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Introduction

Dear Legal Colleagues and Persons Interested in NATO,

With pleasure we publish our 28th issue of the NATO Legal Gazette.

In this edition, we again receive the benefit of a substantive contribution from Dr. Aurel Sari. His article titled *Normative Power Europe: Status of Forces Agreements in the Field of European Security and Defence Cooperation* undertakes the task of defining the "legal position of the military and civilian personnel, as well as the forces and headquarters, deployed by one EU Member State in the territory of another Member State in the context of what is now the Common Security and Defence Policy." Captain Pierre Degezelle, BEL AF, who is currently assigned to the Claims Office of the Belgian Ministry of Defence, provides his thoughtful and hands-on perspective in our second article, *General Principles of the NATO Claims Policy*. In our third article, Mr. Thomas E. Randall, Legal Adviser, Supreme Headquarters Allied Powers Europe (SHAPE) offers his perspective on *The Evolving Role of the Legal Advisor in Support of Military Operation* formed by his distinguished service of more than thirty years as a military and civilian legal adviser.

Recent ACT SEE intern and now full jurist in Germany, Natalia Neufeld explores the legal effect of treaty reservations in her article, *NATO Russia Relations: A Study in Reservations*. Ms. Neufeld offers the ratification process of the PfP SOFA undertaken by NATO nations and Russia as a case to frame her analysis. Finally, our most prolific contributor to this Gazette, Mr. Vincent Roobaert, of the NATO Communications and Information Agency (NCI Agency) provides us with his book review of Douglas Guilfoyle's *Shipping Interdiction and the Law of the Sea*.

As usual, this issue spotlights members of our NATO legal community, offers hails and farewells to the frequently changing members of the NATO legal community as well as providing general news and information about upcoming events.

Finally, for persons in NATO or national legal posts addressing NATO issues, the 2012 NATO Legal Conference will be held from 24-28 September in Tirana, Albania. Mark your calendars for this important event to be held in the capital of one of NATO's newest member states.

Best regards from sunny Belgium,
Sincerely,
Lewis

Sherrod Lewis Bumgardner
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Normative Power Europe: Status of Forces Agreements in the Field of European Security and Defence Cooperation

Dr Aurel Sari (*)

Introduction

Over the past decade, the European Union has taken a series of steps designed to provide its Common Foreign and Security Policy with an operational capability. Cooperating voluntarily, the Member States have agreed to make available to the Union a range of civilian and military assets to be deployed in EU-led crisis management missions, while for its part the EU has equipped itself with dedicated civilian and military organs capable of exercising political control and strategic direction over those assets.¹ As a result of these developments, the EU has conducted over two dozen crisis management missions on three continents since 2003.² While these numbers are impressive, the mandates of EU operations, and consequently their scope and significance, has varied considerably. At the higher end of the spectrum, the Union has conducted a handful of large-scale missions in sometimes challenging political and operational environments, including Operation Althea, the UN-mandated follow-on mission from SFOR in Bosnia and Herzegovina. At the lower end, the EU has carried out a number of assistance and training missions, in particular in the area of the rule of law and security sector reform.

* Lecturer in Law, University of Exeter. Email: A.Sari@exeter.ac.uk. The title of this contribution is borrowed in part from Ian Manners' seminal article entitled 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 *Journal of Common Market Studies* 235. Manners argued that the EU's normative construction predisposes it to act in a normative way in international politics. While this argument may overestimate the unique features of the EU and underestimate the extent to which other international organizations too are agents of normative change (the UN is an obvious case in point), this contribution does confirm that the phrase 'normative power' is not a contradiction in terms when applied to the EU. Not only is the Union capable of setting a normative agenda on the international stage, but in doing so it is evidently motivated by a healthy dose of self-interest.

¹ According to Article 42 of the Treaty on European Union (Lisbon), the EU may deploy civilian and military assets made available to it 'on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter.'

² The European External Action Service maintains an up-to-date list of EU operations on its website. For a detailed review of the main legal aspects of EU operations, see F. Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (2010), at 97–191.

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This process of capacity building and growing operational engagement on the ground has gone hand-in-hand with the development of the legal framework necessary to enable the EU to meet its expanded responsibilities. Internally, the Council of the European Union has adopted a range of legal instruments establishing new political and military structures and addressing related institutional matters, such as staffing regulations. Externally, the EU has entered into a substantial number of international agreements with third countries and other international organizations, in particular NATO.³ These have included status of forces agreements concluded with States hosting EU missions in their territory, participation agreements with third States contributing personnel and assets to such missions and agreements regulating the exchange of classified information between the EU and third parties.⁴ For the EU, the conclusion of these agreements had constitutional implications, as it confirmed, in the opinion of most commentators,⁵ that the Union possessed treaty-making capacity and therefore international legal personality even before the Treaty of Lisbon conferred this status upon it in express terms. However, the EU's treaty practice is of wider interest as well, in particular its practice relating to status of forces agreements.

The present contribution aims to provide an overview of the status of forces agreements concluded in the context of European Security and Defence Policy.⁶ Two types of instruments must be distinguished in this respect: the status of forces agreement concluded among the Member States of the EU in 2003 on the one hand and the agreements concluded by the EU with third States hosting EU crisis management operations on the other hand. Both types of agreements merit attention here and I will deal with them successively.

The EU SOFA: Sleeping Beauty

On 17 November 2003, the Representatives of the Governments of the Member States of the EU signed the EU Status of Forces Agreement, known colloquially as the EU SOFA.⁷

³ See M. Reichard, *The EU-NATO Relationship: A Legal and Political Perspective* (2006).

⁴ For an overview of these different agreements, see A. Sari, 'The Conclusion of International Agreements by the European Union in the Context of the ESDP', (2008) 56 ICLQ 53, 55–59.

⁵ E.g. P. Koutrakos, *EU International Relations Law* (2006), at 409.

⁶ For a more extensive discussion of these issues, see A. Sari, 'The EU Status of Forces Agreement: Continuity and Change in the Law of Visiting Forces', (2007) 46 Mil L & L War Rev 9; A. Sari, 'The EU Status of Forces Agreement (EU SOFA)', (2008) 13 J Conflict & Sec L 353; A. Sari, 'Status of Forces and Status of Mission Agreements under the ESDP: The EU's Evolving Practice', (2008) 19 EJIL 67.

⁷ Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA), Brussels, 17 November 2003, OJ [2003] C 321/6.

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The purpose of this text is to define the legal position of the military and civilian personnel, as well as the forces and headquarters, deployed by one EU Member State in the territory of another Member State in the context of what is now the Common Security and Defence Policy (CSDP).⁸

The EU SOFA is for the most part modelled on the relevant provisions of the NATO SOFA of 1951.⁹ This is not entirely surprising, considering that all of the then fifteen Member States of the EU, except Ireland, were parties to the NATO SOFA or the Partnership for Peace SOFA,¹⁰ as were most of the States waiting to be admitted to EU membership in 2004. Whereas the EU SOFA thus shares most of its genes with the NATO SOFA, it departs from its predecessor in several important respects, above all in its scope of application and structure.

In the case of NATO, three different instruments were negotiated to address the legal requirements of three distinct classes of personnel and entities: the NATO SOFA dealing with forces deployed by one NATO country into the territory of another, the Ottawa Agreement regulating the status of NATO as an international organization, national representatives and international staff,¹¹ and the Paris Protocol defining the status of NATO's integrated military headquarters.¹² In the EU's case, the drafters of the EU SOFA interpreted their mandate to require them to accommodate all personnel engaged in EU crisis management activities, whether acting in a national or international capacity, within a single instrument.¹³ In effect, the EU SOFA thus attempts to combine the diverse objectives and scope of the three NATO instruments in one text.

“The EU SOFA is for the most part modelled on the relevant provisions of the NATO SOFA of 1951.”

⁸ See Articles 42 to 46 of the Treaty on European Union (Lisbon).

⁹ Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, London, 19 June 1951, 199 UNTS 68.

¹⁰ Partnership for Peace Status of Forces Agreement, 19 June 1995, TIAS 12666.

¹¹ Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, Ottawa, 20 September 1951, 200 UNTS 4.

¹² Protocol on the Status of International Military Headquarters Set up Pursuant to the North Atlantic Treaty, 28 August 1952, 200 UNTS 340.

¹³ See Council doc. SN 4438/01, 31 October 2001, at para. 9.

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The EU SOFA achieves this goal by distinguishing between different types of personnel and subjecting them to distinct rules. These rules are arranged into four parts. Part I of the EU SOFA contains provisions of general applicability, such as the duty to respect local law or the rules governing the wearing of uniform and the identification of vehicles, which apply to all military and civilian staff covered by the Agreement.¹⁴ Part II consists of two articles which apply solely to the military and civilian staff seconded by the Member States to the institutions of the EU.¹⁵ The first article deals with the carrying of arms, while the other grants seconded personnel immunity from legal process of any kind in respect of words spoken or written, and of acts performed by them in the exercise of their official functions. Part III applies only to headquarters and forces and to the military and civilian staff working with them.¹⁶ This is the most extensive section of the EU SOFA and the one that follows the NATO SOFA most closely. It contains rules relating to the transit and deployment of forces and headquarters; emergency medical care; the availability of buildings, grounds and connected facilities; policing; the carrying of arms; post, telecommunications and travelling facilities; the inviolability of archives and official documents; taxation; criminal jurisdiction and civil jurisdiction and claims. The last two provisions for the most part replicate Articles VII and VIII of the NATO SOFA. Finally, Part IV consists of a sole article setting out the final provisions of the EU SOFA.¹⁷

¹⁴ Articles 1 to 6 EU SOFA.

¹⁵ Articles 7 and 8 EU SOFA.

¹⁶ Articles 9 to 18 EU SOFA.

¹⁷ Article 19 EU SOFA.

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In addition to their distinct scope of application and structure, the two agreements differ in other important respects as well. The EU SOFA reproduces certain provisions of the NATO SOFA subject to significant modifications. For instance, whereas under the NATO SOFA members of a force or a civilian component and their dependents *may* receive medical and dental care provided that the force's own facilities are inadequate, under the EU SOFA military and civilian staff *shall* receive emergency medical and dental care only. A more curious example is the right of foreign forces to police themselves: by changing the original order of words found in the relevant provision of the NATO SOFA, the EU SOFA makes this right dependent upon the agreement of the receiving State. Other provisions are not reproduced at all, including the fair trial guarantees found in Article VII of the NATO SOFA and most of its economic provisions. Both fields are already covered by more specific rules under EU law. Overall, marked and substantial differences therefore exist between the EU SOFA and the NATO SOFA: it would be a mistake to believe that the former merely duplicates the latter.

The conclusion of the EU SOFA represents an important mile-stone in the development of European Security and Defence Policy, for it establishes a legal framework which enables the Member States to temporarily deploy their personnel into each other's territory on the basis of well-established rules derived from the NATO SOFA. The success of the EU SOFA thus depends on whether the Member States succeeded in addressing the specific requirements of European security and defence cooperation without departing unnecessarily from the spirit and letter of the NATO SOFA. Measured against this standard, the results are mixed.

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The EU SOFA does not address the legal status of all categories of military and civilian staff operating in the context of the CSDP. For example, the Agreement applies neither the personnel seconded to ATHENA nor the intergovernmental mechanism set up to administer the common costs of EU military operations. Neither does it apply to the military personnel of the European Defence Agency. More importantly, the application of the EU SOFA is subject to a series of restrictions. The most significant among these is what may be termed the principle of subsidiarity: Parts I and III of the EU SOFA apply to any forces and headquarters and their personnel only in so far as their status is not already regulated by another agreement.¹⁸ This means not only that any existing agreements, including the NATO SOFA, will supersede the EU SOFA to the extent that they overlap with it, but it also enables two or more Member States to derogate from the EU SOFA by concluding subsequent agreements to this effect. The end result is that the legal status of forces operating in the context of the CSDP is governed by an intricate patchwork of legal instruments rather than a single coherent set of rules.

Nor can the division of the EU SOFA into four parts be described as an unqualified success. Although this division allows different categories of personnel to be governed by distinct rules within the confines of a single text, there are other, less favourable and presumably unintended, consequences of this drafting technique. Whereas the NATO SOFA defines its personal scope of application with reference to the term 'force', the EU SOFA relies on the generic concept of 'military staff' and 'civilian staff' to refer collectively to the different categories of personnel it covers. The use of these generic definitions seems to entitle sending States to exercise their criminal and disciplinary jurisdiction in the territory of the receiving State over personnel belonging to *other* sending States, at least on a purely textual reading. The use of these generic terms also leads to a remarkably broad definition of a 'force'. As defined in the EU SOFA, the term 'force' is not synonymous with armed force, but has a mixed civilian–military meaning. It may include national contingents as well as multinational military formations. It may even refer to single individuals. Not only does this stretch the concept close to breaking point, but it also complicates the interpretation of the text.

¹⁸ Article 19(6) (a) EU SOFA.

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However, for the time being, none of this presents any difficulties in practice. Despite the Member States' stated intention 'rapidly to agree among themselves' on the EU SOFA,¹⁹ the Agreement has still not entered into force more than eight years after its adoption.²⁰ This cannot but raise questions about the weight that the Member States attach to it. In the absence of a practical role, the significance of the EU SOFA is therefore of a more abstract nature: its conclusion confirms the NATO SOFA as the appropriate model for the negotiation of multilateral status of forces agreements in the context of structured military cooperation among politically equal partners. Indeed, it is the very success of the NATO SOFA which condemns the EU SOFA to a subsidiary existence.

EU Mission SOFAs: Bucking the Trend

Since the EU SOFA applies solely between the Member States of the EU and only within their territory, the EU has found it necessary to make separate arrangements to regulate the legal position of European military and civilian staff deployed into the territory of third countries. In some cases, the applicability of pre-existing arrangements concluded by the Member States or by third parties was simply extended to EU missions. For example, in the case of Operation *Artemis*, the EU's first ever military mission, the Government of Uganda unilaterally extended the application of a bilateral agreement it had concluded with France in June 2003 to other contributing States deploying personnel and assets to Uganda where the forward operating base of the mission was located.²¹ In the majority of cases, however, the EU has negotiated separate status agreements with third States hosting EU crisis management missions.

“Since the EU SOFA applies solely between the Member States of the EU and only within their territory, the EU has found it necessary to make separate arrangements to regulate the legal position of European military and civilian staff deployed into the territory of third countries.”

¹⁹ Council doc. 10188/01, 21 June 2001, at 2.

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In its initial practice, the EU followed the precedent set by the Memorandum of Understanding concluded in 1991 between the European Community and its Member States on the one hand and the Federal Authorities of Yugoslavia and the Republics of Croatia and Slovenia on the other hand in order to define the mandate and status of the European Community Monitoring Mission (ECMM).²² This instrument conferred upon the ECMM's personnel the privileges and immunities enjoyed by diplomatic agents under the Vienna Convention on Diplomatic Relations of 1961. These status arrangements remained in place when the EU entered into new agreements with the Federal Republic of Yugoslavia, FYROM and Albania following a restructuring of the ECMM in 2000.²³ Subsequently, they also served as a model for seven status of forces agreements drawn up between 2003 and 2005.

The conferral of diplomatic status on members of foreign armed forces is not unusual in international law. High-ranking members of peace support operations, such as heads of mission or force commanders, are routinely granted privileges and immunities enjoyed by diplomatic agents, while smaller contingents deployed abroad on short-term advisory or assistance missions sometimes benefit from treatment equivalent to that accorded to administrative and technical staff under the Vienna Convention. However, it is quite exceptional in international practice to confer the full array of diplomatic privileges and immunities on every member of a foreign contingent, especially when the number of troops involved is relatively high. Although no rules of international law prevent the EU from maximising the privileges and immunities of its crisis management missions, such a strategy may nevertheless be perceived as heavy-handed and sits somewhat uncomfortably with the EU's self-image as a global champion of human rights and the rule of law. In fact, it appears that this strategy has been a source of contention within the EU. In a paper submitted in December 2002, the Danish Presidency of the Council of the EU advised against the wholesale adoption of the status regimes contained in the Vienna Convention on Diplomatic Relations and instead supported a more flexible 'building-block' approach whereby the legal position of EU missions would be defined on a case-by-case basis to reflect their specific functions and operational circumstances.²⁴

²⁰ As of November 2011, three Member States have not yet notified the Secretary-General of the Council of the European Union of the completion of their constitutional procedures for the approval of the EU SOFA.

²¹ Council doc. 12225/03, 4 September 2004.

²² Memorandum of Understanding on the Monitor Mission to Yugoslavia, 13 July 1991 (on file with the author). See D. Lopandic, 'Les Mémoires d'Entente: Des Instruments Juridique Spécifiques de la Politique Étrangère et de Sécurité de l'Union Européenne - Le Cas de l'ex-Yugoslavie', (1995) n° 392 RMCUE 557.

²³ EU-FRY, 25 April 2001, OJ 2001 L125/2; EU-FYROM, 31 August 2001, OJ 2001 L241/2; EU-Albania, 28 March 2003, OJ 2003 L93/50.

²⁴ Council doc. 15711/02, 17 December 2002.

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“The EU Model SOFA and SOMA grant EU crisis management operations a broad range of privileges in the host State.”

The experiences gained in the course of the first few EU crisis management missions highlighted the need to streamline the conclusion of status of forces agreements in order to facilitate their early entry into force. In 2005, the Council adopted an EU Model SOFA and an EU Model SOMA to this end.²⁵ In doing so, the Council followed the broad example set by the UN Model SOFA of 1990, which was drawn up to ‘serve as a basis for the drafting of individual agreements to be concluded between the United Nations and countries on whose territory peace-keeping operations are deployed.’²⁶ However, unlike the UN Model SOFA, which also serves as a template in operations where no United Nations military personnel are deployed, the Council decided to deal with military and civilian operations in two separate texts. While military and civilian personnel raise different legal considerations, their circumstances do not differ to such an extent as to make the adoption of two separate texts absolutely necessary. Indeed, the majority of the provisions of the Model SOFA and the Model SOMA are all but identical, especially following their revision in July 2007 and December 2008, respectively, which ironed out certain inconsistencies between the two instruments.²⁷

The EU Model SOFA and SOMA grant EU crisis management operations a broad range of privileges in the host State. These include privileges commonly found in similar status agreements, such as those relating to the crossing of borders and movement within the territory of the host State, the installation and operation of communication devices and equipment, and the repatriation of deceased personnel and their personal property. Other privileges, such as the right to display the national flags and insignia of their constituent national elements, are less common. Still others are in fact quite remarkable: thus both the EU Model SOFA and SOMA require the host State to provide, free of charge, facilities owned by private legal entities, if requested to do so by EU operations for administrative and operational reasons. In addition, EU missions also benefit from immunities similar to those enjoyed by diplomatic missions under the Vienna Convention on Diplomatic Relations. Their facilities, archives and documents and official correspondence are inviolable. Their facilities, furnishings and other assets as well as their means of transport are immune from search, requisition, attachment or execution, while the missions themselves, as well as their property and assets, enjoy immunity from every form of legal process and are exempt from national, regional and communal taxes.

²⁵ Council doc. 8720/05, EU Model SOFA, 18 May 2005 and Council doc. 9847/05, EU Model SOMA, 7 June 2005 (both on file with the author).

²⁶ UN doc. A/45/594, Model status-of-forces agreement for peace-keeping operations: Report of the Secretary-General, 9 October 1990.

²⁷ Council doc. 11894/07, EU Model SOFA, 20 July 2007 and Council doc. 17141/08, EU Model SOMA, 15 December 2008.

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Individual members of EU crisis management operations too benefit from extensive privileges and immunities. Most importantly, they are exempt from the criminal jurisdiction of the host State under all circumstances and enjoy immunity from its civil and administrative jurisdiction in respect of words spoken or written and all acts performed by them in the exercise of their official functions. Usefully, the EU model agreements not only reproduce the procedure set out in the UN Model SOFA for determining whether or not an act in question was committed in the performance of their official functions, but they also add a clarification whereby a certification issued by the competent EU authorities to this effect shall be binding on the host State. In addition, members of EU crisis management operations enjoy a range of other privileges and immunities typically granted to foreign personnel in similar circumstances. For instance, they are not liable to any form of arrest or detention and no measures of execution can be taken against them, except in civil proceedings not related to their official functions.

Conclusion

The status of forces agreements concluded in the context of European Security and Defence Cooperation reveal their most interesting facets when viewed against the background of international practice as a whole. On the one hand, they affirm international practice in two important respects. First, the distinct content of the EU SOFA and the EU Model SOFA/SOMA confirms that the legal status of foreign armed forces is not subject to a uniform legal regime under international law, a point I have covered in more detail elsewhere in this issue. Plainly, the concessions that the Member States of the EU were prepared to make to each other in the EU SOFA are not appropriate to govern their relationship with third countries in entirely different operational circumstances. Second, subject to some notable exceptions, the substantive terms of the EU SOFA and the EU Model SOFA/SOMA correspond closely to the terms of comparable agreements, namely the NATO SOFA and the UN Model SOFA. This congruence reflects more than just a lack of imagination on part of those who drafted the EU agreements but may be understood to confirm the general applicability of the legal arrangements contained in the NATO SOFA and the UN Model SOFA to analogous operational circumstances.

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On the other hand, the EU's continued reliance on the Vienna Convention on Diplomatic Relations for inspiration in defining the legal status of its crisis management missions is at odds with international practice. This merits a few brief observations. First, the question as to whether or not the privileges and immunities laid down in the EU Model SOFA and SOMA exceed what is functionally necessary must be judged in its proper context. The EU Model SOFA and SOMA may not appear particularly excessive when compared to the jurisdictional arrangements annexed to the Military Technical Agreement between ISAF and the Interim Administration of Afghanistan, yet they do appear somewhat over the top when compared to the NATO SOFA. However, these comparisons are of limited value since the instruments in question were designed to apply in very different environments and for this reason are not functionally equivalent. Status of forces agreements 'come in a variety of sizes and flavours'²⁸ as Max Johnson has reminded us, and one should avoid comparing apples and oranges.²⁹ Second, the EU Model SOFA and SOMA raise the question as to whether they reflect a sense of entitlement on part of the EU to benefit from more extensive privileges and immunities as a matter of law or merely as a matter of political concession. In other words, is EU treaty practice motivated by *opinio juris* or by *realpolitik*? In the absence of evidence supporting the former conclusion, the latter seems more likely. Third, even if on a strict legal analysis the majority of the privileges and immunities set out in the EU Model SOFA and SOMA do not go markedly beyond those found in the UN Model SOFA, the fact that they echo the language of the Vienna Convention on Diplomatic Relations may create a perception to this effect. Such a perception may be sufficient to call into question their legitimacy in the eyes of host States.

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²⁸ M. S. Johnson, 'NATO SOFA: Enunciating Customary International Law or Just a Model, and What Does the Future Portend?', in H. Fischer *et al.* (eds), *Krisensicherung und Humanitärer Schutz - Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* (2004) 287, at 291.

²⁹ This is not always fully appreciated in the present context. Cf. R. Burke, 'Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity', (2011) 16 *J Conflict & Sec L* 63.

General Principles of the NATO Claims Policy

Pierre Degezelle

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 partners¹, 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.

¹ 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.

General Principles of the NATO Claims Policy

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 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 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.”

General Principles of the NATO Claims Policy

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.

General Principles of the NATO Claims Policy

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 mission². 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.³

² 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.

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

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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 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.

General Principles of the NATO Claims Policy

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.

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

General Principles of the NATO Claims Policy

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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NATO-Russia Relations: A Study in Reservations

Natalia Neufeld

Introduction: Agreement among the States Party to the North Atlantic Treaty and other States participating in the Partnership for Peace regarding the Status of their Forces

Russia, like 42¹ other NATO Allies and Partners signed and ratified the Agreement among the States Party to the North Atlantic Treaty and other States participating in the Partnership for Peace regarding the Status of their Forces (PfP SOFA) on April 21st, 2005. This Agreement entered into force on September 27th, 2007.

The PfP SOFA is a multilateral agreement between NATO Member States and countries participating in the Partnership for Peace (PfP). All the NATO Allies and 24 Partners have signed or acceded to the PfP SOFA since it was issued on June 19th, 1995.

Provisions of Agreement among the States Party to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of Their Forces

As a transition document, the Agreement among the States Party to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of Their Forces extends beyond the scope of application of the Agreement among the States Party to the North Atlantic Treaty regarding the Status of their Forces (NATO SOFA) to cover operations in the Partnership for Peace Partner States and vice versa. This means in practice that the parties to the PfP SOFA exactly identify what the status of their forces will be and what privileges, facilities and immunities will apply to them when they are present on the territory of another state that is party to the PfP SOFA and put these provisions into another bilateral agreement.

¹ Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Luxemburg, Macedonia, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, United States, Uzbekistan.

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The Agreement does not address the issue of the right of foreign forces to be present in the territory of another state. This will be defined in separate arrangements based on the PfP SOFA. Consequently, the PfP SOFA becomes applicable only after an individual, bilateral agreement between the sending and the receiving States has been signed. In addition, all States that are party to the PfP SOFA grant the same legal status to forces of the other parties when these are present on their territory. Therefore, once there is a common agreement, for example, regarding a certain operation, training or exercise, the same set of provisions will apply on a reciprocal basis. A common status and an important degree of equal treatment will be reached which will contribute to the equality between Partners.²

It should be noted, that the NATO SOFA limits the modifications made by the parties in a separate agreement to aspects that are not addressed in the NATO SOFA.³ The PfP SOFA, however, has a less restrictive wording. Its Article IV declares that: *"the present Agreement may be supplemented or otherwise modified in accordance with international law."* In this sense, the rules codified in Article 41 of the Vienna Convention on the Law of Treaties⁴ are relevant. In light of this Article, parties to the PfP SOFA have the right to modify the Agreement between themselves alone and under the following conditions:

1. The modification must not be prohibited by the PfP SOFA.
2. It must not affect the enjoyment by the other parties of their rights under the PfP SOFA or the performance of their obligations.
3. It must not relate to a provision the derogation of which is incompatible with the effective execution of the object and purpose of the PfP SOFA as a whole.
4. The parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the PfP SOFA for which it provides.

² http://www.nato.int/cps/en/natolive/topics_50086.htm?selectedLocale=en

³ See Preamble of the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces; Lazareff, *Status of Military Forces Under Current International Law*, p. 73-75.

⁴ Vienna Convention on the Law of Treaties 23 May 1969, UNTS Vol. 1155, 331.

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Reservations to the Agreement among the States Party to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of Their Forces

"The fact that Russia did not name the statement a reservation has (in line with the *falsa demonstratio non nocet*) in principle no effect on the status of this statement. In fact it has to be examined in the light of the Vienna Convention on the Law of Treaties."

Besides the modifications within a separate Agreement, the parties to the PfP SOFA can influence the provisions of this Agreement with reservations. Even though the PfP SOFA does not provide wording that explicitly allow reservations, it does not prohibit them either.

Russia's statement upon ratification

Russia's instrument of ratification of the PfP SOFA was accompanied by a statement which provided Russia's understanding of the provisions of the Agreement.⁵ Among other provisions, Russia stated that it intended to widen the scope of jurisdiction of the Russian Federation beyond the provisions of Article VII (2) (c) of the Agreement. Furthermore, the Russian statement concerning Article VII (4) of the Agreement widened the scope of jurisdiction of a sending State over persons who are nationals or ordinarily residents in the receiving State. Additionally, Russia expressed a claim for duly certified translations of all documents and materials to be sent to their competent authorities within the framework of the Agreement.

At this point, it should be clarified whether this statement can be considered a reservation or just a statement. The fact that Russia did not name the statement a reservation has (in line with the *falsa demonstratio non nocet*) in principle, no effect on the status of this statement. In fact, it has to be examined in the light of the Vienna Convention on the Law of Treaties.

According to the definition provided by Article 2.1 (d) of the Vienna Convention, a reservation is "a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state". Reservations also have to be distinguished from other statements and interpretative declarations that are made with regard to a treaty but are not intended to have a legal effect, such as understandings, political statements or interpretative declarations. By providing such an interpretative statement, a state aims to clarify what meaning or to what extent it affirms a given treaty or some of its provisions. These statements have no binding consequences; they can be regarded as political manifestations for a primarily internal effect that is not binding upon other parties.⁶ Interpretative declarations can be made at any time. According to Article 23 (2) of the Vienna Convention however, the declaration of a reservation must be firmly confirmed by the reserving state when ratifying, accepting, or approving the treaty. In other words, the qualification of a unilateral declaration as a reservation or an interpretative declaration depends on the legal effects it intends to produce. This differentiation is often very difficult. In cases where a State does not define its statement as reservation or interpretative declaration, it is sometimes the depositary that chooses one of the two designations when communicating the declaration to the other treaty parties.

⁵ www.state.gov/documents/.../91332.pdf

⁶ Malcolm N. Shaw, *International Law*, p. 822.

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In light of the above mentioned rules it can be said that, even though the Russian comment has been called a "statement", it can be considered to be a reservation, because it meets the criteria of the definition. The comments widen the scope of certain provisions of the Treaty and create new obligations for other parties to the Treaty by making Russian translation of documents compulsory. Russia obviously wants the other parties to be bound by its modifications of the Treaty. The Russian declaration was not intended to be only internally binding but to adjust the relation between Russia and the other States under the PfP SOFA. Additionally, the United States as the depositary of this Treaty defined Russia's statements as reservations when informing the other States.

Objections and acceptance

Russia was one of twelve States that provided reservations at the moment of signing, accession to, or ratification of the PfP SOFA. But only Russia's reservations were objected to by several nations. An objection is defined as "*a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.*"⁷ According to Article 20 (5) of the Vienna Convention on the Law of Treaties, the objection has to be expressed by the State within a reasonable period of time after it has been notified of the reservation. A period of twelve months is considered as reasonable.⁸ According to the principle *in majore ad minus*, the objecting State can preclude the entry into force of part of the treaty, or of the treaty as a whole. It can do so unilaterally and another agreement of the reserving State is not required.⁹

⁷ Report of the International Law Commission, Sixtieth Session (5 May-6 June and 7 July-8 August 2008): online at: <http://untreaty.un.org/ilc/reports/2008/2008report.htm>

⁸ Ibid.,

⁹ Mark E. Villinger, Commentary on the 1969 Vienna Convention on the Law of Treaties, pp. 290 – 291.

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"Most of the objecting nations considered Russia's reservations to be incompatible with the provisions of the NATO SOFA and some of them complained that the requirement of translations would create a new obligation for the other nations."

In this concrete case some nations objected to the reservations as a whole, some just to parts of them. Most of the objecting nations considered Russia's reservations to be incompatible with the provisions of the NATO SOFA and some of them complained that the requirement of translations would create a new obligation for the other nations.

On the other hand, twelve nations did not react to the reservations made by Russia at all. They neither accepted nor rejected the reservations expressly. A consolidated view of these different statements made by the other parties of the treaty indicates that there are three main groups:

1. Nations like Georgia, Iceland, Kazakhstan and several others did not provide any statements whether they accept Russia's reservation or not.
2. Other nations such as Latvia, The Kingdom of the Netherlands, Portugal and Slovenia objected to the reservations but pointed out that the Agreement shall bind them and Russia in its original form and Russia shall not benefit from its reservations.
3. The Kingdom of Great Britain objected to the reservations and stated that the Agreement shall not apply between Russia and Great Britain.

These circumstances raise the following questions regarding the impact of these reservations on the relations between the parties to the PfP SOFA and Russia:

1. Did Russia become a party to the agreement?
2. If so, what is the effect of the PfP SOFA between Russia and the
 - a. Parties to the PfP SOFA that did not object or accept Russia's reservations expressly
 - b. Parties that objected to the reservation, while stating that the agreement shall be effective in its original form
 - c. United Kingdom

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Effect of Russia's reservations on the relations with non-objecting states

Article 20 (4) (c) of the Vienna Convention¹⁰ states that *"an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation."* unless the reservation is expressly allowed by the treaty. Read together with Article 20 (4) (a), this means that any such acceptance of the reservation by one State lets the reserving State become a party to the treaty in relation to that State.¹¹ It leads to bilateral treaty relations between the reserving and the accepting States.

Acceptance of a reservation can be expressed in writing (Article 23 (1)), or tacit, or even implied (Article 20 (1)-(3) and (5)). In this concrete case, none of the States accepted Russia's reservations expressly, but several States did not provide a statement at all. The silence of the parties is considered to be a sign of acceptance if they do not express a rejection within a twelve month period after they are notified of the reservation.¹²

This fact cannot be called into question by an objection formulated several years after the treaty has entered into force between the two States without seriously affecting legal security. In practice, however, disagreement between the parties on the field of the status of visiting forces will be clarified within a separate agreement in preparation of sending or receiving forces.

A further question is: what does the acceptance of the Russian reservation mean for the relation between Russia and the accepting State and how does this relation affect the other relations under the PfP SOFA? The effect of reservations is outlined in Article 21 of the Vienna Convention. This Article states that *"a reservation established with regard to another party in accordance with Articles 19, 20 and 23:*

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State."

In this case, it means that all the 17 States that did not expressly object to Russia's reservations approved them and regarded Russia as part of the agreement. The PfP SOFA and the reservations entered into force between Russia and these parties. The limitation issued by the reserving State applies to both parties to an equal extent.

These relations, however, do not effect Russia's relations with the other States party to the agreement. Article 21 states that *"the reservation does not modify the provisions of the treaty for the other parties to the treaty inter se."*

¹⁰ Vienna Convention on the Law of Treaties, Vienna Mai 23. 1969; online at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

¹¹ Mark E. Villinger, Commentary on the 1969 Vienna Convention on the Law of Treaties, pp. 292.

¹² Ibid., pp. 293., pp. 290 – 291.

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Effect of Russia's reservation on the relations with objecting states

While examining the effect of the reservations and objections on the relations between Russia and the objecting parties to the PfP SOFA, the question is whether a reservation incompatible with the aim and purpose of a treaty is to be considered as lack of agreement or whether it is only the reservation itself which has to be considered null and void. In the first case, the PfP SOFA would not come into force between Russia and the objecting States at all. In the other case, the Agreement would be valid between these parties in its original form.

Article 20 (4) (b) of the Vienna Convention states that *"an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State."* The effect of the objection is that the provisions to which the reservation relates do not apply to the extent of the reservation as between the State which has made the reservation and the one which has raised an objection. Furthermore, the mere fact that the reason for the objection is that the reservation is considered to be incompatible with the object and purpose of the treaty is not sufficient to exclude the entry into force of the treaty between the reserving and the objecting State.

Insofar as the States party to the PfP SOFA objected to the Russian reservation and based their objections on such incompatibility, while clarifying at the same time that the finding did not prevent the treaty in its original form from entering into force as between them and the author of the reservation, Russia does not benefit from its reservations. According to this understanding, the PfP SOFA entered into force between Russia and these states in its original form.

Effect of Russia's reservations on its relations with the United kingdom

The United Kingdom objected to the Russian reservations and pointed out that it considered *"that the entry into force of the Partnership for Peace Agreement between itself and the Russian Federation is precluded. Accordingly the Partnership for Peace Agreement does not apply between the United Kingdom and the Russian Federation."*¹³ According to the principles of Article 20 (4) (b) of the Vienna Convention the entry into force of the treaty between the reserving and the objecting State is precluded if the latter definitely expresses its will to do so. In this case, even though Russia and The United kingdom are part of the PfP SOFA, the Agreement did not enter into force between them.

¹³ Fourth Supplementary List of Ratifications, Accessions, Withdrawals, etc., for 2008, Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, September 2009, p. 13.



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Conclusion

The PfP SOFA has greatly facilitated the military-to-military and other practical cooperation between Russia and NATO Member States and partner countries. In particular, it has made it easier to deploy forces to participate in joint operations and exercises. It has also paved the way for Russian logistical support to the NATO-led International Security Assistance Force in Afghanistan. The acts of cooperation and the concluded agreements between the parties are visible commitments of the former adversaries embracing a more peaceful and secure future and moving towards equal partnership. The next crisis will show how solid the partnership and its legal framework actually are.

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The Evolving Role of the Legal Advisor in Support of Military Operations*

Thomas E. Randall

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 advisers in military headquarters today, and will focus on some of the unique challenges faced by legal advisers 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,'¹ 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, 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.

* 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

¹ 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.

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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?'

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"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."

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.

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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.² 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.

² 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).

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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 Resolution³ 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.⁴ Other nations⁵ 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.

³ 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.

⁴ The operation, which morphed into 'Provide Comfort II' in July 1991, officially ended on 31 December 1996.

⁵ i.e. United Kingdom, Italy, France, Australia, The Netherlands, and Turkey.

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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 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 advisors 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.

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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 article⁶ 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 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.

"As the article points out, a lawyer should not be merely an apologist for the actions of his client."

⁶ 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.

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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.

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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 1973⁷ 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 adviser 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,'⁸ and to the 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,⁹ 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.

⁷ UNSC Res. 1973, 17 March 2011.

⁸ 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.

⁹ Allied Command Operations (ACO) and Allied Command Transformation (ACT).

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"The legal advisor 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."

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.¹⁰ 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.¹¹ At SHAPE, in an 'effort to reinforce 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.¹² 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!'

¹⁰ 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.

¹¹ 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, 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.'

¹² 'NATO Policy on Legal Support', NATO Bi-SC Directive 15-23, 23 July 2009, unpublished.

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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.

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

NATIONS	NATO
SOVEREIGNTY	NO SOVEREIGNTY
PARLIAMENTS/CONGRESS	NO PARLIAMENT/CONGRESS
ENACT LAWS	NO LAWS
ENFORCE LAWS	NO ENFORCEMENT
PUNISH VIOLATIONS	NO PUNISHMENT

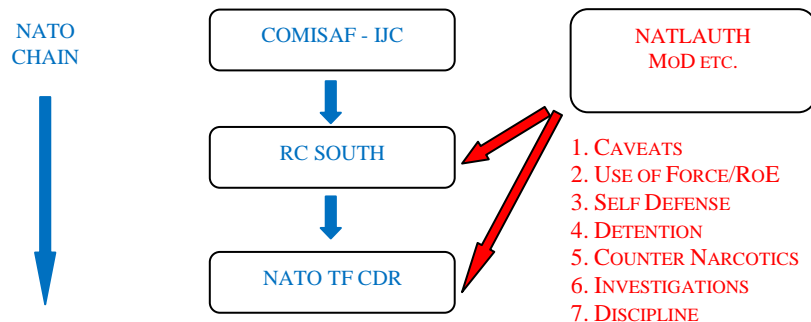
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In essence, it all boils down to a single word: 'Sovereignty.' Whilst nations have it, NATO does not. NATO is an alliance of 29 sovereign nations, but none of the sovereignties owned by its member states 'rubs off' onto the Organization. Therefore 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!'¹³ 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 '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:

DUAL CHAIN OF AUTHORITY



¹³ 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>.

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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!

Thomas E. Randall
Legal Adviser, Supreme Headquarters Allied Powers Europe (SHAPE)

Book review - *Shipping Interdiction and the Law of the Sea*, by Douglas Guilfoyle¹

Vincent Roobaert

"The events in Somalia and the Horn of Africa have shown however, that piracy is neither a thing of the past nor limited to the Malacca Strait and that acts of piracy could seriously hinder international commerce and transportation of goods."

If one were to conduct a survey among international lawyers a couple of years ago about which branch of international law they would consider relevant for their work, many would probably have answered the law governing piracy. To be fair, while there were some discussions on piracy when the Rome Statute for the International Criminal Court was negotiated, the interest was not so much in the crime of piracy itself but in its consequences, namely the possibility for all States to prosecute pirates on the basis of universal jurisdiction. The events in Somalia and the Horn of Africa have shown however, that piracy is neither a thing of the past nor limited to the Malacca Strait and that acts of piracy could seriously hinder international commerce and transportation of goods. Today, international lawyers are concerned with determining whether and in which circumstances a suspected pirate vessel may be intercepted and boarded and how and where pirates can be prosecuted.

In *Shipping Interdiction and the Law of the Sea*, Douglas Guilfoyle examines interception, boarding and arrest of foreign flag vessels and their crews in the high seas. The book does not aim at examining rules on war time blockade but rather it looks at the actions that may be undertaken in peacetime. After explaining basic principles on maritime jurisdiction, the author reviews the following topics in greater detail: piracy and the slave trade, drug trafficking, fisheries management, unauthorized broadcasting, migrant smuggling and counter-proliferation of weapons of mass destruction.

The author starts by making a distinction between prescriptive and enforcement jurisdiction. Prescriptive jurisdiction refers to a State's authority to set out rules of conduct. Enforcement jurisdiction refers to a State's authority to ensure compliance with the rules it has enacted. Contrary to prescriptive jurisdiction, enforcement jurisdiction is usually limited to the territory of that State. In maritime cases, a State's enforcement jurisdiction may be subject to the consent of the flag state but consent of the flag state to board a vessel may not necessarily extend to the right to seize the vessel. The author then explains the distinction made in the law of the sea between the territorial sea, the continuous zone, the exclusive economic zone, the continental shelf or the high sea and the impact of such distinction on a State's jurisdiction.

The author's subsequent review of the specific offences that may lead to boarding and interdiction underlines the lack of a unified regime governing shipping interdiction. In addition to the Convention on the Law of the Sea and other multilateral treaties, interception may also be governed by bilateral agreements whose content may therefore vary greatly.

¹ Cambridge University Press, 2011, ISBN 9781107639072.

Book review - *Shipping Interdiction and the Law of the Sea*, by Douglas Guilfoyle

Starting with piracy and the slave trade, the author reviews the criteria conditioning the qualification of an act as an act of piracy, namely an act of violence for private ends occurring on the high seas by the crew of a private ship. While States have for a long time understood the importance of fighting piracy, the author shows that the prosecution of pirates is a possibility for states but not an obligation. Again, this underlines the lack of a unified legal regime. After a discussion on the theoretical aspects of piracy, the author reviews the situation in the Malacca Strait and the Horn of Africa.

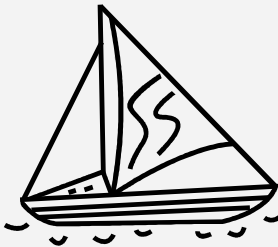
The author's review of interception in case of drug trafficking or migrant smuggling also reveals that these issues are governed by various instruments adopted at the universal, regional or bilateral levels. Of particular importance is the author's analysis of the tension between a State's right to limit migrant smuggling and a State's obligations of 'non-refoulement' under the 1951 refugee convention.

The author concludes his review of specific cases of interdiction by recent efforts to counter the proliferation of weapons of mass destruction and, in particular, the Proliferation Security Initiative and the attempts to create a crime of transporting weapons of mass destruction material by sea.

To conclude, Douglas Guilfoyle reviews the responsibilities of the boarding state under international human rights law and the possibility for the boarding state to use force during an interception. He then examines the potential immunities granted to the boarding state and its agents and the reparation regime in the Convention on the Law of the Sea.

As one can appreciate, the legal regime governing a State's right to board, visit and seize a vessel is a complex one. In *Shipping Interdiction and the law of the sea*, Douglas Guilfoyle nevertheless succeeds in steering his way across this complex topic in a clear and accessible manner.

Vincent Roobaert
Assistant Legal Adviser, NCIA





HAIL

&

FAREWELL

Hail

JWC Stavanger: Col Randy Kirkvold (USA A).
Mr. David Nauta (NDL CIV).

JFC HQ Naples: Col Kerry Wheelhan (USA A).

NATO School: LTC Brian L Bengs, (USA AF).

NATO HQ Sarajevo: LTC Darrin K. Johns (USA AF).

HQ SACT: CDR Shelby L. Hladon (USA NAV).
Ms. Alexandra Perz, (DEU CIV).

ACT SEE: Georgina Dietrich (DEU CIV).
Tom Hughes (USA CIV).

Farewell

JWC Stavanger: Col Brian Brady left in June 2012.

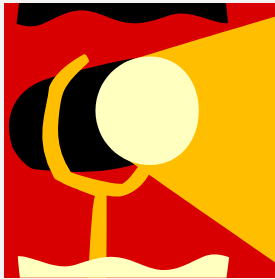
JFC HQ Naples: Col Anne Ehram-Holland left in July 2012.

JFC Lisbon: Col Philippe Trouve left in June 2012.

NATO School: LtCol Ken Hobbs left in June 2012.

EUROCORPS: Mr. Frank Burkhardt left in May 2012.

Spotlight



**CDR Shelby L.
Hladon, JAGC, USN**

Staff Legal Adviser

**Allied Command
Transformation**



Name: Shelby L. Hladon

Rank/Service/Nationality: Commander / Navy / US

Job title: Staff Legal Adviser, HQ SACT

Primary legal focus of effort: Maritime Law, Legal Support to Joint Force Training, and Liaison to HQ, Host Nation, and US Navy

Likes: Spending time with my husband and our two sons (5 and 3), exercising, volunteering, and travelling

Dislikes: Negativity!

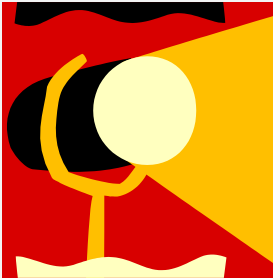
When in Norfolk, everyone should: Live/stay near the water

Best NATO experience: Ask me at the end of this tour 😊

My one recommendation for the NATO Legal Community: I'm a big fan of working together

Shelby.hladon@act.nato.int

Spotlight



Name: David Nauta

Rank/Service/Nationality: NATO civilian, Dutch

Job title: Deputy Legal Adviser Joint Warfare Centre, Stavanger, Norway

Primary legal focus of effort: Training development and host nation support

Likes: Good food and a good laugh

Dislikes: My cooking skills

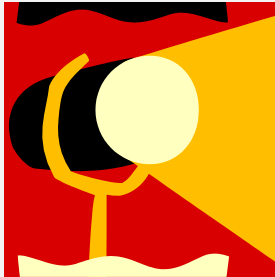
When in Stavanger, everyone should: Ask Lone Kjelgaard where to go, as I just arrived 2 weeks ago. Do try the many Thai restaurants; there are over 6 of them just in the centre! I've tried them all.

Best NATO experience: Working together with so many cultures.

My one recommendation for the NATO Legal Community: Stay in contact by calling each other, meeting at legal conferences and exchanging experiences and ideas.

david.nauta@jwc.nato.int

Spotlight



Name: Alexandra Perz

Rank/Service/Nationality: German (CIV, Res/ Army)

Job title: Assistant Legal Adviser HQ SACT

Primary legal focus of effort: Operational Law, LOAC/IHL, International Human Rights Law

Likes: Work in multinational environment, travelling, learning about different cultures, learning new languages

Dislikes: dishonesty

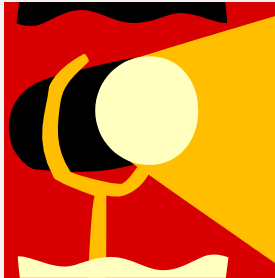
When in Norfolk, everyone should: Cultivate and foster friendships with people from other NATO States

Best NATO experience: Deployment as Chief Legal Advisor of the Commander RC North in Afghanistan

My one recommendation for the NATO Legal Community: Share information and knowledge with colleagues

alexandra.perz@act.nato.int

Spotlight



Name: Darrin K. Johns

Rank/Service/Nationality: Lt Col, USAF, USA

Job title: NATO Headquarters Sarajevo, Chief Legal Adviser

Primary legal focus of effort: Advise NHQSa Commander on all legal issues regarding implementation of the Dayton Peace Accords in Bosnia-Herzegovina. Primary ethics counselor. Advise commanders on military justice and personnel issues.

Likes: My wife!!! Family, church, criminal law, appellate advocacy, reading, cool weather.

Dislikes: Swearing, crowds, heat, humidity (and I still don't like liver!).

When in Sarajevo, everyone should: Take a historical tour through the city. This is a city with history. It was here that Franz Ferdinand was assassinated sparking of World War I. Some still call the assassin a hero while others a terrorist. The tunnel to the Sarajevo airport is also a must see on the historical tour. The history behind the tunnel is one that shows the great lengths people went through to survive during the last war here.

Best NATO experience: NHQS assignment (only NATO experience)

My one recommendation for the NATO Legal Community: Get involved. Don't wait for the commander to come to you. Look for what the commander doesn't see that could hurt him/her and take care of it. Don't be afraid to tell the boss "no," but try your best to understand the overall objective and get the boss there even if it is by means other than the ones the boss has suggested. Just as in a products liability case you need to know your client's product and business better than your client does, same applies with the military. You need to know your boss's business better than your boss knows it.

Darrin.johns@nhqsa.nato.int

UPCOMING EVENTS



2012 NATO LEGAL CONFERENCE 24-28 September

The Ministry of Defence of Albania will host the 2012 NATO Legal Conference for legal personnel from NATO, Ministries of Defence and Foreign Affairs of NATO and Partner Nations and selected partner organizations. The conference will take place in Tirana, Albania from 24 – 28 September 2012 at the Tirana International Hotel and Conference Centre, Scanderberg Square 8.

The theme of this year's conference is "Cooperating with NATO." We will focus on the important legal aspects of NATO's dynamic and varied relationships with non-NATO nations, international organizations, non-governmental organizations, and industry.

In order to register please go to <http://aco.nato.int/2012-nato-legal-conference-september-24-28.aspx>

Deadline to register is **Friday August 22, 2012.**

For any questions regarding the conference, please do not hesitate to contact any of the POCs:

Mr. Sherrod Lewis Bumgardner, sherrod.bumgardner@shape.nato.int
- NCN 254-5499 - COM: +32-65-44 5499

Petty Officer Jessye Leforestier, jessye.leforestier@shape.nato.int
- NCN 254-4950 - COM: +32-65-44 4950

Ms. Georgina Dietrich, Georgina.dietrich@shape.nato.int
- NCN 254 - COM: +32-65-44 8142

Ms. Anne Boulengier, Anne.boulengier@shape.nato.int
- NCN 254-4803 - COM: +32-65-44 4803

UPCOMING EVENTS

The NATO School in Co-Operation with
The International Institute of Higher Studies
in Criminal Sciences (ISISC)
announces its 2012



Shari'a Law and Military Operations Seminar

19 – 23 November 2012

At the International Institute of Higher Studies in Criminal Sciences (ISISC), Siracusa, Italy

This seminar is offered because of its immediate importance to NATO's ongoing missions: the International Security Assistance Force in Afghanistan (ISAF), Kosovo Force (KFOR), support to the African Union mission in Somalia (NSM Somalia) and for the African Standby Force and NATO Training Mission–Afghanistan (NTM-A); and NATO's Numerous supporting relationships with Mediterranean Dialogue countries (Algeria, Egypt, Israel, Jordan, Mauretania, Morocco and Tunisia), Istanbul Cooperation Initiative countries (Bahrain, Kuwait, UAE, Qatar) and other countries such as Pakistan where Shari'a Law applies.

The goal of this seminar is to provide instruction to military officers, legal advisors, operational planners, political and policy advisors by internationally pre-eminent scholars on Shari'a. The seminar will offer an introduction to Shari'a Law, specifically discussing crime and punishment in the Shari'a law of armed conflict, religiously motivated political violence, women's and minorities' rights and operational issues. The detailed program will be provided at a later date.

Place: International Institute of Higher Studies in Criminal Sciences (ISISC), Via Logoteta 27, Siracusa, Italy

Date: 19 – 23 November 2012

Registration deadline: 28 October 2012

Fee: 439,00 Euro

To register: forward (by email or fax) the attached NATO School Seminar Joining Report to the ISISC Programme Coordinator Ms. Stefania Lentinello (stefania.lentinello@isisc.org; fax: +39-(0)931-67622). The Joining Report can be downloaded from the website of the International Institute of Higher Studies in Criminal Sciences <http://www.isisc.org> or from the website of the NATO School <http://www.natoschool.nato.int>.

The Course Fees are € 439,00, which include enrolment, participation in the lectures and student materials. Hotel, flight and other means of transportation, on-site transportation, social events, sightseeing, drinks and meals are not included in the course fees. The fees should be paid in advance by wire transfer. Further information on payment of the fees, on travel and accommodation will be sent with the registration confirmation.

UPCOMING EVENTS



NATO Cooperative Cyber Defence Centre of Excellence
NATO School Oberammergau
U.S. Naval War College

Announce their Joint

International Law of Cyber Operations seminar

10–14 December 2012

The seminar offers an introduction to computers and computer networks, as well as to NATO's policy and doctrine regarding cyber defence. Participants will acquire a basic knowledge of public international law as it applies to cyber operations, including, *inter alia*, issues such as the prohibition of the use of force, the law of self-defence, countermeasures, LOAC, the law of neutrality, legal attribution and State responsibility. The seminar will consist of presentations by noted academics and practitioners, and will include practical exercises focusing on the legal aspects of cyber operations.

Place: NATO School, Oberammergau, Germany

Date: 10 – 14 December 2012

Registration Deadline: 9 November 2012

In-processing: 9 December 2012, 1500-2100 at the NATO School Student Administration Office

Fee: 439.00 Euro, due at in-processing

Target audience: Military and civilian legal advisors to the armed forces, intelligence community lawyers, and other civilian attorneys in governmental billets dealing with cyber issues

Classification: NATO SECRET (those without the required clearance may be excluded from certain presentations)

To Register:

Forward (by email or fax) the attached NATO School Seminar Joining Report to the NATO School Student Administration Office

(Studentadmin@natoschool.nato.int; fax: +49-(0)8822-9171-1399 or +49-(0)8822-9481-1394). You will also find the NATO School contact data on the Joining Report. The detailed program will be provided at a later date. Information on travel and accommodation will be sent with the registration confirmation. For more information about the NATO School and Oberammergau visit:

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

Articles/Inserts for next newsletter can be addressed to
Sherrod Bumgardner (Sherrod.Bumgardner@shape.nato.int) and
Kathy Bair (Kathy.Bair@act.nato.int).

Disclaimer: The NATO Legal Gazette is published by Allied Command Transformation/Staff Element Europe and contains articles written by Legal Staff working at NATO, Ministries of Defence, and selected authors. However, this is not a formally agreed NATO document and therefore may not represent the official opinions or positions of NATO or individual governments.