of self-defence application, French forces deployed in military operations encountered several difficulties in fulfilling their mission. A few examples are presented below:

1. French forces deployed to Mitrovica, Kosovo, under United Nations Security Council Resolution (UNSCR) 1244<sup>4</sup> faced many protests against their presence. These protests turned from peaceful to violent when demonstrators would use lethal weapons to threaten or at times even injure French soldiers. French soldiers, being subject to their domestic criminal law, including the regulations of self-defence, could not respond to attacks without clearly identifying the attacker. This made exercising self-defence during mass protests difficult, because French soldiers struggled to clearly identify the

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<sup>3</sup>Self-defence in French criminal code is "légitime défense" – par. 122 (5) French Criminal Code

<sup>4</sup> UNSCR 1244 dated June 10, 1999

attackers. As a result, several French soldiers were wounded and unable to lawfully defend themselves from protestors' attacks.

2. While deployed in the Ivory Coast during Operation Licorne<sup>5</sup> French forces would often approach road blocks manned by armed outlaws who would threaten and intimidate the soldiers with their weapons. Since the outlaws were not physically using force against the soldiers, the incidents did not meet the threshold of an "attack" to justify a response by the French soldiers. So even though the threats of the outlaws severely hampered the French soldiers' mission (they were forced to reroute or even were restricted from free-movement) the soldiers had no choice but to peacefully retreat.

3. Another incident in Kosovo also resulted in questions of criminal liability. The French soldiers were manning a blockade; however when a Kosovar vehicle forced its way through the blockade, a French soldier in response shot the driver of the vehicle. The driver was seriously injured, and the soldier was left in a precarious situation because this did not fall within the French definition of self-defence. This was because the driver had not used any type of force against the soldier. The driver had simply defied orders. While the driver's actions could be interpreted as a threat, it was not an "unjustified attack" allowing the soldier to respond with lethal force. The French commanding officer overseeing this incident sympathised with the soldier's dilemma, and in the incident report tried to minimize it, stating that the driver had fired upon the soldier in order to justify the soldier's response. However a few days later, an MP investigator discovered the commanding officer's embezzlement, and found that this was an unjustified use of force which was a crime in the French domestic system.

These incidents showed that French soldiers faced a dilemma in operations under the French domestic requirements for self-defence. Soldiers were not able to appropriately respond until they were actually physically attacked, no matter what the level of the threat was.

### **Article L4123-12-II: An Exemption to French Self-Defence Laws**

As a solution to the dilemmas French soldiers were facing in regards to self-defence, as regulated by the domestic criminal law, the French Ministry of Defence Legal Department took the opportunity and proposed the revision of

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<sup>5</sup>The French Armed Forces' peacekeeping operation in support of the United Nations Operation in Côte d'Ivoire



the General Status of Military Law in 2005<sup>6</sup> to propose a legal provision, Article L4123-12-II which was in the 2005 Code de la défense (amended December 2013)<sup>7</sup>. This was basically an exemption from the French domestic standard of an actual attack which has posed a potentially fatal dilemma to French forces, due to the nature of their mission and threats they faced.

Article L4123-12-II applies only to the French military, and therefore it is not part of the French Criminal Code. However, the Code now instructs the French judges to use these provisions for cases of use of force by French soldiers in operations outside of the National Territory<sup>8</sup>. These provisions also apply to French troops deployed in NATO or UN led military operations and activities.

Under Article L4123-12-II provisions, during an operation outside of the National Territory, French soldiers are permitted to use coercive measures up to the use of lethal force as long as this is necessary for the mission and falls within the rules of international law<sup>9</sup>. Basically this clarifies that French soldiers can use force in contexts outside of self-defence, and provides an exemption for soldiers from the domestic criminal laws concerning self-defence. The main conditions posed by this article are as follows:

- Applies only to military personnel, not to civilians
- Applies only for operations held outside the French National Territory

<sup>6</sup>Loi n° 2005-270 du 24 mars 2005 portant statut général des militaires/ Law No. 2005-270 of 24 March 2005 on the general status of military

<sup>7</sup>Article 4123-12.II: "N'est pas pénalement responsable le militaire qui, dans le respect des règles du droit international et dans le cadre d'une opération mobilisant des capacités militaires, se déroulant à l'extérieur du territoire français ou des eaux territoriales françaises, quels que soient son objet, sa durée ou son ampleur, y compris la libération d'otages, l'évacuation de ressortissants ou la police en haute mer, exerce des mesures de coercition ou fait usage de la force armée, ou en donne l'ordre, lorsque cela est nécessaire à l'exercice de sa mission."

English Translation (Rough)

"A soldier is not criminally responsible, if he acts in compliance with the rules of international law and within the framework of an operation that mobilizes military capabilities and takes place outside French territory or the territorial waters of France, irrespective of the purpose, duration or scope—if the soldier exercises coercion measures, or uses armed force, or gives the order, where this is necessary to carry out the mission including the release of hostages, evacuation of nationals or policing of the High Seas. ."

<sup>8</sup> "National Territory" designates the territory of the Republic of France and includes French-administered territories outside of Europe

<sup>9</sup> (FRA) Joint Centre for Concepts, Doctrine and Experimentation. "Article L 4123-12.II of the 2005 Code de la défense, amended in December 2013, following the extension provided by the 2013 Loi de Programmation Militaire (short term military planning law) in the chapter 'Dispositions relatives au traitement pénal des affaires militaires.'" Information retrieved from, [http://www.cicde.defense.gouv.fr/IMG/pdf/20140612\\_np\\_cicde\\_fra-jd-01a-def.pdf](http://www.cicde.defense.gouv.fr/IMG/pdf/20140612_np_cicde_fra-jd-01a-def.pdf) (Last Accessed 5/28/2015)

- Applies to those using or ordering the use of force, operating under Law of Armed Conflict (LOAC) principles (particularly the principle of necessity).

This rule basically represents a criminal liability exemption for soldiers. Nevertheless, Article L4123-12-II remains under the constant and strict control of a criminal judge in France who interprets the rule.

Since 2005 Article L4123-12-II was applied only a few times, each time in the investigative pre-trial stage in order to determine whether French soldiers should be tried or acquitted for criminal liability. Some applications were the following:

- In 2007, French troops deployed in the Ivory Coast used lethal force at a check point they were manning. The soldiers fired at a truck driver forcing a roadblock. In his preliminary investigation, the French judge identified the clear necessity of the use of force in that case and decided at that stage there was no criminal liability.
- In March 2008, French troops deployed to Kosovo faced a riot in front of the Mitrovica tribunal. The soldiers were attacked with stones and hand grenades, and were fired at by the rioters using small arms. After having identified the main leaders, the force commander decided to respond by employing snipers. Very specific and targeted force was used against the riot leaders and this led to the end of the riot. When reviewing the case, the French Judge decided that under Article L4123-12-II, there was no criminal liability.



investigations, to date no official judgement has been rendered by the French justice system regarding Article L4123-12-II. So for the time being there is no official precedent on Article L4123-12-II. Despite the lack of precedent, cases on the use of force by French troops is under the supervision of one specific trial chamber located in Paris (6th Chamber du Tribunal de Grande Instance de Paris). Therefore, commanders are now more confident in using force in operations, since they have a better expectation of how the judge will rule.

As a summary, the extended self-defence exemption that Article L4123-12-II provides now allows French troops to conduct any mission outside the National Territory without having to deal with any caveats regarding the use of force, so long as their conduct is within international law particularly the Law of Armed Conflict (LOAC). This gives French commanders more flexibility and a clear framework for the use of force in operations outside the National Territory of France.

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[www.nato.int](http://www.nato.int)

## NATO Gender Mainstreaming, LOAC, and Kinetic Operations

by Jody M. Prescott<sup>1</sup>

### Introduction

General Sir Rupert Smith coined the term “war amongst the people” to describe the new paradigm in which military action increasingly takes place in a civilian-centric environment.<sup>2</sup> For too long, however, “civilian-centric” has ordinarily been understood from a normative male perspective, rather than including and valuing female perspectives as well. As set out primarily by iterations of Bi-SC Directive 40-1 (Directive),<sup>3</sup> NATO gender mainstreaming seeks to implement UNSCR 1325 on women, peace and security,<sup>4</sup> and later related resolutions, in all of its activities and thereby factor female perspectives into its operations. This article suggests that when assessed in light of the unique and largely underappreciated feminist critique of the law of

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<sup>2</sup> Toni Pfanner, Interview with General Sir Rupert Smith, 88 INTERNATIONAL REVIEW OF THE RED CROSS 719, 719-20 (2006).

<sup>3</sup> Bi-SC Directive 40-1 (Rev. 1), Integrating UNSCR 1325 and Gender Perspectives in the NATO Command Structure including Measures for Protection During Armed Conflict, Supreme Allied Commander Europe & Supreme Allied Commander, Transformation (8 Aug. 2012), (NATO Unclassified).

<sup>4</sup> S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000) (recognizing the important role played by women in the prevention and resolution of armed conflict, and the need for greater protection of women and girls during armed conflict).



armed conflict (LOAC), NATO gender mainstreaming efforts and work in the area of LOAC training show important, but uneven, progress within the Alliance on this important issue. To better appreciate the effect that LOAC-oriented gender mainstreaming might have on Alliance activities and operations, however, we must first picture what its operationalization in a LOAC context might look like. . .

### **The Platoon Leader's Dilemma**

. . . Assume for a moment that it is the year 2020. In one of the many conflict zones that have flared across the world in the wake of accelerating climate change, resource scarcity, and the mass movements of people, a young NATO infantry lieutenant and her platoon are conducting a security mission. Whilst patrolling the lieutenant's platoon is becomes pinned down by cross-fire from a village. The platoon leader quickly assesses her unit's situation. She has a decent view of the buildings, which look to her like dwellings, but she cannot see or hear any civilians. Her rules of engagement are sufficiently robust that she could call in a strike to target the buildings from which her unit is taking fire. However, she is mindful of the guidance given by her theatre-level commander to exercise tactical patience, and avoid destroying dwellings unless necessary for her unit's self-defence. She knows from her training and education that armed conflict has a disparate impact upon women and children, and that the loss of dwellings can have multiple cascading negative effects upon the most vulnerable civilians – generally women and girls. Prior to their deployment, she and her platoon went through realistic and stressful situational training exercises that required them to consider the differentiated impact of their actions on the female civilian population in their area of operations. Further, when she pulls out her smart phone and accesses an application that uses her GPS location to go back to the cloud of intelligence analysis maintained by the theatre-level command, she learns that the village is heavily populated with women and children, and that the water and food resources available to the villagers are of surprisingly high quality.

Having trained and exercised with her platoon on conducting effective withdrawals under fire, she is confident that she can extricate her unit without casualties to a position where her soldiers can watch the village and be ready to engage their adversaries if they leave the dwellings. The lieutenant makes her decision – this village left intact will likely have a greater beneficial impact on the overall mission than neutralizing the armed band at this moment. “We

will get them next time!" she yells to her platoon sergeant. The lieutenant tells the joint terminal air controller to hold his request for air support, the platoon sergeant nods and orders the squads to fall back, and the lieutenant quickly reports to her company commander. Her company commander confirms her decision, and she begins to redeploy her troops to be able to intercept any of the shooters they had encountered at the village. Patiently, they wait . . .

. . . But it is not 2020 just yet. Starting in 2013, what changes needed to be made within the numerous NATO military systems of personnel selection, doctrine, education, training, planning, intelligence collection and analysis, and operations in order for this measured, tactically savvy and strategically sound decision on the part of this young woman to occur? To set the proper context within which to make this assessment, we must first question what most military lawyers have accepted as a bedrock principle of LOAC – the protective impartiality of the law as it applies to all civilians and fighters no longer in combat.

### **The Feminist Critique of LOAC**

UNSCR 1325 recognizes that armed conflict has a disparate impact upon women and girls as compared to their male counterparts. This differentiated impact likely has a number of inter-related causes, including women's generally lower level of education and economic resources in many conflict areas, the responsibilities they often have as care-givers for families, and prevailing cultural norms that assign them a lower social status than men.<sup>5</sup> These factors affect not only female civilians but also women and girls who are forced to become combatants in these conflicts.<sup>6</sup> As international lawyers, we are familiar with the feminist human rights perspective on these factors, and the laudable efforts to address these issues through such measures as explicitly criminalizing sexual violence in armed conflict, and seeking to increase women's participation in post-conflict decision-making in reconciliation and rebuilding.

What we are less likely to be familiar with, and frankly, may never have discussed in a critical fashion, is the feminist perspective on LOAC itself. Simply stated, the feminist critique of LOAC holds that the core treaties that are LOAC's foundation, and which enjoy near global participation, discriminate

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<sup>5</sup> See JUDITH G. GARDAM & MICHELLE J. JARVIS, WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW, 8-9 (2001) (women experience armed conflict in different ways than men due largely to their disadvantaged status).

<sup>6</sup> Johanna Valenius, Gender Mainstreaming in ESDP Missions, 23, CHAILLOT PAPER NO. 101 (May 2007).

against women both as combatants and as non-combatant civilians because the protections they afford women are based upon an unspoken, underlying male-normative perspective, and not on the principle of equal treatment for women as women.<sup>7</sup> Customary LOAC and widely accepted state practice have to some degree ameliorated this shortcoming, as have certain developments in international human rights law (IHRL), but the male-normative perspective continues to skew understandings of LOAC and its implementation.

For example, the Geneva Conventions (GCs) explicitly state that they are to be applied impartially, and in certain circumstances afford greater protections to women and girls.<sup>8</sup> The underlying premise of impartial treatment of all people, however, is the normative male experience, not the female, and the seemingly greater protections are not based on the equal priority of women's rights and medical requirements from a female perspective, but on women's relationships to others and a dated presumption of women's weakness and modesty. For example, under GC III, women POWs are to be provided separate barracks and hygienic facilities from men, but these "facilities" are defined only as "adequate infirmary[ies];" baths and showers with soap and water; and latrines.<sup>9</sup> Medical inspections focus on such things as cleanliness and the detection of sexually transmitted diseases (STDs),<sup>10</sup> but, for example, the importance of contraception as a woman POW's health issue is not addressed. Instead, the Commentary to GC III notes only that "particular regard" is to be afforded to women POWs who become pregnant "despite the precautions taken"<sup>11</sup> – which apparently consist only of separate barracks and ablution facilities. As evidenced even today by the recent controversial statements of a Japanese municipal official regarding the propriety of forcing women into sexual slavery during World War II,<sup>12</sup> this reflects a dated and discriminatory way of thinking. Women who find themselves imprisoned under such conditions can never truly be considered to have consented to sexual relations with their guards and captors, nor in many cases with their fellow male POWs.<sup>13</sup> Pregnancy among female POWs

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<sup>7</sup> Judith Gardam & Hilary Charlesworth, *The Need for New Directions in the Protection of Women in Armed Conflict*, 22 HUMAN RIGHTS QUARTERLY 148, 161 (2000).

<sup>8</sup> Valenius, *supra* note 5, at 61.

<sup>9</sup> Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 29 & 30, 6 U.S.T. 3316, 75 U.N.T.S.135.

<sup>10</sup> *Id.*, art. 31.

<sup>11</sup> GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, Jean S. Pictet, ed., 148 (1960).

<sup>12</sup> Osaka Mayor survives censure over sex slaves comment, BBC.CO.UK (30 May 2013)

<<http://www.bbc.co.uk/news/world-asia-22720226>>.

<sup>13</sup> Mindful of the experience of so-called "comfort women" enslaved in prostitution by Japanese forces

should not be considered “just one of those things that happens” – both it and the recognition of women's specific medical needs to prevent it are health issues no less important than STDs.<sup>14</sup>

From the perspective of the feminist critique of LOAC, perhaps one of the most glaring deficiencies in the application of armed force is the extent to which current interpretations of LOAC and doctrinal and operational applications of it ignore the differentiated impact of conflict upon women and girls in the assessment of proportionality. The common formulation of this principle is that a commander may use that force necessary to accomplish the mission that is not prohibited by LOAC, so long as the concrete and direct anticipated military advantage will not be outweighed by excessive and reasonably foreseeable injury to civilians or damage to their property.<sup>15</sup> In this equation, a civilian is a civilian, and a house is a house, so it appears impartial, but in reality injury to women who are responsible for caring for families will have a much greater impact upon civilians in the area in general, and the loss of a dwelling may expose women and girls to greater insecurity and suffering than it would to men, and maybe even boys. Proportionality analysis as ordinarily expressed in military manuals<sup>16</sup> and applied does not generally factor in the differentiated impact of the proposed action upon women and girls, despite the international community's longstanding recognition of this reality.

Despite its cogent expression in the writing of certain feminist legal theorists, the feminist critique of LOAC has neither registered with feminists in general nor with militaries. The reason for this is uncertain, but it may be due to a number of factors. A cursory survey of feminist legal writing suggests that most feminist writers approach problems of women and girls in armed conflict from a international human rights law (IHRL) perspective rather than a LOAC perspective. As noted earlier, this has led to such important developments as

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during World War II, see George Hicks, *THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* (1997), it is questionable whether there really is a distinction between forced and voluntary prostitution in the context of prisoner of war camps.

<sup>14</sup> For example, only recently has the U.S. Army really begun to recognize that the failure to address women's particular health needs in operational settings has a negative and unnecessary impact on readiness. See Gregg Zaroya, *Army task force: Female troops need better health care*, USA Today.com, June 6, 2012, <<http://www.usatoday.com/news/military/story/2012-06-06/female-soldiers-need-better-health-care>> (“basic improvements are needed to help women avoid higher rates of urinary tract or vaginal infections, stress-related menstrual difficulties”).

<sup>15</sup> Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, arts. 51(5)(b) & 57, 1125 U.N.T.S. 3.

<sup>16</sup> See, e.g., *LAW OF WAR DESKBOOK*, International and Operational Law Department, The Judge Advocate General's Law Center and School (Jan. 2010); *OPERATIONAL LAW HANDBOOK*, International and Operational Law Department, The Judge Advocate General's Law Center and School, JA 422 (2010).



the explicit criminalization of sexual violence in armed conflict, particularly that which is committed against women and girls. Some writers look at such efforts and note an increasing convergence of norms in the areas of LOAC and IHRL, geared towards the greater protection of persons in armed conflict. This may be true to an extent, but there are two fundamental differences between LOAC and IHRL that will for the foreseeable future distinguish them – the standard required before lethal force may be used against another, and the principle of proportionality. Reasonable certainty of another's direct participation in hostilities is the trigger to engage that person with lethal force under LOAC, but under IHRL, the higher standard of the threat of imminent serious injury or death is what must ordinarily be met. This standard interacts closely with the LOAC principle of proportionality, which in essence accepts that innocent civilians may be lawfully injured or killed under certain circumstances. Militaries, largely still male-normative and conscious of the latitude afforded them by the more easily met standard of reasonable certainty in the application of armed force in operations and the principle of proportionality, perhaps equate feminism with IHRL and pacifism, and might also have conflated the feminist critique of LOAC with advocacy of the applicability of IHRL to modern operations,<sup>17</sup> and therefore ignored it.

### **Bi-SC Directive 40-1's Emphasis on Non-Kinetic Operations**

Mindful of the feminist critique of LOAC, we are now better able to assess the potential efficacy of NATO's gender mainstreaming efforts in the use of armed force, particularly its kinetic manifestations. A review of the 2012 version of Bi-SC Directive 40-1 suggests that despite many positive features, it tends to reflect more of an IHRL perspective on the operational issues involving women and girls. This is shown, for example, by its emphasis on enforcement of the NATO Standards of Behaviour and the prosecution of cases of alleged sexual or gender-based violence by personnel provided by the Troop Contributing Nations (TCNs).<sup>18</sup> Although this is certainly an important component of gender mainstreaming, it is not balanced by a similar effort in dealing with the complexities of operationalizing gender from the LOAC perspective.

The Directive sets out many tasks for Gender Advisors (GENADS) and Gender Field Advisors (GFAs) in NATO-led operations. Among these are assisting the J3 with the planning of "Information Operations, Psychological

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<sup>17</sup> Jody M. Prescott, NATO Gender Mainstreaming and the Feminist Critique of the Law of Armed Conflict, 14 GEORGETOWN JOURNAL OF GENDER AND THE LAW 83, 103-104 (2013).

<sup>18</sup> Directive, supra note 2, at 3-4, 7, 12, and 13; Annex A, A-2; Annex B.

Operations, patrols, and search operations.”<sup>19</sup> This highlights the Directive’s general avoidance of gender considerations in a kinetic context. Although these non-kinetic operations are very important, information and psychological operations in a theatre of operations such as Afghanistan may be only be indirectly under a J3’s purview – in such an environment, a J3 is likely more concerned with kinetic operations. At this operational level, however, a headquarters might therefore find itself involved in dynamic targeting, but depending upon the nationality of the GENADs, they might not be able to participate in the actual dynamic targeting process because of security classification issues regarding the handling of nationally-provided intelligence and technology.<sup>20</sup> Further, a headquarters J3 is also not likely to be involved in the planning of patrols because this would more likely be a tactical-level function – but a headquarters special forces command cell might in fact operate at this level. Gender considerations could be very important in these sorts of operations. However, it is not clear that the Directive contemplates the requirements for participation in this community’s work.

The GENADs and GFAs are also tasked with providing the LEGAD with “gender dimensions in the judicial system” and “relevant information where women, girls and boys [sic] legal rights are neglected and/or violated.”<sup>21</sup> This information could be very useful if the LEGAD is working on rule of law issues, but it will be of no value to the advice that the LEGAD provides to the commanders on the factors to be considered in their proportionality analyses before deciding to engage with armed force. This further suggests that the Directive is taking a more human-rights oriented approach to operationalizing gender mainstreaming, and perhaps by omission, not engaging on kinetic force issues. Not addressing important LOAC concepts in the context of gender mainstreaming, such as proportionality, will delay NATO’s efforts to truly operationalize gender mainstreaming in a way that effectively impacts upon decisions to use armed force.

## **Conclusion**

It was not until I was midway through my tour in Afghanistan with ISAF that I began to become aware of a troubling disconnect in our operations and in my education, training and experiences. One day, my office’s LEGAD

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<sup>19</sup> Id., Annex A, A-2.

<sup>20</sup> Prescott, *supra* note 16, at 125-26. This possibility is not specific to the gender area, and includes other staff officers irrespective of their staff functionality.

<sup>21</sup> Directive, *supra* note 2, at Annex A, A-3.

who worked on rule of law issues and myself might be meeting with representatives of different international organisations and non-governmental organisations who worked on women's rights issues. Our goal was to figure out how to best gather data on the legal situation of Afghan women so that we could properly differentiate the status of women in our effects-based assessments of rule of law efforts in Afghanistan. The next day, I might find myself in a window-less room filled with computers and big-screen television monitors, providing advice to a commander on the use of kinetic force, but without noting any need for differentiating the potential impacts of the proposed use of force on the basis of gender. By not fully grappling with the complexities of kinetic operations in the context of gender mainstreaming, the Directive runs the risk of obscuring just how expensive and far-ranging the changes in military systems and policies would need to be to effectively implement it such that it meets both the spirit and the letter of UNSCHR 1325 from a LOAC perspective. The recent move by the U.S. military to begin opening all of its combat branches to women will likely over time have a very important positive effect in terms of gender mainstreaming, if only because of the significance of American forces to the Alliance force structure. But merely increasing the number of women serving in the military will not by itself change the way in which the young platoon leader would view gender in the kinetic context on that dry and stressful day in 2020 when her unit is pinned down by cross-fire, and she must decide what to do. Developing such awareness requires a willingness to relook what we have learned and applied regarding the use of kinetic force from critical perspectives such as the feminist critique of LOAC.

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Excerpt from NATO Legal Gazette Issue 26 (September 2011), pag. 13-18

## Cyber Defense and Counterintelligence

by Mr. Richard Pregent<sup>1</sup>

In August 2011 it was disclosed that a massive series of cyber attacks had been taking place for five years targeting over 72 national governments, international organizations including the United Nations, and private businesses, particularly military contractors.<sup>2</sup> An information assurance company traced the attacks to a common (command and control) internet server. These attacks were not intended to block the victim's ability to use the global internet (denial of services) such as the 2007 attack on Estonia<sup>3</sup>. Rather, they were intended to surreptitiously steal information. The attacks were said by many experts to be state sponsored, although no technical evidence proving attribution has been produced. The cyber attacks were described as the largest in history; the amount of data that was taken was extraordinary. It could also be described as the largest act of cyber espionage in history.

In June 2010 the Stuxnet worm was discovered. This was a very different kind of cyber attack. Experts have concluded that it was specifically designed to attack an Iranian nuclear facility.<sup>4</sup> This was not a denial of services attack or an effort to steal information. Here the malware was specifically designed to destroy the centrifuges Iran was using to enrich uranium by manipulating the power sent to them and overriding the safety systems in place. It was an extraordinarily complex and narrowly targeted attack. Experts stated that over 15,000 lines of code were in the payload and that the worm itself did not cause damage to control systems other than those at the Iranian nuclear facility. The attack targeted "dumb" switches, programmable logic controllers (PLC). The worm disabled the safety system by playing back information indicating all systems were function properly

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<sup>1</sup> Legal Adviser Allied Command Counterintelligence

<sup>2</sup> [http://www.msnbc.msn.com/id/43998147/ns/technology\\_and\\_science-security/](http://www.msnbc.msn.com/id/43998147/ns/technology_and_science-security/);

<http://www.telegraph.co.uk/technology/news/8679658/China-chief-suspect-in-major-cyber-attack.html>

<sup>3</sup> [http://www.google.de/gwt/x?q=cyber+attack+on+estonia&ei=5FA6ToDnMcK\\_8APcw66bAQ&ved=0CAsQFjAB&hl=de&source=m&rd=1&u=http://www.guardian.co.uk/world/2007/may/17/topstories3.russia](http://www.google.de/gwt/x?q=cyber+attack+on+estonia&ei=5FA6ToDnMcK_8APcw66bAQ&ved=0CAsQFjAB&hl=de&source=m&rd=1&u=http://www.guardian.co.uk/world/2007/may/17/topstories3.russia)

<sup>4</sup> <http://www.ccdcoe.org/280.html>, see Ralph Langer keynote speech at the Third International Conference on Cyber Conflict



while the PLCs continued to power the centrifuges as they destroyed themselves. The targeted “dumb” switches are literally everywhere; they are part of the fabric of every nation's infrastructure including manufacturing, energy, and transportation sectors. The Stuxnet attack proved how extraordinarily vulnerable every nation's critical infrastructure is to cyber attack.

Cyber threats are not new but have grown exponentially in the asymmetric nature of the damage they may cause. Yesterday, the greatest cyber concerns were threats to individual privacy and the disruptions caused by lone-wolf hackers. Today, the greatest cyber concerns include the state-sponsored theft of massive amounts of intellectual property, the compromise of enormous classified databases, and the potential for terrorist attacks on a nation's critical infrastructure. Unfortunately, the international and domestic legal regimes involved in the cyber realm have not progressed as the threat has. In fact, those legal regimes provide neither clarity nor any effective enforcement mechanisms for violations of law committed in the cyber world. There has been some international cooperation in the law enforcement arena to identify and prosecute particularly egregious identity theft and child pornography cases but these are the exception rather than the rule.

As a result, cyber defense has been primarily a commercially driven, reactive discipline. Large service providers identify new malware, worms, and viruses. They then develop patches to be uploaded by information assurance managers and individual computer users around the world. Cyber defense has become an extremely complex game of tennis. On one side are the hackers, some lone wolves but more and more apparently sponsored by states, organized crime, or even international terrorist organizations. The hackers, unconstrained by law, devise innovative ways to defeat the latest cyber defenses. Opposing the hackers is the information assurance community. They are trying to detect and defeat the latest malware. Bound by domestic and international laws, they are unable to attribute attacks to a given actor making law enforcement or any other form of deterrence impossible. Although the industry tries to anticipate threats, it frequently suffers an attack, tries to limit the damage, and designs and installs protective measures to defend against a repeat of the same assault.

And how does all this affect NATO?

## **An Alliance Cyber Strategy**

Like every other organization in the world, NATO grew to rely upon the cyber world for virtually every aspect of its activities including data management, communications, logistics, planning, and command and control. And like all of its member nations, the Alliance's reliance on the cyber world made it vulnerable to cyber espionage and attacks. Initially, the Alliance followed the nations' and private industry's leads and invested in commercially available solutions to detect malware and patch their systems. While the Alliance continues to do this, it has now adopted a more proactive approach to its cyber defense.

The massive denial of services cyber attack on Estonia in 2007 was described by the Commander of Allied Command Transformation as a "wake up call for NATO."<sup>5</sup> One response to these attacks was the establishment of the NATO Cooperative Cyber Defence Centre of Excellence (CCD COE) in May 2008. Estonia is the Framework Nation and hosts the centre in Tallinn.<sup>6</sup> The mission of the Centre is to "enhance the capability, cooperation, and information sharing among NATO, NATO nations and partners in cyber defense." Among several other initiatives, the CCD COE hosts an annual international cyber conflict conference and is sponsoring the development of a Manual on International Law Applicable to Cyber Warfare.

In November 2010 the Alliance Heads of State and Government adopted a broad "Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization."<sup>7</sup> The Strategy recognized the threats created by cyber attacks and stated that the Alliance would "develop further our ability to prevent, detect, defend against and recover from" such attacks.

The Lisbon Summit Declaration provided more detail:<sup>8</sup> creation of the NATO Computer Incident Response Capability (NCIRC) was accelerated to 2012; all NATO bodies will be brought under centralized protection; cyber defense will be included in the defense planning process; and the North Atlantic Council was directed to devise a specific action plan to implement

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<sup>5</sup> [http://www.nytimes.com/2011/02/28/opinion/28iht-edabrial28.html?\\_r=1](http://www.nytimes.com/2011/02/28/opinion/28iht-edabrial28.html?_r=1)

<sup>6</sup> <http://www.ccdcoe.org/11.html>. Sponsoring nations include Latvia, Lithuania, Germany, Hungary, Italy, Slovakia and Spain.

<sup>7</sup> <http://www.google.com/gwt/x?source=m&u=http%3A%2F%2Fwww.nato.int/lisbon2010/strategic-concept-2010-eng.pdf&wsi=fcc22aa7f102f7e3&ei=l2M2TfrgMsyPsgb95MywBQ&wsc=bk>

<sup>8</sup> [http://www.google.com/gwt/x?source=m&u=http%3A%2F%2Fwww.nato.int/cps/en/natolive/official\\_text\\_68828.htm&wsi=fcc22aa7f102f7e3&ei=nr87TuKsOIW\\_1AaOgoSABw&wsc=eb&whp=3Acyber](http://www.google.com/gwt/x?source=m&u=http%3A%2F%2Fwww.nato.int/cps/en/natolive/official_text_68828.htm&wsi=fcc22aa7f102f7e3&ei=nr87TuKsOIW_1AaOgoSABw&wsc=eb&whp=3Acyber)

the cyber strategy.

NATO is particularly challenged by the complex and, at times, conflicting legal regimes involved in cyber defense. Each Alliance nation has domestic laws that protect the privacy of its citizens including their use of personal computers, communications over the internet, and real-time and stored communications. Each Alliance nation also limits the authority of both law enforcement and intelligence agencies to intrude into or manipulate computers and servers used by service providers.

The United States relies upon a confusing patchwork quilt of Federal statutes<sup>9</sup> to protect the privacy interests of its citizens and enable law enforcement and intelligence authorities to collect the information they require. European Union members of the Alliance each have domestic statutes that implement the EU Data Privacy Directive of 1995<sup>10</sup>, an effort to provide a comprehensive approach to protecting individual privacy from both government and industry intrusions. Those members have also implemented EU Data Retention Directive<sup>11</sup>, an effort to maintain data in support of civilian law enforcement.

Some Alliance partners require judicial authorizations even in the context of an ongoing criminal or counterintelligence investigation. Others have established independent commissions to oversee evidence collection during state sanctioned investigations. Still others rely upon an administrative oversight process with varying levels of approval authorities depending upon the intrusiveness of the investigative activity. For some alliance members simply sharing Internet Protocol (IP) addresses with a non-EU nation may be a prohibited dissemination of "personal data."<sup>12</sup>

Based upon the Paris Protocol and the Ottawa Agreement NATO, its "subsidiary bodies" and International Military Headquarters, are not subject to the EU Directives.<sup>13</sup> Internally, NATO is able to manage its information

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<sup>9</sup> Electronic Communications Privacy Act of 1986, Pub. L. No 99-508, 100 Stat. 1848 (1986); Wiretap Act, 18 U.S.C. sects. 2510-2522 (1968); Stored Communications Act 18 U.S.C. 2701; Pen Register/Trap and Trace Statute, 18 U.S.C. 3121-3127; Computer Fraud and Abuse Act, 18 U.S.C. 1030; Patriot Act, LL 107-65; Foreign Intelligence Surveillance Act, Pub. L. 95-511, 92 Stat. 1783, 1978; Homeland Security Act, Pub. L. 107-296, including the Cyber Security Enhancement Act of 2002, sect 225; Privacy Act, 5 U.S.C. 552a.; N.B. this is not an exhaustive list.

<sup>10</sup> Directive 95/46/EC

<sup>11</sup> Directive 2006/24/EC

<sup>12</sup> [http://www.ccdcoe.org/publications/legalproceedings/Tikk\\_IPAddressesSubjecttoPersonalDataRegulation.pdf](http://www.ccdcoe.org/publications/legalproceedings/Tikk_IPAddressesSubjecttoPersonalDataRegulation.pdf).

<sup>13</sup> Agreement on the Status of the North Atlantic Treaty Organisation, National Representatives and

technology communications systems and databases as NATO sees fit. The Alliance is, however, impacted by each individual nation's domestic laws governing privacy and criminal and intelligence investigations. Cyber defense cannot be accomplished unilaterally by any individual commercial entity, national government, or regional alliance; it must be a cooperative effort amongst all IT users. To be effective NATO's cyber action plan must be synchronized with the Alliance's 28 different national legal regimes and international standards.

### **Alliance Counterintelligence**

Within the Alliance cyber defense is not the exclusive province of information assurance organizations or security offices. As noted by one expert, "to establish a robust and efficient cyber defence regime, legal and policy frameworks must have a multidisciplinary approach..."<sup>14</sup> The Alliance's leadership has taken care to involve all interested parties in the development of the NATO Cyber Action Plan. One discipline that will play a crucial role in the Alliance's cyber defense is counterintelligence (CI). When cyber defense was seen as primarily a law enforcement problem, the counterintelligence community had a very limited role. This has changed with the advent of cyber attacks that compromise classified databases, steal enormous amounts of intellectual property, and threaten the critical infrastructure of a nation.

Attribution is one of the most difficult issues in cyber attacks. Rarely is it possible for information assurance authorities to determine who launched a given attack. The reasons for this are both legal and technical. Virtually every nation has statutes that forbid the unauthorized access into personal computers and internet service providers' servers, actions that would be necessary to trace back (hack back) the attack to its origins. The process to seek judicial authorization is time consuming and burdensome; by the time it is granted the evidence is gone. And this presumes that this action is even possible. The use of anonymizers that successfully mask the origins of a given attack is widespread.

Despite the fact that attribution is difficult, evidence must be preserved. Forensic analysis of cyber attacks can disclose both technical and tactical

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International Staff [The Ottawa Agreement], September 1951, Article V.  
<http://www.nato.int/docu/basicxt/b510920a.htm>; Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty [The Paris Protocol], August 1952 Article 13,  
<http://www.nato.int/docu/basicxt/b520828a.htm>

<sup>14</sup> Maeve Dion, Center for Infrastructure Protection, Preface to International Cyber Incidents, Legal Considerations, Cooperative Cyber Defence Centre of Excellence, 2010



activities of a given cyber attacker. How was the attack mounted? What was compromised? Is there an insider threat? If the attack was an effort to steal information, what information did the attacker seek to collect? Was a hostile intelligence service involved? An international terrorist organization? What was the motivation behind the attack? Developing these questions, seeking answers, and collecting evidence that would be admissible in a criminal prosecution is doctrinally a role for counterintelligence (CI).

While every nation conducts CI activities, each nation has a slightly different definition of the term. Within the Alliance CI is defined as:

**Those activities concerned with identifying, assessing, exploiting or neutralizing existing and emerging threats to the Alliance posed by terrorism, espionage, sabotage, and subversion.<sup>15</sup>**

The Alliance CI mission is very similar to the Alliance cyber defense mission. Both must identify and assess threats to the Alliance. Both seek to identify emerging threats. Both seek ways of countering those threats. Included in the CI mission is the development and preservation of evidence to support criminal prosecutions. Unique to Alliance CI is that it is designed to be a multilateral effort. NATO CI is never unilateral; by definition it is an Alliance defensive intelligence activity.<sup>16</sup> Like Alliance cyber defense, Alliance CI activities must respect both the host nation's and the sending state's legal regimes.

Allied Command Counterintelligence (ACCI), NATO's only CI organization, is part of the Allied Command Operations (ACO) command structure but provides CI support to Allied Command Transformation (ACT) and other designated NATO related entities. Within ACCI there is a Cyber Counterintelligence Activity (CCA). This organization provides cyber forensic support to CI investigations helping to determine what was compromised and by whom. CCA also supports damage assessments and security doctrinal and policy changes to improve the Alliance's security posture.

Investigations of cyber attacks are extremely important but, like cyber defense, an effective counterintelligence program is not simply reactive. Allied CI agents work closely with host nation and sending nation intelligence and security authorities to discover threats to the Alliance. They also work closely with Alliance personnel, training them in how to recognize efforts to

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<sup>15</sup> SACEUR's Mission Directive for Allied Command Counter Intelligence, 5 July 2011

<sup>16</sup> Id; see also ACE Directive 65-3, Counterintelligence Policy, Allied Command Europe, 6 June 2000.

elicit Alliance information and how to deal with them. These activities are key to preventing espionage and terrorist threats to our Alliance and apply equally to the physical and cyber worlds.

An initial step in building a partnership between the information assurance and CI worlds is to identify cyber threats from the CI perspective. Allied agents through their coordination with Alliance national intelligence and security authorities can help identifying websites used by terrorist organizations to radicalize, recruit, communicate, and control. Allied agents can help Alliance information assurance develop protocols that instantly recognize, preserve evidence, and give notice of the misuse of Alliance communications systems to compromise secure information or communicate with hostile intelligence or terrorist organizations.

Similarly, all evidence of efforts to gain unauthorized access to any Alliance cyber systems must be detected and preserved for security and CI analysis. From the information assurance perspective, cyber attacks are dangerous assaults upon the integrity of the Alliance's ability to communicate and manage its data. From a CI perspective these attacks are threats but also opportunities to better understand the threat and enable the leadership to counter it and future threats. Information assurance officials' immediate efforts to maintain the integrity of Alliance cyber systems (stop the intrusion and limit the damage) must be taken in such a way that evidence is preserved. Different technical activities may be available to accommodate both the information assurance interests as well as the CI interest in exploiting cyber activities for their intelligence value and evidence development.

## **Conclusion**

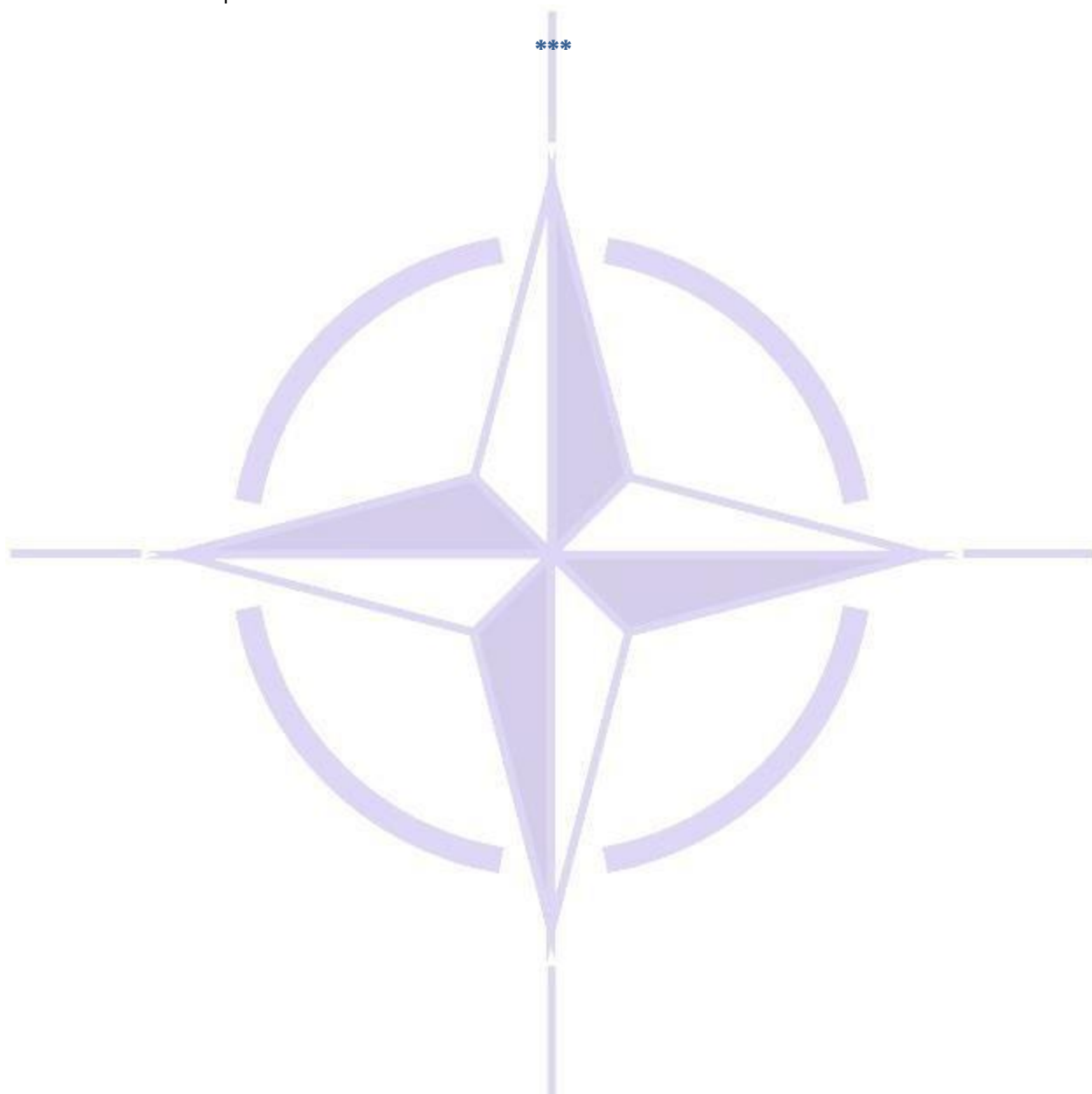
"In the millisecond sectors of communications and information technology, there is often little time to orchestrate response and mitigation efforts. Cyber security defence and response options must therefore be predetermined at numerous levels within information and communications technology companies, law enforcement and intelligence offices, military and security departments , foreign affairs agencies, and international alliances and organizations."<sup>17</sup>

As NATO develops its detailed cyber action plan it must ensure that authorities are in place for the Alliance to be disciplined, agile and adaptive in its management of IT resources and capabilities. Alliance cyber defense

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<sup>17</sup> Note 8 at page 7

actions must also be synchronized with the legal regimes of the Alliance partners and the host nations involved. And evidence collected must comply with the prosecuting state's criminal procedural codes. This has been the established practice of Alliance counterintelligence operations for sixty years. The cyber action plan should take advantage of these existing CI procedures and relationships.



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[www.nato.int](http://www.nato.int)

## Cyber Warfare and NATO Legal Advisors

by Dr. Gary D. Solis<sup>1</sup>

### Introduction

Cyber warfare issues could not have been imagined by the International Committee of the Red Cross's Committees of Experts who wrote the 1949 Geneva Conventions<sup>2</sup> – or those who created the 1977 Additional Protocols I<sup>3</sup> and II<sup>4</sup> that supplement the 1949 Conventions. Today, military commanders may ask their legal advisors, does existing Law of Armed Conflict (LOAC) even apply to cyber issues? It certainly does.

The Statute of the International Court of Justice (ICJ) tells us the sources of International law that the Court looks to: first, international conventions, then international custom. Next the Court considers “*general principles of law recognized by civilized nations*,” then judicial decisions and, finally, it looks to “*the teachings of the most highly qualified publicists of the various nations....*”<sup>5</sup> When it comes to cyber warfare, however, there are no international

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<sup>2</sup> Geneva Conventions on protection of victims of armed conflicts I – IV, 1949.

<sup>3</sup> Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (API).

<sup>4</sup> Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (APII).

<sup>5</sup> Statute of the International Court of Justice, Art. 38.1 (June 26, 1945).



conventions, no custom, and no judicial decisions to look to. For now, we must depend on general principles of law and the writings of publicists and scholarly publications.

As the ICJ wrote in its 1996 Nuclear Weapons Advisory Opinion, LOAC applies to “any use of force, regardless of the weapons employed.”<sup>6</sup> Whether a 500-pound kinetic bomb or a computer’s electronic keystroke, a weapon is a weapon, and is subject to LOAC. Still, cyber warfare presents military legal advisors with difficulties because so many aspects of cyber warfare are unsettled or unconsidered by modern LOAC...so far. There are no multinational conventions, no protocols or treaties relating directly to cyber warfare, although they are surely being considered by cyber-aware states. There is no cyber warfare experience that rises to “*international custom*,” or “*general principles recognized by civilized nations*” to turn to for unambiguous answers to cyber legal matters. There are no cyber-specific norms, and State practice is slow to evolve. The few judicial decisions that consider cyber delicts relate to domestic cyber crime, rather than violations of international law or its subset, LOAC. American and European law journals are flush with articles on cyber crime but few consider cyber warfare.<sup>7</sup> So far, there is not even agreement as to whether cyber warfare is one word or two.

Despite an absence of specific references in traditional LOAC sources, there are reliable analogous guidelines to the law of cyber warfare found in the 1949 Geneva Conventions and their 1977 Protocols. After the 2007 attack on Estonia involving cyber intrusions,<sup>8</sup> is there a legal advisor to any military commander who doesn’t recognise the need to be as current as possible on the rapidly evolving law of cyber warfare? When command networks are regularly hacked by State actors and civilian agents of States?<sup>9</sup> When military aircraft control systems are taken over by unknown intruders?<sup>10</sup> When advanced weapon systems are subject to wholesale theft?<sup>11</sup> Examples of cyber intrusions that threaten combatant forces around the world are numerous and constant.

Good work is being done in capturing basic international cyber warfare legal norms and NATO and NATO Nations have been at the forefront of that work; notably, the NATO Cooperative Cyber Defence Centre of Excellence, based in Tallinn, Estonia. The Tallinn Manual on Cyber Warfare,<sup>12</sup> produced

<sup>6</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1995, I.C.J. 226-67, ¶ 39, July 8, 1996).

<sup>7</sup> Notable journal exceptions are the Military Law Review, published by the US Army’s Judge Advocate General’s Legal Center & School, and the International Review of the Red Cross. Doubtless there are others of which the author is unaware.

<sup>8</sup> Jason Healey, “A Brief History of US Cyber Conflict,” in Jason Healey, ed., A Fierce Domain: Conflict in Cyberspace (Vienna, VA: Cyber Conflict Studies Assn., 2013), at 14, 68.

<sup>9</sup> J.P. London, “Made in China,” US Naval Institute Proceedings (April 2011), at 54, 56.

<sup>10</sup> “Virus Hits Networks Used for Drone Flights,” Wash. Post, (9 Oct. 2011), at A7.

<sup>11</sup> Richard A. Clarke & Robert K. Knake, Cyber War (NY: Ecco, 2010), at 233.

<sup>12</sup> Michael N. Schmitt, ed., The Tallinn Manual on the International Law Applicable to Cyber Warfare

under the expert leadership of Professor Michael N. Schmitt, of the US Naval War College, is a leading text on cyber warfare that every military legal advisor would do well to read. This issue of the NATO Legal Gazette is further evidence of NATO's forward thinking in the cyber arena.

### **Cyber Misunderstandings**

There are widespread cyber warfare misunderstandings. Foremost among them is that all cyber intrusions are cyber attacks. The term "cyber attack" is frequently applied in the media to a broad range of cyber conduct that falls outside the boundaries of an attack, as that term is defined in the LOAC.<sup>13</sup>

For either international or non-international armed conflicts, an excellent definition of "cyber attack" is: a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury, or death to persons, or damage or destruction to objects.<sup>14</sup> *"[The definition of cyber attack] should not be understood as excluding cyber operations against data (nonphysical entities, of course) from the ambit of the term attack. Whenever an attack on data results in injury or death of individuals or damage or destruction of physical objects, those individuals or objects constitute the 'object of attack' and the operation therefore qualifies as an attack."*<sup>15</sup> Cyber theft, cyber intelligence gathering, and cyber intrusions that involve only brief or periodic interruption of non-essential cyber services, do not qualify as cyber attacks. Cyber espionage does not constitute a cyber attack. Nor does the hacking of a State's military command network, alone, constitute an attack.

Without a loss of life or injury, or destruction or damage to objects, a cyber manipulation or intrusion, by itself, does not automatically indicate hostile intent. An intrusion may be considered akin to a military aircraft being tracked by enemy radar, but not locked into a missile fire control system.

A "sneak" cyber attack occurring during a period when hostilities were not previously in progress, raises *jus ad bellum* issues; was the conflict-initiating attack a lawful resort to armed force? A cyber attack in the course of an ongoing armed conflict, however, is a tactical event that can only raise *jus in bello* issues.

There has been confusion as to whether or not an entry for malicious

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(Cambridge, Cambridge University Press, 2013).

<sup>13</sup> Attack means acts of violence against the adversary, whether in offence or in defence. Article 49 Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts.

<sup>14</sup> Michael N. Schmitt, ed., *The Tallinn Manual on the International Law Applicable to Cyber Warfare* (Cambridge, Cambridge University Press, 2013). A trans-border element is added in the Manual's Rule 13, at 54.

<sup>15</sup> Michael N. Schmitt, ed., *The Tallinn Manual on the International Law Applicable to Cyber Warfare* (Cambridge, Cambridge University Press, 2013), Rule 30.6 at 107-08.

purposes into the control systems of a State's critical national infrastructure – telecommunications, electrical power systems, gas and oil storage and transportation, banking and finance, water supply systems, and continuity of government, for example – would constitute an attack.

*"The mere manipulation of a banking system or other manipulation of critical infrastructure, even if it leads to serious economic loss, would probably stretch the concept of armed force...But the disruption of such vital infrastructure as electricity or water supply systems, which would inevitably lead to severe hardship for the population if it lasted over a certain period, even if not to death or injury, might well have to be considered as armed force...."*<sup>16</sup>



The confusion is, in part, a result of critical infrastructure systems being civilian controlled while corporate civilian entities are beyond the direction of a State's defense officials. Civilian corporations have been resistant to defence officials' pleas to install costly anti-intrusion systems. At the same time, defence authorities have been reluctant to accept responsibility for weakly defended critical civilian systems. That defense authority view seems to be changing. In some countries, such as the US, it seems to be discarded entirely and a cyber intrusion/attack on critical national infrastructure will be viewed as raising a right to armed response, should loss of life, or injury, or damage or destruction of objects, be a reasonably foreseeable result.<sup>17</sup> Legal advisors should particularly be aware of their nation's approach to the protection of critical national infrastructure – and further aware that the approach that could be taken to cyber attacks on critical national

<sup>16</sup> Cordula Droege, "Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians," 94/886 Int'l Rev. of the Red Cross, at 548 (Summer 2012).

<sup>17</sup> This US policy is evidenced in Presidential Policy Directive 20, "U.S. Cyber Operations Policy (Oct. 2012), at 6, as well as Executive Order 13231, "Critical Infrastructure Protection in the Information Age (16 Oct. 2001), at § 1.

infrastructure does not enjoy international agreement.

Another common error in thinking of cyber attacks is that electric impulses cannot constitute an “armed” attack justifying an armed counter-attack. Whether a cyber attack constitutes a use of armed force matters, because UN Charter Article 51 requires that an armed counter-attack, if any, be a response not to a use of force, but to a use of “armed force.”

A surprise cyber attack mounted without actual physical force of arms is an armed attack in the same way that surprise attacks by means of lethal gas or deadly chemicals constitute armed attacks. International law scholar Yoram Dinstein observes, “[w]henever a lethal result to human beings – or serious destruction to property – is engendered by an illegal use of force by State A against State B, that use of force will qualify as an armed attack. The right to employ counter-force in self-defense against State A can then be invoked by State B...”<sup>18</sup> Professor Dinstein continues, “From a legal perspective, there is no reason to differentiate between kinetic and electronic means of attack. A premeditated destructive [computer network attack] can qualify as an armed attack just as much as a kinetic attack bringing about the same...results. The crux of the matter is not the medium at hand (a computer server in lieu of, say, an artillery battery), but the violent consequences of the action taken.”<sup>19</sup>

While appreciating that the answers are not firmly agreed upon, military legal advisors should be prepared to correct these and other common cyber misconceptions of commanders, the media, or elected officials.

### **Cyber conflict classification**

Conflict classification of cyber attacks can be complex. An international armed conflict must by definition be “armed” and must be “international.” In considering the international aspect of a common Article 2 of the Geneva Conventions, international conflict, if a cyber attack were launched from BlueLand against RedLand by an individual, or a group of individuals acting on their own initiative, should a resulting armed conflict be viewed as international? The answer is “yes,” but only if the State of BlueLand exercised “overall” control of the individual or group, or otherwise endorsed or encouraged the attack.<sup>20</sup> Absent overall control by a State, the attack would

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<sup>18</sup> Yoram Dinstein, “Computer Network Attacks and Self-Defense,” in Michael N. Schmitt and Brian T. O’Donnell, eds., *International Law Studies*, Vol. 76: *Computer Network Attack and International Law* (Newport, R.I.: Naval War College, 2002), at 99, 100.

<sup>19</sup> *Id.*, at 103.

<sup>20</sup> In the author’s opinion, whether the test for State attribution is “overall control” (*Prosecutor v. Tadić*, IT-94-1, Judgment in Sentencing Appeals (ICTY, 26 January 2000), ¶ 131), or “effective control” (*Military and Paramilitary Activities in and Against Nicaragua*, ICJ, Judgment of 27 June 1986, ¶ 115), has been settled in favor of overall control by subsequent ICC jurisprudence (*Lubanga Decision on the Confirmation of Charges* (ICC, 29 January 2007), ¶ 211) and the ICJ itself (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ, Judgment of 26 Feb. 2007, ¶ 404).



be the unlawful act of an individual or group of individuals, subject to the domestic law enforcement of the State from which the attack was launched.

Might the same attack, launched by the same State-unaffiliated individuals be considered a non-international armed conflict? A cyber-initiated non-international armed conflict would require the participation of an organised armed group, and protracted armed violence of a certain level of intensity.<sup>21</sup> An individual cyber attacker is unlikely to meet such criteria, nor can most opposition groups, particularly those who "organise" on-line without a physical connection between members. These inabilities *"would preclude virtually organised armed groups for the purpose of classifying a conflict as non-international."*<sup>22</sup>

In combination, these impediments raise a high bar that would hinder most cyber operations launched by individuals or groups from achieving non-international armed conflict status. Instead, their acts would be left to domestic law enforcement agencies, guided by human rights norms.

The resolution of conflict status classification issues, of which there are many in LOAC, will continue to evolve through State practice.

### **Cyber Self-Defence**

Self-defence exercised against a cyber attack need not be limited to cyber-on-cyber warfare. A State engaged in armed conflict may lawfully employ all of its military assets, electronic and kinetic. *"For targets of value, however, cyber weapons are difficult to engineer, and delivery is difficult to orchestrate."*<sup>23</sup> The legal challenges, primarily of attribution, and the principles of distinction<sup>24</sup> and proportionality,<sup>25</sup> make an immediate armed counter-attack impractical, if not impossible.<sup>26</sup>

*"Attribution is one of the most difficult issues in cyber attacks. Rarely is it possible to determine who launched a given attack. The reasons for this are both legal and technical. Virtually every nation has statutes that forbid the unauthorized access into personal computers and Internet service providers' servers, actions that would be necessary to trace-back (hack back) the attack to its origins. The process to seek judicial authorization is*

<sup>21</sup> Prosecutor v. Haradinaj, IT-04-84-T (ICTY, 15 July 1999), Judgment, ¶ 49.

<sup>22</sup> Michael N. Schmitt, "Classification of Cyber Conflict," 17 J. of Conflict & Security L., at 245, 248 (2012).

<sup>23</sup> LtCdr. Brian Evans and Rick Lanchantin, "Lifting the Fog On Cyber Strategy," US Naval Institute Proceedings, at 66, 68 (Oct. 2013).

<sup>24</sup> Article 48, Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts.

<sup>25</sup> E.g. see Article 57/2(b) of the Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts.

<sup>26</sup> The principles of distinction and proportionality are also explained in NATO STANAG 2449, Edition 2 and it's ATrainP-2 Training in Law of Armed Conflict. <http://nso.nato.int/nso/zPublic/ap/ATrainP-2%20EDA%20V1%20E.pdf>

*time-consuming and burdensome; by the time it is granted the evidence is gone. And this presumes that this action is even possible.*"<sup>27</sup>

An immediate counterattack against a presumed source, without significant prior trace-back efforts, or requests for investigative assistance from the state from where the attack originated, would very likely violate the principle of distinction. If a state can aim their counter-attack accurately, however, they will have a target rich environment because, *"in cyber warfare...the physical infrastructure through which the cyber weapons (malicious codes) travel qualify as military objectives...Disabling the major cables, nodes, routers, or satellites that these systems rely on will almost always be justifiable by the fact that these routes are used to transmit military information and therefore qualify as military objectives."*<sup>28</sup> Indeed, at some point in cyber warfare, the LOAC principle of distinction could be in danger of becoming near meaningless in protecting civilian cyber infrastructure.

Another pre-counter-attack hurdle is the LOAC principle of proportionality – whether the envisioned counterforce is proportionate to the attack suffered, and the need to repel or deter further attacks. Once distinction, military necessity, and proportionality issues are sorted out, the specifics of a counter-attack may be considered. Satisfying these core requirements clearly narrows a victim State's options. Can a counter-attack oriented on an attacker's reverse azimuth, routed through civilian computer networks, servers, and routers, ever avoid catastrophic damage to a civilian computer network, raising potential violations of distinction and proportionality? Would the damage to the civilian networks be proportional and lawful collateral damage? If a counter-attack is not considered politically feasible or militarily possible, a means other than a cyber counter-attack is required.

A possible lawful response to a confirmed unlawful cyber attack, one carried out as a surprise attack that opens hostilities, for example, is a belligerent reprisal; a specific violation of the LOAC, undertaken in the course of the armed conflict, to encourage an enemy who has violated the law, to refrain from continuing their unlawful conduct.<sup>29</sup> Any belief that reprisals are entirely outlawed by modern LOAC is mistaken, although some

<sup>27</sup> Richard Prgent, "Cyber Defense and Counterintelligence," NATO Legal Gazette, Issue 26, at 13, 16 (19 Sept. 2011).

<sup>28</sup> Droege, "Get Off My Cloud," *supra*, note 16, at 564.

<sup>29</sup> Jean S. Pictet, Commentary, I Geneva Convention 1949 (Geneva: ICRC, 1952), at 341-42. Other sources suggesting the utility of belligerent reprisal: William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), 496; Yoram Dinstein, "Computer Network Attacks and Self-Defense," in Michael N. Schmitt and Brian T. O'Donnell, eds., *International Law Studies*, Vol. 76: *Computer Network Attack and International Law* (Newport, RI: US Naval War College, 2007), at 107; Frits Kalshoven, *Belligerent Reprisals* (Leiden: Martinus Nijhoff, republished 2005), at 375; and Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006), at 12-13.

commentators and scholars do not share that view.<sup>30</sup> Today, after their grave abuses in World War II, there are specific and narrowly tailored requirements for a lawful reprisal that military legal advisors may determine.

The advantages of a belligerent reprisal in cases of unlawful cyber attack are several: they need not be immediate, giving a victim State time to positively identify the attacker and minimise issues of distinction, they may be carried out in a different, unexpected location, and they can be calibrated to meet the requirement of proportionality.

Belligerent reprisal is a possible response to an unlawful cyber attack in the course of an international armed conflict, but not to every cyber attack. If a State Party were attacked by an opposing State Party in an ongoing international armed conflict, reprisal would not be a lawful option because the cyber attack would simply be another form of lawful attack in the course of an armed conflict.

How might a State lawfully respond to a cyber intrusion not rising to an attack? A category of responses offering lawful options is countermeasures. Essentially, countermeasures are reprisals, such as economic or trade restrictions, without the use or threat of force. Possible countermeasures are varied, each being tailored to the situation giving rise to their use. They may be taken solely to induce, convince, or compel the other State to return a situation to lawfulness. Counter measures, like reprisals, must be preceded by a request that the responsible State remedy its wrongful act. Like reprisals, they may only be taken to induce compliance with international law after an earlier international wrong, attributable to a State, has occurred. They must be proportionate, and they must end when the responsible State returns to compliance with its obligations.<sup>31</sup>

## **Conclusion**

So far, no one is known to have died from a cyber attack anywhere in the world. An experienced cyber expert in the military and civilian communities writes:

*"The most meaningful cyber conflicts rarely occur at the "speed of light" or "network speed."...[C]yber conflicts are typically campaigns that encompass weeks, months, or years of hostile contact between adversaries, just as in traditional warfare...While some attacks are technically difficult to attribute, it is usually a straightforward matter to determine the nation responsible, since the conflict takes place during an on-going geo-political crisis.*

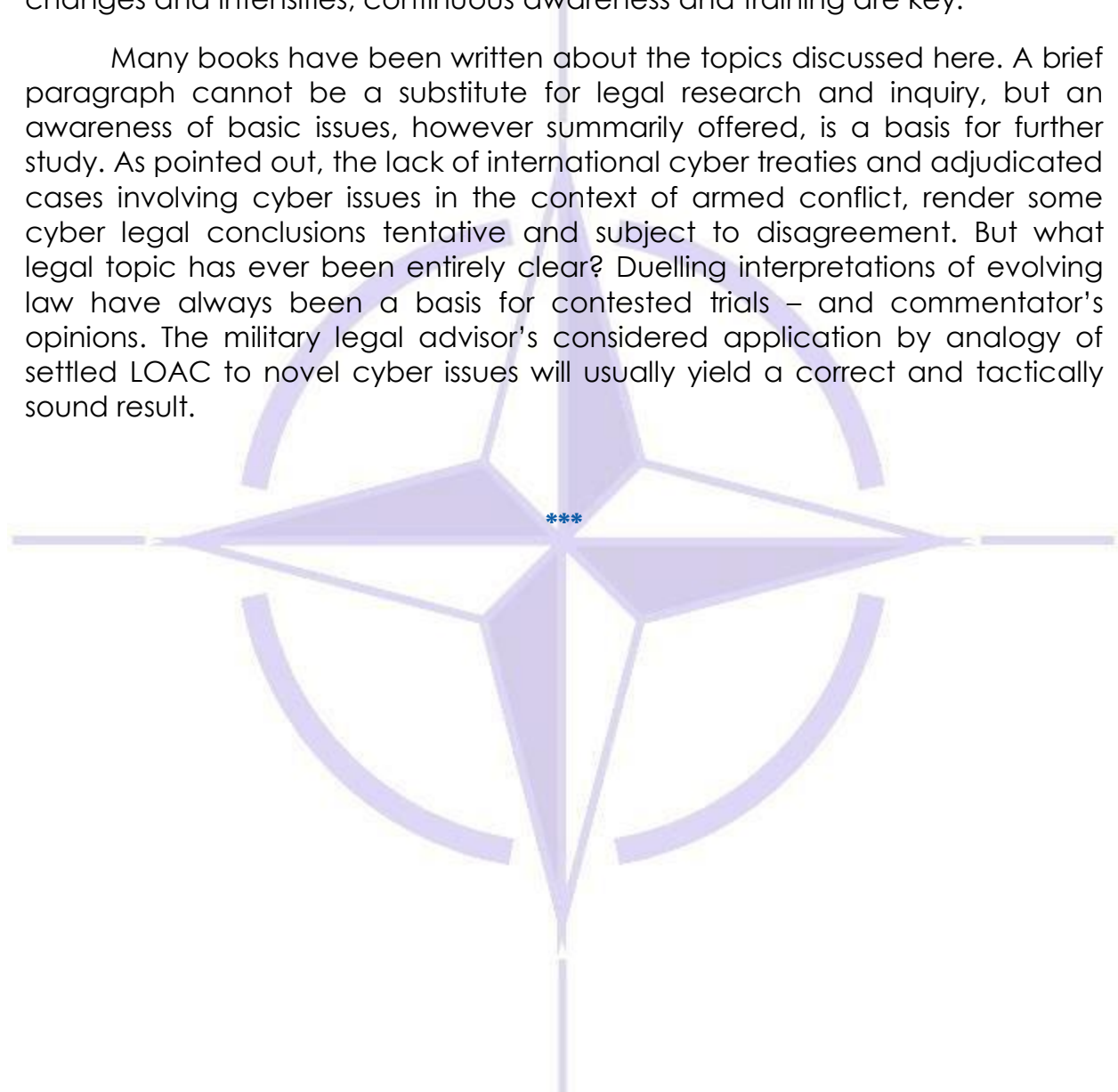
<sup>30</sup> Prosecutor v. Kupreškić, IT-95-16-T, Judgment (ICTY, 14 Jan. 2000), ¶ 527-36.

<sup>31</sup> Countermeasures proportionality differs from the more familiar proportionality in LOAC. In gauging countermeasures proportionality, the focus is on the injury suffered by the victim State, rather than limiting defensive measures to those required to defeat the armed attack of another State.

*Despite early fears that nations would strike at each other using surprise...there is no evidence that such conflicts have occurred. Nations seem to be willing to launch significant cyber assaults during larger crises, but not out of the blue...*<sup>32</sup>

Such reassuring words cannot be the basis of a military legal advisor's awareness of the cyber threat. In a cyber environment that continuously changes and intensifies, continuous awareness and training are key.

Many books have been written about the topics discussed here. A brief paragraph cannot be a substitute for legal research and inquiry, but an awareness of basic issues, however summarily offered, is a basis for further study. As pointed out, the lack of international cyber treaties and adjudicated cases involving cyber issues in the context of armed conflict, render some cyber legal conclusions tentative and subject to disagreement. But what legal topic has ever been entirely clear? Duelling interpretations of evolving law have always been a basis for contested trials – and commentator's opinions. The military legal advisor's considered application by analogy of settled LOAC to novel cyber issues will usually yield a correct and tactically sound result.



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<sup>32</sup> Healey, "A Brief History of US Cyber Conflict," in Healey, A Fierce Domain, supra, note 8, at 21-23.



## Upcoming courses at the....



For the first time, the **NATO Operational Law Course**, will have a **second iteration (N5-68-B16)**. Because the April 2016 NATO Operational Law Course filled up quickly, to serve the needs of NATO and national operational legal personnel, the NATO School Oberammergau has scheduled a second Operational Law course **from 5 to 9 December 2016**.

The Operational Law Course aims to provide in-depth training and practical exercises focused on legal issues faced during NATO military operations. The course focuses on issues such as the legal aspects of NATO operations, International Humanitarian Law, International Human Rights Law, detention, NATO ROE, targeting, Command limits and others. The lectures are always delivered by highly qualified subject matter experts and the students' syndicates are orchestrated by experienced syndicate leaders. The students' critiques from the April 2016 course (see chart below) have proven that this course is valuable for an operational lawyer.

100 %	Considered that this course has <u>some or great value</u> for their professional development
100 %	Would <u>recommend</u> this course to other people
97.2 %	Considered that the course learning objectives were achieved <u>well enough</u> or <u>completely</u>
93.25 %	Were very or completely satisfied with the performance of the <u>syndicate leader</u>
94.8 %	Were very or completely satisfied with <u>syndicate exercises</u>

All the details on the course curriculum can be found here: [NATO School Oberammergau-NATO Operational Law Course description](#).

Seats are available for this course. If interested, please sign up soon.

To book a seat at this course, please contact your NATO or national POC ([NSO Courses POC finder](#)). You may also contact the NATO School Student Administration at +49-8822-9481-4477.

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The next **NATO Legal Advisors Course (M5-34-B16)** will take place from **10 to 14 October 2016**. The course aims to provide military and civilian legal advisors, in national or NATO billets, an understanding of legal basis for establishing the Alliance, NATO Organisations, International Military Headquarters and other NATO entities. It is focused on the administrative aspects of the Alliance and the NATO functions. The course covers issues such as the International Agreements, the financial aspects of NATO and the role of Commanders and Legal Advisers in NATO.

All the details on the course curriculum can be found here: [NATO School Oberammergau - NATO Legal Advisor Course description](https://www.natoschool.nato.int/About-us/Programs-and-Courses/NATO-Legal-Advisors-Course)



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