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Introduction

Dear Fellow Legal Professionals and Persons interested in NATO,

Best regards from Mons. Although we are in the summer period, not “all is quiet on the Western Front.” Continuing developments in Ukraine require NATO’s vigilance as do the many other security threats that serve to remind NATO of its core principles and legal basis, such as democracy, individual liberty, and the rule of law, as enshrined in the North Atlantic Treaty.

Spurred on by the recent developments on the international scene and also by the celebration of the North Atlantic Treaty’s sixty-fifth anniversary, we offer you one of our most substantive issues yet. The first article by Sylvain Fournier and Lewis Bumgardner, titled *Article 5 of the North Atlantic Treaty: The Cornerstone of the Alliance*, inspired this issue of the Legal Gazette dedicated to “NATO Legal Cornerstones.”

Although Article 5 of the North Atlantic Treaty is the most well-known, it is not the Alliance’s sole legal cornerstone. To highlight other legal foundations, we present an article on NATO Status Agreements as well as Memorandum of Understanding, NATO’s most frequent tool for concluding agreements. These are written by two of NATO’s leading practitioners on this topic, Mette Hartov and Andres Munoz. Finally, in our “Questions On” section, Frederic Tuset-Anres provides an illuminating viewpoint to key legal questions on NATO Centres of Excellence.

In the operational law arena, I authored a short overview on the evolution and legal framework for conducting NATO operations. The ACO Legal Adviser, Thomas Randall contributes his views on the legal authority of NATO Commanders. With Mr. Randall’s retirement this summer, after 40 years

of exceptional service and professional experience at US and NATO posts, it is an honour to provide his article on the legally delicate role of the NATO commander. And by its publication capturing his masterful knowledge and experience as SACEUR's Legal Adviser.

As usual, we provide an article about CLOVIS with an update of its 2014 activities; a book review on the International Court of Justice (an international legal cornerstone in its own right); a Spotlight introducing our new NATO colleagues; Hail & Farewells; and, finally, information about upcoming events of legal interest.

We wish to inform you that our next Issue (#35) will be focused on Cyber Law. It will be published in autumn of this year. As cyber is one of the prominent current topics of legal interest and will be discussed at the NATO Summit in Wales, I would welcome your short papers (2000 words) about legal aspects of cyber and cyber-related legal issues that affect NATO. Please send your submissions by email to petra.ochmannova@shape.nato.int by 22 September 2014.

Sincerely yours,

Dr. Petra Ochmannova
Deputy Legal Adviser ACT SEE



CLOVIS: What is going on in 2014?

By Allende Plumed Prado¹

The search for solutions to improve legal knowledge sharing and information retention capabilities within NATO has been an ongoing topic of discussion for many years. As described in previous editions of the NATO Legal Gazette, the Comprehensive Legal Overview Virtual Information System) platform (CLOVIS) aims to facilitate this process, and increase the level of collaboration between NATO Legal Offices and the national legal departments of NATO nations.

During the first half of 2014, CLOVIS has been primarily focused on two main activities: the retention of legally relevant operational records and capture of best legal practices in ISAF; and implementation of collaborative sub-projects seeking to support the NATO Legal Community.

1. Retention of legally relevant operational records and capture of best legal practices in ISAF

As the NATO-led International Security Assistance Force (ISAF) mission is coming to an end in December 2014, the NATO nations require that the Alliance's Operational Records² must be preserved. Significant effort has been put forward to identify, collect, store, and dispose of these records in order to retain information regarding NATO's activities during operations in ISAF. To support this endeavour the CLOVIS team is working with the HQ ISAF Legal Office to assist in the accomplishment of this essential mission. The aim is to help legal offices in theatre to capture and transfer operational records of legal significance in compliance with the required security and retention policies.³ A workspace was created for the HQ ISAF Legal Office to facilitate the collection of vital operational records and this effort is being extended to

¹ Allende Plumed Prado is a Spanish attorney who works as a contractor for the CLOVIS team within ACT SEE Legal Office. The views expressed in this article are solely those of the author and may not represent the views of NATO, ACO or ACT.

² AC/324-WP(2013)0003-REV1, Archives Committee, Operational Records of Permanent Value (NATO UNCLASSIFIED).

³ Such as C-M(2011)0043, NATO Records Policy and C-M (2012)0014 Management of Records Generated on Operational Deployment (NATO UNCLASSIFIED).

ISAF Joint Command (IJC). Ultimately, the objective is to structure the information in order to make NATO's legal actions in Afghanistan easily retrievable by the NATO Legal Community to allow lessons to be identified and thus learned, and identify best practices.



CLOVIS team in ISAF (photograph provided by the author)

2. Implementation of collaborative projects seeking to support the NATO Legal Community.

Collaborative work is being undertaken by the CLOVIS team to deliver new products aimed at easing and harmonising legal practices within NATO's Legal community. These projects include: A collaborative effort between the two lawyers on the CLOVIS team and the Office of Legal Affairs (OLA) at NATO HQ was initiated in January 2014 to work on an annotated version of the NATO Civilian Personnel Regulations (NCPR). This initiative will provide an anthology of NATO Administrative Tribunal judgments which are meticulously cross-referenced with the corresponding articles of the NCPR. The final product is scheduled to be published on the CLOVIS platform and made accessible exclusively to NATO legal personnel by the end of 2014. This project will allow legal advisers involved in future cases to reference previous decisions when representing NATO in front of the Administrative Tribunal.

If any NATO legal advisers wish to participate in this process, they are welcome to contact any of the CLOVIS team members whose contact details are to be found at the end of this article.

Secondly, in the same vein, the CLOVIS team is also actively seeking inputs from users to create two products: an updated list of all Claims Officers and Offices within NATO nations along with a practical guide which briefly describes the claims procedure in each member nation. Indeed, there is currently no centralised location where this information can be accessed; this can lead to significant difficulties when attempting to resolve a claim under

Article VIII of the NATO SOFA. Assistance from the nations is indispensable at this point in order to accomplish a truly comprehensive and accurate repository. Thirdly, the CLOVIS team is developing a comprehensive list of national cases that have been presented before the domestic courts of NATO nations and concern NATO in some manner. Finally, in order to increase collaborative practices and ensure that all NATO nations are provided with the same access to relevant legal information, efforts are being undertaken to identify the relevant points of contact from within the Ministries of Defence and Foreign Affairs as well as the Military Commands (including Training and Doctrine organisations) of NATO nations who routinely work on NATO matters or train military personnel for participation in NATO operations and exercises.

In conclusion, the CLOVIS platform has now been active since 2010 and has come a long way from its origins as an ACT experiment to an expected capability in the years to come. The team continues to work hard to provide valuable support to the legal community. For example as ACT takes on the responsibility of delivering the training and exercise program for NATO, the role of legal support in NATO exercises is currently undergoing a review within HQ SACT Office of the Legal Advisor to ascertain ways in which CLOVIS can support that effort. To that end, it is envisioned that CLOVIS can assist legal advisers involved in the exercises by responding to their queries regarding the retrieval of NATO documents and providing customised legal research and support. For this purpose, the two attorneys working for CLOVIS will travel to JFC Naples during the exercise TRIDENT JUNCTURE 2014. This is an opportunity to meet with all legal personnel participating and deliver CLOVIS training and support. Once the exercise is concluded and the lessons learned process is complete, the CLOVIS team will extract the core information relevant to the NATO legal community and will incorporate it into the CLOVIS platform. The aim is to capture and institutionalise the work conducted by legal advisers during NATO exercise on a single platform and to ensure easy access to the relevant legal information for use of it in future exercises of real life scenarios.

In order to successfully achieve this mission, collaboration from the growing CLOVIS users community is critical. Therefore, **we invite everyone in a NATO legal billet or providing legal support to a NATO nation on NATO matters to register for access to both the classified and unclassified platforms**, if they have not done so already.

Any feedback regarding how CLOVIS can improve its service and help better perform users' daily tasks as well as any contribution regarding the above mentioned initiatives can be addressed to:

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<https://transnet.act.nato.int/WISE/COE>

Frequently Asked Legal Questions about the NATO-Accredited Centres of Excellence

By commissaire en chef de deuxième classe Frédéric TUSET-ANRES¹

NATO-accredited Centres of Excellence (COEs) are unique bodies whose nature and operation have given rise to several recurring legal questions. Although these questions may not always have uncontested or definitive answers, the referenced documentation, coupled with years of legal experience, allow the author to provide a more clear understanding of these Centres' status and activities.

For that purpose, this article presents answers to the most frequently asked legal questions, in order to provide those who are interested in COEs in general, and the legal practitioners in particular, with some valuable information about the COEs and their activities.

For each and every topic addressed below, the reader is encouraged to refer further to the official documentation. A full list of questions and answers about COEs can be found in CLOVIS.

Is a COE a “subsidiary body of the North Atlantic Council (NAC)”?

A COE is definitely not a subsidiary body of the NAC. As a matter of fact, some have argued that COEs could be considered as subsidiary bodies of the NAC, in the meaning of Article 9 of the North Atlantic Treaty.²

This assumption is not correct and is contradicted by the very wording of said Article 9, which provides that “*the Council shall set up such subsidiary bodies as may be necessary*”. Indeed, it is clear that COEs are neither set up by decision of the NAC, nor vested with any authority to act on its behalf.³

¹ Commissaire en chef de deuxième classe, Staff Legal Adviser at Headquarters, Supreme Allied Commander Transformation's Legal Office. The views expressed in this article are solely those of the author and may not represent the views of NATO, ACO or ACT.

² North Atlantic Treaty, signed in Washington, DC, on 4 April 1949.

³ Most of the COEs being covered by the provisions of the Protocol on the Status of International Military Headquarters established pursuant to the North Atlantic Treaty (Paris Protocol), signed in Paris on 28 August 1952 – NATO Unclassified, it is interesting to note here that its Article 1.d defines the NAC as ‘the council established by article 9 of the North Atlantic Treaty or any of its subsidiary bodies authorised to

Rather, they are set up by the will of their Sponsoring Nations (SN), through appropriate Memoranda of Understanding (MOU). COEs are funded and manned not “*at the expense of NATO billets in the NATO Military Command Structure (NCS)*”⁴, and steered by their SNs, through their Steering Committee, where each SN has a vote.

Additionally, the decisions of the SNs, or of the COE itself, as a legal entity, do not bind NATO unless they are specifically endorsed by a relevant NATO authority (see below the question regarding COEs’ works and products).

Therefore, pretending that the COEs are covered by Article 9 of the North Atlantic Treaty is not only irrelevant, but as well confusing, for it ties a fictitious bond between the COEs and the NAC.

Eventually, it must be highlighted that the NAC’s decision to activate a COE as a NATO Military Body (NMB), following its accreditation as a NATO COE, does not make the COE a ‘subsidiary body’ of the NAC. Rather, it opens the possibility for the said COE to be granted international status under Article 14 of the Paris Protocol.

Is a COE an “international military organisation”?

A COE must be acknowledged by the NAC as an international military organisation to be activated as a NATO Military Body.

International Military Organisations (sometimes referred to as “IMOs”) are only mentioned alongside International Military Headquarters (IMHQs) in the Paris Protocol, Article 14, which specifies what kind of entities could be granted the benefit of the provisions of the Paris Protocol through a specific decision of the NAC, while Supreme Headquarters (HQs) and their immediately subordinated Allied HQs have the benefit of the said Protocol by virtue of its Article 2.

The Paris Protocol does not provide any definition for IMOs, nor does it mention them outside of Article 14. Thus, every kind of bodies can claim being one of them, including COEs. At the time the Paris Protocol was drafted, this was aimed to give the NAC maximum flexibility to endorse bodies which were not military Headquarters, in order to provide them with international status under a NATO treaty. Pursuant to its Article 14, even bodies not pertaining to the NCS may enjoy the status granted by the provisions of the Paris Protocol.

act on its behalf’.

⁴ MCM-236-03, Military Committee’s Concept for Centres of Excellence, dated 4 December 2003 - NATO Unclassified, Article 5.c.

Yet, the way Article 14 is written provides quite clear indications about which features the IMHQs and IMOs should have to obtain international status. On one hand, it appears that, for being granted international status under the Paris Protocol, an IMHQ or an IMO has first to exist as such. Indeed, the treaty specifies that the benefit of its provisions may be granted “to” IMHQs/IMOs. Thus, the granting of international status by the NAC does not create IMHQs/IMOs, nor does it confer any kind of IMO/IMHQ status – which doesn’t exist anywhere, as previously mentioned.

On the other hand, not all the IMHQs/IMOs are eligible to benefit from a NAC decision to be granted status under the Paris Protocol: the considered IMHQ/IMO must be “*established pursuant to the North Atlantic Treaty*,” which narrows dramatically the scope of the potential candidates for being granted international status by the NAC.

These arguments prove wrong the idea, unfortunately often repeated, that the NAC’s decision to grant Paris Protocol status gives the COEs a so-called IMO status. The process is actually the exact opposite: COEs must first be acknowledged as “*international military organisations established pursuant to the North Atlantic Treaty*”, before expecting to be granted international status by the NAC.

In fact, the only means for being granted international status under Paris Protocol is for an organisation to be activated as a NATO Military Body, pursuant to the provisions of CM(69)22.⁵ Unlike the Paris Protocol, CM(69)22 provides the criteria for the activation and granting of international status by the NAC. Therefore, it is suggested to draw from CM(69)22 the criteria to be met in order to determine if a COE may be considered as an ‘IMO established pursuant to the North Atlantic Treaty’ that, through the Framework Nation, can request activation and granting of the Paris Protocol international status. Those criteria would be:

- Establishment by NATO member States (“Sponsoring Nations”) acting as such, in order to being activated as a NATO entity;
- Sponsorship by at least two NATO Nations, in order to be considered as “international”;
- Availability of the COE to the Alliance, in order to be considered as “*established pursuant to the North Atlantic Treaty*”;
- Meeting MC criteria for accreditation as a NATO COE;⁶

⁵ CM(69)22, Procedures for the activation and reorganization in peacetime of the NATO Military Bodies and rules for granting them international status and international financing, dated 19 May 1969 - NATO Unclassified. Part III, Articles 3, 4 and 5 on activation of NATO Military Bodies, and Part V, Articles 10, 11 and 12 on the international status granted by the NAC.

⁶ In compliance with IMSM-0416-04, NATO Centres of Excellence Accreditation Criteria, dated 11 June 2004 - NATO Unclassified.

- Military organisation and manning, in order to be considered as “military” (which does not prevent the COE from having civilian personnel).

Scrutiny of the applicable documents demonstrates that international military organisations and NATO Military Bodies cannot be mistaken one for the other. On one hand, an IMO can absolutely exist by itself without being activated as an NMB – especially when considering the lack of any definition for IMOs. On the other hand, most of the bodies activated as NMBs are not IMOs but IMHQs, being they Supreme, Allied or international military HQs.

For the purpose of facilitating future activation, SNs are therefore strongly encouraged to mention in the MOU for the establishment, administration and operation of a prospective COE, that it is “*established as an IMO pursuant to the North Atlantic Treaty*”.⁷ That way, the SNs would make clear, from the very beginning of the COE’s establishment process, that they have the intent to create a body that fits with the wording of both the Paris Protocol and CM(69)22.

Could a COE have relationships with a non-NATO entity?

COEs are encouraged to have relationships with non-NATO entities, under certain conditions. The principle laid down in MCM-236-03, Article 7.d. is that “*relationships between COE and Partnership for Peace (PfP) Nations and Mediterranean Dialogue countries are encouraged.*” As the Istanbul Cooperation Initiative dates only back to June 2004, while MCM-236-03 has been issued in December 2003, it is likely that relationships with countries participating in this program would receive the same encouragement as those with PfP Nations and Mediterranean Dialogue countries.

MCM-236-03, Article 7.d. gives further direction for the COEs to establish relationships with non-NATO entities. On one hand it states that “*relations with ‘Triple Non’ Nations may be developed on a case by case basis in accordance with NATO policies.*” On the other hand it specifies that “*COEs are encouraged to establish and maintain relationships with other external entities (international organisations, industry, private companies, schools, universities, research institutes, etc.)*”

Guidance has been given to supplement these principles. In the field of Education, Training, Exercises and Evaluation (ETEE), guidance must be looked for in MC 458/2⁸, through which the Military Committee has

⁷ Such wording has been developed and included by HQ SACT in the template for the said MOUs.

⁸ MC 458/2, NATO Education, Training, Exercise and Evaluation (ETEE) Policy, dated 12 October 2009 – NATO Unclassified Releasable to PfP.

established the policy for all ETEE activities within NATO.⁹ Inasmuch as they are conducting or supporting NATO ETEE activities,¹⁰ the COEs are to comply with such policy, which requires that they request MC endorsement and NAC approval before beginning dialog with non-NATO Entities for the purpose of an ETEE activity.

SACT has issued an additional guidance¹¹ for addressing the specific question of relationships between COEs and the Contact Countries, which are '*considered countries outside of NATO's Military Cooperation Framework*'. COEs are not prevented to engage those Contact Countries, or any other external entity. They must, however, develop relations with them on a case-by-case basis, according to a couple of principles:

- The inclusion of Contact Countries in a COE's activities requires prior approval from its Steering Committee, and then the NAC.
- The inclusion of some other external entities may be politically sensitive to NATO and should be dealt with on a case-by-case basis.
- Involvement with Contact Countries or external entities should be identified in the COE's Program of Work (POW). In case of doubt, the COE should seek HQ SACT's assistance.
- A COE, as an independent national or multinational entity, is free to organise non-NATO sponsored events open to Contact Countries or external entities. Prior NAC approval is not required if the information disclosed during these events is not NATO Classified,¹² but International Military Staff (IMS) and the NATO Office of Security (NOS) have to be informed.
- The inclusion of Contact Countries or external entities in COEs' activities remains at all times subject to the adhesion to all NATO security regulations.

Could a COE have the benefit of NATO common funding?

One must first recall the guidelines laid down in the MC concept for NATO COEs.¹³ This founding document provides the following:

- Article 1: "*COEs [...] are nationally or multinationally [...] funded*". In this case '*multinationally funded*' has always been understood as '*funded by the SNs of the COEs*', as opposed to '*internationally*', which means "*commonly funded by NATO 28 Nations*."

⁹ MC 458/2 is under revision at the time this question is addressed, and should be superseded by MC 458/3.

¹⁰ For example, by providing NATO-accredited courses or participating in NATO exercises.

¹¹ 500/YSC-FEN-0210/TT-9397, HQ SACT Guidance: Relationships between COEs and Non-NATO Entities, dated October 2013 - NATO Unclassified.

¹² As defined in NATO Security Policy.

¹³ MCM-236-03.

- Article 5.c: *“COE infrastructure, operating and maintenance cost are nationally or multinationally funded.”* This provision encompasses all types of costs engaged by the SNs for the COE's mission performance. In that respect, the “operating costs” of the COE cannot be narrowed to the expenses that make the COE operational (utilities, supplies), but encompass all expenses ensuring its effective operation and the fulfilment of its mission, in compliance with its Concept, as well as its Operational and Functional MOUs.
- Additionally, MCM-236-03 specifies, as MC 234/3 does as well, that the COEs are *“not part of the NATO Command Structure.”*

Then, it must be underlined that the relationship between the COEs and NATO is organised through Functional MOUs. The Functional MOUs signed so far provide, with subtle differences, the following principles:

- First, NATO is a priority beneficiary of the COEs' works and products. This is expressed in the Functional MOU template developed in HQ SACT by the following provision: *“The COE will ensure the first priority of work for provision of services and products requested by HQ SACT on behalf of NATO entities”*;
- Then, the Functional MOUs usually recall that the funding of the COEs is the responsibility of their SNs, through a provision stating that, *“in accordance with COE Operational MOU, the SNs will bear all financial responsibilities resulting from the operation of the COE”*;
- Finally, the Functional MOUs provide that, *“in general, all services and products included in the POW and provided to NATO entities will be free of charge.”* Therefore, the works performed for NATO, in furtherance of the COEs' Programme of Work, and following HQ SACT's requests, must be free of charge.

Contained within the text of the Functional MOUs, however, is a further statement suggesting that, a deviation from the principle according to which COE's products and services are provided free of charge to NATO could be contemplated: *“Exceptions, further details, and particular requirements or restrictions may be laid down in appropriate arrangements.”* This indicates that the possibility of charging NATO for COE's products is not impossible, depending on the circumstances.

That said, given the possible consequences of the use of common funds on the way COEs are considered and run, some key-elements should be considered:

- A customer-funded relationship between COEs and NATO entities would be a clear deviation from the MC Concept for COEs. Therefore, it should only be considered taking into account the disruption it could

generate in the balanced relationship the COEs currently have with NATO.

- COEs are not corporations but – for most of them – NATO Military Bodies, with international status under the Paris Protocol. This raises the question if the current status of the COEs entitles allows them to conduct quasi-commercial activities in the territory of their Framework Nation (other than reimbursement of incremental costs).

To date, such a deviation has never been formally requested, but the Military Committee has given guidance¹⁴ concerning the reimbursement to COEs for supporting NATO activities. The MC first recalls that the principle of reimbursement would “*need to be reviewed across all COEs*” and not only through a ‘*selective approach*’ for only some of them or case-by-case requests. It then adds that “*whenever there is a requirement for establishing any new model for handling COEs, it should be clearly defined and then agreed by the MC and the Resource Policy and Planning Board in order to follow a standardised approach.*”

The MC concludes specifying that “*a new financial framework for COEs would lead to a revision of the agreed COE concept*¹⁵ *and the Allies have not exposed any strong need for this to date,*” which closes the door for the use of common funds for the COEs’ service until further notice.

Can a COE use the NATO’s name, logos and crest in its works, products or events?

Under certain conditions, a COE can use NATO’s name, logos and crest. As soon as the COE is created by the SNs, it may enjoy a large autonomy and a legal personality, depending on the rules laid down in their Operational MOU and the status granted to them by their Framework Nations on their territories. Once accredited by the Military Committee and endorsed by the NAC, a COE can present itself as a “NATO COE”, while it is not yet an NMB.

When activated by the NAC, the COE becomes an NMB, which makes it a NATO entity, even though it remains outside the command structure and steered by and under the full responsibility of its SNs.

That makes the COEs entities which nature and status are the result of a delicate balance. As NATO bodies, they are entitled to present themselves as such. But, as multinational entities, they cannot commit NATO as a whole, or NATO member States, like if they were subsidiary bodies of the NAC.

¹⁴ DGIMS-BUS-0002-2014, Reimbursement to Centres of Excellence for supporting NATO activities, dated 9 January 2014 – NATO Unclassified.

¹⁵ MCM 236-03.

Preserving the independence of NATO vis-à-vis the COEs, and vice-versa, must be a guiding principle of the relationship between those organisations, while keeping close coordination for their mutual benefit.

COE's works and products:

Considering the principles detailed above, and following the guidance issued by HQ SACT in 2008,¹⁶ the following rules must be respected with respect to the identification of the COE's works and products:

- Until they have been endorsed by HQ SACT, the products and services provided or drafted by a COE must not be assimilated, in any way, into NATO products and services, even if they are issued by a NATO-accredited COE.
- For this purpose, the products and services not yet endorsed by HQ SACT, NATO HQ or SHAPE, depending on the situation, must contain, whatever their form could be, a disclaimer which specifies that they do not reflect NATO's policies or positions, neither do they engage NATO in any way, but only the COE itself, or solely their author(s), depending on the circumstances.
- The form of the disclaimer will depend on the type of product or service considered. Whatever it may be, it will be realised in an appropriate form, and designed to avoid any confusion in the mind of the users or customers of the COE's works, products and services.

Use of NATO's logos:

When duly authorised and under certain conditions, a COE can use NATO's logos. NATO's and HQ SACT's (ACT's) logos are not registered or protected by International Law on the protection of Intellectual Property.¹⁷ However, as far as the COEs are concerned, the NATO Nations have the responsibility to protect the Alliance's interests and, subsequently, to take appropriate measures for preventing a misleading use of NATO's logos and crest.

NATO's, SHAPE's and HQ SACT's (ACT's) logos can only be used with the formal and written agreement of the relevant authorities of NATO HQ, SHAPE and HQ SACT.

When it comes to the use of logos and crest, these main principles are to be implemented in order to avoid any confusion in the public's perception:

¹⁶ 3000 T-3-5-TC/TT-3551, Guidance to COEs – Marking and Handling of Products, dated 3 November 2008 – NATO Unclassified.

¹⁷ SHAPE's name, acronym and logo are officially registered with the World Intellectual Property Organization in Geneva, Switzerland and is legally protected by the applicable International Law on the protection of Intellectual Property.

- NATO's, SHAPE's and HQ SACT (ACT's) logos must be used only in association with the COE's logo and not in isolation.
- NATO's, SHAPE's and HQ SACT (ACT's) logos can only be used when so authorised.
- NATO's, SHAPE's and HQ SACT (ACT's) logos cannot be associated with companies' logos or in a manner that suggests endorsement of any commercial product or enterprise.
- Any use of either the NATO's, SHAPE's or HQ SACT (ACT's) crest or logo by the COEs that would differ from what is described above would have to receive prior approval from SHAPE, HQ SACT and/or NATO HQ, as applicable.

Sponsored events or publications:

Sponsored events organised or publications issued by COEs must be clearly presented as 'NATO COE's' and not 'NATO's' or 'ACT's' events or publications. The COEs must pay attention to not commit NATO or ACT as a whole in the sponsorship process.

For that purpose, the use of logos must be done in compliance with these guidelines:

- The use of the COE's logo, alone or with sponsors' logos, is up to the Steering Committee. However, it goes differently with NATO's and ACT's logos. These latter must be used only in association with the COE's logo and not in isolation. They cannot be associated with companies' logos and their use by the COEs must be subject to NATO HQ and/or HQ SACT appropriate authorisation.
- Ultimately, NATO HQ and HQ SACT must remain in control of their image, and COEs must avoid giving the impression to the attendees or readers that Industry is sponsoring NATO or vice-versa.



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

By Sylvain Fournier and Sherrod Lewis Bumgardner¹

Introduction

Russia's illegal² military intervention in Ukraine in February 2014 has invigorated consideration of NATO's collective defence measures³ and the meaning of Article 5 of the North Atlantic Treaty⁴ of 1949. The North Atlantic Treaty is a short document. Just 30 sentences using 1144 words create its 14 articles. Of these, Article 5 is proclaimed as the, "cornerstone of our Alliance,"⁵ from which the indivisibility of Allied security arises and is, "...its core."⁶

¹Sylvain Fournier, Lieutenant Colonel, Canadian Army (Retired), is a lawyer and former JAG officer whose last assignment was at the International Military Staff Legal Office, NATO Headquarters, Brussels. Sherrod Lewis Bumgardner is Legal Adviser, Allied Command Transformation Staff Element Europe, in Mons, Belgium. The views expressed in this paper are the responsibility of both authors in their personal capacity and are neither approved nor to be attributed to NATO, the International Military Staff or Allied Command Transformation.

²See "Secretary General sets out NATO's position on Russia-Ukraine crisis" at http://www.nato.int/cps/en/natolive/opinions_110643.htm. For English language legal arguments regarding the public international law (and some domestic constitutional law) aspects of the use of force in Ukraine, see <http://opil.ouplaw.com/page/ukraine-use-of-force-debate-map>. (visited on 8 May 2014).

³NATO's Enhanced Collective Defence measures in the wake of Ukraine crisis are described at http://www.nato.int/cps/en/natolive/topics_110496.htm. (visited on 8 May 2014).

⁴The full text of the North Atlantic Treaty is available at: http://www.nato.int/cps/en/natolive/official_texts_17120.htm. It is also called the Washington Treaty for the city where it was negotiated and signed. (visited on 8 May 2014).

⁵Declaration on Alliance Security, 4 April 2009. See http://www.nato.int/cps/en/natolive/news_52838.htm. (visited on 8 May 2014).

⁶Lionel Hastings Ismay, NATO The First Five Years, 1949-1954, Bosch-Utrecht, Netherlands, 1955, p. 13 at

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

Historical background

With victory in Europe accomplished and defeat of Japan imminent, the peoples of the world hoped that the signing of the Charter of the United Nations in June 1945 would, "save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."⁷ Regrettably, fear, instability, ideology, and geo-political enmity dashed this aspiration almost immediately.

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

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

⁷ Preamble, Charter of the United Nations, San Francisco, 26 June 1945. See <http://www.un.org/en/documents/charter/preamble.shtml>. (visited on 8 May 2014)

⁸ "The nature of Stalin's foreign policy may be described as cautious expansionism in those areas that Stalin and his advisors defined as Soviet 'natural' spheres of influence." V. M. Zubok and K. Pleshakov, *Inside the Kremlin's Cold War: From Stalin to Khrushchev*, Cambridge: Harvard University Press, 1996, p. 74; John Lewis Gaddis, *The Cold War*, Allen Lane, Penguin Books, Ltd, London, 2005, p. 11; Timothy J. White, 'Cold War Historiography: New Evidence Behind Traditional Typographies,' *International Social Science Review*, Vol. 75, No.3/4, 2000, p. 37; See also the comment of Charles Bohlen who served as the Russian translator for the President of the United States at Tehran, Yalta, and Potsdam: "While Potsdam reached a number of decisions, some of which lasted, many of which did not, it cannot be regarded as a vital conference. Most of the policy lines on both sides had been laid down before the meeting." Charles E. Bohlen, *Witness to History, 1929-1969*, New York: W. W. Norton, 1973, p. 240.

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

approached with same thoroughness and care as solution of major strategic problem in war...."¹⁰ In March 1946, less than 30 days after Stalin's words and six months from the end of World War II hostilities, Winston Churchill eulogised that, "...an iron curtain has descended across the Continent."¹¹

In 1947, while the Soviet Army continued its occupation of Hungary, Bulgaria, Romania, and Poland, the Communist Party seized power. Through armed insurrection Soviet-backed Communist fighters sought to gain control in Greece. To aid Greece and support Turkey, President Truman announced in March of 1947, "the policy of the United States to support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures."¹² In June 1947, with what became known as the Marshall Plan, the United States proposed an economic recovery effort for Europe.¹³ The Soviet Union and the recently installed communist governments of Eastern Europe declined to participate. Concurrently, UN Military Staff discussions that had started in 1946 with the Permanent Five members of the Security Council to create the United Nations armed forces envisioned in Articles 43 to 48 of the UN Charter ceased.¹⁴ The year ended with the collapse of the Four-Powers (France, Great Britain, United States, and the Soviet Union) Council of Foreign Ministers who had been directed at the Potsdam Conference to reach post-war political settlements on the status of Germany.

The arrival of 1948 hastened more dire developments. February brought the forced capitulation of the democratic government of Czechoslovakia to the Soviet-backed Communists. In March, the United States Commander in Berlin, General Lucius Clay, warned that war with the Soviet Union, "...may come with dramatic suddenness."¹⁵ In June, after months of preparatory actions, Stalin ordered the complete land blockade of Berlin. By September, Paul-Henri Spaak, Prime Minister of Belgium, and future Secretary General of NATO denounced the ambitions of the Soviet Union on the floor of the

¹⁰ Kennan to State Department, February 22, 1946, U.S. Department of State, Foreign Relations of the United States: 1946, VI, p. 707 at <http://digital.library.wisc.edu/1711.dl/FRUS.FRUS1946v06>. (visited on 28 May 2014). In 1947, Kennan, writing as Mr. X, famously publicized his view that, "...the main element of any United States policy toward the Soviet Union must be that of a long-term, patient but firm and vigilant containment of Russian expansive tendencies." In the 'The Sources of Soviet Conduct', Foreign Affairs, Volume 25, Number 4, July 1947, pp. 566-82.

¹¹ Robert Rhodes James, Winston S. Churchill: His Complete Speeches 1897-1963, Chelsea House Publishers: New York and London, 1974, vol. VII, 1943-1949, pp.7285-93 at <http://www.hpol.org/churchill/peace>. (visited on 8 May 2014).

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

¹³ Address Given by George C. Marshall, 5 June 1947, at http://www.ena.lu/address_given_george_marshall_harvard_june_1947-020000339.html. (visited on 8 May 2014).

¹⁴ A. Roberts, 'Proposals for UN Standing Forces: A Critical History' in V. Lowe, A. Roberts, J. Welsh, and D. Zaum (eds), The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945, Oxford University Press, Oxford, 2008, p.100-1.

¹⁵ J. Forrestal, The Forrestal Diaries ed. Millis, Forrestal, arthor, New York: Viking Press, 1951, p. 387.

General Assembly of the United Nations in his *Discours de la Peur* (Speech of Fear) declaring, "...the basis of our policy (in the West) is fear...It is fear of you...because you are the one power emerging from the war with territorial conquest and you speak much of imperialism."¹⁶

Devastated from the war, European states were justifiably threatened by the proven might of the still fully mobilised, combat ready, massive Soviet Army.¹⁷ Before this danger, the armed forces of the old continent were in such a condition that they could no longer carry on the fight. The only military deterrent to the Soviet Union taking over Western Europe was material support offered by North America and the sole ownership of the atomic bomb by the United States.¹⁸

To face the menace of Soviet aggression—be it by military attack or subterfuge—and address the uncertainty about the future of Germany, in March of 1948 five European States (Belgium, France, Luxembourg, the Netherlands, and the United Kingdom) signed the Brussels Treaty, establishing the Western European Union with a regional obligation for collective self-defence.¹⁹ Immediately after the signing of the Brussels Treaty, secret tripartite talks among the United Kingdom, Canada, and the United States began in Washington to encourage American participation in this collective defence effort. Quickly the parties to these talks regarding the creation of a North Atlantic defence organisation broadened to include Belgium, France, Luxembourg, and the Netherlands.²⁰

From the outset of these discussions, the mandatory provisions of the Brussels Treaty were unacceptable to the North Americans. For the United States, an axiomatic aversion to treaties with European nations reached back to 1796 and the last official words of its first President, George Washington.²¹ Simply, the domestic politics of the United States "...would never allow incidents in Europe to automatically commit the nation"²² to an armed

¹⁶ For the full speech, see Paul F. Smets (ed.), 'La pensée européenne et atlantique' de Paul-Henri Spaak (1942-1972). Book 1. Bruxelles: Goemaere, 1980, p. 148-60; see also excerpts at <http://www.newspapers.com/21587244>. (visited on 8 May 2014).

¹⁷ See, for instance, Prime Minister Churchill's telegram to President Truman on 12th May 1945, expressing his immense anxiety about the growing Soviet threat while the Allied forces demobilized. W.S. Churchill, *Triumph and Tragedy*, New York: Houghton-Mifflin Books, 1953, p. 679.

¹⁸ *Supra* 6, *Ismay* 7.

¹⁹ The Brussels Treaty, 17 March 1948. Art. IV provides: "If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power."

²⁰ Richard D. McKinzie, 'Oral History Interview with Theodore Achilles', Washington, D.C. November 13, 1972, p.27. See <http://www.trumanlibrary.org/oralhist/achilles.htm>. (visited on 8 May 2014).

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

²² L. S. Kaplan, *NATO 1948 – The Birth of the Transatlantic Alliance*, Lanham: Rowman & Littlefield, 2007,

conflict as required by the Brussels Treaty. For Canada, the possibility of going to war before the United States, as it had done twice before, made the immediate commitment to defensive action contained in the Brussels Treaty fatally unappealing.²³



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Collectively, the North Americans favoured the language of the Rio Pact²⁴ of 1947, in which an attack against any American country was an attack against all, with the measures taken in response to that attack determined individually by each country. The Europeans, however, found the ambiguity contained in the Rio Pact as unappealing as the North Americans found the close commitment of the Brussels Treaty. Adding to the difficulty for both the Europeans and the North Americans were fundamental questions concerning their responsibilities to the still new United Nations and its role in the maintenance of international peace, security, and the pacific settlement of disputes between nations.²⁵

Resolving this conflict and building a Euro-Atlantic security relationship required forging a link that connected the North Americans and the Brussels Treaty nations and acknowledged the structures embodied by the creation of the United Nations. As a bridge, the United States offered a political declaration. In June of 1948, the United States affirmed as national policy the importance of the Charter of the United Nations. This statement of policy, known as the Vandenberg Resolution,²⁶ said nothing about Europe. It

p. 95.

²³ Documents on Canadian External Relations, Vol. 15, Ch. IV at <http://epe.lac-bac.gc.ca/100/206/301/faitc-aecic/history/2013-05-03/www.international.gc.ca/departement/history-histoire/dcer/detaile-en.asp@intRefid=8875>. (visited on 8 May 2014).

²⁴ Inter-American Treaty of Reciprocal Assistance (Rio de Janeiro, 2 September 1947) called the Rio Pact of 1947 at www.oas.org/juridico/english/Treaties/b-29.html. (visited on 8 May 2014). Article 3: "The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations."

²⁵ See the Charter of the United Nations, generally: Chapter I, Purposes and Principles, Chapter VI, Pacific Settlement of Disputes, and Chapter VII, Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression at <http://www.un.org/en/documents/charter/>. (visited on 8 May 2014).

²⁶ U.S. Senate Resolution 239, 80th Congress, 2nd Session, 11th June 1948 (The Vandenberg Resolution)

asserted that American assistance and the development of collective arrangements for potential self-defence would be subject to domestic constitutional processes and outside the veto authority of the four other permanent members of the Security Council. This formulation resolved the question of whether a possible Euro-Atlantic Alliance would be treated as a Regional Organisation under Article VIII of the United Nations Charter whose actions would be overseen by the Security Council which was subject to frequently wielded vetoes by the Soviet Union.²⁷ It would not.

Many benefits arose from closely aligning the North Atlantic Treaty with the Charter of the United Nations. All prospective members of the North Atlantic Alliance could correctly assert that their efforts were aimed at no nation in particular but rather were only intended to deter aggression, no matter from where it may come. Furthermore, the United Kingdom²⁸ and France could, in good faith, declare their support of the defensive North Atlantic Treaty consistent with their treaties of alliance with the Soviet Union.²⁹ Accepting the American legerdemain, Canada and the European nations plunged into what became a tedious drafting process that started in the hot summer of 1948 while simultaneously pursuing members whose participation would offer mutual assistance to their collective defence.

Iceland, Denmark, Norway, and Portugal were encouraged to join the five Brussels Treaty states because the geographic location of the combined territories of these four nations offered control of the Norwegian Sea and actual or potential locations for airbases to better link North America to Europe.³⁰ Although it did not border the Atlantic, Italy was included because the United States considered it essential to the defence of the European continent and France thought Italy's membership advantageous because of geographic proximity and southern European perspective. Bargaining and negotiation extended until March 1949. Virtually every word contained in the North Atlantic Treaty became essential.

To address the imbalance of military power on the European continent, the North Atlantic Treaty set forth imperatives for immediate fulfillment. Preceding the pledge of assistance in the case of armed attack found in Article 5, the nations "[r]esolved to unite their efforts for collective defence

at http://avalon.law.yale.edu/20th_century/decad040.asp. (visited on 28 May 2014).

²⁷ Paul-Henri Spaak served as the second Secretary-General of NATO from 1957-1961.

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

²⁸ W. Eric Beckett, *The North Atlantic Treaty, The Brussels Treaty, and The Charter of the United Nations*, Stevens & Sons Limited, London, 1950, p. 32-33.

²⁹ Twenty-Year Mutual Assistance Agreement Between the United Kingdom and the Union of Soviet Socialist Republics, May 26, 1942 at <http://avalon.law.yale.edu/wwii/brsov42.asp>. (visited on 28 May 2014). Treaty of Alliance and Mutual Assistance between the U.S.S.R. and the French Republic, 10 December 1944. *The American Journal of International Law*, Vol. 39, No. 2, Supplement: Official Documents, April 1945, pp. 81-157.

³⁰ Lawrence S. Kaplan, *NATO Before the Korean War April 1949 – June 1950*, The Kent State University Press, 2013, p. 7-8.

and for the preservation of peace and security³¹...The Parties will...seek to eliminate conflict in their international economic policies and will encourage economic collaboration between any or all of them³²....by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack³³....will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened."³⁴ A Council was created,³⁵ the possibility for other European states - by invitation - to join the alliance established,³⁶ sovereign ratification processes pursued,³⁷ review of the Treaty after 10 years promised,³⁸ and for a minimum of 20 years loyalty to the terms of the Treaty affirmed.³⁹ Signed on 4 April 1949, after the deposition of the ratifications by all signatory states with the archives of the United States government,⁴⁰ the North Atlantic Treaty came into force on Wednesday, 24 August 1949. On Monday, 29 August 1949, the Soviet Union detonated its first atomic bomb.

Article 5 – Analysis

The three sentences that compose Article 5⁴¹ were accepted by twelve states as an agreement governed by international law. Unlike domestic law that offers the comfort of rules ordered and enforced by a sovereign, international law exists as the continuous process of authoritative decision-making by states and international organisations.⁴² Meaningful understanding of Article 5 requires acknowledgment of the dynamic interaction of politics, law,⁴³ and governments that has occurred constantly and simultaneously

³¹ Preamble, The North Atlantic Treaty, signed on 4 April 1949, at http://www.nato.int/cps/en/natolive/official_texts_17120.htm. (visited on 28 May 2014).

³² Ibid, Art. 2.

³³ Ibid, Art. 3.

³⁴ Ibid, Art. 4.

³⁵ Ibid, Art. 9.

³⁶ Ibid, Art. 10.

³⁷ Ibid, Art. 11.

³⁸ Ibid, Art. 12.

³⁹ Ibid, Art. 13.

⁴⁰ Ibid, Art. 14.

⁴¹ Ibid, Art. 5: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all, and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security."

⁴² R. Higgins, 'Policy Considerations and the International Judicial Process', p. 17, International and Comparative Law Quarterly 58, 1968, at pp. 58-59; M. S. McDougal and F. P. Feliciano, 'Law and Minimum World Public Order', in The Legal Regulation of International Coercion, Yale University Press, New Haven, 1961, vii.

⁴³ Within this process, the Vienna Convention on the Law of Treaties (VCLT) provides the accepted methodology for treaty interpretation. The primary rule is straightforward: "A treaty shall be interpreted

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

a. The Parties agree...

Two of the basic principles in international law are that treaties bind only parties to them and that these parties must fulfil the terms of the agreement in good faith.⁴⁴ Consistent with these principles, the North Atlantic Treaty creates neither obligations nor rights for third party states.

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

Consistent with Article 51 of the Charter of the United Nations, Article 5 offers no definition of the term "armed attack."⁴⁵ The only definition the North Atlantic Treaty offers is a convoluted description of the geographic area and military forces against which an armed attack would be considered, "...[f]or the purpose of Article 5..." contained in Article 6.⁴⁶ In addition to the

*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Context may be determined by consulting additional agreements made by the parties relating to the treaty application of the treaty that establishes agreement of the parties, and relevant international law. Resort to the preparatory work of the treaty and the circumstances of its conclusion may be made when the conclusions drawn by application of the primary rule leaves the meaning ambiguous, obscure or, leads to a result that is which is manifestly absurd or unreasonable."*Vienna Convention on the Law of Treaties, adopted on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331 at https://treaties.un.org/doc/Treaties/1986/03/19860321%2008-45%20AM/Ch_XXIII_03p.pdf ((visited on 28 May 2014).

⁴⁴ See *Ibid*, Art. 26, *Pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". On this point Sir Robert Jennings and Sir Arthur Watts commented: "The question why international treaties have binding force is much disputed. The correct answer is probably that treaties are legally binding because there exists a customary rule of international law that treaties are binding. The binding effect of that rule rest in the last resort on the fundamental assumption, which is neither consensual nor necessarily legal, of the objectively binding force of international law." R. Jennings and A. Watts (eds), *Oppenheim's International Law*, vol 1, London: Longman, 9th edition, 1996, p. 1206.

⁴⁵ UN Charter, Art.51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

⁴⁶ The 1949 text of the Article 6 of the North Atlantic Treaty stated: "For the purpose of Article 5 an armed attack on one or more of the Parties is deemed to include an armed attack on the territory of any of the Parties in Europe or North America, on the Algerian Department of France, on the occupation forces of any Party in Europe, on the islands under the jurisdiction of any Party in the North Atlantic area north of the Tropic of Cancer or on the vessels or aircraft in this area of any of the Parties." Note the changes in Article 6 as modified by Article 2 of the Protocol to the North Atlantic Treaty on the Accession of Greece and Turkey of 1951: "For the purpose of Article 5, an armed attack on one or more of the Parties is deemed to include an armed attack: 1. on the territory of any of the Parties in Europe or North America, on the Algerian Departments of France, on the territory of or on the Islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer; 2. on the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into

continental identifications contained in Article 5, this formulation in Article 6 is referenced as “the North Atlantic area” in the treaty’s Preamble, Article 10, and Article 12. Fulfilling a policy goal of the United States and Canada to keep the North Atlantic Alliance from being used in colonial conflicts, this location excluded the colonial territories of the member nations except for the Algerian Department of France.⁴⁷ Following the Berlin Blockade in 1948 and the accession of Greece and Turkey to the Alliance in 1951, a second sentence was added to Article 6⁴⁸ that explicitly expanded the reach of Article 5 to protect the occupation forces of the signatories stationed in what had become the Federal Republic of Germany and West Berlin.

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

While less lyrical than French author Alexandre Dumas’s description of unity, “*all for one and one for all*,” the imperative passage of Article 5 may be what animated the Russian Minister of Foreign Affairs, Sergey Lavrov in 2010 to assert that for the member nations of the North Atlantic Alliance, “the indivisibility of security is an obligatory, legally confirmed norm.”⁴⁹ The multilateral model of an armed attack against one member of an Alliance constituting an attack against all the other member states is found in several international instruments formulated before the conclusion of the North Atlantic Treaty,⁵⁰ of which the Charter of the United Nations is the most prominent. The direct mutuality of this phrase achieved a primary policy goal of Canada, geographically the second largest country in the world, which gained the commitment of the United States and the Treaty’s ten European Parties to its protection.⁵¹

force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer.” (Italics added).

⁴⁷ On January 16, 1963, the North Atlantic Council modified this Treaty in its decision C-R(63)2, point V, on the independence of the Algerian departments of France.

http://www.nato.int/cps/en/natolive/topics_110496.htm. (visited on 28 May 2014).

⁴⁸ Supra 46.

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

⁵⁰ Richard H. Heindel, Thorsten V. Kalijarvi and Francis O. Wilcox, ‘The North Atlantic Treaty in the United States Senate’, The American Journal of International Law, Vol. 43, No. 4, October 1949, p. 645. These include the 1940 Declaration XV of the Meeting of the Ministers of Foreign Affairs in Habana, Cuba, in the Declaration on Reciprocal Assistance and Cooperation for the Defense of the Nations of the Americas at http://avalon.law.yale.edu/20th_century/decad058.asp; the 1945 Resolution approved by the Inter-American Conference on Problems of War and Peace at Mexico of 6 March, (Act of Chapultepec) at http://avalon.law.yale.edu/20th_century/chapul.asp; Article 3 of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) of 1947 at <http://www.oas.org/juridico/english/Treaties/b-29.html>; the Brussels Treaty, 17 March 1948 at http://www.cvce.eu/obj/the_brussels_treaty_17_march_1948-en-3467de5e-9802-4b65-8076-778bc7d164d3.html. The Charter of the Organization of American States signed at the Bogota Conference of American States, 30 March-2 May, 1948 at http://avalon.law.yale.edu/20th_century/decad062.asp. (visited on 28 May 2014).

⁵¹ A.K. Henrikson, ‘The North American Perspective: A Continent Apart or a Continent Joint?’ in L. S. Kaplan, S. V. Papacosma, M.R. Rubin and R.V. Young (eds), NATO after Forty Years, SR Books,

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



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Textually, the argument can be made that the individual or collective right of self-defence described in Article 5 is narrower than the inherent right of self-defence found in pre-UN Charter customary international law mentioned by the wording of Article 51. By not including of the word, "inherent" when describing the exercise of the right of individual or collective self-defence the drafters of the North Atlantic Treaty limit the invocation of Article 5 until after an armed attack. Each NATO member may carry out independent actions consistent with its rights recognised by Article 51 and obligations under Chapter VII and the whole of the Charter of the United Nations including the restriction contained in Article 2.4 that prohibits, "...the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."⁵²

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

This part of Article 5 is the important pledge and promise of assistance. Parties have an obligation to assist but the nature of their commitment remains undefined. Article 11 further declares that provisions of the Treaty, such as Article 5, will be, "...carried out by the Parties in accordance with their respective constitutional processes."⁵³ The United States alone required the purposefully vague wording of Article 5 and buttressed it with the wording of Article 11 to overcome domestic objections that events in Europe would automatically thrust it into an international conflict without the approval of the legislative branch of its federal government.⁵⁴

Wilmington, 1990, pp. 13-14.

⁵² See M.N. Shaw, *International Law*, 5th ed. Cambridge University Press, 2005, p. 1017.

⁵³ The North Atlantic Treaty Art. 11.

⁵⁴ D. Acherson, *Present At The Creation My Years In The State Department*, W.W. Norton & Company,

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

The archaic Middle English adverb “forthwith” declares urgent action by member states. Its plain meaning, “*immediately, at once, without delay*”⁵⁵ commands no hesitancy. The United States inserted this rhetorical flourish to sanctify an intention of action if an armed attack occurred, even though the next phrase in the sentence purposely left the fulfilment of this promise unspecified.⁵⁶

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

The expression “such action” gives each nation of the Alliance the opportunity to determine, “*as it deems necessary,*” its response to a minor incident or a major attack. The United States proposed this phrase⁵⁷ for two reasons. The first was to ensure consistency with legislative prerogatives contained within its domestic federal government. The second was to respond to an armed attack according to strategic concepts rather than directing armed forces towards a battle chosen by the attacker.⁵⁸ “[I]n other words, to beat the hell out of the aggressor wherever and however seemed best.”⁵⁹ The expression “armed force” was added to stiffen the martial sense of the sentence although this formulation was less robust than desired by the Canadian and European negotiators because of its separation by a comma from the words “such action” made clear there would be no automatic commitment to the use of force.⁶⁰ The European and Canadian negotiators did successfully persuade the Americans to include the phrase, “including the use of armed force,” to strengthened the martial promise of the sentence.⁶¹ The nations knew, however, that by committing themselves in principle if an armed attack on any of them did occur, the line between their moral commitment and the legal obligation could quickly fade.⁶²

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

Underscoring both the defensive nature of the North Atlantic Alliance and the consistency of the North Atlantic Treaty with the UN Charter, this final clause of the long first sentence of Article 5 reverses the sequence of international actions contained in Articles 39⁶³ and 42⁶⁴ of Chapter VII of the

Inc. New York, 1969, pp. 281-82.

⁵⁵ The New Shorter Oxford English Dictionary On Historical Principles, ed. Lesley Brown Volume 1, Clarendon Press, Oxford, 1993, p. 1010.

⁵⁶ T.C. Achilles, ‘The Omaha Milkman: The Role of the United States’ in NATO’s Anxious Birth, The Prophetic Vision Of the 1940s, ed. Nicholas Sherwen, St Martin’s Press, New York, 1985, p. 36.

⁵⁷ Reid, 155.

⁵⁸ Ibid, 147.

⁵⁹ Acheson, 21.

⁶⁰ Reid, 155; M.A. Goldberg, ‘Mirage of Defense: Reexamining article five of the North Atlantic Treaty after the terrorist attacks on the United States’, in Boston College International and Comparative Law Review, Vol 26, Iss 1, 2003, p. 6.

⁶¹ Acheson, 281.

⁶² L.S.Kaplan, ‘Nato Enlargement: The Article 5 Angle’, February 2001, Vol. XII, No. 2, The Atlantic Council of the United States Bulletin, at p. 2.

⁶³ See Article 39: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall

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

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

This second sentence of Article 5 continues the explicit alignment of the defensive purpose of the North Atlantic Alliance with the responsibilities of the Security Council to take action with respect to threats to the peace, breaches of the peace and acts of aggression. The extraordinary: “...any such armed attack... shall be immediately reported...,” places a requirement on the Alliance not found in the Charter of the United Nations. On behalf of the member nations of the Alliance, the North Atlantic Treaty Organization fulfilled the notification requirement to the Security Council contained in Article 51 and repeated in Article 5 on 12 September 2001 when its Secretary-General, George Robertson, officially informed the UN Secretary-General Kofi Annan of the attack against the United States and that NATO would undertake collective security measures following the 9/11 attacks.⁶⁵

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

This provision primarily quotes from the first sentence of Article 51 of the UN Charter. This provision again⁶⁶ displays the deference of the North Atlantic Treaty to the collective security system of the UN and acknowledges the primary responsibility of the Security Council to re-establish peace and security.⁶⁷

Article 5 Invocation After 11 September Attacks

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

be taken in accordance with Articles 41 and 42, *to maintain or restore international peace and security.*” *Emphasis added.*

⁶⁴ See Article 42: “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to *maintain or restore international peace and security.* Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.” *Emphasis added.*

⁶⁵ SG(2001)1043, Letter to the UN Secretary General, 12 September 2001.

⁶⁶ The North Atlantic Treaty, which reaffirmed in the Preamble their faith in the purposes and principles of the Charter of the United Nations.

⁶⁷ See Chapter V, Article 24 of the UN Charter in the in B. Simma, D.E. Khan, G. Nolte, and A. Paulus (eds), *The Charter of the United Nations*, Oxford University Press, Oxford, 3rd edition, 2012.

precisely negotiating its three sentences, it is striking how its requirements were dealt with in quick bold strokes. Senior Members of NATO's International Staff prepared the memorandum for Council approval during the evening of September 11th. They conducted a plain reading of the North Atlantic Treaty, untrammelled by reference to the judgments of the International Court of Justice⁶⁸ or the 1974 UN General Assembly Resolution 3314 on the Definition of Aggression.⁶⁹ They concluded that a plane used as a missile constituted an armed attack. They reached a common sense conclusion about the importance of the scale of the attack "because the Washington Treaty had been written to deal with threats to peace and security in the North Atlantic area."⁷⁰ To distinguish the 9/11 attacks from domestic terrorism, prior Council decisions were researched to reach the conclusion that external guidance was necessary to place the Alliance's response within the goals of the treaty.

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

While the full text of Dr. DeVidts' memorandum remain classified, he reassured that it was up to each state to judge what should be done adding, "*(whatever actions states were to take) should be appropriate to the scale of the attack, the means of each country and the steps necessary to restore peace and security.*"⁷¹ and that consultation was necessary for collective Alliance action.⁷² Upon recall of the Council to session and the legal memorandum provided to all national representatives, the Council reached consensus, without a break of silence, to invoke Article 5 so long as the attack against the United States had been directed from abroad.⁷³

⁶⁸ Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)[1984]; Oil Platforms (Iran v. US)[1996]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)[2004]; and Case Concerning Armed Activities on the Territory of the Congo, Case Concerning (Congo v. Uganda)[2005].

⁶⁹ UNGA Res 3314 (XXIX) (14 December 1974) (Definition of Aggression).

⁷⁰ E. Buckley, 'Invocation of Article 5; Five Years On (Invoking Article 5),' NATO Review, Summer 2006, p.1. <http://www.nato.int/docu/review/2006/issue2/english/art2.html>. (visited on 28 May 2014).

⁷¹ Ibid.

⁷² Ibid.

⁷³ Invocation of Article 5 was confirmed on 2 October 2001 following a briefing to the Council by Frank Taylor, the U.S. Ambassador at Large and Coordinator for Counter-Terrorism. See <http://www.nato.int/docu/update/2001/1001/e1002a.htm>. (visited on 28 May 2014).

Conclusion

As a subject and creation of public international law by the North Atlantic Treaty, NATO, “...is rules and institutions but it is also a tradition and a political project.”⁷⁴ When the North Atlantic Council met on 12 September 2001 to consider invoking Article 5, its decision entailed a factual and political judgment, not a legal pronouncement. Despite the irony of Article 5 being envisaged by the signatories to the NATO Treaty as a mechanism by which the USA would come assist its European allies, it was the Europeans who offered their help to Washington on the first time the article was ever invoked, and the Treaty's goals were achieved.

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

There is no doubt that Article 5 and its invocation has had an astonishing effect on NATO. Over the years its pledge obligated its member States to demonstrate their commitment to cooperate by contributing to create a solid integrated military structure. Without it, the Alliance would have neither the political will to remain in existence and the capability to conduct non-Article 5 operations when the threat of armed attack against its States appeared low, nor the structures and capacities to protect its member nations in a world where threats remain. Overall, those, “...who composed this seemingly timeless document would be surprised by how effectively it has served as a continuing basis for Euro-Atlantic security cooperation.”⁷⁵ We are persuaded that it will continue to do so.

⁷⁴ M. Koskeniemi, *The Politics of International Law*, Hart Publishing, Oxford, 2011, p.330.

⁷⁵ Stanley R Sloan, ‘Invocation of Article 5; Five Years On (Invoking Article 5),’ *NATO Review*, Summer 2006, p.3. <http://www.nato.int/docu/review/2006/issue2/english/art4.html> (visited on 28 May 2014).



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NATO: Evolution and Legal Framework for the Conduct of Operations

By Dr. Petra Ochmannova¹

Introduction

The attempts of nation-states to establish security pacts constitute a motif of human history. Looking back to the 20th Century the creation of multinational security arrangements represents a particularly defining characteristic of those 100 years.² The formation of the North Atlantic Alliance and its integrated defence system, well known as the North Atlantic Treaty Organisation³ (NATO), is a worthy example of an organisation established by states to obtain closer international cooperation in matters of defence.

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

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

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

NATO Strategic Concepts since 1991

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹² The Alliance's Strategic Concept, 1999, http://www.nato.int/cps/en/natolive/official_texts_27433.htm?selectedLocale=en (visited on 15 April 2014).

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

¹⁴ Operation Eagle Assist (2001 – 2002) and Operation Active Endeavour (2001 – present).

the pursuit of declared Alliance objectives.”¹⁵

This standardised concept of NA5CRO could be practically illustrated through the following examples of NATO/NATO-led operations: the conduct of combat and counterinsurgency operations such as in Afghanistan through the ISAF mission,¹⁶ disaster relief and humanitarian assistance provided to USA after Hurricane Kathrina¹⁷ or to Pakistan after the earthquake and massive flooding,¹⁸ the security mission to secure the delivery of humanitarian relief supplies to Somalia (Operation Allied Provider),¹⁹ or maritime interdiction operations, embargoes, and no-fly zones seen in the case of Libya.²⁰

NATO and Peacekeeping

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

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

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

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

¹⁷ NATO Relief Mission to the United States after Hurricane Kathrina (2005).

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

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

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

²¹ P. Olson, ‘Introductory comments – 2013 Tallinn NATO Legal Adviser's Conference’, NATO Legal Gazette #32, 2013, p. 25.

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

²³ http://www.nato.int/cps/en/natolive/topics_50321.htm?selectedLocale=en (visited on 22 April 2014).

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



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

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

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

NATO: Legal Basis for the Conduct of Operations

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

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

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

²⁷ UN Peacekeeping Operations – Principles and Guidelines, 2008, the so called "Capstone Doctrine", p. 13-14, http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf (visited on 22 April 2014).

request from Greece in 2004 for AWACs coverage during the Athens Olympic Games or Pakistan's request to NATO for disaster relief following the 2005 earthquake and the 2010 flooding); or 3) regional mandates from international organisations based on principles of the UN Charter.²⁸

Irrespective of the underlying authority for NATO action — a UNSCR, sovereign consent, or the regional mandates — the necessary predicate for legally valid North Atlantic Alliance operations is approval by the NAC which is achieved through the consensus of its member states.²⁹

Consequently, there is no difference, in terms of NATO procedure, as to whether the NAC issues a decision under an Article 5 operation or an NA5CRO. In both cases member nations are exercising their sovereign authority to bind themselves to obligations made through their acts and decisions.³⁰ The only distinction is the level of support required by the Washington Treaty from the NATO nations. For collective defence action taken under Article 5 of the Washington Treaty,³¹ NATO nations have a binding obligation to support the NATO state under armed attack, although this support could be political, moral, or financial rather than military in nature. For NA5CRO which is factually founded upon Articles 2, 3 and/or 4 of the Washington Treaty, there is neither a legal nor a formal obligation for nations to provide support.³²

Translation of NATO Mandate into National Mandate

As every operation has a different strategic goal, it requires different assets and can prescribe different levels of involvement from each NATO nation. Therefore, within NATO, it is the approved NAC mandate that provides the purpose and scope of each operation. This mandate is subsequently implemented by: 1) NATO and partner nations who decide to participate and contribute to the specific NATO operation; and 2) the Supreme Allied Commander Europe (SACEUR), through the NATO command and force structure. With respect to the NATO nations, all are required to implement the NATO mandate via their respective national procedures in order to ensure

²⁸ The issue of Kosovo within NATO represents a specific case and is outside the scope of this paper.

²⁹ Because of the nature of the consensus rule, the current 28 Allies do not manifestly vote. The decisions are not made by majority or unanimity, but rather through a NATO-specific procedure called the "silence procedure." Here, all decisions are made only if the "silence procedure" is not broken (no objection is raised during the given period of time), as silence indicates affirmation.

³⁰ See *The Wimbledon (1923)*, PCIJ, p.25, "... any convention creating an obligation ...places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty."

³¹ Article 5, The North Atlantic Treaty, signed on 4 April 1949 in Washington, D.C.

³² See Allied Joint Doctrine for Non-Article 5 Crisis Response Operations (AJP-3.4(A)), NATO UNCLASSIFIED, 2010, para 0104, p. 1-3, "one principal difference between Article 5 operations and NA5CRO is that there is no formal obligation for NATO nations to take part in a NA5CRO".

the lawful use of their national military assets.³³

For SACEUR, the NAC approval is a green light. Based on such approval, SACEUR may direct his staff to develop a mission operational plan (OPLAN)³⁴ that contains detailed information on the mission objectives and how they should be reached. NATO nations have many opportunities, during the OPLAN development and approval process, to comment on the OPLAN draft. When SACEUR determines that the OPLAN contains his best military recommendations for mission accomplishment, it is finalised and forwarded through the Military Committee for approval by the NAC. Only after the NAC approves the OPLAN may the specific NATO/NATO-led operation actually commence.

This process for initiation of NATO operations through the OPLAN development displays the high degree of interconnectivity between NATO (as an international organisation) and its member states. Decisions related to the conduct of operations are not taken by any NATO body or military headquarter independently. The twenty-eight NATO nations sitting collectively in the NAC, partner nations participating in NATO operations, and the NATO military command structure directed by SACEUR constantly interact. Thus, NATO obtains proactive participation of its member states during all phases of the conduct of its operations. Each step in the decision-making process involves the nations' considerations and approval. As a result, they are wholly involved in this process and can either reaffirm their initial intent to execute an operation or halt the planning process at any step, thereby changing NATO's course of action.

Conclusion

The aim of this article was to briefly describe the evolution and transformation of NATO from an organisation focused solely on the collective defence of its members into a modern security and defence organisation capable of conducting a wide variety of missions. As NATO became very active on the international scene after 1991, the complexity of the organisation and the similar terminology used by other international organisations have caused numerous misunderstandings concerning the actual functioning of the Alliance.

³³ Confirmation of this basic principle is found in Para 31 of The Alliance's Strategic Concept, 1999, http://www.nato.int/cps/en/natolive/official_texts_27433.htm?selectedLocale=en (visited on 15 April 2014).

³⁴ OPLAN means "a plan for a single or series of connected operations to be carried out simultaneously or in succession. It is usually based upon stated assumptions and is the form of directive employed by higher authority to permit subordinate commanders to prepare supporting plans and orders. The designation "plan" is usually used instead of "order" in preparing for operations well in advance. An operation plan may be put into effect at a prescribed time, or on signal, and then becomes the operation order." AAP-06 (2012(2)) NATO Glossary Term. NATO UNCLASSIFIED.

Given the explained establishment and functioning of NATO, NATO nations are clearly involved at every stage of the decision-making process as they exercise their full sovereignty and control over their level of involvement within the Alliance. Although it is usually emphasised that "*the legal hierarchy between international organisations and their member states is interestingly unclear*",³⁵ such a premise does not apply to the close degree of interaction between the Alliance and its member states in their conduct of operations.



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³⁵ Ian Hurd, *International Organizations, Politics, Law, Practice*, 2011, p. 267.



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Legal Authority of NATO Commanders



by Thomas E. Randall¹

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

So why, you might ask, would there be any difference between NATO and national Commanders' authorities? When the four-star orders the three-star to carry out certain actions, typically the latter is bound to obey and fails to do so at his or her peril. In the US military, where I "grew up" as a judge advocate (legal advisor), subordinate officers who deliberately failed to carry out the orders of their senior Commanders normally found themselves on the retirement rolls shortly thereafter. Some wound up as "talking heads" on CNN, or ran for public office, but the price of disobedience was the abrupt end to their military careers. Why would things be any different in the NATO world?

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

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

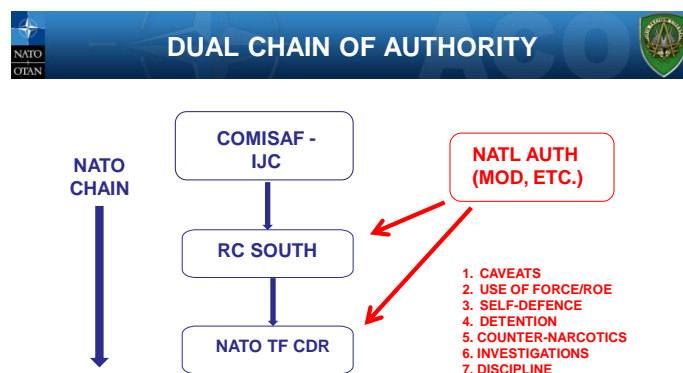
(Diagram provided by author)

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

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

But, the difference between NATO and national Commanders goes even beyond this basic point. In giving his orders, a NATO Commander frequently faces competition or constraints not encountered by the national Commander. The following diagram illustrates this point:

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



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

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

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

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

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

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

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

Some NATO officers regard caveats as a hindrance, but others see them as a matter of necessity. Their view is that without the ability to declare such limitations, some nations might be unable to participate at all in many NATO operations. Caveats afford nations the ability to approve an OPLAN, and all its associated ROE, at the political level in the NAC, while at the same

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

time retaining their sovereign prerogative to ensure that the use of their land, sea, and air forces remains consistent with their domestic laws and policies. For the NATO Commander, unlike his national counterpart, they are a potentially complicating factor that he must always take into account when planning and executing his NAC-directed military missions.

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

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

In my first year as the SHAPE Legal Adviser⁵, I accompanied General Jones, the SACEUR, on a mission to Afghanistan, where we met with President Karzai and other senior Afghan officials to obtain their agreement, in principle, to the handling and turnover of detainees to Afghan authorities. During our visit, the Afghan leadership readily agreed on a set of principles that could be formalised into a Memorandum of Understanding (MOU) with NATO, and which would establish a common detention policy for all nations participating in the ISAF operation.

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

As a fallback, provisions regarding detainees were eventually inserted into the NAC-approved OPLAN for the expanded ISAF mission, including ROE to address criteria for turnover of detainees to Afghan authorities. These were agreed unanimously, through consensus, by the nations in the NAC. These provisions regarding detainees provided the political and military direction for SACEUR and his subordinate Commanders, such as COMISAF, to follow with regard to the handling of detainees in Afghanistan. In essence, the OPLAN,

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

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

ROE, and amplifying guidance sent down the NATO chain of command established the "blue line" with respect to handling of detainees in the ISAF operation.



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

If space and level of classification permitted here, I could describe many other examples of "clashes" between NATO guidance, either political or military, versus national laws, policies, and constraints in the context of NATO operations. In a classified setting, for example, I could relate how a senior officer, backed by his nation's policies and subordinate to a former SACEUR, refused to carry out NATO direction regarding counter-narcotics operations in Afghanistan. I could also recount how a senior NATO officer who deliberately disobeyed direction from the NATO Secretary General, but who again had

the support of his nation, was impervious to any removal or "punishment" by NATO military or civilian authorities. Or I could describe the consequences that resulted from two simultaneous investigations into an incident of civilian casualties arising in Afghanistan, where the NATO and national investigations reached opposite conclusions regarding whether a national Commander's actions complied with the Law of Armed Conflict and NATO direction.

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

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

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



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NATO Status Agreements

By Mette Prassé Hartov¹

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

The immunities and privileges of foreign forces are rooted in the concept of state immunity. Soldiers and forces are state agents or state representatives. Common practice under Public International Law has varied from providing absolute immunity to recognising functional immunity only.³ As such, while customary international law does provide for certain immunities, they appear to be limited in scope, and, where they were sufficient to cater for transiting or a closed garrison environment in past times, the modern and more complexly regulated society requires a more nuanced approach. States conclude Status of Forces Agreements (SOFAs) to overcome these complexities and to effectively facilitate and enable the presence of foreign

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

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

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

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

Per its provisions, the NATO SOFA is only open to accession by States who are also parties to the North Atlantic Treaty. Moreover, it only applies to the (metropolitan⁷) territories of the contracting Parties. These embedded restrictions led to the drafting and conclusion of the PfP SOFA in 1995.

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

In the context of NATO, the cooperation between Allies is set in Article 3 of the North Atlantic Treaty; it includes both events that are scheduled and conducted under the NATO flag and those activities undertaken by Allies "...separately and jointly, by means of continuous and effective self-help and mutual aid, [to] develop their individual and collective capacity to resist armed attack".⁸ The NATO SOFA applies to all activities without distinction, unless the parties agree otherwise. The drafters of the NATO SOFA deliberately refrained from referring to "NATO" duties in order not to limit its functional

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

⁵ Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces, done in Brussels June 19, 1995.

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

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

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

application. Looking at the preparatory works, it is evident that the drafters did not intend to limit the scope of application. In fact, their discussion clearly states the contrary.⁹

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

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

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

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

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

¹¹ The Agreement on the Status of the North Atlantic Treaty Organization, National Representatives, and International Staff, done in Ottawa on September 20, 1951.

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

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

¹² See for example the Paris Protocol, Article 4.

organisation and the States sponsoring its personnel.

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

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

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

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

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

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

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

Island.

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

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

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



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

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

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

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

Generally, the Supplementary Agreements confirm and complement the status granted under the Paris Protocol/Further Additional Protocol¹⁷ and thus the NATO SOFA/PfP SOFA. They elaborate on the immunity enjoyed by an International Military Headquarters, the inviolability of its premises, archives, documents, and the functional immunities to be afforded to flag and general officers. The Supplementary Agreements also address allocation and operation of facilities, security and force protection. They direct reporting of assigned personnel, operation, registration and licensing of vehicles, carrying and storage of arms, access to banking facilities, and measures to be considered with regard to public hygiene, environmental protection and health and safety. They serve to confirm tax exemptions enjoyed by an International Military Headquarters and the right to operate canteens and other facilities. They also identify fiscal entitlements of the members. Of equal importance, they elaborate on definitions, extend entitlements and waivers, for example, on visa and residency requirements for civilians and dependents. In general, they supplement and detail the status to be afforded to the International Military Headquarters and their personnel.

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

¹⁷ Further Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces, done in Brussels on December 19, 1997.



SACEUR Eisenhower signing the activation order for SHAPE

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

By Andrés B. Muñoz Mosquera¹
Dedicated to Thomas E. Randall

Introduction

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

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

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

A notable number of commentators, from an epistemological standpoint, have already assessed MOU as non-binding agreements. Some of them have analyzed this instrument² as an informal agreement, others as a gentlemen's agreement, and others yet as informal law³ (IN-LAW),⁴ etc. All the commentators have analysed MOUs with the understanding that this phenomenon has increased exponentially since the end of WWII, with major peaks after the fall of the Berlin Wall. Until very recently, most international lawyers, especially in academia, have denied that MOUs have a legal reality. They asserted MOUs to have only political effects. On the other hand, publicists have not approached MOUs from an international institutional law standpoint. Thus, MOUs' role as rules (internal and external) of international institutions has been left unexplored. This paper intends to address the apparent dichotomy between the political and legal reality of MOUs as well as their place within institutions' rules. The prophets of said dichotomy seem to have found sanctuary in the cosy haven of voluntarily ignoring the dynamics of international law and its malleability. The "new"⁵ emerging forms of international cooperation cannot be strange to international law; otherwise this discipline has to be considered defunct awaiting a royal and pompous burial. There is a mistake in this short-sighted appraisal: some internationalists

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

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

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

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

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

Current Status of MOUs

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

On the other hand, determining the status of an MOU is clearly not just a matter of the term itself. We can say upfront that MOUs are not treaties if the parties clearly intended that it would not be legally binding on them. This does not detract the existence of good faith⁸ or, in spite of some commentators' arguments, the principle of *pacta sunt servanda*, as this is a basic variable in the equation of the existence of international law that permits that states be the judges in disputes with other states. This raises the question if the signatories⁹ consider the MOU provisions to be *sans portée*

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

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

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

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

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



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In the case of NATO, where the cooperative relationship is the glue of its collective defence maxim, MOUs could be considered key enablers for reaching the joint objectives and commitments set up on 4 April 1949.¹³ On this note, it is necessary to say that, while there is much voluntariness in the implementation of MOUs, it is also true that the principle of reciprocity applies equally with a strength not seen in other contexts; this principle links the future actions of the MOU participants indicating that “a greater degree of commitment is intended.”¹⁴ To establish the status of an MOU, it is critical to

¹⁰ Oscar Schachter, 'The Twilight Existence of Nonbinding International Agreements', 71 AJIL (1977), at 296.

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

¹² Raymond Cohen, 'Rules of the Game in International Politics', 24 International Studies Quarterly (1980) 1, at 135.

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

¹⁴ Paraphrasing Hartmut Hillgenberg, 'A Fresh Look at Soft Law', 10 EJIL (1999) 3, at 507.

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

MOUs are not exempt from certain and non-immediate¹⁸ legal effects. In order to address the question of MOUs and responsibility derived from them, it is necessary to recall what Aust states¹⁹ on the fact that an MOU is considered, in many occasions, a subsidiary or subsequent agreement per Article 31(2)(a)²⁰ of the 1969 Vienna Convention of the Law of Treaties (VCLT). In these cases, the authority that approved the specific MOU, and the surrounding circumstances such as the purpose and scope of the MOU, along with the overall objectives and commitments defined in the MOU and in the framework agreements will all be key to study its potential legal effects with respect to the legitimate expectations created among the MOU participants.

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

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

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

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

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

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

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

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

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

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

Bona Fides MOU Fundamentum Est

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

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

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

²⁴ David Bederman, *International Law in Atiquity* (2001), at 137.

police", good faith²⁵ underpins all cross-border relations among states or international organisations. Consequently, good faith becomes an important feature for MOUs as it is for treaties, which requires an understanding of why it is a key element in international relations.

Yet, even if they place an "element of non-commitment into the commitment",²⁶ MOUs permit the transformation of the non-commitment into a de facto commitment. This can apparently be seen outside of the principle of *pacta sunt servanda*, but legal effects may be created out of expectations. Therefore, it is easy to appreciate that de jure or de facto commitments are rooted in the principle of good faith, with moral and positive legal obligations for the signatories when contextualised in the framework of treaties.²⁷ There are also consecutive individual and collective political decisions in the form of statements²⁸ or conduct. In this manner, the *rebus sic stantibus* principle,²⁹ with respect to the framework instrument(s), remains safe and leads to a proper and clean implementation of international law. Consequently, a different understanding from that which is explained above would make MOUs non-functional and pointless; this is clearly not the case, as states and international organisations resort to them when framework treaties need to be developed or implemented, and they carry the essential message of their drafters.

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

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

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

²⁷ See footnote 12

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

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

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

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

The Charter of the United Nations has recognised the principle of good faith as a key principle in positive law. Its Article 2(2)³¹ explicitly shows that good faith is of relevant importance in international relations. As discussed at the International Law Commission: "In the absence of good faith, no procedural safeguards could ensure the observance of international law, and force would dominate international relations."³² This explains the necessary relation between both paragraphs of Article 2 and the need to understand that MOUs may have legal effects. Thus, contrary to Kelsen's theory, and in spite of his postulations claiming that the Charter does not establish any kind of sanction for breaching good faith, good faith³³ is more than a moral principle in MOUs.

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

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

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

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

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

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

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

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

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

International Norms and MOUs

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

We need to recognise that an ad-hoc spirit is the dominating norm, and that norms have an intangible nature that necessitates observing their existence through different instruments. Regardless of whether we choose vertical or horizontal typologies, the empirical reality of MOUs is that legal positivism does not exclusively produce norms and rules. MOUs play an increasingly significant role in the creation of partner-specific norms as instruments providing, via written international agreements, principles, understandings, formulations and interpretations of rules. Therefore, we can affirm that MOUs, as technical agreements, are enablers that permit the fulfilment of specific actions.³⁸ As Cohen states, "norms are more frequently partnership-specific than actor-universal",³⁹ which is a key dimension of the domain of the applicability of norms. This phenomenon is easy to observe due to the significant number of bilateral, regional and international organisations. Each of these are developing their own partner-specific norms and have the potential to surpass the partner-specific realm, thus allowing them to be considered by the other members of the international community⁴⁰ as

³⁷ Ronald Dworkin, *Taking Rights Seriously* (1977), at 78.

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁶ NATO Legal Deskbook, 2nd edition, 2010, at 127.

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

Potential Legal Effects of MOUs

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

⁴⁷ Stanley Hoffmann, at 96-98.

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

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

What would occur, in terms of legal effects, if one or more participants decide not to contribute in accordance with the provisions of an MOU? If the decision to stop the contribution was done in accordance with the provisions of the withdrawal section of the specific MOU in question, nothing would happen. However, if the withdrawal is done contrary to the provisions of the MOU and, thus, dismantles the expectations of the other participants, the previously discussed *ut supra* principle of good faith is relevant to the possible legal effects. Aust reminds us⁵⁰ that paragraph 51 of the ICJ judgment of the Nuclear Tests case between France and Australia,⁵¹ in which the Court states in which situations the behaviour of a state implies the intention to enter into legal obligations. In this case, the statements of France were “conveyed to the world at large ... “and”[i]t was bound to assume that other States might take note of these statements and rely on their being effective.” Besides, “... the actual substance of these statements, and ... circumstances attending their making” are elements that shed light on the legal effects of France’s statements. The judgment established that “[t]he objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effects.”

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

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

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

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

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

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

words, it is solely for the group of states that participate in the MOU to formulate the legal effects of the agreed provisions within that restricted community.

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

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

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

Conclusion

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

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

place within both international relations and international law.

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

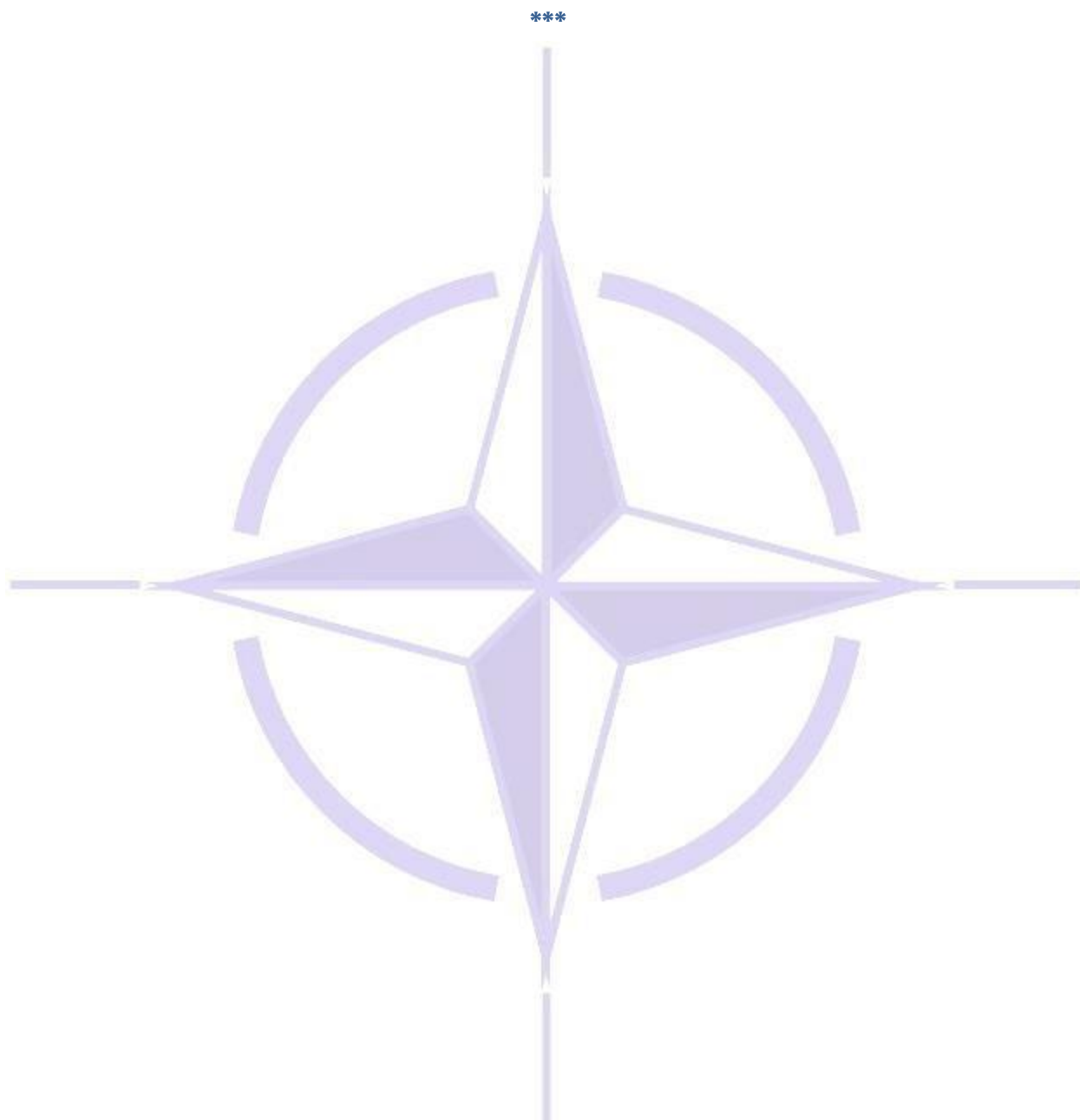
MOUs further provide principles, understandings, formulation and interpretation of rules, all of which bring them to the level of normative standards among the MOU participants, i.e., among those who are part of the partner-specific community. Moreover, since legal positivism does not have the exclusive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

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

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

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

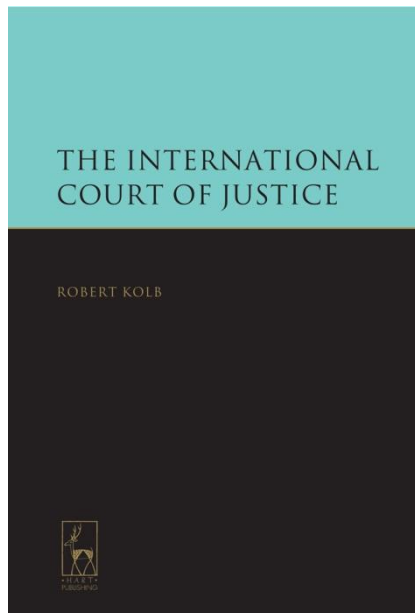
of a transformative, evolving and necessary “new international law” tool⁵⁷, as MOUs permit political commitments and legal effects to be created through partner-specific community normative standards. This would result in a dialogue that is naturally integrated in an easily recognisable coherent system.



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

Book Review: *The International Court of Justice* by Robert Kolb¹

By Vincent Roobaert²



Since its creation in 1945, the International Court of Justice has become a major actor in the interpretation of international law and the peaceful settlement of disputes between States. In recent years, the Court has concerned itself with issues of critical importance for the defense community, such as the legality of nuclear weapons, the 1999 air campaign in Kosovo and the construction of the wall in Palestinian territories. In its nearly seventy years of existence, the International Court of Justice has developed an extensive case-law covering both substantive and procedural matters. It is the latter that is mainly the topic of Robert Kolb's comprehensive contribution on the International Court of Justice³, although the author first sets the background by looking at the history of peaceful settlement of disputes.

The author explains the increased use of peaceful settlement mechanisms by identifying the growing costs of conflicts. Consequently, the establishment of the International Court of Justice as a permanent forum for settling disputes results from the fact that the entire international community became interested in ensuring compliance with international rules. However, the nations' will to settle disputes peacefully must be balanced with their continued attachment to sovereignty, which explains why the jurisdiction of the international court of justice remains based on the consent of the nations concerned.

The International Court of Justice must be distinguished from other international tribunals whose jurisdiction only covers individuals (such as the international criminal tribunals) or is limited to a specific area of international law (such as the International Tribunal for the Law of the Sea), or from those other settlement mechanisms, such as international arbitration, which allows for more flexibility in terms of the rules applied. Moreover, as the principal

¹ R. KOLB, *The International Court of Justice*, Hart Publishing, 2013.

² Assistant Legal Adviser, NCI Agency. The views expressed in this review are solely those of the author and may not represent the views of NATO and the NCI Agency.

³ Readers interested by the contribution made by the International Court of Justice in the development of international law may be interested by C. Tams and J. Sloan (eds), *The Development of International Law by the International Court of Justice*, published in 2013 by Oxford University Press.

judicial organ of the United Nations, the International Court of Justice must follow the UN Charter and the resolutions of the Security Council.

Following this background, the author concentrates on the procedural issues of the International Court of Justice, most specifically the contentious procedures open to states and the advisory opinions open to certain organs of the United Nations. Mr. Kolb's review covers the whole process from start to finish, including the initiation of procedures and withdrawal from a court case.

The jurisdiction of the International Court of Justice is extensively examined. First, the author examines the Court's competence of '*rationae personae*', namely the States that can submit cases to the Court and the conditions under which a non-UN member State can appear before the Court. Secondly, the author reviews the Court's competence of '*rationae materiae*', namely the type of disputes that the Court can settle. The focus here is on the definition of what constitutes a legal dispute. Finally, the author reviews the means whereby states can accept the jurisdiction of the Court, such as compulsory jurisdiction. Other aspects of the process are covered as well, including provisional measures, counterclaims, intervention by third parties and the effect of judgments.

The advisory opinion procedure is also comprehensively studied, and the author exams which organs may request the Court's opinion, the type of questions that may be submitted to the Court, and the specific process for requesting an opinion.

Mr. Kolb's monograph is best described as the 'must have' manual for practitioners dealing with the International Court of Justice due to its comprehensiveness and depth of study. It is extremely well researched and supported by numerous references to court cases. Mr. Kolb's book only has the drawback that it is probably less suited to those readers not yet acquainted with peaceful settlement of disputes as they might find this study too detailed to be a useful introduction to the topic. On the other hand, those with prior acquaintance to the Court will find many answers to their questions in Mr. Kolb's study.



Name: Steven Hill

Rank/Service/Nationality: A-6, NATO Civilian, United States

Job title: Legal Adviser and Director, Office of Legal Affairs – NATO IS

Primary legal focus of effort: Providing legal advice to senior management at NATO HQ and representing NATO in the broader international legal community.

Likes: Cooking, running, museums

Dislikes: Paperwork

When in Brussels everyone should: check out Museum Night Fever, an annual event where the city's museums are open very late.

Best NATO experience: helping shape our Alliance's response to the Ukraine crisis.

My one recommendation for the NATO Legal Community: get to know the strengths of your colleagues, and work together as much as you can.

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Name: Gilles CASTEL

Rank/Service/Nationality: Colonel (OF 5)/Army/French

Job title: JALLC LEGAD/ANALYST

Primary legal focus of effort: JALLC Legal support (SOFA, MoUs)

Likes: Running, swimming, Aikido, Good Wine, Movies.

Dislikes: People who are not able to smile!

When in JALLC (Portugal) everyone should: take the opportunity to discover such a wonderful country and especially the nice people!

Best NATO experience: COMKFOR LEGAD, in 2008, during the KOSOVO declaration of Independence period.

My one recommendation for the NATO Legal Community: Discuss with other Legad's; they have always good advice for you...



Name: Robert Gray "Butch" Bracknell

Rank/Service/Nationality: A3 /NATO Civilian/ United States

Job title: Staff Legal Adviser, International Law

Primary legal focus of effort: International law, particularly international agreements, exercises, Centers of Excellence

Likes: Professional sports particularly baseball, basketball, hockey and American football, Coaching youth sports, travel, cold beer, politics, international security issues.

Dislikes: Warm beer that should be cold.

When in Norfolk, Virginia everyone should: travel the US as broadly as possible, and try to see several great American cities – Boston, Washington, Atlanta, New York, Philadelphia, Baltimore, Charleston SC, New Orleans, Denver, San Diego, Los Angeles, San Francisco, and Chicago among many others.

Best NATO experience: Deployment to HQ SFOR in Sarajevo when I was on active duty as a US Marine Corps officer.



Name: Milena Y. Dicheva

Rank/Service/Nationality: NATO Civilian/ Bulgarian

Job title: Assistant Legal Adviser, Office of the Legal Adviser, NATO Communications and Information Agency

Primary legal focus of effort: Agreements with Nations, International Organisations and NRFs; HR matters

Likes: Jogging, hiking, relaxing on the beach ... and Belgium chocolates

Dislikes: Bad weather

When in Brussels everyone should try the Belgium waffles, chocolate and beer ... not necessarily in that order ...

Best NATO experience: I have just started working in NATO, so my best NATO experience is the chance to have one ☺

My one recommendation for the NATO Legal Community: Continue to stay connected and closer, regardless of physical location and organisational affiliation.

HAIL & ...

Bienvenue...

ACT SEE

Mr. Lockwood, Philip (CAN CIV)

Mr. Shaun Hiller (USA CIV)

CAOC Torrejon

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CAPT McCarthy, Pat (USN)

LtCol Schaap, Arie (USAF)

Maj Bennett, Mark (USAF)

MAJ Martens, Roberto (US Army)

MAJ Berhow, Chris (US Army)

ISAF Joint Command

LTC Korkmaz, Ibrahim (TUR)

CW4 Jones, Nathan (USA)

MAJ Flor, Andrew (USA)

CPT Kumar, Sean (USA)

CPT DeFlorio, Joseph (USA)

CPT Tison, Sara (USA)

CPT Sickendick, Katherine (USA)

SSG Ludwig, Timothy

Land Command Izmir

LtCol Schiffer, Thomas E. (USA)

CPT Savy, Magali (FRA A)

Lt Tas, Samet (TUR A)

NATO CIS Group

Ms. Dimitrova, Stanila (BGR CIV)

NHQ Sarajevo

LtCol Patyski, Lyn T.

TSgt Franjul, Rafael A.



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FAREWELL**Bon Voyage...**

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Land Command Izmir	LtCol Frost, John (USA A)
NATO CIS Group	Ms Juarez, Margarita (ESP CIV)
NATO HQ / IMS	COL Lozo, Christopher (USA AF)
NATO HQ /IS	Ms McGrail, Klarisa (CAN CIV)
NHQ Sarajevo	COL Roderic, Michael Ssgt LeBeauf, Donald
SHAPE	Ms Sebastian Moncho, Maria Teresa (ESP CIV)



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UPCOMING EVENTS OF LEGAL INTEREST...

...at the NATO School, Oberammergau, Germany:



The **NATO Legal Advisers' Course**, from **6 to 10 October 2014**, aims to provide military and civilian legal advisers, in national or NATO billets, an understanding of legal aspects of NATO operations and activities. Note that the Legal Advisers' Course is taking place twice per year. The next one is in May 2015.

...at the US European Command (EUCOM), "Patch Barracks", Stuttgart, Germany:



The George C. Marshall Center for Security Studies and EUCOM Staff Judge Advocate co-host the annual **International Legal Conference**, from **2 to 5 September 2014**, to encourage collaboration between European neighbours and the United States on mutual legal



challenges they face in conducting joint operations and combating terrorism. You can find more details on the EUCOM website <http://www.eucom.mil/> or contact Mr. Kirk Samson (kirk.h.samson.civ@mail.mil), in the EUCOM Legal Office.

...at Ypres, Belgium:



The International Society for Military Law and the Law of War (ISMLLW) in collaboration with the International Committee of the Red Cross, and the Royal Higher Institute for Defence (Belgium) organises the first **Flanders Fields Conference of Military Law and the Law of War**, that will be hosted by the historical city of Ypres (Belgium) from **12 to 15 October 2014**, and forms part of the activities commemorating the centenary of the outbreak of World War I. You can find more information on the programme and registration for the event on the ISMLLW website <http://www.ismllw.org/Events%201.php>

...at the College of Europe, Bruges, Belgium:



College of Europe
Collège d'Europe



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The international Committee of the Red Cross and the College of Europe organize every year the **Bruges Colloquium on International Humanitarian Law**. The event will take place from **16 to 17 October 2014** and this year's theme will



ICRC

be "Detention in Armed Conflict". Registration will open at mid-September 2014 <http://www.coe-icrc.eu/>. For further information, you can contact the ICRC Brussels: skolanowski@icrc.org or tbraibant@icrc.org

...of NOTE



The NATO Legal Gazette can also be found on the official ACT web page:

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