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Articles
on
**NATO Current
Challenges**

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Introduction

Dear Fellow Legal Professionals and Persons Interested in NATO,

Issue 37 of the NATO Legal Gazette departs from our practice of publishing thematically organized issues which we adopted in 2013 with Issue 32¹. The reason for this change is that we have received five articles that merit publication now.

Mr. Andrés B. Muñoz Mosquera, Legal Advisor, Supreme Headquarters Allied Powers Europe (SHAPE), continues to provide valuable articles as the most prolific contributor to the *NATO Legal Gazette*. In this issue he provides two articles. He and Dr. Sascha Dominik Bachmann, Associate Professor in International Law at Bournemouth University, United Kingdom, provide an overview of the legal scholarship on the concept of lawfare in hybrid warfare in their article, *Understanding Lawfare in a Hybrid Warfare Context*. Mr. Muñoz also offers Part II of his article, *Memorandum Of Understanding (MOU): A Philosophical and Empirical Approach*². Here he discusses the characterisation of MOUs, how national or international courts view them and dedicates the last section of this article to assist practitioners with comments about MOU structure.

Mr. Jean-Michel Baillat, when serving as a Commissaire en chef de 1ere classe and the Head of the Operational Section in the SHAPE Legal Office, asked the question, *Hybrid Warfare, a new challenge to the Law of Armed Conflicts?* He builds his article around three more questions: "What is hybrid warfare;" "Is hybrid warfare contrary to the Law of Armed Conflict (LOAC)?," and "How to tackle Hybrid Warfare and stay within Legal Boundaries?" Readers are encouraged to consider Jean-Michel's answers to these questions and his conclusion.

Mr. Eduardo Martinez Llarena is the logistical coordinator for NATO's Readiness Action Plan (RAP) Agreements Implementation Office (RAIO) at SHAPE. Mr. Ignacio Fonseca Lindez is an assistant legal advisor at the SHAPE

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

² NATO Legal Gazette Issue 34, "NATO Legal Cornerstones": "*Memorandum Of Understanding (MOU): A Philosophical and Empirical Approach (Part I)*", by Andrés B. Muñoz Mosquera, Issue 34 (July 2014), pag. 55-69 http://www.act.nato.int/images/stories/media/doclibrary/legal_gazette_34a.pdf

Legal Office and serves as the legal coordinator for RAIO. Their joint article, *NATO Readiness Action Plan: The Legal and Host Nation Support Architecture*, surveys the development of the RAP, its genesis as a response to Hybrid Warfare announced at NATO's 2014 Wales Summit, and its four pillar architecture: 1) Supplementary agreements (SAs) to the 1952 Paris Protocol to the North Atlantic Treaty; 2) Memoranda of understanding (MOUs) for the NATO Force Integration Units (NFIU) Headquarters and the Headquarters Multinational Division Southeast (HQ MND SE); 3) Accessions by all Nations of the Alliance to the Host Nations Support Memorandums of Understanding for Exercises, Operations, and Disaster Relief Operations; and, 4) Border crossings and freedom of movement.

Finally, LTC Keirsten Kenned, U.S. Army Judge Advocate, serving as a NATO Legal Advisor in 1 (German-Netherlands) Corp in Münster, Germany, gives us a concise presentation of the NATO Exercise program, its purpose and structure, and the various challenges that a Legal Advisor will face when involved in a NATO exercise.

As usual, Issue 37 also provides a list of upcoming events that may be of interest to our readers as well as a listing of hails and farewells for personnel joining NATO or moving on to new challenges. We will be returning to a thematic format with Issue 38 on the Protection of Cultural Property. But in the meanwhile, the authors and the editorial staff of the *NATO Legal Gazette* hope you enjoy reading Issue 37.

Best wishes from Belgium,

Lewis

Sherrod Lewis Bumgardner
ACT SEELegal Advisor



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Understanding Lawfare in a Hybrid Warfare Context

by Andrés B. Muñoz Mosquera and Sascha Dov Bachmann ¹

Introduction²

The use of Law as a weapon, Lawfare,³ is one of many tools used by

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The text is provided in a personal capacity and is not intended to represent the views of their employers or the organisations they are a member of.

² Parts of this article were originally presented at the University of Exeter - Strategy and Security Institute. During the seminar "The Legal Framework of Hybrid Warfare and Influence Operations", which took place 16-17 September 2015.

³ Term coined by Colonel Dunlap in 2001. C. Dunlap, 'Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts' (2001) Humanitarian Challenges in Military Intervention Conference, November 2001, Harvard University. C. Dunlap, 'Lawfare today: A Perspective' (2008) 3 *Yale J. Int'l Affairs* 146, 146.

human beings in their interactions. The current holistic nature of the physical and virtual battlespace favors the inclusion of law in that battlespace, which becomes one of the war protagonists by its own merits. Law has its own place among the instruments of power⁴: Diplomatic, Informational, Military, Economic, Financial, Intelligence and Law.⁵ While we are familiar with the first four in an operational environment, the last three are new in the comprehensive approach battlespaces where the classical interstate warfare has given way to intrastate warfare in an asymmetrical and/or hybrid manner, which is now the untamable rule. Battlespace today can be a muddy field close to Aleppo as much as a carpeted corridor at 8 Paradeplatz in Zürich, Switzerland⁶, the fiber-optic cabling in one of the NATO Cooperative Cyber Defence Centre of Excellence servers in Tallinn, Estonia, or at the meeting room of Wachtell, Lipton, Rosen & Katz in New York.

Law is now moving from the second row to the first, not only during conflict, but also in non-defined situations. Law in the battlefield is definitely an instrument of power unique for law-abiding and non-law-abiding actors. It is not true that law as a weapon is used more by law-oriented societies. Actually, these societies absorb badly law attacks, because they understand the use of law affirmatively and not negatively. This perversion creates dysfunctional responses and confusion in both decision-makers and ordinary tax-payers or law-abiding actors.

The affirmative use of national and international laws and justice systems during a conflict serves to protect free democracies – the rule of law consolidates trust and legitimacy among friendly actors, and forces adversaries to stop their kinetic and non-kinetic actions. The question is to analyse the two edges of Lawfare and how it functions.

Lawfare fits well in all types of wars, but it appears that hybrid warfare and info ops give law the visibility it does – or did - not have in classical warfare. In this regard, we will introduce hybrid warfare as a platform where the instruments of power are also played.

Hybrid warfare, while not necessarily new as a category of war is more

⁴ DIMEFIL is an evolution of the acronym MIDLIFE in the Interim Field Manual FMI 3-07.22, Counterinsurgency Operations, which expired October 2006.

⁵ U.S. doctrine cites it as 'Law Enforcement', but for the purpose of Hybrid Warfare with state and non-state actors, the term 'Law' appears more accurate as it permits the development of the term 'Lawfare'.

⁶ Credit Suisse Group headquarters.

a mindset, and it has the potential to change the future conceptualisation of conflict. Examples of hybrid warfare are the Russian/Ukrainian conflict of 2014 and the ongoing conflict with Daesh, both particularly sensitive to lawfare due to an apparent asymmetric adherence to the international rule of law among involved actors. The differing legal and ethical approaches of law-abiding actors in warfare versus non-law-abiding ones in hybrid warfare scenarios impact the success of Western military actions. The authors argue in favour of an understanding that lawfare, in spite of its negative connotation, can be an excellent weapon for law-abiding actors during a conflict. The difficulty rests on developing a continuous mindset of prevention and planning, as well as exploratory tools of the contours of domestic and international laws and their susceptibility to the tactics of lawfare.

Hybrid Warfare

In military history,⁷ there are multiple examples of conflicts characterised by applying economy of war techniques, i.e., different actors aimed to reach their political/military goals by using a mix of conventional and non-conventional or irregular methods and kinetic and non-kinetic means in very different operational environments.

Hoffman observed the 2006 Israel - Hezbollah's war, and championed the 'movement' on Hybrid Threats and Warfare. He summarised the elements of this form of warfare as follows:

"Hybrid threats incorporate a full range of different modes of warfare including conventional capabilities, irregular tactics and formations, terrorist acts including indiscriminate violence and coercion, and criminal disorder. Hybrid Wars can be conducted by both states and a variety of non-state actors [with or without state sponsorship]. These multi-modal activities can be conducted by separate units, or even by the same unit, but are generally operationally and tactically directed and coordinated within the main battlespace to achieve synergistic effects in the physical and psychological dimensions of conflict."⁸

⁷ Spanish guerrillas during the Roman conquer or Independent War against Napoleonic armies. Washington's militia against British forces. Palestinian -Jewish and Muslim- irregular forces used by British regular forces against revolts in Palestine.

⁸ Frank G. Hoffman, *Conflict in the 21st Century: The Rise of Hybrid Wars* (Arlington, VA: Potomac Institute for Policy Studies, December 2007), p. 8. See also Hoffman 'Hybrid threats: Reconceptualising the evolving

While Hoffman's work on hybrid-warfare lead the debate as it set the military-historical scene for recognising such form of warfare as either 'new' or evolving 'old' warfare, it also makes it clear that there is not yet a binding definition on hybrid warfare in place; instead the 'hybrid' element indicates the existence of multiple elements and factors which are somehow merged into a method of warfare.⁹ Actually, a definition of hybrid warfare will always be elusive as this warfare appears to be an intentional or circumstantial mindset based on calculations made to take into account one's own or the adversary's resources. The definition is mobile at best and tailored to suit the actor's purposes.

Today's hybrid warfare variance appears to be that it "has the potential to transform the strategic calculations of potential belligerents [it has become] increasingly sophisticated and deadly".¹⁰ Some of the non-kinetic aspects of hybrid warfare share methods with 'influence operations' by aiming to misinform (like Russia in Crimea and now Syria) or become a force multiplier (like Jihadists and Daesh in the Middle East). These methods have a long history of successful employment. As Sun Tzu once said: "[t]o subdue the enemy without fighting is the supreme excellence".¹¹

In general, a shared understanding of a term is necessary for providing readers common grounds to understand and approach any discussion. Based on these grounds, hybrid warfare appears to be mainly a warfare variant resulting from use of an economy of force in war, in which State or non-State actors interact with the intention to engage with a minor traditional military investment. Hybrid warfare actors are characterised by the use of not only direct but also, and more normally, indirect and multi-disciplinary approaches: civil and military, legal and illegal, kinetic and non-kinetic, high-tech and 'rock-art' means, etc. Actors using hybrid warfare pursue the following:

1. Forcing the end of hostilities before political goals are reached;
2. Consolidating stagnant situations – turning them into intractable or 'simple incidents';

character of modern conflict' (2009) *Strategic Forum* 240. See also Hoffman 'Hybrid warfare and challenges' (2009), *Joint Forces Quarterly* 52.

⁹ See P. R. Mansoor 'Hybrid Warfare in History', in Murray and Mansoor (eds.), *Hybrid Warfare: Fighting Complex Opponents from the Ancient World to the Present*, (New York, Cambridge University Press, 2012).

¹⁰ A. Deep 'Hybrid War: Old Concept, New Techniques', *Small Wars Journal*, 2 March 2015.

¹¹ *The Art of War*, Sun Tzu. *The Book of Lord Shang*, (Wordsworth Editions Limited, Hertfordshire, 1998), p. 25.

3. Eroding and delegitimising the internal and external prestige, reputation, and support of a superior military force, State or States' apparatus, and/or International Organisations;
4. Creating confusion in general by questioning agreed political, religious or territorial *status quo*; and
5. Building new dependencies and structures on essential-resources to support consolidated or imposed political, religious or territorial changes.



A destroyed tank is seen along a road in Luhansk region, eastern Ukraine, November 19, 2014. ©

REUTERS

www.nato.int

Since hybrid warfare appears to impose itself as a reality, it is not outlandish to claim that hybrid warfare must be categorised as an existing strategic doctrine, which forges strategists' minds. Current US Military writing acknowledges the existence of hybrid warfare without clarifying whether it should be considered as a new category or simply a sub-category of warfare. Hybrid warfare can be described in a causal manner as a conflict "in which States or non-State actors exploit all modes of war simultaneously by using advanced conventional weapons, irregular tactics, terrorism, and disruptive technologies or criminality to destabilise an existing order"¹² and which blurs "distinct categories of warfare across the spectrum, from active combat to civilian support".¹³ In any case, "the hybrid notion reflects the porosity

¹² R. Wilkie, 'Hybrid Warfare – Something Old, Not Something New, (2009), *Air & Space' Power Journal* 2009, <www.airpower.au.af.mil/airchronicles/apj/apj09/win09/wilkie.html>, 30 March 2016.

¹³ U.S. Government Accountability Office. 2010. *Hybrid Warfare*, GAO-10-1036R, Washington, D.C., September 10 cited in National Research Council of the National Academies, *Improving the Decision Making Abilities of Small Unit Leaders*, Washington 2012, p. 1.

between irregular and regular warfare".¹⁴

Hybrid warfare presents itself as a platform for different methods or means of power. The use of law as a weapon is one of them. Therefore, Lawfare is using law as a weapon with a goal of manipulating the law by changing legal paradigms. As stated at the outset, this 'manipulation' can be done either maliciously or affirmatively. While lawfare appears to be first defined by Dunlap back in 2001, he refined later his previous definition in 2007 to state that lawfare "is the strategy of using - or misusing - law as a substitute for traditional military means to achieve an operational objective."¹⁵ Actually, since law appears to influence the three planes of an operational environment, i.e., strategic, operational and tactical, lawfare can necessarily be applied in all of them.

Before addressing lawfare, it appears relevant for this paper to address very briefly NATO States' collective understand of hybrid warfare.

NATO and Hybrid Warfare

NATO's 2010 Capstone Concept did not use the term hybrid warfare but 'hybrid threats'.¹⁶ This concept explains NATO's requirements "to adapt its strategy, structure and capabilities accordingly ... to deliver an effective response".¹⁷ NATO defines, in this concept, hybrid threats as "those posed by adversaries, with the ability to simultaneously employ conventional and non-conventional means adaptively in pursuit of their objective."¹⁸ On the other hand, in 2011, NATO issued a 'longsighted' report, which predicted that States may be attracted by non-conventional wars as "[hybrid threats] can be largely non-attributable, and therefore applied in situations where more overt action is ruled out for any number of reasons".¹⁹ Hybrid threats were defined as multimodal, low intensity, kinetic as well as non-kinetic threats to international peace and security.²⁰ These include asymmetric conflict

¹⁴ E. Tenenbaum 'La piège de la guerre hybride' (2015), Focus stratégique n. 63, p. 5.

¹⁵ C. Dunlap 'Lawfare Today: A Perspective', *YALE Journal of International Affairs* (Winter 2008), p. 146.

¹⁶ NATO – Headquarters Supreme Allied Commander Transformation, 'Military Contribution to Countering Hybrid Threats Capstone Concept', <www.act.nato.int/the-countering-hybrid-threats-concept-development-experiment>, 1 August 2015.

¹⁷ *Ibid.*

¹⁸ S. Bachmann & H. Gunneriusson 'Hybrid Wars: The 21st Century's New Threats to Global Peace and Security', *Scientia Militaria, South African Journal of Military Studies*, Vol 43, No. 1, 2015, p. 79.

¹⁹ *Ibid.* Referring to J. Sanden, S. Bachmann 'Countering hybrid eco-threats to global security under international law: The need for a comprehensive legal approach', *Liverpool Law Review* 33, 2013, 16.

²⁰ Bachmann S-D and J Sanden, "Countering Hybrid Eco-threats to Global Security Under International Law":

scenarios, global terrorism, piracy, transnational organised crime, demographic challenges, resources security, retrenchment from globalisation and the proliferation of weapons of mass destruction.²¹ In spite of NATO's 2011 concept of hybrid threats and its visionary look at States it did not go beyond, as in June 2012 the Organization decided to discontinue work on Countering Hybrid Threats.

'Hybrid Warfare' is a term NATO used in 2014 to describe Russian actions in the occupation of Crimea and military activities in Eastern Ukraine.²² NATO's Wales Summit Declaration of September 2014 provides us with a reference to hybrid warfare and its components:

"We will ensure that NATO is able to effectively address the specific challenges posed by hybrid warfare threats, where a wide range of overt and covert military, paramilitary, and civilian measures are employed in a highly integrated design. It is essential that the Alliance possesses the necessary tools and procedures required to deter and respond effectively to hybrid warfare threats, and the capabilities to reinforce national forces"²³

Following this declaration, subsequent publications and announcements by NATO²⁴ seem to indicate that NATO has accepted the reality of facing hybrid warfare.

On 1 December 2015, NATO Secretary General Jens Stoltenberg and

The Need for an Comprehensive Legal Approach", 33 (3) Liverpool Law Review 261 - 289

²¹ The same year 2011, NATO's Headquarters Supreme Allied Commander Transformation (HQ SACT), conducted Experiment'21, supported by the U.S. Joint Forces Command Joint Irregular Warfare Centre (USJFCOM JIWC) and the U.S. National Defense University (NDU). This experiment aimed to 'Assessing Emerging Security Challenges in the Globalized Environment (Countering Hybrid Threats)'. Among its findings we can find the argument hybrid threats faced by NATO and its non-military partners require a comprehensive approach allowing a wide spectrum of responses, including kinetic and non-kinetic, by military and non-military actors. Essential to NATO's planning was the hypothesis that such a comprehensive response will have to be in partnership with State and non-State actors, such as international and regional organisations, as well as representatives of business and commerce. See "Updated List of Tasks for the Implementation of the Comprehensive Approach Action Plan and the Lisbon Summit Decisions on the Comprehensive Approach", dated 4 March 2011, p. 1-10, paragraph 1 cited in S. Bachmann & H. Gunneriusson, 'Russia's Hybrid Warfare in the East: Using the Information Sphere As Integral to Hybrid Warfare', *Georgetown Journal of International Affairs: International Engagement on Cyber V* (2015): 204.

²² NATO *Wales Summit Declaration*, par 13 Sept 2015, at http://www.nato.int/cps/fr/natohq/official_texts_112964.htm?selectedLocale=en.

²³ (n.9).

²⁴ See eg. Davis, J A, "Continued Evolution of Hybrid Threats – The Russian Hybrid Threat Construct and the Need for Innovation",

http://www.jwc.nato.int/images/stories/threeswords/CONTINUED_EVOLUTION_OF_HYBRID_THREATS.pdf.

European Union High Representative for Foreign Affairs Federica Mogherini announced the construction of a new hybrid warfare programme and a new NATO Hybrid Warfare Strategy. Currently, new challenges by Russia and Daesh to alter the Euro-Atlantic security order and the Middle East stability are increasingly performed using Hybrid Warfare means. This has forced NATO to adopt new strategies, which still need to be developed over 2016.

Finally, the fact that Russia is keen on using hybrid warfare (non-linear war or the Gerasimov Doctrine)²⁵ clearly departs from the common conception, or misconception, that this warfare not only includes non-State actors but also States. Today, we have these blatant examples that States, like non-States, find this type of warfare very appealing because it reduces the need for using classical military resources – a reduction in the need to use only kinetic means. Further, and perhaps more significantly, Hybrid warfare provides a layer of ‘fake’ legitimacy, or at least reduces the erosion of apparent legitimacy, due to the non-attributable aspects inherent in hybrid warfare while using ‘easy’ hybrid warfare methods in a malicious manner, like lawfare.

Zeus versus Hades

In a parallelism of the everlasting fight between good and evil represented by Zeus and Hades, lawfare, as the use of law as a weapon, can be Hadesian or Zeusian. This will depend on whether law is used to diminish its principles and protocols or to reaffirm and strengthen them. Lawfare has been traditionally approached as a negative use of law as a weapon, although the correct approach is that lawfare can be used affirmatively to support the rule of law.

Lawfare can be used either in Hybrid Warfare or ‘influence operations’, and it can be defined in several ways. In any case, Kittrie’s test is applicable to qualify as lawfare and may replace the need for a ‘final’ definition:

“(1) the actor uses law to create the same or similar effects as those traditionally sought from conventional kinetic military actions – including impacting the key armed forces decision-making and capabilities of the target; and (2) one of the actor’s motivations is to weaken or

²⁵ P. Pomerantsev, ‘How Putin is Reinventing Warfare’ (2014) *Foreign Policy*, 4 May 2014, <foreignpolicy.com/2014/05/05/how-putin-is-reinventing-warfare/>, 5 October 2015.

destroy an adversary against which the lawfare is being deployed".²⁶

Non-law-abiding actors play the "po zakonu" [by the law], which is a way of taking actions with an appearance of legality.²⁷ In the case of the current situation in Russia and Ukraine, lawfare has its roots in an undefined situation, i.e., the lack of definition of the conflict - international armed conflict, non-international armed conflict, or civil unrest.²⁸ This ambiguous situation creates patent confusion as to the source or paradigm of applicable law and any eventual action to identify and assign legal responsibilities and demand accountability. The same occurs in the case of the 2008 and 2014 wars between Israel and Hamas. Drawing the idea from Bachmann, we can affirm the following with respect to the limits imposed by international law in regular conflicts: i) in the former and in the context of *jus ad bellum*, where Russia denies being an active agent in the conflict, law is evaded and misused; and ii) in the latter and in the context of *jus in bello*, where Hamas uses human shields and protected places, law is ignored or simply dismissed.²⁹

Lawfare not only focuses on *jus in bello*, but also addresses areas relating to the interpretation and implementation of international obligations, as we will see below, which fall in the realm of *jus ad bellum*. In conclusion, 'modern' hybrid warfare and the use of lawfare not only presents challenges to international peace and security, but also undermines current national and international legal frameworks by questioning existing public international law and the rules of the game currently being played.

Given the legal uncertainties arising from the 'fog of lawfare', it becomes apparent the potential role lawfare actually plays in the context of hybrid warfare. Lawfare in this context thrives on legal ambiguity and exploits legal thresholds and fault lines. Applied by an adversary, both State and non-State actors, lawfare can exploit the disadvantages of legal restrictions

²⁶ O. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford University Press, Oxford, 2015), p. 8.

²⁷ G. Lasconjarias, J. A. Larsen, *NATO's Response to Hybrid Threats*, (Rome, DeBooks, 2015) NATO Defense College, p. 117

²⁸ A commonly recognised methodology for defining the nature of conflict was established by the ICTY in *Tadic*. These criteria appear to be inadequate or insufficient to characterise conflicts dominated by hybrid warfare methods, as these are intended to disguise the actual facts. Therefore, the necessary attribution of direction or control in a conflict, which entirely depends on the appreciation and assessment of facts, becomes a 'mission impossible' in hybrid warfare environments where subterfuge dominates the stage. This situation diminishes the authority of International Humanitarian Law and Human Rights Law (and Public International Law in general). International Criminal Tribunal for the former Yugoslavia. *Tadic Case* (Judgment) ICTY-94-1 (26 January 2000).

²⁹ S. Reeves, R. Barnsby 'The New Griffin of War. Hybrid International Armed Conflicts', *Harvard International Review*, (winter 2013), p. 18. See also Bachmann, *supra* note 6, pp. 90-93.

placed upon the compliant actor leading to the emergence of 'asymmetric warfare by abusing laws'.³⁰

Lawfare. Middle East

As we have seen above, an example of Zeusian use of lawfare is the case where NATO launched a media campaign in Afghanistan stating that NATO fighters will not fire on positions if civilians are nearby. The Taliban, in turn, used this campaign to develop tactics by boomeranging NATO's campaign in the form of malicious lawfare. The Taliban, for their benefit and to its military advantage, regularly placed civilians near their positions.³¹ This tactic was extremely disadvantageous for NATO as it strove to communicate its efforts to reduce harm to civilians and civilian objects in accordance with International Humanitarian Law.³²

Another example of pernicious use of lawfare is the case of Hamas during the 2008 and 2014 Gaza wars. The European Union strongly condemned Hamas' calls on the civilian population of Gaza to provide themselves as human shields.³³ During those two wars Hamas' tactic of launching rocket attacks from densely populated areas into Israeli territory was the normal behavior and continuous practice. This amounted to intentionally disregarding International Humanitarian Law and Human Rights Law. In fact, this has to be qualified as a contumelious use of lawfare. This is also extremely disturbing from the standpoint of the principle of reciprocity of International Humanitarian Law. Actually, while this is disturbing it also confirms a trend already highlighted by the International Court of Justice in the *Nicaragua case*³⁴ with respect to a lack of reciprocity in non-regular conflicts.

This malicious employment of lawfare by Hamas and against an adversary governed by the rule of law, increased Israel's need to make much more accurate legal calculations with high doses of precision and judgment.

³⁰ See <http://www.thelawfareproject.org/what-is-lawfare.html> for the term and related discussions.

³¹ Dunlap, *supra* note 12.

³² NATO, in order to avoid any campaign against air strikes arguing that these were being conducted in an unfair, or inhumane manner, used a media campaign with hidden legal content that, in turned, was use by the Taliban as lawfare by placing civilians nearby their positions. "NATO would not fire on positions if it knew there were civilians nearby ... [if] there is the likelihood of even one civilian casualty, we will not strike". C. Dunlap 'Airpower' in T. Rid, T. Keaney (eds), *Understanding Counterinsurgency Warfare: Doctrine, Operations, and Challenges* (Oxon, Routledge, 2010), p. 107.

³³ European Union. 'EU Council conclusions on the Middle East Peace Process', <eu-un.europa.eu/articles/en/article_15300_en.htm>, 5 August 2015.

³⁴ International Court of Justice, *Nicaragua v. United States*, Merits para. 218.

It appears that Israel, concerned by its image among media and world populations, 'overacted' and used lawfare by increasing precautions or warnings in Gaza to unprecedented levels. According to international legal expert, in 2014 Israel forces prevented certain civilian casualties while fighting Hamas. Willy Stern, of Vanderbilt Law School, accounted how Israel sent thousands of telephone calls, leaflet drops, TV and radio messages to Gaza residents, and "calls to influential citizens urging them to evacuate residents, and in doing so gave the terrorist enemy detailed information about its troop movements".³⁵ The entire efforts and realities 'target' the public opinion in order to remove an 'endemic' belief that Israel behaves inhumanely when conducting military operations in Gaza, which has immensely deteriorated its image as a law-abiding state.

The conclusion of some international experts is that the way Israel uses military lawfare is creating a precedent that Hamas-like groups may use to their advantage as Taliban did with NATO in Afghanistan.³⁶ However, since the Israeli behavior aims to remove from public opinion the perception on how Israel conducts and reviews military operations, that advantage may be a short-term one. This manifests the above mentioned conflicting reality, i.e., lawfare employed maliciously versus lawfare employed affirmatively.

First Preliminary Conclusions

These two cases appear to suggest that when lawfare is used in hybrid warfare situations by a party as a "necessary element of mission accomplishment"³⁷, the other party, who considers itself in disadvantage force-wise, will transform any adherence to the rule of law by its adversary into a 'legal boomerang'. This boomerang would carry a piece of Hadesian

³⁵ *Ibid.* Willy Stern: "It was abundantly clear that IDF commanders had gone beyond any mandates that international law requires to avoid civilian casualties".

³⁶ *Ibid.* "Indeed, international legal experts quoted in the article argued that the IDF's actions do go to inappropriate measures, and may end up harming the ability to fight terrorist organizations." Wolff Heintschel von Heinegg, "[the IDF] is setting an unreasonable precedent for other democratic countries of the world who may also be fighting in asymmetric wars against brutal non-state actors who abuse these laws." Michael Schmitt, director of the Stockton Center for the Study of International Law at the US Naval War College, supported that idea that the IDF is creating a dangerous state of affairs that may harm the West in its fight against terrorism. Schmitt said, "[t]he IDF's warnings certainly go beyond what the law requires, but they also sometimes go beyond what would be operational good sense elsewhere ... People are going to start thinking that the United States and other Western democracies should follow the same examples in different types of conflict. That's a real risk". See also M. Schmitt and J. Merriam 'A Legal and Operational Assessment of Israel's Targeting Practices' *Just Security*, 24 April 2015 <www.justsecurity.org/22392/legal-operational-assessment-israels-targeting-practices/>, 12 August 2015.

³⁷ C. Dunlap 'Lawfare: A Decisive Element of 21st Century Conflicts?' *Joint Force Quarterly* (2009), p. 35.

lawfare, which intends to paralyse the adversary or, at least, anesthetise the rule of law and the government/administration structures of that law-abiding adversary. Along these lines, Lin argues:

“[T]errorists are waging lawfare and hijacking the rule of law as another way of fighting, to the detriment of humanitarian values as well as the law itself. Using human shields, abusing international law and post-conflict investigations to blur the line between legitimate counter-terror tactics and human rights violations, lawfare – similar to terror tunnels – is also becoming an effective counter-measure against the superiority of western air power.”³⁸

Drawing the idea from Pfanner,³⁹ in hybrid warfare we could argue that, as a consequence of those using international law and judicial processes weakly and rhetorically, International Humanitarian Law and Human Rights Law may become inapplicable, as it provides only partial answers. Moreover, this inapplicability may also be anchored in the idea that abiding by the law may also become inconsistent with perceived interests of the warring parties.

However, two points need to be remarked. First, this understanding would be equivalent to abandoning the legal battlespace to those who deny the rule of law. In this vein, Dunlap considers that “lawfare is more than something adversaries seek to use against law-abiding societies; it is a resource that democratic militaries can — and should — employ affirmatively.”⁴⁰ Bilsborough argues that this employment must be done by “map[ping] the contours of international law (particularly the law of armed conflict) and structure their operations accordingly”.⁴¹ Thus, there is room for a Zeusian use of lawfare.

The lesson learned is that in order to prepare military operations within the contours of international law, using lawfare affirmatively, politicians and commanders alike need to train, before any actual conflict, difficult and complex legal scenarios with major and lasting impact, on internal and external public opinions. These scenarios will have: i) short-lead response time

³⁸ C. Lin ‘Israel, China, and US/NATO – Counter-Terrorism as War Crimes?’ *ISPSW Strategy Series: Focus on Defense and International Security*, (Issue 287) September 2014, p. 1.

³⁹ T. Pfanner ‘Asymmetrical warfare from the perspective of humanitarian law and humanitarian action’, *International Review of the Red Cross*, Vol. 87, No. 857, p. 165.

⁴⁰ Dunlap, *supra* note 21.

⁴¹ S. Bilsborough ‘Counterlawfare in Counterinsurgency’, *Small War Journals*, 14 December 2011, p. 2.

to prepare a sound moral and legal case for forces intervention; ii) high political consequences; iii) likely future court review; and iv) intervention of international organisation⁴² infiltrated by Hadesian lawfare practitioners, as well as NGOs,⁴³ and multinational companies.⁴⁴ Consequently, the shaping of the legal battlespace requires drafting contingency plans and conducting exercises based on those premises.

Secondly, we must never forget that public opinion is malleable. For this reason alone, we cannot afford to think naively and argue that lawfare has to rely exclusively on its legal paradigms; the legality and legitimacy of [military] action are first and foremost subject to scrutiny of public opinion. Consequently, any successful counter-lawfare action, or Zeusian use of lawfare, against 'boomerangs' must not be limited in scope, but comprehensive and holistic, as it will have to aim at establishing the right perceptions among the internal and external public opinions.



A Ukrainian serviceman operates a drone during a training session outside Kiev, November 6, 2014. © REUTERS

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Lawfare. Russia

After the breakup of the Soviet Union, Ukraine agreed to transfer the nuclear weapons to Russia and in return it asked for security assurances. In

⁴² "[T]he PA and its allies have turned numerous international organizations into lawfare battlegrounds. As a result, one international organization (UNESCO) has been weakened by having its budget slashed, and another (the UN Human Rights Council) has been largely diverted from accomplishing its original mandate", in O. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford University Press, Oxford, 2015), p. 339.

⁴³ Palestinian Centre for Human Rights, <www.ngo-monitor.org/article/ngo_lawfare>, 21 February 2016.

⁴⁴ As targets, note the hacking of Sony before the premier of 'The Interview', <www.lawfareblog.com/sony-hack>, 20 February 2016. As weapons, *Linde v. Arab Bank*, <www.osenlaw.com/case/arab-bank-case>, 20 February 2016.

1994 the so-called Budapest Memorandum⁴⁵ was signed by Ukraine, United States, Russia and United Kingdom. In that memorandum, the parties agreed to “respect the independence and sovereignty and the existing borders of Ukraine” and “refrain from the threat or use of force against the territorial integrity or political independence of Ukraine.”

Russia, in March 2015, argued that any allegation of Russia's violation of its international obligations under the 1994 Budapest Memorandum would show that the text of the agreement had not been read by those alleging Russian involvement in the events in Crimea and Eastern Ukraine. The Russian Ministry of Foreign Affairs emphasises that:

In the memorandum, we also undertook to refrain from the threat or use of force against Ukraine's territorial integrity or political independence. And this provision has been fully observed. Not a single shot was fired on its territory during which, or before, the people of Crimea and Sevastopol were making crucial decisions on the status of the peninsula. The overwhelming majority of the population of Crimea and Sevastopol, in a free expression of their will, exercised their right to self-determination, and Crimea returned to Russia. As for the ongoing attempts to accuse us of military interference in the events in southeastern Ukraine, the authors of these claims have not presented a shred of conclusive evidence yet.

Furthermore, neither in the Budapest Memorandum, nor in any other document, has Russia pledged to force a section of Ukraine to remain as part of the country against the will of the local population. The loss of Ukraine's territorial integrity has resulted from complicated internal processes, which Russia and its obligations under the Budapest Memorandum have nothing to do with.⁴⁶

Reading this official Russian statement in conjunction with the official text of the 1994 Budapest Memorandum, we can easily identify a misinformation campaign. The statement mixes specific characteristics of hybrid warfare, namely denial - “Not a single shot was fired on its [Ukraine] territory during which, or before, the people of Crimea and Sevastopol were

⁴⁵ United Nations Document A/49/765, S/1994/1399, 19 December 1994, <www.cfr.org/nonproliferation-arms-control-and-disarmament/budapest-memorandums-security-assurances-1994/p32484>, 12 August 2015.

⁴⁶ The Ministry of Foreign Affairs of the Russian Federation, Foreign Ministry Spokesman Alexander Lukashovich answers a media question about the situation around the Budapest Memorandum, 12 March 2015, <archive.mid.ru//brp_4.nsf/0/CC1C845CAA26D5A043257E07004BF6EB>, 12 August 2015.

making crucial decisions on the status of the peninsula” – with deliberate disinformation regarding the scope of existing treaty obligations, thus creating deliberately confusion of the public opinion. This outcome is the result of using lawfare affirmatively, or maliciously, by Russia in a very effective way.

Second Preliminary Conclusions

The malicious use of lawfare negates the validity of treaties and voids the inherent principle of international law's *pacta sunt servanda*, qualifies as concept of treaty abuse, as a special case of the concept of *abus de droit*.⁴⁷ This concept of 'abuse of right' relates to situations, where states or international organisations [or other subjects of international law], as parties to an international agreement, interpret and apply its provisions depending on the particular circumstances in order to benefit from such a deviation. In this context, the parties not applying the agreement can claim circumstantially that the other party exercises the agreement's provisions abusively.

The practice of treaty abuse constitutes an incorrect use of the agreement, notwithstanding the violating party's 'justifications' to the contrary. Moreover, the incorrect use of an international agreement cannot be justified by the legal discretion⁴⁸ given by international law makers to those applying it, as that discretion is not absolute. The limits of discretion are justified by the principle of good faith. In this regard, the International Court of Justice in the *Oil Platform* case established that:

“[t]he Court recalls that, according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.”⁴⁹

In international law the principle that “good faith prevails” is paramount, and it is described in international relations as ‘... idea[s] of community, tolerance, and trust, the basic prerequisites for the development of international law.’⁵⁰ Thirlway argued that “[w]here an obligation, legal or

⁴⁷ M. Byers 'Abuse of Rights: An Old Principle, A New Age', (2002) *McGrill Law Journal*, Vol 47, pp. 397-404.

⁴⁸ H. Thirlway 'The Law and Procedure of the International Court of Justice, 1960-1989, Part One', (1989) 60 *BYIL* 4, p. 25.

⁴⁹ International Court of Justice, *Islamic Republic of Iran v. United States of America* (Preliminary Objection, Judgment) 12 December 1996, p. 812.

⁵⁰ David Bederman, *International Law in Antiquity* (Cambridge Press University, New York, 2001), p.137.

conventional, is defined by specific words, good faith requires respect not only for the words but also for the spirit".

Good faith underpins all cross-border relations among states as the *sine qua non* of any *pacta sunt servanda*. In this regard, 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.'*⁵¹

At this point, we would like to affirm our view that the deliberate non-appliance of good faith when implementing international agreements amounts to the use of lawfare negatively. However, this can be argued only if the following conditions⁵² are met:

- a) Although the action may be permitted by the international agreement, it renders the purpose of the agreement null and void;
- b) Although the action may be based in the interpretation rules established by Articles 31-33 of the 1969 Vienna Convention of the Law of the Treaties, the understanding is clearly unfounded; and
- c) Although the actions may be difficult to characterise as breaches of an international obligation, the party in breach describes the facts rhetorically using legal arguments that clearly demean it.

In support of these criteria, one can argue that the situation in Ukraine shows that Russia has engaged in hybrid warfare not only against Ukraine, but also against NATO and its member States by distorting international law. An example is President Putin's declaration that Russia intervened, under international humanitarian law, "to defend the rights of Russian-speakers living abroad". These commentators present Russia's abuse of law and argue that any Russian claims to its having the right of intervention in Ukraine under international humanitarian law must prove "the urgent humanitarian catastrophe it seeks to avert and why there is no alternative to its action ... [i]t should not act by stealth and revert to the "big lie", denying that its forces are

⁵¹ 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, p. 228.

⁵² The idea is drawn from U. Linderfalk 'The Concept of Treaty Abuse: On the Exercise of Legal Discretion'. Final Draft Version, dated 17 November 2014, p. 37, <papers.ssrn.com/sol3/papers.cfm?abstract_id=2526051>, 20 August 2015.

engaged, denying that its missile units shot down Malaysian airliner MH17, and pretending to be the peacemaker".⁵³

Voyger in support of the above argues that "[w]hile Russia is not in control of the entire international legal system, and thus not fully capable of changing it 'de jure', it is definitely trying to erode its fundamental principles 'de facto'." He also presents his argument with relevant examples of how Russia uses lawfare extensively and in its different approaches to lawfare in order to give a sense to Gerasimov's doctrine:

- a) Modification of internal laws to affect external territories: "bill amendment on the incorporation of territories of neighbouring states providing for the annexation of regions of neighbouring states following popular local referenda (FEB-MAR 2014)";
- b) Citizenship: "citizen law amendment using residency claims dating back to USSR and Russian Empire to grant current Russian citizenship (APR 2014)";
- c) Passports: "the practice of giving away Russian passports to claim the presence of Russian citizens in neighbouring regions (Abkhazia, South Ossetia, Crimea);
- d) Misuse of United Nations Security Council: "the attempts to use the UN SC to sanction potential Russian opening of "humanitarian corridors".
- e) Use of 'fake' internal legal proceedings: "the sentencing of Ukrainian officials *in absentia* by Russian courts"; and
- f) Misleading use of the term "peacekeeping": "the vigorous propaganda fabricating a legal case to justify the sending of Russian "peacekeeping forces" into East Ukraine to prevent "a humanitarian catastrophe" or "a genocide" against Russian speakers".⁵⁴

The above shows Russia is currently using lawfare maliciously with the aim of confusing public opinion by debasing law. The interpretation of international agreements in a circumstantial manner amounts to lack of good faith, which ends up being an *abus de droit* and can give rise to state

⁵³ See eg E. Buckley, I. Pascu 'NATO's Article 5 and Russian Hybrid Warfare' (17 March 2015), <www.atlanticcouncil.org/blogs/natosource/nato-s-article-5-and-russian-hybrid-warfare>, 17 August 2015.

⁵⁴ M. Voyger, 'L-Element of RUS Comprehensive Strategy', NATO Land Command Izmir LAND POWER magazine, Spring 2015, Volume 1, Issue 2, page 20

responsibility,⁵⁵ in the case of Russia or States supporting non-state actors. On this point, more longitudinal studies on other fundamental elements of international responsibility are required to produce empirical data and observations in support of the argument that those using malicious lawfare, amounting to *abus de droit*, bear responsibility for internationally wrongful acts.

Final Conclusion

The main conclusions of this paper is that unscrupulous and malicious use of lawfare by State and non-State actors must not discourage law-abiding international actors from continuing to act in compliance with international law. Actors using lawfare affirmatively will give the political and military leadership the necessary room to fine-tune the planning and conduction of military operations using all instruments of power and reflecting on anticipated lawfare by the opponent. Affirmative use of lawfare as counteraction of Hadesian lawfare has extreme limitations in terms of time, space and applicable procedures. Law-abiding actors will be confronted with short-lead times for political decision-making and military planning based on incomplete intelligence and open-source information, an incommensurate broadness of the battlespace – tangible and virtual, and the ‘dictates’ of compliance with the rule of law, in order to follow democratic procedures and be subject to court review and the scrutiny of the public opinion. Moreover, law-abiding actors will also confront both international organisations to which they belong and which have been ‘infected’⁵⁶ by Hadesian Lawfare and international tribunals used by non-law-abiders who know the non-intuitive nature of international humanitarian law⁵⁷. This requires a comprehensive legal approach and broader legal interoperability, which includes the use of affirmative lawfare.

Zeusian lawfare can be used in an offensive manner (extra warnings, targeting recording, sanctions) or defensive manner (media training on selected topics, safeguarding of inquiry processes, information liaison with courts) against an opponent who is prone to ignoring the rule of law. In this

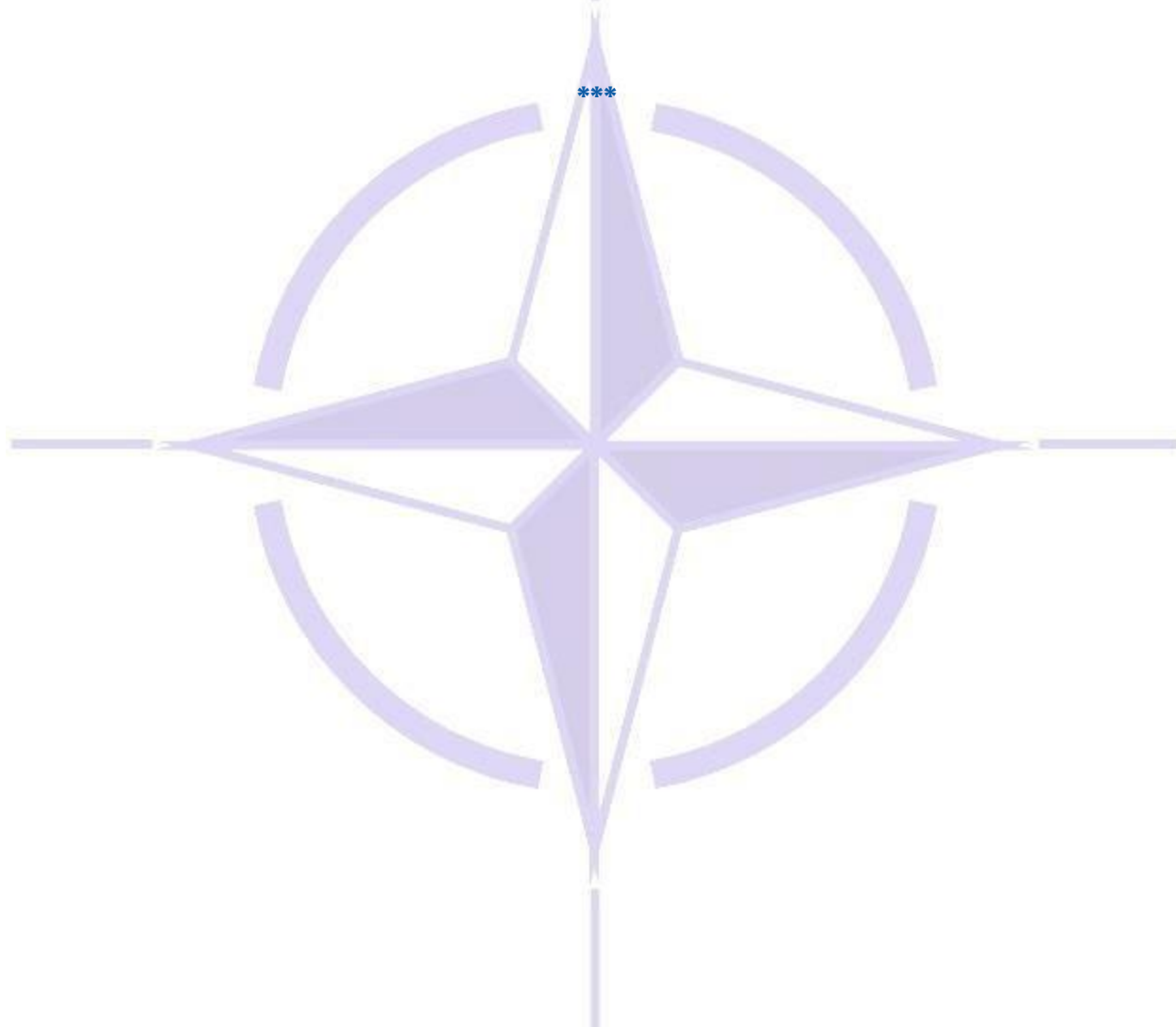
⁵⁵ ‘1075th Meeting’, Yearbook of the International Law Commission 1970, vol. 1 (New York: United Nations, 1971) 181 at para. 40. See also the Articles on Responsibility of States for Internationally Wrongful Acts 2001, <legal.un.org/avl/ha/rsiwa/rsiwa.html>, and the Articles on the Responsibility of International Organizations New York, 9 December 2011, <legal.un.org/avl/ha/ario/ario.html>, 19 August 2015.

⁵⁶ O. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford University Press, Oxford, 2015), p. 339.

⁵⁷ *Ibid.*, p. 215.

context, lawfare requires extensive pre-planning and continuous training of their uses in order to convince with sound arguments the political (and military) leadership in support of lawfare counter-actions to neutralise the malicious application of law.

Lawfare has just started taking up a central role in hybrid warfare. It opens a broad spectrum for specialist and collaborative research by both academia and practitioners. Law-abiding actors when in an armed conflict must govern their actions by the rule of law. For that reason, Zeus must pilot the use of lawfare.





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Hybrid Warfare, a new challenge to the Law of Armed Conflicts?

by Jean-Michel BAILLAT¹

The nature of the subject would no doubt require treatment from a wider perspective than the Law of Armed Conflicts (LOAC). Such a title as “Hybrid Warfare and International Law” would be more adapted to the scope of the matter. However the dimensions of the present article remain modest and, as a consequence, it will be restricted to the field of LOAC. Anyhow, one should probably start by first enquiring: “What is meant by “Hybrid Warfare””?

What is “hybrid warfare” (HW)?

Although the phrase can be traced back at least as far as 2005, it was popularized by numerous press articles on the Ukraine conflict, including its phases prior to the annexation of Crimea. On this occasion, it has also been consecrated by NATO (see for instance NATO Secretary General Mr. Jens

DISCLAIMER: The views expressed in this article should be considered as the author’s own. They cannot be construed as expressing NATO’s position

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Stoltenberg's address to NATO Parliamentary Assembly, 24 November 2014)².

The HW concept is particularly appropriate to characterize Russia's stealthy destabilising of Ukraine. Russia's annexation of Crimea and its ongoing aggression, direct and through proxies, in Eastern Ukraine constitutes a breach of international law. Still, well beyond the current Ukraine situation, the phrase may indeed apply to a range of actions that are being witnessed in most contemporary conflicts, where peace and crisis are no longer divided by clear-cut lines : "asymmetric warfare" was already blurring the lines between peace and war. Following the United Nations (U.N.) Charter's prohibition of the use of force as a means of settlement of international disputes, "war" had already become "conflict". Now "conflict" turns to "hybrid warfare".

HW covers a range of unconventional efforts designed to destabilise a State and foster internal conflicts. It is comprised of a combination of military and non-military means for overt and covert operations, propaganda, creation of Non-Governmental Organisations (NGOs), disrupting administrations, public life, furtive methods to encourage dissent, on up to the provision of weapons and direct use of force. Unlike conventional warfare, that targets the forces (or should target them, in accordance with the LOAC), 'the "centre of gravity" in HW is the population. The adversary tries to influence policy-makers and key decision makers by combining kinetic operations with subversive efforts. The aggressor often resorts to clandestine actions to avoid attribution or retribution'³

HW may include, but is not limited to:

- Cyber-attacks (e.g. Estonia 2007). "While they may not involve direct physical damage, the resulting system malfunctions can be devastating⁴." CNE Computer network exploitation (CNE) is a technique through which computer networks are used to infiltrate target computers' networks to extract and gather information, namely "the ability to gain access to information hosted on information systems and the ability to make use of the system itself". CNE, though not of a direct destructive nature, could have equally significant military

² http://www.nato.int/cps/en/natohq/opinions_115098.htm

³ Peter Pindják, Deterring hybrid warfare: a chance for NATO and the EU to work together?, NATO Review, 18 November 2014.

⁴ ICRC, Third Expert Meeting on the Notion of Direct Participation in Hostilities, Geneva, 23 – 25 October 2005.

implications. CNA stands for "computer network attack." This includes actions designed to destroy or otherwise incapacitate enemy networks. That is -- among other things -- sabotage. When causing military harm to the adversary in a situation of armed conflict CNE and CNA may be regarded as part of the hostilities (International Committee of the Red Cross, ICRC, Report on Direct Participation in Hostilities (DPH), 2005, p. 14, see note 2).

- Information campaigns;
- Use of proxies (e.g. Ukraine pro-Russian separatists);
- Special forces under anonymity (Crimea and the "little green men");
- Use of humanitarian assets to provide support to a Party to a conflict (Georgia 2008, Ukraine 2014);
- Facilitating or inducing the use of force, including through the provision of indiscriminate weapon systems.

The essence of HW is to confuse both political and legal analysis. This makes it imperative that we try to determine whether such proceedings may be assessed as illegal.

Is hybrid warfare contrary to the LOAC?

Let us take a look at information campaigns for instance. These have long been utilised. Strategic communication is by nature a military-civilian activity and, but for exceptional cases⁵, cannot be adequately addressed by LOAC: it would rather fall under laws on the non-interference with the press and possibly International Human Rights Law.

The use of proxies – i.e. various groups, armed or unarmed, to disguise the action of a foreign State – is not new either. Indeed, the International Court of Justice has issued its famous decision on State responsibility based on the US activities in Nicaragua, 1986⁶. Yet it seems more of a concern for *jus ad bellum* than for LOAC. It is a question of whether the state behind the proxies really exerts control over the territory of the other Party, and therefore whether the conflict is an international armed conflict or not.

Little Green Men⁷: the troops that took over Crimea were in uniform but

⁵ In relation to the genocide in Rwanda, the broadcaster of Radio Mille Collines was convicted of grave breach of LOAC, Prosecutor v. Georges Ruggio, ICTR-97-32-I.

⁶ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) ICJ 1986.

⁷ For further analysis and pictures, see SACEUR blog, 11 March 2014, The Importance of Identity, <http://www.aco.nato.int/saceur2013/blog/the-importance-of-identity.aspx>

had no badges or other forms of identification. Still it was well known that some of them were Russian marines based in Sevastopol⁸. Trucks and armed vehicles in Ukraine had their number plates disguised too, though some of the coverings fell off, revealing them to belong to the Russian army. Russian President Vladimir Putin in the first place refused to confirm they were Russian regulars and suggested they were spontaneous groups who could have acquired the uniforms from army surplus stores. Then in April 2014, he acknowledged that they were Russian troops⁹.

Is the absence of a military uniform contrary to the LOAC? Additional Protocol I to the Geneva Conventions, under art.44, para.7 provides: "In accordance with the generally agreed practice of States, members of regular armed forces shall wear their uniform." It is a "generally agreed practice" and therefore not mandatory. What does appear mandatory is that "combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack". In fact, uniforms bear a primary function of identification. The military uniform plays an important part in meeting the LOAC fundamental requirement for distinction. The Geneva Conventions and Protocols do not deny prisoner-of-war status on the basis that combatants of a regular force have failed to wear a uniform. Uniformed or not, they do remain combatants. But, when not wearing uniform, members of regular armed forces can possibly violate the requirement for distinction from the civilian population. However in the case of Ukraine they were definitely wearing distinctive signs and could not possibly be mistaken for civilians. There was no blatant violation of LOAC.

The Organization for Security and Co-operation in Europe (OSCE) repeatedly complained about difficulties in monitoring Russian so-called humanitarian aid in Ukraine¹⁰. Now, would it be perfidy to use Humanitarian Convoys in support of one Party to the conflict? Indeed, usurping the insignia of protection of the medical personnel to participate in an attack amounts to a crime of perfidy. It is a serious violation of the LOAC. Therefore, using

⁸ As such, it has been argued that Russian annexation of Crimea was first a breach of the Black Sea Fleet Status of Forces Agreement: The Case of Ukraine and the Black Sea Fleet SOFA, by Aurel Sari - See more at: <http://opiniojuris.org/2014/03/06/ukraine-insta-symposium-breach-status-forces-agreement-amount-act-aggression-case-ukraine-black-sea-fleet-sofa/#sthash.Z03j6l76.dpuf>

⁹ See the TV broadcast on <http://www.youtube.com/watch?v=XhC66DR4BVw>

¹⁰ See for instance UNSC Security Report, 5 June 2015, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7457.pdf

humanitarian convoys to benefit from the protections of LOAC and support attacks during a conflict could be deemed illegal. To determine what could be considered as supporting an attack, we should first analyse the conditions of direct participation to the conflict, as described in the ICRC report on DPH (see note 2).

Derived from Common Article 3 to the Geneva Conventions, the notion of “taking a direct or active part in hostilities” (DPH) may be found in many provisions of the LOAC. In non-international armed conflict, for instance, organised armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”).

To be so characterised, DPH must meet the following cumulative criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm). For example, short of the killing and wounding of military personnel or the causation of damage to military objects, the military operations or military capacity of a party to the conflict can be adversely affected by sabotage and other armed or unarmed activities restricting or disturbing deployments, logistics and communications. Adverse effects may also arise from capturing or otherwise establishing or exercising control over military personnel, objects and territory to the detriment of the adversary. Electronic interference with military computer networks could also suffice, whether through computer network attacks (CNA) or computer network exploitation (CNE), as well as wiretapping the adversary’s high command or transmitting tactical targeting information for an attack.
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation).
3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus). Where a specific act does not directly cause *per se* the required threshold of harm, the requirement of

direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm. Examples of such acts would include, *inter alia*, the identification and marking of targets, the analysis and transmission of tactical intelligence to attacking forces, and the instruction and assistance given to troops for the execution of a specific military operation.

Thus, driving an ammunition truck to support an active firing position at the front line would almost certainly have to be regarded as an integral part of ongoing combat operations and, therefore, as direct participation in hostilities. The only drawback is that, of course, in the absence of monitoring, the use of humanitarian convoys to carry ammunition or directly support combat positions is very difficult to prove: This is the zest of hybrid warfare. It creates ambiguity that allows for State action across national borders to avoid direct international law violations.

Let us now turn to the use of indiscriminate weaponry: namely GRAD rockets, a type of multiple-launch rocket system. A recent Human Rights Watch (HRW) report¹¹ called on all parties to the conflict in Ukraine to stop using GRAD rockets in or near populated areas because of the likelihood of killing and wounding civilians. HRW considers that:

GRAD rockets cannot be targeted with sufficient precision to differentiate military targets ... from civilians and civilian structures..., which are immune from attack. As such, their use in populated areas violates the laws-of-war prohibition against indiscriminate attacks.

Yet GRAD rockets are not specifically prohibited by any treaty. What is prohibited falls under customary International Humanitarian Law (IHL). It is the use of 'weapons which are by nature indiscriminate' (Rule 71, ICRC, Customary IHL study¹², 2005). There is, however, no common agreement on which weapons concretely, if any, should be deemed 'indiscriminate weapons' whose use would be prohibited, *inter alia*, on this basis.

According to the ICRC, the two criteria most frequently cited to determine what is an indiscriminate weapon are 'whether the weapon is capable of being targeted at a military objective and whether the effects of

¹¹ See HRW Annual Report 2015 and <https://www.hrw.org/news/2014/07/24/ukraine-unguided-rockets-killing-civilians>

¹² <https://www.icrc.org/customary-ihl/eng/docs/home>

the weapon can be limited as required by international humanitarian law'. These criteria are drawn from the prohibition on indiscriminate attacks, which are described in Article 51(4) of 1977 Additional Protocol I to the Geneva Conventions.

The prohibition on indiscriminate attacks is, however, silent on what means of combat are deemed sufficiently dirigible or limited in their effects. In its customary IHL study, the ICRC notes that weapons cited in practice as being indiscriminate in certain or all contexts include Scud missiles and Katyusha rockets. The GRAD, the most widely used multiple barrel rocket launcher in the world, is conveniently not mentioned.

We will not enter into that discussion: In the absence of a weapon-specific treaty, we are unable to definitively assess the legality of any weapon under international law.

What interests our subject here though, in order to finalise this examination of HW with regard to LOAC criteria, is to observe that when it comes to means and methods of combat, there is nothing new under the sun: In other words, a supposedly new method like so-called hybrid warfare may be addressed with "classical" tools from the LOAC such as the good old principles of distinction, humanity etc., mitigated with military interest and avoidance of unnecessary suffering. The only courses of action in hybrid warfare that would escape the net of LOAC norms are ones that would fall not under international law, albeit remain governed by the domestic body of law.

Actually one could infer that the problem with hybrid warfare does not reside in its capacity to set new challenges to the LOAC. The LOAC in its current state, especially the Additional Protocols and Customary Law, is perfectly apt for implementation within any type of conflict. The difficulty rather lies with characterisation of the type of conflict caused by HW. Various rules will apply according to the international or non-international type of the armed conflict. HW might even create doubts as to whether the armed conflict would exist as such, or would remain at the stage of internal tensions. The aim of HW consists precisely of blurring the basic limits drawn by the law, thus rendering uncertain the legal recourse.

For that very reason, it is of the utmost importance to respond to HW within a clear legal framework.

How to tackle HW and stay within legal boundaries?

Everyone remembers Clausewitz's famous opinion that war is the continuation of politics by other means. HW also, with the deliberate ambiguity of its modes, is nothing but a mix of war and politics:

"To counter irregular threats, hard power alone is insufficient. Regardless of how rapid a response may be, deploying military force to an area swept by hybrid warfare will turn out as "too little too late". Too often, the conflict evolves under the radar. Finally, a deterrent built upon military force alone will not be credible.¹³"

Therefore any response to HW should also embed a large scope of courses of action, military as well as civilian. The best response to a mix of war and politics is a mix of political and military action.

Political moves include, for instance, a round of EU statements and positions, including non-recognition of Crimean independence, sanctions, financial aid to Ukraine, and efforts to reduce dependence on Russia for energy supplies. Five trust funds were created by NATO to help Ukraine improve its own security. "They aim to make Ukraine's defence forces more modern, more transparent, and more effective", the Secretary General said¹⁴. NATO's contributions are in addition to bilateral support provided separately by Allies.

Military response is envisaged on NATO's web: the Readiness Action Plan is part of the organisation's adaptations. It includes notably Training and Exercises: Coordinating and directing training to address HW, shaping exercises as a response to HW threat. HW, together with cyber-defence, is one of the important aspects of the Trident Juncture 2015 exercise. NATO tested its capability to counter aggressive propaganda from a fictitious enemy via classic communications means (e.g. TV) and contemporary means (social networks).¹⁵ One of the key decisions made at the NATO 2014 Wales Summit was to implement a rapid response force called the Very High Readiness Joint Task Force – the VJTF. VJTF deployment induces the establishment of an appropriate multinational command and control presence on the territories of the Eastern Allies.

¹³ Peter Pindják, Deterring hybrid warfare: a chance for NATO and the EU to work together?, see note 1.

¹⁴ NATO Secretary General to the UKR Prime Minister, 15 December 2014. NATO support to Ukraine, see: http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2015_06/20150624_1506-Factsheet_PracticalSupportUkraine_en.pdf

¹⁵ Press briefing by the NATO Spokesperson together with the Commander of JFC Brunssum and the Chief of Staff of Allied Command Transformation, July 2015.

Not so publicised but easily guessed is a response that might include Intelligence: NATO is “sharpening up [its] intelligence sharing and early-warning mechanisms”, as Deputy Secretary General Alexander Vershbow recently put it¹⁶. Also foreseeable is some kind of use of the Special Forces, building on their experience in counter-terrorism that could extend to cooperation in the field of law-enforcement.



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Civilian emergency planning could even be tailored to hybrid threats: States that appear vulnerable to destabilisation can adopt measures to increase the resilience of their security sectors in advance. The concept of Security Sector Reform (SSR), embedded in UNSC (United Nations Security Council) Resolution 2151¹⁷ offers a framework that could be used in that respect. SSR aims to strengthen a State's ability to provide public safety and secure the rule of law, while embracing transparency and accountability. This includes development of guidance and civilian capacities, coordination mechanisms, and collaboration with regional and sub-regional organisations.

Finally, focusing on the juridical domain, specific responses remain available, of which some have already referred to as “lawfare”.

The European Court on Human Rights (ECHR) has already received inter-

¹⁶ NATO Parliamentary Assembly Spring Session, Budapest, Hungary, 18 May 2015.

¹⁷ S/RES/2151 (2014), 28 April 2014, <http://unscr.com/en/resolutions/2151>

state applications from Ukraine.¹⁸ In addition to those, more than 160 individual applications are pending before the Court. Justice Minister Pavlo Petrenko announced in August 2015 that Ukraine was finishing the preparation of the fourth lawsuit filed with ECHR against Russia. It will concern the violation of human rights in annexed Crimea, including alleged persecution of the Crimean Tatars and other indigenous ethnic groups, as well as violations of the right to free elections. Obviously the 14 July 2015 judgment of the Constitutional Court of the Russian Federation, which states that the European Convention on Human Rights and the judgments of the ECHR cannot 'annul the precedence of the Constitution' will need to be addressed.

The International Criminal Court (ICC) may investigate and prosecute the case of the shooting down of the airliner MH17. It has stated that it closely follows the progress of the current national investigations, particularly following the release of the report by the Dutch Safety Board that found that a warhead fired from a Buk missile system caused the crash. Although Ukraine has not yet ratified the statute of the ICC, it could refer the case to the Court pursuant to Article 12(3) of the Rome Statute. This provision allows states that are not party to the Rome statute to accept the jurisdiction of the Court on an *ad hoc* basis absent full ratification, even retroactively. Ukraine has already relied on this Article to accept ICC jurisdiction for events that occurred in Ukraine between 21 November 2013 and 22 February 2014.

On the whole, it seems that HW does not present so much of a new challenge to LOAC: The personal view of the contributor is that changes in the LOAC should not be viewed as a response to that threat – although new developments in the field of Customary International Law, such as the doctrine on Direct Participation to Hostilities, will of course be core to an adequate treatment of the issue.

¹⁸ Two inter-State applications have been lodged by the Government of Ukraine against the Russian Federation under Article 33 ECHR (Inter-State cases) on March 13th and June 13th 2014. The ECHR extended the time for Russian government official comments regarding Russia's actions in the Donbass and Crimea up until September 25th, 2015.



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

by Andrés B. Muñoz Mosquera¹

*'Sur la prétendue primitivité du droit international nous croyons que la réalité mérite davantage de respect que la théorie.'*²

Part I: Recapitulation

In Part I³ of this article, we acknowledged that the increasing use of the MOU formula could trigger a quite stimulating debate among practitioners and academia. On the other hand, we also learned that international institutions, in the exercise of their legal personality, have fostered, by means

* DISCLAIMER: The views and opinions of the author expressed herein do not state or reflect those of NATO. All references made to NATO documents are open source and can be found on the Internet.

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² “ ‘On a pretending International Law primitivity, we think that reality deserves advantage with respect to theory’ Emmanuel Decaux, ‘Le droit international en devenir – Essais écrits au fil des ans – Michel Virally’, *Politique Etrangère* (1990) 55/2, at 425. (paraphrased)

³ A. B. Munoz Mosquera, ‘Memorandum Of Understanding (MOU): A Philosophical and Empirical Approach (Part I)’ (2014) *Nato Legal Gazette*, 34, at 55-69,

http://www.act.nato.int/images/stories/media/doclibrary/legal_gazette_34a.pdf

and www.ismllw.org/NATO%20LEGAL%20GAZETTE/Legal%20GazetteIssueNo%2034.pdf, 10 May 2015.

of their implied powers, intra and inter-institutional practices that use MOUs as a protuberant instrument. These practices take place not only inter-States, but also intra and inter-institutions of international character – international organisations. In this vein, we have also seen in the previous Part, that MOUs have their place in international law and international relations, and that they are a clear contribution, *inter alia*, to international institutional law development.

On this note, the functionality of MOUs rest on the principle of good faith, which per definition creates legitimate expectations among participants. On the other hand, these legitimate expectations trigger a sort of duty that, if breached may consequently lead to potential legal effects, that are different from the legal obligations that emanate from the breach of treaty provisions. This is why even if MOUs are generally considered non-binding instruments, the principle of good faith presents them as a conduit to interpret, inform, implement or supplement other - and superior - binding legal rules.

This provides the nucleus for MOUs' characterisation, which permits seeing them – with certain flexibility – as normative standards among MOU participants. These participants, as members of a partner-specific community, could claim within that restricted community the legal effects of the agreed provisions.

Yet in the MOU realm, there is self-restriction to address the potential judicial consequences, if there are ever any, of breaching the provisions of an MOU and eventually the legitimate expectations created by the MOU. An MOU may not be the direct object of the dispute, however, courts will have little choice but to take a comprehensive approach towards the facts, and the agreements and arrangements among participants, in order to produce a judgment structured in space and time.

In the next sections we will discuss both the characterisation of MOUs and how national or international courts view them. Moreover, we will dedicate the last section to assist practitioners by developing a commented MOU structure.

MOUs Characterisation

The NATO Legal Deskbook briefly characterises MOUs as follows:

“The form of MOU is frequently used to record informal arrangements

between States on matters which are inappropriate for inclusion in treaties or where the form is more convenient than a treaty (e.g. for confidentiality). They may be drawn up as a single document using non-treaty terms, signed on behalf of two or more governments, or consist of an exchange of notes or letters recording an understanding reached between two governments, or a government and an international organization. MOUs usually do not require ratification. However depending on the content and the agreement between the Parties on the nature of the document, MOUs can be subject of a certain level of domestic ratification...NATO, in general, concludes MOUs in numerous occasions. MOUs are a very flexible and adaptable instrument to record the will of entities with legal personality to achieve practical results that do not amount to treaty obligations.”⁴

How are MOUs practiced? There are several ‘schools’ of practice that nations and international organisations have developed, with different references to this practice in the British-law influential area⁵, continental European states and the United States.⁶ Aust highlights that in all of these areas, MOUs are considered ‘agreements without legally-binding force’ and refers to the European Commission document PESC/SEC 899 of 9 August 1996 to support his argument. Aust also admits that in certain circumstances non-binding becomes binding.⁷ However, practice shows that states have different approaches depending on their political approach to the topic or topics addressed in specific MOUs.⁸

At this point, it is relevant to note the process for creating MOUs at NATO, a ‘classic’ international organisation practicing intergovernmentalism. At NATO, during the decision making process, members may reaffirm their sovereignty⁹, several times, by supporting or opposing the existence of an

⁴ NATO Legal Deskbook (2010), at 127. <publicintelligence.net/nato-legal-deskbook/>, 10 May 2015.

⁵ ‘Non-binding International Instruments’ and its Annex C. Canada Treaty Information

⁶ United States Department of State: ‘Guidance on Non-Binding Documents’, <www.state.gov/s/l/treaty/guidance/>, 7 May 2015.

⁷ Anthony Aust, ‘Alternatives to Treaty-Making: MOUs as Political Commitments’, in D. Hollies (ed.), *The Oxford Guide of Treaties* (2012), at 54-58.

⁸ States in a multilateral environment behave differently either due to political views on the topic addressed or due to obligations under their national legislation due to the content of the MOU. Non-attributable.

⁹ “[S]overeignty is not a monolithic prerogative and, is therefore, permeable, either on a voluntary basis by consent, or, in more extreme circumstances, by force. With regard to the former manner, the quid pro quo principle normally applies. Be that as it may, states often are willing to “surrender” some portions of their sovereignty in exchange for, *inter alia*, economic benefits, security, etc.” in A. B. Munoz Mosquera, ‘Host Nation Support Arrangements: the NAC-approved Military-to-Military Legal Tools’ (2011), *NATO Legal Gazette*

MOU in their collective realm. One wonders if in the process of creating MOU organisations or simple MOU initiatives there is any other international organisation in the world that gives its members so many opportunities to express their 'super-will'¹⁰ with respect to scope and purpose, as well as to the provisions of MOUs, which are intended to implement the obligations under the foundational treaty. These treaty obligations are updated by an established practice that operates through the decisions taken, in general per the practice of consensus, by its highest decision making bodies. It is necessary to note that this consensual commitment does not only have a collective nature, as consensus reflects ineludibly the individual commitment of each of the NATO members on any specific decision taken by the Council for creating a concept supported by an MOU. In the Council's decision, states do not particularly address the non-binding status of the MOUs. In fact, the non-binding status discussion rarely happens before the MOU text negotiations start and, normally, ends at national level exclusively mandated by political approaches or national legislation. This acts as almost pro-forma language applied dependent on a states' individual practice and perspective, irrespective of the actual points negotiated in the MOU.

Consequently, are MOUs non-binding documents by default? How valid is the written commitment of the participants? Could the 'bindingness'¹¹ created in a non-binding environment lead to legal effects? This battery of 'tricky' questions, partially addressed *ut supra*, takes us outward to square one and convinces us that the law of parsimony fed by anterior facts and posterior behaviour surrounding the life of an MOU has to be taken into account seriously when determining its legal effects.

In this regard, MOUs are chosen for cross-border relations because there has been a previous political commitment or the basic principles of framework treaties have been implemented. The form of negotiations does not vary from that of a treaty, and in general, although there is a tendency to use lax or soft wording vis-à-vis treaties, the treaty negotiation strategies are clearly displayed. MOU texts, contrary to popular belief, have little flexibility for review once agreed upon. As such, MOU drafters incorporate predictable 'mobile' elements through annexes to MOUs, which negotiators assume can

Issue 24, at 2-3. This takes place normally through NATO's committee system, see B. Eriksen, *The Committee System of the NATO Council* (1967), at 66.

¹⁰ Hans Pijl, 'Beyond Legal Bindingness', *Deloitte Assets*, at 128, <www.scribd.com/doc/160221871/Beyond-Legal-Bindings#scribd>, 3 May 2015.

¹¹ *Ibid.*, at 95.

be opened by lower level managers, though it always requires a 'political' mandate either directly or indirectly.¹² MOU practice shows that it is not common to incorporate reservations (statements of interpretation). However, these have recently found their way into MOUs carrying heavy and long-term financial commitments within their provisions.

Compared to treaties, MOUs have, in general, shorter internal coordination processes for approval, and few states pass them through parliament or their commissions. Moreover, since most MOUs have some financial clauses related to budget and taxes, many negotiators regularly announce that their parliaments or specialised commissions need to give their approval before the state in question can consider the text of the MOU agreed upon.

Another example of how MOUs trigger complicated internal coordination processes is seen in the Host Nation Support Arrangements¹³ negotiated with states not party to the North Atlantic Treaty and other NATO treaties. The fact of not counting on those treaties initiates a parallel process of negotiations for concluding treaties¹⁴ on status of forces and international military headquarters. These treaties commonly address an array of matters that range from entering and staying in foreign territory, taxes and customs, wearing uniforms, holding weapons, policing compounds, claim waivers, freedom of movement, concurrent jurisdiction, etc. In addition, another significant factor is that due to confidentiality, MOUs are published only at the level of for official use only, as most of them are classified.

We must also say that MOUs often serve multiple purposes and are drafted to create a cooperation framework. This may require establishing understandings via joint procedures, or creating a sophisticated network of structures and procedures that would require detaching states' resources abroad, which in turn increases their level of commitment and, inextricably, their expectations vis-à-vis the other participants.

¹² Change of budget lines, change of structures and establishments, terms of reference, etc.

¹³ Allied Joint Doctrine 4.5(B) on Doctrine for Host Nation Support (Exercises, Operations and Disaster Relief Operations), NATO Standardisation Agency. See also EU Battlegroups' Host Nation Support MOUs and follow-on documents, see para. 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.

¹⁴ A. B. Munoz Mosquera, 'Host Nation Support Arrangements: the NAC-approved Military-to-Military Legal Tools' (2011), *NATO Legal Gazette*, 24, at 7.

Finally, we cannot conclude this section without referring to MOUs as implanting rules. Cross-border relations have, since ancient history, required minimum sets of principles that, in accordance with Dworkin, have the nature of standards that carry more weight in form of precise rules.¹⁵ This reality has been documented, for more than five thousand years, and '[a]ll groups of nations in regular contact had in practice adopted certain rules defining the conduct which could usually be expected among their members.'¹⁶

The principle of good faith is linked to that of estoppel, which leads us to address briefly the consequence of conflicts within MOUs.¹⁷ Since MOUs enjoy 'all' of the elements and principles that treaties do, we may warily open the Pandora's Box of state responsibility, which cannot be addressed in this article. But is it true that state responsibility applies for MOUs, and is there any legal effect? MOU participants reach a consensual engagement reflected in the MOU provisions, which obliges those participants to communicate unilateral acts that can have legal effects. If those acts, fruits of a consensual engagement, are committed contrary to good faith by any participant, they are considered unfriendly acts and will, in certain cases, be void. Therefore, they will be subject, at the least, to retorsion, which is nothing other than a non-amicable act of retaliation within the bounds of proportionality, and based on good faith, common sense, and reasonableness.¹⁸ But what about justice and MOUs?

JUDICIS OFFICIUM EST UT RES ITA TEMPORA RERUM QUEARERE¹⁹

On the question of how municipal and international courts may see MOUs, we cannot rule out the possibility that, despite the dispute settlement provisions in MOUs, a state or an affected third party may try to establish a case to be brought before a municipal or international court in a certain moment and under specific circumstances.²⁰ What would happen? Aust argues that a judge will look into the MOU and if he considers that its provisions are relevant for solving the case, then, the court will take into

¹⁵ Ronald Dworkin, *Taking Rights Seriously* (1977), at 78.

¹⁶ Evan Luard, *Types of International Society* (1976), at 61.

¹⁷ "The status of such arrangements has been debated in international law. However, practice shows that MOUs rarely give rise to disputes. As such, they adequately fulfil their mission." *NATO Legal Deskbook* (2010), at 128.

¹⁸ Definition taken from the MIT Western Hemisphere Project. <web.mit.edu/hemisphere/>, 9 May 2015.

¹⁹ "The judge's duty is to inquire about the time, as well as the facts", by Publius Ovidius Naso.

²⁰ In this cases, the MOU would be considered as an integral part of a treaty and therefore its breach an element of an international obligation breach.

consideration the MOU as long as it confers “discretionary power on the government or other public bodies.”²¹



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It is not necessary to be a Dworkin's Hercules to know that it is necessary to look into all relevant instruments and materials available for the case that will serve the purpose of providing justice. There is no doubt that an exhaustive review of the materials relating to the case needs to be conducted regardless of both whether it is within the international relations realm, and whether the instrument is considered binding or non-binding. An illustrative case²² is that from the German Constitutional Court where it analysed the ISAF²³ operational plan. This document was agreed upon by the NATO members at the North Atlantic Council showing the intention of the parties with respect to the conduct of operations in Afghanistan. Is it an operational plan a formal agreement?²⁴ The answer is that a court will understand that it is, at a minimum, a manifestation of intent. In this case, as the intention of the authorities who collectively and officially approved,

²¹ Aust, *Modern Treaty Law and Practice*, (2007), at 56.

²² “according to the above-named resolution [UNSCR] this is only to occur on the basis of the ISAF operational plan of NATO ‘if this is required for the necessary implementation of the ISAF operation or for the security of the ISAF forces’ (Bundestag document 16/4298, p. 3).” BVerfG, 2 BvE 2/07 of 07/03/2007, paragraphs No. (1 - 90), 82.

²³ UNSCR 1386 created the International Assistance Security Force, whose inception occurred during the Bonn Conference in December 2001.

²⁴ Operational Plans in NATO require a North Atlantic Council decision.

through their plenary the North Atlantic Council, and who also provided powers to NATO bodies to carry out the United Nations mandate including, *inter alia*, the use of deadly force.²⁵ Can we imagine if Germany's behaviour with respect to the operational plan would have been to deny it any legal effect?

In this regard, when courts include in their deliberations the review of non-binding instruments, they scrutinise their content and the circumstances of their inception to find whether they have any normative value. This normative value will serve to identify the legal effects of those instruments, which affect the behaviour of states that have committed themselves to honour them as rules of, for example, a partner-specific community. This is eventually an incentive to MOU participants to comply with its provisions and live up to any future legal effects derived from the agreed provisions. This is a manifestation of parsimony and 'bindingness' in a non-binding environment.

In order to understand the role of the courts if approached by a claimant who tries to establish a case based partially or totally on the breach of MOU provisions, Klabbers argues that, with respect to informal law:

"[i]t is more felicitous then that courts by and large tend to approach IN-LAW as they would approach regular law: while drafters of IN-LAW typically will want to escape both democratic and judicial accountability, courts are not too keen on letting them do so."²⁶

He goes on to say that courts, in this setting, need to assume that: a) instruments before them are of some legal or normative value (presumptive law thesis); and b) abstraction needs to be used when reviewing facts. Besides, Klabbers rightly argues that there are legal effects of informal law, in which MOUs are arguably included. These effects may come in the form of good faith, estoppel and/or expectations.²⁷ Consequently, it is still to be seen whether MOU participants will leave the instrument in a no-man's land when a 'sexy' case lies on the lap of a court. Most likely, the courts will consider non-binding agreements as *de facto* binding agreements in their assessment and analysis for the sake of exhausting all means in an effort to bring justice. This is justified as an effort made by the courts to encompass today's ways of

²⁵ For further details see Ulf-Peter Haußler, 'Germany's Federal Court refines German Perception of NATO and ISAF' (2007), *NATO Legal Gazette*, 7, at 9-13.

²⁶ Jan Klabbers, 'International Courts and Informal International Law' in Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds), *Informal International Law Making* (2012), at 223.

²⁷ *Ibid.*, at 237 - 238.

reaching commitments in cross-border relations, as *judicis officium est ut res ita tempora rerum quaerere*.

We can easily see the above through Kant's theory of transcendental grounding, where after having established categories through a metaphysical deduction, he argues that judgements are structured in a space-time form related to the judge's intuition. In this form, substance and facts are ontologically related in a cause and effect manner, which leads Kant to postulate an objective world of substances that interact by following causal laws. This analysis should not discourage the practice of using MOUs in international relations, but rather encourage acceptance of the fact that responsibilities derive from the commitments therein, and then recognize that MOUs lead to potential legal effects.

Few Tips on MOU Structure and Style

Multiple forms and multiple colours. It must be noted that the subject matter of the MOU, and participants, will directly or indirectly cause negotiators to customise the structure and style of the instrument. Be that as it may, MOU practitioners normally take into account multiple existing models and specimens.²⁸ In all existing models the proposals on structuring and wording MOUs are similar. On the other hand, using one or another model is irrelevant to distinguish an MOU from a treaty, as other and more significant elements will have to be taken into account if the time comes to make such a distinction. Finally, it is to be noted that non-treaty terminology is not a keystone element for a participant or a court to confer or not confer legal effects to an MOU.

This section does not propose an MOU wording or terminology guide, as there are multiple choices and room for creativity in this realm. Below is an unpretentious and non-exhaustive barebones account of some sections or paragraphs that normally appear in MOUs.

Cover page is in capitals, centred and normally bold.²⁹

²⁸ Aust, *supra* note 20, at 492 and 496; NATO Legal Deskbook, 128-131 and references made to Bi-Strategic Commands Directive 15-3 on the 'Preparation and Control of International Agreements'; 'Guidance on Non-Binding Documents' of the United States; 'Guidance on Practice and Procedures' of the United Kingdom Foreign and Commonwealth Office Department of State, etc.

²⁹ MEMORANDUM OF UNDERSTANDING BETWEEN [OR AMONG]²⁹
THE GOVERNMENT/MINISTER/MINISTRY/ORGANISATION OF []
THE GOVERNMENT/MINISTER/MINISTRY/ORGANISATION OF []

Table of Contents: This part shows section per section [or paragraph by paragraph] the different topics that an MOU addresses. Sections will be shown in Arabic numerals, e.g., 'Section 1: Definitions.'

Introduction: It records the MOU participants and incorporates a series of 'considerings', 'notings', 'recognisings', and "having regards" where treaties, political decisions, and/or relevant documents are referenced as means of backing up the understanding the MOU records.

Body provisions.³⁰

Definitions: This paragraph incorporates by reference definitions from other documents. It also creates specific definitions for the sole purpose of the MOU and its follow-on documents.

Purpose and Scope: The purpose usually expresses the decision-making body(ies) vision or intent that triggered the negotiation of the MOU, it constitutes the object. On the other hand, the scope defines the activities – and personnel – covered by the MOU.

Responsibilities. This section reflects, in detail, the commitments of the participants to fulfil the purpose and scope designated by the decision-making body(ies). It describes activities and ensures actions and services to be provided either individually or collectively for successfully reaching the goals envisioned. In many cases, this includes commitments to provide actual physical or logistical contributions by the MOU participants. This section is key to understanding the participants' expectations.

Organisation and Relationships: In case the MOU intends to set up an organisation, the MOU will establish structures and procedures to plan, conduct and assess the activities of such organisation (director, staff, finances, steering committee and their terms of reference, statement of functions, external and internal relationships, coordination procedures, etc.). This section will provide basics agreed to by the participants to create an organisation, provide resources, and share work. This will be

AND THE INTERNATIONAL ORGANISATION []
THE PUBLIC INSTITUTION []
CONCERNING[]

³⁰ The "Body" varies depending upon the aim of the MOU. The present one represents a suggestion, a starting point that will have to be tailor-made by drafters and negotiators.

directly linked to guidelines aimed at reaching the collective aim. Finally, this section will most likely prompt other sections relating to personnel, claims, and the programme of work, etc.

Financial Arrangements / Taxes, Customs, Duties / Accounting and Auditing:

Most of the MOUs require from their participants medium term and long term financial commitments, which require rigorous budgetary plans back in their respective country capitals, as well as joint recognised accounting and auditing mechanisms. On the other hand, MOUs usually work under a treaty framework and, therefore, its activities enjoy certain fiscal entitlements. For all these reasons, the participants may desire to record these entitlements for the benefit of the common goal and a better and full use of the assigned budget. There might be occasions when the goal pursued by the MOU relates to providing certain goods and services that will, in turn, require a specific section dedicated to sales and transfers to third parties, quality assurance, etc.

Legal: This section normally stems from certain 'considerings' or 'having regards' already stated in the "Introduction" and are intended to point out, among the participants, those specific legal aspects and considerations that they will have to take into account in their undertaking, such as the framework treaties under which the MOU will be developed. This includes international or national law [the latter when applicable]³¹ that have to be taken into account, the status of

³¹ "Note also that the Belgian Court de Cassation rightly considered (see Cassation. 12 March 1968, Immobiliara SA (company under Luxembourg law) vs Belgian State, Ministry of Finance, JT, 1968, 290 and 27 January 1977 (JT, 1977, 438 – quoted by Jean Salmon, ULB coursebook on international public law, Vol 1, 1992/93 edition, p.89) that "an international agreement cannot be interpreted unilaterally by authoritative means: since such agreements are by their very nature an emanation of the will of the high contracting parties, one of them may not bind the other by making a unilateral interpretation of the agreement through legislative channels".

The second ruling of the Cour de Cassation stipulates that "the interpretation of an international agreement... cannot make reference to the national law of one of the contracting States. If the text requires interpretation, this must take place on the basis of aspects specific to the Agreement itself, in particular its object, its aim and its context, as well as the preparatory work behind it and its origins. It would be pointless to draft an agreement intended to establish international legislation if the courts in each State were to interpret it on the basis of concepts specific to their own law". In a similar sense, the terms used by the authors of a treaty must be interpreted on the basis of their internationally-understood meaning (i.e. that jointly intended by the parties) and not on the basis of meanings that they may have in national law (Cassation/Quashing), 13 February 1911, Pas, I, 125; and above-mentioned rulings)." A. B. Munoz Mosquera, 'The 7 Question on: International Law – International Organizations -SHAPE' (2014) *Nato Legal Gazette*, 29, at 8-9, <www.ismllw.org/nato%20legal%20gazette/legal%20gazetteissueno%2029.pdf>, 14 May 2015. See also Article 25 of the Vienna Convention of the Law of the Treaties. Article 27: "A party may not invoke the provisions of its

the organisation created by the MOU or that of their personnel or assets, liabilities, claims, etc. This section is sometimes used to show that participants do not have the intention to create new rights or obligations under international law by virtue of the provisions of the MOU under negotiation.³²

Security: Participants, depending on the nature of the MOU's purpose, may establish, or adopt from another organisation, certain rules related to the broad matter of security that may range from actual physical security of personnel and facilities, to merely controlling access to information developed under the provisions of the MOU.

Final provisions.³³

Joining or Accession of new participants: Accession or joining is normally done through a Note of Accession/Joining (NOA/NOJ); a template is normally attached to the MOU as an annex. Sometimes this feature becomes complicated to implement. This is because MOUs' goals and requirements evolve, which makes participants identify desirable candidates for the MOU which, on the other hand, may not be part of original framework treaties. Note that in certain situations the NOA/NOJ can take the form of a Statement of Intention (SOI) where the new participant establishes under which circumstances it joins the specific MOU.

Settlement of Disputes: This section uses wording to prevent participants addressing any dispute for settlement to national or international tribunals or any other third party for settlement (mediation, arbitration, etc.). However, nothing impedes a participant from using the MOU as evidence in case of breach of the framework treaty. Note that, in many occasions, framework treaties also contain provisions where parties agree to address their disputes to tribunals or mediation.

internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46".

³² In this regard the MOU drafters and negotiators have to understand that there is not full guarantee with this last sentence that a participant or a tribunal may see at a later stage the MOU creating legal effects as a consequence of posterior behavior of the participant(s), specific circumstances of the MOU not seen or overlooked during the negotiations and manifested during its implementation, the good faith and estoppel principles, and, even, the own dynamics of the international law development, as well as other aspects.

³³ In the paper this paragraph does not intend to create a category among the sections of an MOU, but its purpose is merely dogmatic and systemic and tries to group together all sections that are repeatedly found no matter the topic addressed by the MOU in discussion.

Withdrawal: This is a topic that may create controversy among participants and drafting a stand-alone section for this purpose or incorporating it in any other section is convenient for future disputes. This section is especially useful when MOUs have major commitments of resources of any kind, like budget and personnel. The wording will normally establish the pre and post obligations with respect to the MOU partner-specific community, as well as the status of rights of the withdrawing participant.

Amendment: In this section participants lay down procedures (by consensus, majority vote, etc.) to amend MOU provisions and the amendment of annexes to it, which may become extremely important.

Termination: This is also a relevant paragraph for MOUs, as conflicts may arise if this provision is ambiguous and then left open for participants to interpret themselves. When termination is not clearly stated and monetary investments are at stake, some participants produce different interpretations on when the legal object of the MOU stops existing and, consequently, the MOU itself. This causes undesirable situations with irreconcilable positions, which end up eroding trust among participants for future endeavours.

Duration and Entry into Effect: In this section participants will record the date from which they consider the MOU to be in effect, its initial period of duration, as well as further renewals if required.

Final Considerations: This is an optional, but convenient section that may or may not be numbered after the one referred to as 'Entry into Effect' and it may address questions relating to the MOU language(s), budget interim periods, personnel allocation, protocol communications or notifications, etc.

Annexes: These are not always necessary, although they represent an option where drafters and negotiators can provide further and diverse details required in the MOU body provisions or by the scope of the MOU. It is also true that annexes, in many occasions and as agreed by participants, are also tools that permit changes to the MOU that are required for further updates of its goals. This is instrumental when the scope of the MOU requires flexibility for its achievement in areas related to, *inter alia*, governance, personnel or budget. On the other hand, in the context of international institutional law context, annexes contribute to the inherent evolving nature of international

organisations under the principle of functional necessity.³⁴

Conclusion

The Greek hero Ulysses, warned by Circe the sorceress, escaped the danger of the sirens' song by plugging the ears of his crew. However, he tied himself to the mast of his ship and was able to hear their song. Thus, Ulysses could resist the sirens' temptation and he survived to tell the story.

Forewarned by the facts, international lawyers exposed to MOUs have to plug the ears of other internationalists from Academia and practice, and prevent them from hearing the song that says that MOUs are not part of international law. At the same time, those exposed to these sirens need to tie themselves to the mast of the 'MOU vessel' to be able to hear the tune and the lyrics of the song, 'MOUs vs. treaties', and argue, when they survive, that MOUs are full contributors to international law – importantly but not exclusively to international institutional law – and international relations, and that they did not come to replace treaties.

Aglaope, Pisinoe, and Thelxiepia, the main sirens, were endeavoured to attract Ulysses and his crew to their ruin. However, Ulysses heard that Aglaope said that MOUs do not create partner-specific norms, but the ropes tying him to the mast made him sure that MOU participants could claim *sui generis* legal effects of their provisions. Pisinoe claimed, with an enticing tune, that courts will not consider MOUs when producing a judgement, but Ulysses resisted because he knew that MOUs contribute to legal structures in space-time and cause-effect ways. Finally, Thelxiepia sang that MOUs are excluded from international law, but Ulysses was tightly fixed to the belief that MOUs belong to the transformative and evolving nature of international law.

Only those with Ulysses' valour and Penelope's patience will see MOUs in their proper dimension and context as full contributors to practical international relations.

³⁴ This principle argues that international organisations are created by states to carry out a specific mission for the common interest. Functionalism explains why international organisations evolve naturally over the time using their institutions to adapt their functions to the changing environment of international relations. M. Virally, 'La Notion de Droit', *Le Droit International en Devenir, Essais Ecrits au Fil des Ans* (1990), at 275.



SOURCE: www.nato.int

NATO Readiness Action Plan: The Legal and Host Nation Support Architecture

by Eduardo Martinez Llarena¹ and Ignacio Fonseca Lindez²

Introduction

In September 2014, NATO Member States, at the NATO Wales Summit, approved the Readiness Action Plan (RAP) as part of a package of solutions to counter the emanating hybrid warfare threats³. The North Atlantic Council (NAC), NATO's highest decision-making body, agreed to develop a plan with measures to respond to the current security environment changes in and around Europe posed by Russia's hybrid threats⁴. The RAP has also been

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³ Wales Summit Declaration, http://www.nato.int/cps/en/natohq/official_texts_112964.htm 5th September 2014.

⁴ The conflict in Ukraine clearly illustrated a new example of hybrid warfare threat. However, hybrid warfare is not a new way of carrying out hostilities; it has been part of human history since antiquity. Whilst hybrid means of warfare appear to be most common in conflicts of contemporary times, they have nevertheless existed for centuries. The term "hybrid warfare" is defined as a conflict in which a belligerent employs both conventional and unconventional means not limited to the use of force, and can include a variety of components such as special forces, propaganda, strategic communications, cyber attacks, and lawfare. In the words of General Gerasimov, Chief of the General Staff of the Armed Forces of Russia, there exists a ratio of four to one of non-military to military measures in modern conflict. Hybrid warfare threats are a challenge for the current Western institutional mechanisms of collective defence and security and complex combination of activities that

developed to respond to threats emanating from the Middle East and North Africa. In this regard, the Secretary General qualified the RAP as “the biggest reinforcement of our collective defence since the end of the Cold War”.⁵

This article sets out to describe the legal and logistical architecture that the RAP requires in order to support its two pillars: a) Assurance Measures - increased NATO military activities for assurance and deterrence; and b) Adaptation Measures - long-term changes of NATO military posture and capabilities.

Developing the RAP

The response to these threats must not rely on shortcuts simply to expedite the process. Instead it should be based on upholding the foundations of Western development. In this regard, NATO's response needs to be in line with democratic principles as well as international law, which are manifested in the governing treaties and NATO policies. These provide the necessary checks and balances in order to develop a proper legal and logistical architecture to support the RAP. Historically, the conclusion of agreements that provided status and support to visiting forces were little used.⁶ One of the fathers of modern military logistics, Carl Von Clausewitz, actually disregarded the necessity of carrying billets during the march. He simply calculated how many soldiers he needed to allocate per (private) house.⁷ Nowadays, NATO has a well-developed practice for providing such status and support to deploying forces. Bilateral Supplementary Agreements (SA) to the multilateral 1952 Paris Protocol⁸ combined with the cluster of arrangements envisaged in NATO's Host Nation Support policy provide a crucial starting point for developing the legal and logistics architecture for the RAP. The series of bilateral and multilateral agreements/arrangements

seek the destabilization of the adversary. See Charles K. Bartles, “Getting Gerasimov Right,” *Military Review*, (January-February 2016) 34 < <http://usacac.army.mil/CAC2/MilitaryReview/repository/English-2016-Archive.asp>>

⁵ NATO Readiness Action Plan, <www.nato.int/nato_static_fl2014/assets/pdf/pdf_2014_12/20141202_141202-facsheet-rap-en.pdf>, 24 May 2015.

⁶ An early exception to this was the Treaty of Ehrenbreitstein of 9 April 1632 between King of France Louis XIV and the Archbishop and Prince-elector of Trier Philipp Christoph of Sötern regarding the peaceful military occupation of Trier soil by French troops. See IILJ Working Paper 2006/8, “Defensive Warfare, Prevention and hegemony: The Justifications for the Franco-Spanish War of 1635” (History and Theory of International Law Series). www.iilj.org

⁷ Carl Von Clausewitz, *On War*, Ed. Princeton Paperback, 1989. at 334

⁸ ‘Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty’, www.nato.int/cps/en/natohq/official_texts_17300.htm?, 25 MAY 2015.

planned will establish a series of 'fundamentals' that permit NATO member States to develop their NATO international treaty and political obligations while still respecting their national legislations.

Therefore, many questions arise: *first*, can these military actions be applied to the eastern flank Allies, *secondly*, is the West struggling to have a cohesive response and *lastly*, what is NATO's plan to face this challenge?

NATO is anything but anachronistic, and the organisation has been constantly adapting to the changing strategic environments. This has been achieved mainly via strategic concepts approved by the NAC at summits supported by all 28 members of the Alliance. It can be said that the Prague Summit in 2002 was the beginning of a change from a well-defined actor on NATO's borders during the Cold War, to the expeditionary and discretionary NATO operations in the Middle-East. NATO has remained flexible by recognising that the factors involved in the strategic environment may change. The Wales Summit in 2014 anticipated and delineated the tasks in order to effectively face this new paradigm of threats. The RAP is an adequate and proactive response. On this note, it is worth recalling U.S. Navy Rear Admiral and logistician Henry Eccles when he stated that no one should deceive himself by believing that he has achieved flexibility when by reason of the events he has been forced to react.⁹

The RAP is also an update of the NATO Response Force (NRF) to face current hybrid warfare environments. RAP's flagship is the Very High Readiness Joint Task Force (VJTF), which is able to deploy up to a Brigade in a matter of days.¹⁰ This spearhead can be escalated to a division size by Follow on Forces.¹¹

The NATO Force Integrations Units (NFIU)¹² Headquarters, which are part of the NATO Force Structure (NFS), will support among other tasks the VJTF deployment. On 1st September 2015 the NAC activated the first six¹³ NFIUs as NATO Military Bodies per Article 14, paragraph 1, of the 1952 Paris Protocol and consequently they will enjoy International Military Headquarters status.

⁹ RADM US Navy Henry E. Eccles, *Logistics in the National Defense*, Naval War College Press, 1997 at 120-130.

¹⁰ 'NATO's new spearhead force gears up', www.nato.int/cps/en/natohq/news_118642.htm, 25 May 2015.

¹¹ 'NATO Response Force / Very High Readiness Joint Task Force Fact Sheet', www.aco.nato.int/page349011837.aspx, 25 May 2015.

¹² J. Deni, 'A New and Necessary Acronym for NATO', *War on the Rocks* (2015) February, <warontherocks.com/2015/02/a-new-and-necessary-acronym-for-nato/>, 25 May 2015.

¹³ 'Statement by the NATO Defence Ministers on the Readiness Action Plan' <www.nato.int/cps/en/natohq/official_texts_117222.htm>, 25 May 2015.

The NFIUs primary function is to facilitate the Reception, Staging and Onward movement (RSOM) of VTJF and its later sustainment. NFIUs are the closest NATO bodies to assess hybrid warfare threats. Be that as it may, the NFIUs liaise with the Host Nations in order to permit the rapid deployment of Allied forces to the region, support collective defense planning, and assist in the coordination of multinational training and exercises.¹⁴

One of the key elements for NFIU and VJTF success are the Host Nation Support Arrangements (HNSA), which are in fact a fundamental enabler for the RAP. HNSA are tools that help establish a balance between the Host Nations' international commitments and their national laws, whilst also permitting the operations of Sending Nations (SN) in Host Nations' (HN) territory.

HNSA are concluded by the Supreme Headquarters Allied Powers in Europe (SHAPE) on behalf of both SHAPE and Headquarters Supreme Allied Commander Transformation (HQ SACT) and completed through its command, the Allied Command Operations (ACO) chain. Generally, in a pure HNSA environment, Memoranda of Understanding (MOU)¹⁵ are negotiated at the strategic level, Technical Arrangements (TA)¹⁶ are dealt with at operational level and finally, Joint Implementing Arrangements (JIA) at the tactical level between SN and HN. RAP requirements demand a new comprehensive legal and logistical blueprint because of their short deadlines and intrinsic complexity.

In order to deal with the legal and logistical architectural development, SHAPE has established the RAP Arrangements Implementation Office (RAIO) composed of legal and logistics subject matters experts. The integration of logistical and legal planning by staff officers working in close physical proximity to each other is an essential factor that adds a holistic approach to RAP's challenges. Logistic capabilities limit the type of forces that can be deployed, and the legal framework constrains how forces can be employed. The combination of legal and logistics in the same office seek to support the so-called *design for production* model.¹⁷ The intention is to minimise a

¹⁴ *Ibid.*

¹⁵ Allied Joint Publication-4.5 (B) Annex B. <http://nso.nato.int/nso/zPublic/ap/ajp-4.5%20edb%20v1%20e.pdf>

¹⁶ Allied Joint Publication-4-5 (B) Annex E. <http://nso.nato.int/nso/zPublic/ap/ajp-4.5%20edb%20v1%20e.pdf>

¹⁷ The design for production is a manufacturing methodology that proposes changes in the product design according to the production chain capabilities in order to avoid problems or gain efficiency. Govil, Manish, and Edward Magrab, "Incorporating production concerns in conceptual product design," *International Journal of Production Research*, Volume 38, Number 16, at 3823- 3843.

stubborn and persistent trend that considers any legal support to logistics as a reactive response.¹⁸ Accordingly, RAIO is a direct response to the need for creating structures and procedures across ACO in order to produce robust deliverables, which ensure consolidated assurance and adaptation measures.

The development of the different RAP elements require a series of legal and logistics arrangements in order to deliver full-fledged NFIU and other newly established Headquarters with proper status, support, command-and-control, as well as resources and access to HN advanced planning systems. This will make the deployment of VJTF plausible with all the guarantees of HNSA.

Four Pillar Architecture

a) Supplementary Agreements (SAs) to the 1952 Paris Protocol.

Upon a decision by the NAC, NFIU are activated as NATO Military Bodies and granted International Military Headquarters status, therefore, the provisions of the Paris Protocol and, where applicable, its Supplementary Agreements are applicable. Having in place a SA facilitates enormously the implementation of privileges and immunities during the day-to-day of the NFIUs.¹⁹ Consequently, it is recommended to have such SAs in place. These issues are mainly related with legal status, such as implementation of the customs and taxation exemptions enjoyed by International Military Headquarters.

The Supplementary Agreements are designed to supplement and complement the status granted under the 1952 Paris Protocol (and thus the NATO SOFA.)²⁰

¹⁸ "Past experience tends to show that the relationship between the legal and logistic communities is reactive, legal advice is sought once a problem has arisen, or been identified," Stuart Addy 'Logistics Support, in Dieter Fleck, *The Handbook of The Law of Visiting Forces* (Oxford, 2003, ano), at 187.

²⁰ "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,

It is of significant importance to note that the development of SAs is an important tool to facilitate the establishment of NFIU as an International Military Headquarters with Paris Protocol status, but it is not required for VJTF deployment which remain national contingents of the participating NATO Member States. Thus, when granted international status, NATO military activities and personnel attached to an NFIU is regulated by the 1952 Paris Protocol, whereas the VJTF framework contributing troops will enjoy the protections of the NATO SOFA.

b) MOU for NFIU and HQ MND SE

The Memorandum of Understanding (MOU)²¹ for the NFIUs is a multilateral document valid for current and future NAC-approved NFIUs in any NATO member State's territory. The NFIU MOU sets the conditions under which NATO member States and SHAPE intend to co-operate and share responsibilities. This MOU is multilateral because it is signed by those member States that host a NFIU and SHAPE. Therefore, Nations sending personnel to NFIUs will not be participants to the NFIU MOU and will not have to join.

It is relevant to underline that even if NFIUs and *NATO Rapidly Deployment Corps (NRDCs)* both fall under the NATO Force Structure, NFIUs are not entirely under the same governing structures as NRDC. Conversely, NFIUs are administered solely by the HN, financed by the HN and NATO common funding, and the international manning is coordinated by SHAPE. We can affirm that even if NFIUs are part of the NATO Force Structure, there are certain reminiscences to the NATO Command Structure.

It was the intent of the drafters to develop follow-on documents known as Base Support Arrangements (BSAs) to properly implement the HN support to the NFIUs. The BSAs required are related to the actual base support. These represented a major challenge at the time of implementation of the agreed principles. Even starting from a common baseline and template, BSAs are country specific and they have been conducted by both Joint Force

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." M. Hartov 'NATO Status Agreements (2014), NATO Legal Gazette, Issue 34, at 54. <http://www.act.nato.int/publications>.

²¹ On the nature of MOUs see A. Munoz Mosquera, 'Memorandum of Understanding. A Theoretical and Empirical approach' (2014), NATO Legal Gazette, 34, at 55-69, <http://www.act.nato.int/publications>.

Commands (JFCs) Naples and Brunssum. With the BSAs, the Host Nations and ACO detail how the provisions of the NFIU MOU are implemented. BSAs will be signed between the JFCs and the HNs.

It is extremely important to be accurate and precise at the time of drafting all provisions of a BSA and to make sure they are in accordance with the provisions of both the NFIU MOU as well as the Paris Protocol and any pertinent SA. For example, if the BSA is not detailed enough, a NATO Commander may end up not being able to increase the status alert due to a lack of HN Force Protection manning.

The establishment of Headquarters Multinational Division Southeast (HQ MND SE) follows the same legal principles and procedures for its activation. The HQ MND-SE mirrors the concept employed for the Headquarters Multinational Corps Northeast (HQ MNC-NE). The function of the Corps and the Division in respect to NFIUs is to serve as the coordination body of these units in their region. HQ MND-SE was activated as a NATO Military Body with IMHQ status as of 1st December 2015 coinciding with the Romanian National Day.

c) Accession to the HNS MOU for Exercises, Operations and Disaster Relief Operations.

MOUs for Exercises, Operations and Disaster Relief Operations are already in place between SHAPE and the Nations.²² The existence of these standing and bilateral documents between SHAPE and each nation is a major advantage for readiness. It avoids case-by-case negotiations and is a reminder that NATO forces can only visit the HN with its consent. Disaster relief interventions show how these standing HNS MOUs help logisticians with pre-planning to provide successful outcomes in such interventions.

For the RAP implementation it is necessary for the rest of the Nations in the Alliance to conclude a Note of Accession (NOA) to the standing HNS MOU of the Nations in the Joint Operations Area (JOA), as well as to those Nations that may potentially receive VJTF. These NOAs must be signed by all NATO member States since they may contribute in different manners to the VJTF. NOAs are not directly related to NFIU; they are, however, indirectly relevant as they are a requirement for VJTF deployment. It is necessary to

²² As an example see HNS MOU between SHAPE and Republic of Latvia, <http://likumi.lv/doc.php?id=146482> 10 July 2006.

clarify that NFIU and VJTF require different and unique agreements and arrangements, which when taken together contribute to the overall RAP legal and logistics architecture.

Since the standing HNS MOUs are already in place, the RAIO task is to develop TAs to said HNS MOUs in order to enable the VJTF. This is a demanding effort since Minimum Military Requirements must be itemised and linked to the Host Nation Capabilities. In order to facilitate the work for the logistic planners, NATO, based on an Enterprise Resource Planning platform, has capability catalogues. Thanks to this tool, Concept of Requirements mapping is expedited.

These type of TAs, which are to be standing technical agreements, are signed between SHAPE and the corresponding HN. A SN deploying on short notice can join this TA at any time, through the process of Note of Accession, having taken into consideration that nations are sovereign and they can choose to follow any bilateral agreement that they might have in place or want to develop for the occasion. However proper SHAPE management of these TAs can save enormous staffing hours for the SN.

Finally, and in order to complete the HNSA process, a Joint Implementing Arrangement (JIA) is normally concluded between the SN and the HN. JIAs establish, *inter alia*, deployment areas for SN, payment methods and reimbursements.

d) Border Crossing and Freedom of Movement.

The NATO SOFA reserves the need to obtain HN consent for the presence of a visiting force in its territory, to include border crossing and transit of such forces. Accordingly, consent and/or diplomatic clearance are necessary to transit or station visiting forces in support of NATO military activities in NATO member States.

NATO SOFA Articles III and XI, paragraph 10, were included to facilitate the effective movement of troops. These provisions are further implemented in the Allied Movement Publication Series, yet there is still a requirement for the Parties to conclude additional agreements and arrangements to implement and simplify the procedures, such as official forms, customs or any other matter requiring specificity such as the number of troops or designated border-crossing areas.

As the split in the title of this work strand suggests, it is important to

differentiate between Border Crossing and Freedom of Movement (FOM).

Border Crossings are the set of activities, documents, diplomatic clearances and legal acts that have to take place to provide the necessary status and to grant access into a sovereign territory for visiting forces. Otherwise the transit of the Force would not be legal under Public International law. Therefore we can consider this the *abstract* piece of the work.

Insofar as physical transit is effective as long as you have the logistics chain ready and its theatre coordination in place; the added value provided by NATO is about gathering several sources of requirements, merging them into a single one and then disseminating a consolidated message to the different HN. Somehow this *physical* piece can be considered as a spoke-hub-spoke distribution model.

In sum, when both the abstract international legal requirements and the physical pieces are in place then one can assess that Freedom of Movement is granted at the Joint Area of Operations for the VJTF.

Conclusion

Faced with the quandary of not knowing if hybrid threats might be a “threat to peace” or actual hostilities, NATO, through the RAP, is developing a complex legal and logistics architecture for supporting assurance and adaptation measures to counter any possible escalation of hybrid warfare threats²³.

This includes the establishment of new International Military Headquarters for advance planning, a spearhead for an enhanced NATO Response Force and the necessary agreements and technical arrangements to meet an ambitious Notice To Move.

The RAP renews the vows taken by the Nations that formed the North Atlantic Treaty Organization in 1949 for implementing the United Nations Charter's *raison d'être*: the maintenance of international peace and security.

²³ We must learn from history as approximately 250 years ago, the West experienced a very similar situation; an enlightened Catherine the Great annexed Crimea to her territories.

NATO Exercises and the LEGAD

By Lieutenant Colonel Keirsten Kennedy¹



www.shape.nato.int

Introduction

The North Atlantic Treaty Organization (NATO) exercise program is a robust system designed to ensure NATO military readiness. Exercises² serve an important function for the Alliance to “test and validate its concepts, procedures, systems, and tactics.”³ Beyond that, exercises “enable militaries and civilian organizations deployed in theatres of operation to practice working together” so that they can identify best practices and lessons learned for future operations.⁴ The role of a NATO Legal Advisor (LEGAD)⁵ planning

***DISCLAIMER: The views and opinions of the author expressed herein may not represent the official views of NATO or of individual member governments on all policy issues discussed.**

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² <http://www.shape.nato.int/exercises>. The term “NATO Military Exercise” includes all exercises for which NATO is the initiating or the joint initiating authority.

³ http://www.nato.int/cps/en/natolive/topics_49285.htm.

⁴ http://www.nato.int/cps/en/natolive/topics_49285.htm.

⁵ For an excellent overview of the role of a NATO Legal Advisor (LEGAD), see Colonel Brian H. Brady, *The NATO Legal Advisor: A Primer*, ARMY LAW., Oct. 2013, at 4, 4, available at https://www.loc.gov/rr/frd/Military_Law/pdf/10-2013.pdf.

for, advising in, or augmenting a NATO exercise is crucial both before and during an exercise. This article explains the purpose and structure of the NATO exercise program, outlines the numerous legal actions that must occur to support NATO exercises, and highlights some current substantive issues (most pertaining to real-world legal support) that the NATO LEGAD might encounter when participating in a NATO exercise.

NATO Exercise Program: Purpose and Structure

Policy on NATO exercise planning is contained in MC 458/3, NATO Education, Training, Exercise, and Evaluation (ETEE) Policy⁶ and Bi-Strategic Command Directive (Bi-SC Dir) 75-3, Collective Training and Exercise Directive.⁷ “The focus of NATO's collective training and exercise programme and policy is to ensure that the Alliance has a coherent set of deployable, interoperable and sustainable forces that are equipped, trained, exercised, and commanded so as to meet NATO's level of ambition.”⁸ Bi-SC Directive 75-3 describes four stages of exercise planning: Stage 1—Concept and Specification Development; Stage 2—Planning and Product Development; Stage 3—Operational Conduct; and Stage 4—Analysis and Reporting. A NATO entity planning an exercise follows those stages in developing, planning, and executing an exercise.⁹ This article concentrates mostly on Stage 2 (planning and product development), covering both the exercise “play” (planning for and solving legal issues that come up in the exercise's scenario documents) as well as the “real-life” issues (e.g., host nation support) in exercise planning.

A. NATO Exercise Program Purpose

Military units, in NATO particularly, conduct exercises in order to prepare for possible near-future, real-world operations. “The rationale for planning and executing military exercises is to prepare commands and forces for operations in peace, crisis, and conflict. Therefore, the aims and objectives of military exercises must mirror current operational requirements and priorities.”¹⁰

⁶ <http://www.act.nato.int/etee> (“The aim of this document is to provide general ETEE direction and guidance to Strategic Commands, and to establish a standardized ETEE policy throughout NATO.”)

⁷ Bi-Strategic Command Dir. 075-003, Collective Training and Exercise Directive (CT&ED) (Oct 2, 2013)

⁸ MC 458/3, p.14.

⁹ See Captain Audun Westgaard & David Nauta, *Operational Level Exercises as Preparation for NATO Operations*, NATO Legal Gazette, Iss. 36 (Nov. 2015), at 21, 26 (Captain Audun Westgaard is the Joint Warfare Centre (Stavanger) Legal Advisor, and Mr. David Nauta is the Deputy Legal Advisor).

¹⁰ <http://www.shape.nato.int/exercises>.

Connecting the aims of exercises with the purpose of NATO operations is critical to conducting a fruitful exercise, worth all the military participants' time and money.¹¹ The three types of military missions that NATO engages in are (1) Article 5 collective defense operations; (2) non-Article 5 crisis response operations (NA5CRO); and (3) consultation and cooperation operations.¹² Thus, the military exercises that NATO plans and executes reflect preparations for those types of missions.

Interoperability is a high priority in NATO, due mostly to how it operates with military troops contributed from its member nations.¹³ Nations participating in a multinational exercise must be able to communicate and work together;¹⁴ if troop-contributing NATO nations are not used to communicating or even unable to communicate with each other, this might lead to severe problems in a real-world mission. Exercises serve the purpose of "practice[ing] and evaluat[ing] collective training of staffs, units and forces to enable them to operate effectively together, to demonstrate military capability, or to provide improvements to the capability."¹⁵ Beyond just NATO nation participants, "[e]xercises...integrate and improve the military capabilities of non-NATO participants..."¹⁶ The United States expresses a similar belief in the benefits of multinational exercises: "These exercises are a smart investment. They not only build allies, they increase our military proficiency, and they create trust and understanding between the Soldiers and leaders of Europe and the [United States]."¹⁷

There are three types of exercises in NATO: (1) the live exercise (LIVEX), in which actual forces participate; (2) the command post exercise (CPX), where a headquarters (commanders and their staffs) communicate with other participating headquarters and friendly forces/opposing forces are

¹¹<http://www.shape.nato.int/exercises>.

¹²<http://www.shape.nato.int/exercises>. These are also referred to as Article 4 operations following consultations described in Article 4 of the North Atlantic Treaty, Washington D.C. 4 April 1949. http://www.nato.int/cps/en/natohq/official_texts_17120.htm?

¹³http://www.nato.int/cps/en/natolive/topics_49285.htm. "Alliance exercises are supported by NATO countries and, as appropriate, by partner countries, which provide national commitments in the form of troops, equipment or other forms of support." "The participating countries are normally responsible for funding any form of national contribution." *Id.*

¹⁴<http://www.eur.army.mil/exercises/>. "U.S. Army Europe multinational exercises ensure interoperability with our current, and potential, coalition partners, and for working out possible mission command issues including computer network and communications interoperability." *Id.*

¹⁵<http://www.shape.nato.int/exercises>.

¹⁶<http://www.shape.nato.int/exercises>.

¹⁷<http://www.eur.army.mil/exercises>.

simulated; and (3) an exercise study (e.g., map exercise, war game, series of lectures, discussion group, or operational analysis).¹⁸ This article focuses on LIVEs, outlining how NATO plans exercises, how NATO military units plan for support in an exercise, and what the LEGAD's role is throughout the exercise planning and execution.

B. NATO Exercise Program Structure



The NATO training and readiness cycle is a reiterative process guided by both strategic commands: Allied Command Transformation (ACT) and Allied Command Operations (ACO). It involves individual education and training;¹⁹ collective training;²⁰ operations and exercises;²¹ and lessons learned

¹⁸ <http://www.shape.nato.int/exercises> ("During an exercise, forces are asked to respond to a fictional scenario that resembles what might occur in real life. Exercises cover the full range of military operations, from combat to humanitarian relief and from stabilization to reconstruction. They can last from a day to several weeks and can vary in scope from a few officers working on an isolated problem, to full-scale combat scenarios involving aircraft, navy ships, artillery pieces, armored vehicles and thousands of troops.").

¹⁹ The NATO School in Oberammergau, Germany, is primarily responsible for individual education and training. <http://www.natoschool.nato.int>

²⁰ Three ACT organizations are responsible for collective training: HQ SACT in Norfolk, Virginia, United States

and doctrine.²²

Since July 2012, the Supreme Allied Commander, Europe (SACEUR) has been responsible for setting collective training requirements. Exercising command over Allied Command Operations (ACO) from the Supreme Headquarters Allied Powers Europe (SHAPE) in Mons, Belgium, SHAPE conducts the evaluation of headquarters and formations participating in NATO exercises. In coordination with SACEUR, the Supreme Allied Commander Transformation (SACT) who commands Allied Command Transformation (ACT) from Headquarters, Supreme Allied Commander Transformation (HQ SACT) in Norfolk, Virginia, has responsibility for managing collective training and exercises, based on SACEUR's requirements.²³ In addition to NATO nation training, SACT acting through Headquarters, Supreme Allied Commander Transformation (HQ SACT) is in charge of Partnership for Peace (PfP) joint education, individual training, and associated policy and doctrine development. Lastly, HQ SACT also sets NATO instructional standards and accredits NATO schools.²⁴ As NATO's two strategic commands, ACO and ACT work closely together on education and training, which includes NATO military exercises.²⁵ Both strategic commands "are assisted by the alliance's network of education, training, and assessment institutions, as well as national structures."²⁶

C. Military Training and Exercise Program

Both ACO and ACT develop events and activities relating to NATO exercises. "This process culminates with the publication of the annual Military

(http://www.nato.int/cps/en/natolive/topics_52092.htm); the Joint Warfare Centre (JWC) in Stavanger, Norway (<http://www.jwc.nato.int>); and the Joint Force Training Centre (JFTC) in Bydgoszcz, Poland (<http://www.jftc.nato.int>).

²¹The Allied Command Operations is responsible for operations and exercises (http://www.nato.int/cps/en/natohq/topics_52091.htm).

²² The Joint Analysis Lessons Learned Center in Lisbon, Portugal, is responsible for lessons learned and doctrine. (<http://www.jallc.nato.int/activities/jointanalysis.asp>)

²³ Bi-SC Collective Training and Exercise Directive (CT&ED) 075-003, *available at* [https://discussions.sisostds.org/index.htm?A3=ind1506&L=SAC-PDG-PSG-C2SIM&E=base64&P=1258580&B=--0a026f101c0d43bab1b0e28fc97106ac&T=application%2Fpdf;%20name=%22NATO_BI_SC_%20075_003_final\(1\).pdf%22&N=NATO_BI_SC_%20075_003_final\(1\).pdf&XSS=3](https://discussions.sisostds.org/index.htm?A3=ind1506&L=SAC-PDG-PSG-C2SIM&E=base64&P=1258580&B=--0a026f101c0d43bab1b0e28fc97106ac&T=application%2Fpdf;%20name=%22NATO_BI_SC_%20075_003_final(1).pdf%22&N=NATO_BI_SC_%20075_003_final(1).pdf&XSS=3).

²⁴ <http://www.act.nato.int/role-and-structure>.

²⁵ <http://www.shape.nato.int/exercises> ("All exercises are reviewed not only to assess the achievement of the aim and objectives, but also to assess whether the aims and objectives are valid in the prevailing environment, and whether the product is worth the expenditure of effort and resources.").

²⁶ http://www.nato.int/cps/it/natohq/topics_49285.htm?selectedLocale=ru.

Training and Exercise Programme (MTEP)."²⁷ In July 2015, ACT published the 2016-2020 MTEP,²⁸ which follows the guidance provided in SACEUR's Annual Guidance on NATO Education, Training, Exercise, and Evaluation 2015 (SAGE 15).²⁹ "The exercise program covers a period of six years, with detailed programming for the first two calendar years, and outline programming for the following four calendar years."³⁰ Although published by ACT, the document considers and encompasses the priorities and intent of both strategic commanders (ACT and ACO). Within the MTEP, "[t]he areas typically included are current and future operations, the NATO Response Force, transformational experimentation and NATO's military cooperation programs."

Once published, the MTEP remains a somewhat flexible document. In 2015, when it published the MTEP for 2016 through 2020, ACT acknowledged that several NATO force structure changes were underway and could affect the current MTEP. This refers, of course, to the changes in NRFs (NATO Response Forces)³¹ and VJTFs (Very High Readiness Joint Task Forces, a "spearhead force" usually within the NRF).³² Nevertheless, those force structure changes within NATO did not thus far and will likely not affect the planned exercises in 2016/2017, as the planning process for an exercise is quite lengthy and somewhat complicated.³³ "Preliminary planning culminates in the NATO Training and Exercise Conference, where NATO Commands, NATO and partner countries, and other invitees conduct final exercise coordination and provide support to the annual MTEP."³⁴ Planners can use the Electronic MTEP (eMTEP) to assist in planning operational and

²⁷ http://www.nato.int/cps/en/natohq/topics_49285.htm.

²⁸ <http://www.act.nato.int/act-concludes-largest-training-synchronisation-conference>.

²⁹ SH/PLANS/J7/PLL/MS/14-206541/2, SACEUR's Annual Guidance on NATO Education, Training, Exercise, and Evaluation 2015 (SAGE 15).

³⁰ <http://www.shape.nato.int/exercises>.

³¹ http://www.nato.int/cps/en/natolive/topics_49755.htm. "Launched in 2002, the [NATO Response Force (NRF)] consists of a highly capable joint multinational force able to react in a very short time to the full range of security challenges from crisis management to collective defence." *Id.*

³² The Very High Readiness Joint Task Force (VJTF) is a "highly capable and flexible air, land, maritime and special forces package capable of deploying at short notice when tasked." <https://www.shape.nato.int/page349011837>. "At the 2014 Wales Summit, NATO Allies agreed to enhance the capabilities of the [NRF] in order to adapt and respond to emerging security challenges posed by Russia, as well as the risks emanating from the Middle East and North Africa." *Id.*

³³ http://www.nato.int/cps/en/natolive/topics_49285.htm ("NATO exercise requirements are coordinated during MTEP Programming Board Meetings (which are open to representatives from partner countries) starting at least eighteen months before the beginning of the next cycle.")

³⁴ *Id.*

strategic exercises.³⁵ “Planners insert exercise details such as training dates, the aim, budget information, *et cetera*, on the eMTEP which is then visible to other planners. This allows visibility of exercise details to a large audience and facilitates concurrent planning.”³⁶

Administrative Law Issues in NATO Exercise Planning

As described above, before an exercise can begin, the planning process takes place. The entire staff becomes involved, to include the LEGAD in a few distinct areas. Beyond the expected international and operational law issues the LEGAD encounters when working with the command group, G2, and G3 in the actual exercise scenario (the “play” portion of the exercise), numerous administrative law issues will arise throughout exercise preparations (the “real-life” portion of the exercise). The LEGAD must work with various staff officers within the headquarters of the unit, in particular, the G4 and/or Joint Logistic Support Group (JLSG) as they prepare the logistic portion of the exercise.³⁷ Host nation support (HNS) coordination leading up to a NATO exercise is both mandated and logistically necessary for successful operations.



www.shape.nato.int

A. Host Nation Support and NATO Doctrine

The applicable NATO doctrine for HNS is Allied Joint Publication (AJP)-4.5(B),³⁸ which supports the principles and policies in MC 319/2, NATO

³⁵ <https://emtep.exonaut.com/ExonautWeb/cal/#/start> (password and login required).

³⁶ <http://www.act.nato.int/etee>.

³⁷ <http://www.emgfa.pt/documents/930q1f5kv8sd.pdf>.

³⁸ AJP-4.5(B).

Principles and Policies for Logistics;³⁹ MC 334/2, *NATO Principles and Policies for Host-Nation Support*;⁴⁰ and AJP-4, *Allied Joint Doctrine for Logistics (generic guidance)*.⁴¹ Used extensively in exercise planning, AJP-4.5(B) translates NATO's agreed HNS concept into principles, practices, and procedures in order to provide direction to ACO, ACT, and NATO member nations hosting visiting forces. The document follows a logical sequence: Overarching concept of HNS; various stages of the planning process; allocation of responsibilities and authority; and last, implementation. Most valuable for planners, the AJP provides templates of all the documentation and products required in negotiating and executing HNS. "It is designed to foster coordination and cooperation among the Strategic Commands (SCs) and nations emphasizing the need for flexibility in HNS planning to meet the differing requirements of military planning in support of NATO-led military activities and assisting the NATO Commanders in the achievement of their missions."⁴²

B. Host Nation Support and Legal Authority

Section IV of AJP-4.5(B) lists some legal considerations and the legal authority⁴³ to enter into host nation support agreements (HNSAs), mainly in the form of memorandums of understanding (MOUs)⁴⁴ and resulting technical

³⁹ MC 319/2, *NATO Principles and Policies for Logistics*.

⁴⁰ MC 334/2, *NATO Principles and Policies for Host-Nation Support*.

⁴¹ AJP-4, *Allied Joint Doctrine for Logistics (generic guidance)*.

⁴² AJP-4.5(B).

⁴³ AJP-4.5(B) (Section 0124 "provides a brief description of the treaties and international agreements, which govern NATO activities. These treaties are the source of legal competence permitting NATO International Military

Headquarters to undertake obligations, exercise rights and receive privileges and immunities. All HNSA will be supplemental to but based on the principles contained in these treaties and international agreements. These agreements provide the baseline for many of the express and implied provisions contained within the HNS MOU and TA and form the binding framework for all participants to the process. It is therefore essential that the principles of HNSA are consistent with those contained in the treaties. A complete understanding of the relevance of these documents is imperative when drafting and negotiating HNSA.") The relevant legal authorities listed are as follows: NATO Treaty; NATO SOFA; Paris Protocol; PfP SOFA; Further Additional Protocol to the PfP SOFA; Supplementary Agreements; Transit or Basing Agreements; and other legal agreements. *Id.*

⁴⁴ For an excellent analysis of MOUs and their legal effect in NATO, see Andrés B. Muñoz Mosquera, *Memorandum of Understanding (MOU): A Philosophical and Empirical Approach*, NATO LEGAL GAZETTE, Issue 34 (July 2014), at 55, available at http://www.act.nato.int/images/stories/media/doclibrary/legal_gazette_34a.pdf ("MOUs concluded within the NATO community are considered nonbinding 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.").

arrangements (TAs). In general, the publication encourages legal involvement early in the planning process: "In all circumstances involving MOUs and follow-on HNSA it is essential to seek legal advice and review at the earliest opportunity and during all stages of the HNS process."⁴⁵ In terms of legal support for drafting agreements in an exercise, Bi-SC Directive 15-23 describes those duties as including the preparation of agreements, along with the necessary coordination with higher headquarters: "All actions and advice that may affect the legal status of NATO International Military Headquarters in host nations or negotiations *shall* be coordinated and approved by the Legal Advisors of the Strategic Commands."⁴⁶

Additionally, a NATO LEGAD should not (and in fact shall not) operate alone (without supervision of the legal technical chain of command) when it comes to negotiating, drafting, and seeking approval for MOUs. Bi-SC Directive 15-3 explains in paragraph 1-2.b. how Host Nation Support Agreements play into the LEGAD's exercise role: "Standing Host Nation Support Arrangements that serve as the primary and overarching source of agreement for provision of HNS to missions and exercises shall, in almost all cases, be negotiated and concluded with SHAPE as the lead Strategic Command."⁴⁷ Lastly, for LEGADs serving in ACO (or a NATO Force Structure entity attached to ACO for an exercise or operation) ACO Directive 35-4 goes into great detail about the requirements for the creation of ACO documents.⁴⁸

C. Host Nation Support Concept

"The purpose of NATO's Host-Nation Support (HNS) concept is to provide effective support to NATO military activities and to achieve efficiencies and economies of scale through the best use of a host nation's available resources. This concept has always to be interpreted in accordance with the NATO Strategic Concept."⁴⁹ Developing a HNS concept is important during the planning concept: as the logistics planners determine what they

⁴⁵ AJP-4.5(B).

⁴⁶ Bi-SC Directive 15-23, *Policy on Legal Support* (2009).

⁴⁷ Bi-SC Directive 15-003, *Preparation and Control of International Agreements* (2007).

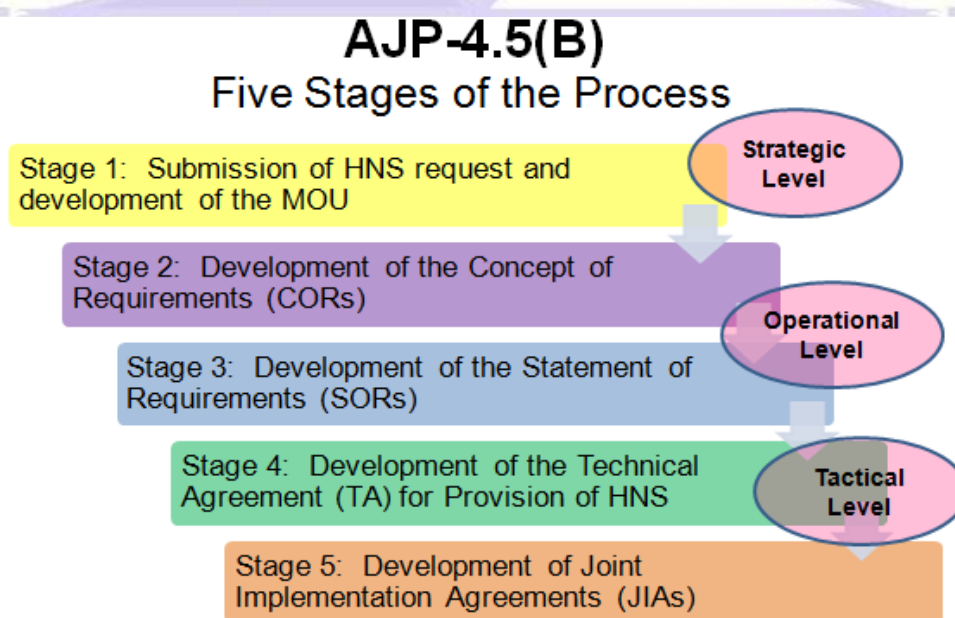
⁴⁸ ACO Directive 35-4, *Preparation of Documents* (2013) (For MOUs in particular, see paragraph 1-1.n. of the directive.).

⁴⁹ AJP-4.5(B), para. 0101. "The NATO HNS concept provides a framework to enable NATO's mobile and flexible multinational forces to deploy and be sustained through the provision of timely and effective support. This support is dependent on cooperation and coordination between NATO and national authorities, the establishment of HNS arrangements based upon the best use of available host-nation resources and the consideration of HNS from the start of the operational planning process." AJP-4.5(B), para. 0102.

will need, where they need it, and how to get it, that overarching concept will inform each of those factors. Thus, HNSA agreements should “reflect mutually agreed principles and procedures that are applicable to HNS. [Host nation support agreements] are affected by many legal considerations, both from national and international law.”⁵⁰ The LEGAD must be aware of these constraints and able to provide a legal opinions terms included (or proposed for inclusion, ideally) in such agreements.

D. Allied Joint Publication 4.5(B)

Although the LEGAD is not ultimately responsible for planning HNS, in order to make thoughtful, value-added legal contributions, it is important for an attorney to understand the steps the G4 or JLSG will follow to ensure HNS in an exercise. There are five stages to the process, taking place at the strategic, operational, and tactical levels. At the operational level, Stage 1 consists of submitting a HNS request and developing the MOU. At the operational level, Stage 2 is developing the Concept of Requirements (COR), followed by Stage 3, developing the Statement of Requirements (SOR). The tactical level encompasses Stages 4 and 5, developing the TA for provision of HNS and developing Joint Implementation Agreements (JIAs), respectively.⁵¹



(diagram provided by the author)

⁵⁰ AJP-4.5(B) (“MOUs and TAs are, subject to the provisions of the specific MOUs and TAs, to be provided and signed in either of or both the official NATO languages, English and French.”).

⁵¹ AJP-4.5(B).

1. Stage 1 - Submission of Host-Nation Support Request and Development of the Memorandum of Understanding (Strategic Level).⁵²

In this first stage, the G4 or other entity responsible for logistic support determines if a standing HNS MOU⁵³ already exists. If SHAPE (or a properly delegated subordinate NATO command) has already negotiated such a standing HNS MOU⁵⁴ (on behalf of both strategic commands), then that MOU can be used. If no MOU exists, the strategic command identifies the logistic and support requirements for an activity, then submits the request to the host nation (HN). The products for Stage 1 are the HNS request and the HNS MOU.

2. Stage 2 - Development of the Concept of Requirements (Operational Level).⁵⁵

At the operational level, a unit develops a Concept of Requirements (COR), which “addresses broad functional support requirements including land, air, maritime, security, transportation, telecommunications, facilities, etc.”⁵⁶ The COR contains a list of non-detailed types of support that the unit will require. Usually, the NATO formation will conduct a site survey to make those determinations prior to submitting their draft CORs. The Sending Nations (SNs) are also involved in the process and contribute to the COR during this stage, as they confer with the HN regarding possible shortfalls they have identified. The product for Stage 2 is the COR.

3. Stage 3 – Development of the Statement of Requirements.⁵⁷

Once the COR is submitted and fully discussed, it is time to develop a Statement of Requirements (SOR).⁵⁸ At this point, “SN force contributions have been identified. Usually, a unit will form a Joint Host Nation Support Steering Committee (JHNSSC) to oversee the development of the SOR, Technical

⁵² AJP-4.5(B), para. 0302.

⁵³ AJP-4.5(B). “[The MOU] represents the formal establishment of the overarching principles for provision of HNS between the Strategic Commands (SCs), the Sending Nations (SNs) and the HN and establishes the basis for follow-on HNS documents.” *Id.*

⁵⁴ AJP-4.5(B). “In order to save time and resources, SHAPE, on behalf of both SCs, develops Standing HNS MOUs with potential HNs. These remove the requirement for a specific HNS MOU to be developed for each activity.” *Id.*

⁵⁵ AJP-4.5(B).

⁵⁶ AJP-4.5(B) (“It provides the HN with a list of the required types of support, but does not yet furnish details regarding the timing and quantity of that support.”).

⁵⁷ AJP-4.5(B).

⁵⁸ AJP-4.5(B). “[Statements of Requirements (SORs)] take the planning process from the generic to the specific, in that they require identification of the force(s) to be supported. Therefore, identification of SNs and the Allied Forces is a prerequisite for proceeding with this Stage.” *Id.*

Arrangements (TAs), and Joint Implementation Arrangements (JIAs). The LEGAD participates in the JHNSSC to advise the committee on the creation of these documents and to review any pre-existing HNS bilateral agreements between the HN and troop-contributing nations. Common issues a LEGAD might encounter as a member of the JHNSSC are related to contracting, HN labor laws, customs, or construction, among many other potential topics that trigger legal ramifications. The products for Stage 3 are a set of SORs from each SN and NATO formation deploying to or through the HN.

4. Stage 4 - Development of the Technical Arrangement for Provision of Host-Nation Support.⁵⁹

"A TA will be developed to amplify the concept and procedures for the provision of HNS common to all participants."⁶⁰ Topics covered in a TA are, for instance, what nations are participating; command and control arrangements; responsibilities; financial provisions; legal aspects, supplies and services; and other topics.⁶¹ Although the TA is usually a lengthy document containing several annexes, it is important to avoid duplicating information already found in the MOU and operation/exercise orders. The product for Stage 4 is the TA.

5. Stage 5 - Development of Joint Implementation Arrangements.⁶²

In Stage 5, whether or not Joint Implementation Arrangements (JIAs)⁶³ are prepared depends on the size of the exercise. If a small or medium-sized exercise, the SORs can be stand-alone agreements or even annexed to the TA. A JIA is like a "contract between the HN and SNs/NATO Commander for the provision of specific HNS" that outlines the financial obligations.⁶⁴

The LEGAD does not lead any of these efforts described in AJP-4.5(B) in

⁵⁹ AJP-4.5(B).

⁶⁰ AJP-4.5(B).

⁶¹ AJP-4.5(B). "The TA should contain a list of all nations participating in the military activity to ensure they are all considered as NATO-led forces." *Id.*

⁶² AJP-4.5(B).

⁶³ AJP-4.5(B) ("If JIAs are produced, planning is decentralized and will be conducted in one of two ways:

(a) Under the immediate direction of one or more JICs as appropriate which are established by, and operate under the direction of, the JHNSSC. This is more likely to be the approach adopted for contingency planning; or
(b) With the HN in conjunction with SNs and with the support of the JHNSSC. This is more likely to be the approach adopted for military activities where time constraints preclude the establishment of the more methodical approach of the option above.").

⁶⁴ AJP-4.5(B).

any of the five stages. As is often the case in operational matters, a LEGAD participates with a careful eye toward identifying potential legal pitfalls. Knowing the process, along with what should or should not be included and accomplished, makes having the LEGAD in the meeting room—on the committee, in the working group, etc.—value added to the HNS planning process. The final portion of this article explores the LEGAD's value when issues arise during an exercise, illustrated with some examples of recently conducted exercises.

Current Examples of Substantive Planning Issues for LEGADs

A. NATO Exercises Legal Issues

1. Exercise Trident Juncture 2015

Taking place in the fall of 2015, Exercise Trident Juncture was “the largest NATO military exercise since 2002.”⁶⁵ Exercise participants moved across several international borders, and the participating LEGADs had to become knowledgeable about those types of transit during the planning process.⁶⁶ Not only that, but the exercise included air-to-air refueling missions, amphibious landings, and ship-boarding in the Mediterranean Sea, to name a few of the more complicated aspects of the exercise. Teams of LEGADs from the 28 participating nations (and five non-NATO nations' participants)⁶⁷ were part of the planning process and worked out the legal details enabling those military maneuvers.

The most important lesson learned from Trident Juncture 2015—not just for LEGADs—was the difficulty in communicating during such a large-scale, multinational exercise. For LEGADs, this challenge in interoperability to facilitate communication is a great hindrance to ensuring uniform (or at least complementary) legal reviews and interpretations of international law. For

⁶⁵ <https://www.wsws.org/en/articles/2015/07/24/nato-j24.html> (“Trident Juncture 2015, the largest NATO military exercise since 2002, is scheduled to begin in late September and will involve 36,000 troops from more than 30 countries. The exercises will take place in Spain, Italy and Portugal, with all 28 NATO countries plus five allies participating.”).

⁶⁶ <http://breakingdefense.com/2015/10/hey-putin-nato-can-adapt-trident-juncture-2015/> (“When you actually have to move real troops over real terrain—and often across real international borders—you run into a lot of messy logistical and even legal issues that you really want to figure out **before** there’s a crisis.”).

⁶⁷ *Introduction*, NATO LEGAL GAZETTE, Issue 36, at 4, available at

http://www.act.nato.int/images/stories/media/doclibrary/legal_gazette_36.pdf

the LEGADs who reached out to each other during the planning process of Exercise Trident Juncture 2015, it was an obstacle easily overcome during the exercise. However, some LEGADs in the exercise missed out on learning and training opportunities simply because they were out of the sphere of information flow.⁶⁸

2. Exercise Trident Jaguar 2017⁶⁹

The 1 (German/Netherlands) Corps (1GNC)⁷⁰ is participating in Exercise Trident Jaguar 2017⁷¹ as part of its SHAPE-led certification as a standby Joint Task Force.⁷² Preparations for the exercise next spring at the Joint Warfare Center (JWC)⁷³ in Norway include 1GNC's Exercise Truthful Sword 2016⁷⁴ (in Germany) and Exercise Ultimate Sword 2016⁷⁵ (in Poland at the Joint Forces Training Center (JFTC)⁷⁶), all of which employ the SKOLKAN 2 Scenario⁷⁷ of the JWC. Crisis Response Planning (CRP)⁷⁸ began in mid-2016⁷⁹ in Muenster, Germany, where the 1GNC headquarters is located, but also involved the week-long deployment of the Operational Liaison and Reconnaissance Team (OLRT)⁸⁰ to the JWC in September 2016.

The CRP included the activation of the Joint Operations Planning Group (JOPG), working from the Static Operations Center (STOC) in Muenster during September; the JOPG, adhering to the guidance of NATO's Comprehensive Operations Planning Directive (COPD),⁸¹ followed the planning steps of a Mission Analysis Briefing, Course of Action (COA) Development, as well as a COA Decision Brief. As of the date of publication of this article, the JOPG is finalizing their Concept of Operations (CONOPS) and then their Operational

⁶⁸ http://www.jwc.nato.int/images/stories/_news_items_/2016/Learning_from_TRIDENT.pdf.

⁶⁹ <https://events.jwc.nato.int/>.

⁷⁰ <http://1gnc.org/about-us/>.

⁷¹ <http://1gnc.org/future-exercises-of-1-germannetherlands-corps/>.

⁷² <http://www.shape.nato.int/nato-response-force--very-high-readiness-joint-task-force>.

⁷³ <http://www.jwc.nato.int/>.

⁷⁴ <http://1gnc.org/truthful-sword-2016/>.

⁷⁵ <http://1gnc.org/future-exercises-of-1-germannetherlands-corps/>.

⁷⁶ <http://www.jftc.nato.int/>.

⁷⁷ For an overview of the SKOLKAN scenario, see

<http://www.jwc.nato.int/images/stories/threeswords/skolkan.pdf>.

⁷⁸ http://www.nato.int/cps/en/natohq/topics_49192.htm?selectedLocale=en.

⁷⁹ <http://1gnc.org/crisis-response-planning/>.

⁸⁰ For an excellent overview of a high-performing Operational Liaison and Reconnaissance Team (OLRT) report, see <http://www.jwc.nato.int/images/stories/threeswords/OLRT.pdf>.

⁸¹ See <https://publicintelligence.net/nato-copd/>. For an excellent article explaining NATO's Comprehensive Operations Planning Doctrine (COPD), see <http://www.nato.int/nrdc-it/magazine/2009/0914/0914g.pdf>.

Plan (OPLAN) for submission to SACEUR in October 2016. The following issues arose in which the NATO LEGAD had an active part during the exercise planning and in the planning occurring as part of the exercise.

(a) HNS and TAs: 1GNC's OLRT Deployment to JWC

In planning for the OLRT's one-week deployment to Stavanger, Norway, the 1GNC exercise planners had access to experts at the JWC, who routinely facilitate the execution of technical arrangements based on HNS MOUs (usually standing MOUs conducted bilaterally with SHAPE). In that regard, the LEGAD team at 1GNC simply had to review the MOU and Technical Arrangement, giving advice to the 1GNC planners about the NATO SOFA,⁸² any diplomatic notes exchanged in reference to HNS, and any other MOUs between Norway and the two framework nations of 1GNC, Germany and the Netherlands. Because Norway is a NATO member and because the JWC routinely conducts exercises, the LEGAD at 1GNC's tasks were simple: review the legal documents and ensure that the required exercise support/planning legal arrangements were included as an annex in the Exercise Plan (EXPLAN).

(b) Where Is the Status of Force Agreement (SOFA) and the Host Nation Support MOU?

Within the exercise, an operational legal planner must ensure from the start that the legal "play" and documents are sufficient for the exercise. An exercise's scenario (and an operation, for that matter) will always have a legal framework. Part of this legal framework entails the basis for legal operations in a country (host nation consent, UN Security Council resolution, self-defence, etc.), but the framework includes SOFAs, MOUs, any other applicable agreements, as well as certain operational documents (e.g., SACEUR's Planning Directive, which usually contains a legal annex). In a NATO exercise, the scenario documents will contain clues as to what the mission's legal framework is in that particular exercise.

If key documents are missing, the LEGAD should actively pursue them (almost always through SHAPE—or the personnel simulating SHAPE in the exercise). In 1GNC's recent CRP, the LEGAD team there noted the absence of a SOFA, which is a critical agreement when deploying to a non-NATO country (as the SKOLKAN 2 scenario calls for deploying to fictitious "Arnland," a non-NATO country). The astute LEGAD who looks for these key

⁸² http://www.nato.int/cps/en/natohq/official_texts_17265.htm.

documents—like MOUs regarding HNS, intelligence sharing, intelligence collecting, airspace management, medical care agreements, etc.—is a valuable operational asset in the exercise planning process.

(c) OLRT Composition: No LEGAD in the Organic Structure

For the OLRT deployment, a unit's Standing Operating Procedures list the core members: these are usually logistics and supply planners, contracting planners, intelligence personnel, and other military personnel a unit will want to send to an area of operations at the first opportunity to establish liaison with the host country. In the case of 1GNC, the LEGAD is not listed as an organic member of the OLRT. Based on advice from the JWC during the academic phase of Exercise Trident Jaguar 2017, 1GNC decided to add a LEGAD to the team. This proved to be beneficial to the OLRT as it navigated the murky waters of what their unit could and could not do to prepare for a mission in the host country. For NATO LEGADs embarking on an exercise, ensuring participation from the start is essential to identifying operational legal issues early in the exercise and working those out can be the difference in mission failure or mission success (or, perhaps, delay of mission success if the LEGAD is not included from the beginning of the planning process).

C. Non-NATO Exercise Legal Issues

Because legal issues in exercises are certainly not confined to only NATO exercises, this section briefly highlights two exercises in which U.S. Army Europe (USAREUR) recently took part—Exercise Anakonda 2016 and Exercise Dagoon Ride 2015—and the accompanying main legal issues that came up in the conduct of those exercises. Omitting the U.S.-specific legal issues (like adherence to the U.S. Joint Travel Regulation and soldiers' criminal actions under the U.S. Uniform Code of Military Justice), the discussion that follows could benefit the NATO LEGAD in preparations for a NATO exercise.

1. Exercise Anakonda 2016

The Anakonda series of exercises (part LIVEX, part CPX) is a Polish national exercise, in which many nations usually participate. "Exercise Anakonda 2016 [was] one of the U.S. Army Europe's [USAREUR's] premiere multinational training events . . . [seeking] to train, exercise, and integrate Polish national command and force structures into an allied, joint,

multinational environment.”⁸³ Major Joon Hong, the Deputy Chief of International and Operational Law at the USAREUR Office of the Staff Judge Advocate, participated as a legal advisor in Exercise Anakonda 16⁸⁴ and noted some key legal issues.⁸⁵ The first major legal issue Major Hong encountered while planning for the exercise was non-Polish military drivers using the Polish road system. He relied on Exercise Support Agreements (ESAs), which he was careful to draft so they would not be international agreements. For some of the legal issues that came up during planning, he was able to use existing Defense Cooperation Agreements (DCAs) between nations’ militaries to resolve potential problems (e.g., contracting, exchange of goods and services, etc.).⁸⁶

During the exercise, questions arose regarding military air travel (mainly with ethical regulations in how it was used) and donating excess food. Because the dining facilities routinely produced more food than was consumed by the military members, it made sense to donate the rest to surrounding Polish communities. Major Hong worked through several legal and administrative hurdles to accomplish those donations. Lastly, in terms of national criminal justice actions, it was difficult to enforce a common standard of conduct in all of the various life support areas (LSAs) in the exercise; this was due mostly to the varying conduct policies of the participating nations.⁸⁷

2. Operation Dragoon Ride 2015⁸⁸

⁸³ <http://www.eur.army.mil/anakonda/>.

⁸⁴ Anakonda 16 After Action Report,” Powerpoint presentation by Major Joon Hong (Aug. 18, 2016) (on file with author) (“[Anakonda 16] was a Polish-led exercise comprising of over 31,000 Soldiers from 24 different nations, including NATO components (LANDCOM and MNC-NE).”)

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ <http://www.army.mil/article/145670/> (“More than 400 Soldiers assigned to U.S. Army Europe’s 2d Cavalry Regiment completed a historic 1,100 mile road march across Eastern Europe April 1. The road march, dubbed Operation Dragoon Ride, began as Stryker Armored Vehicles driving from Estonia, Lithuania and Poland towards the unit’s home base at Rose Barracks, here. All three convoys of vehicles converged in the Czech Republic and then, together, continued home. Altogether the convoy consisted of approximately 100 vehicles and included around 60 Stryker Armored Vehicles. In addition to the Soldiers of 2d Cavalry Regiment, Soldiers from 4th Infantry Division’s Mission Command Element, from Fort Carson, Colorado, provided oversight and assistance throughout the operation. Helicopters from the 12th Combat Aviation Brigade, Army logisticians from the 21st Theater Sustainment Command, NATO jets and U.S. Air Force assets also assisted in the mission’s success. Operation Dragoon Ride’s vehicles began marching home on March 21, marking the effort to showcase NATO unity and solidarity the longest vehicular road march by U.S. forces in Eastern Europe since World War II.”).

In March 2015, the U.S. Army's 2d Cavalry Regiment conducted Operation Dragoon Ride, a U.S. national exercise intended as a show of force, to "[s]how the world some of the firepower the United States and its NATO partners have in Eastern Europe."⁸⁹ Covering approximately 1,100 miles and convoying vehicles through six European countries, the U.S. Army and NATO forces set out "[t]o reassure countries on Russia's western periphery."⁹⁰ One of the issues encountered in the exercise was coordinating their movement through the various sovereign nations.⁹¹ Although countries granted permission for maneuvers in specified areas by the U.S. Army, last-minute changes requested by the 2d Cavalry Regiment were difficult for the liaison officers in those countries to deal with. A LEGAD should be part of the planning cell for such cross-border movements to ensure smooth travel, especially when plans change suddenly and at the last minute. Understanding the customs and border regulations from a legal standpoint can make the diplomatic transit request process much easier.

Another issue in the Dragoon Ride last year was driver's licenses and insurance certificates for drivers and vehicles participating in the exercise.⁹² The regulation pertaining to the U.S. Army, Army Europe Regulation 55-1 refers specifically to military vehicles and outlines the process for obtaining such liability certificates.⁹³ Although applicable to U.S. participants and vehicles in the exercise, each driver from the various participating nations had to be similarly insured (along with their vehicles). An active LEGAD can identify this issue ahead of time; however, even in the middle of the exercise, a LEGAD can assist the J4/G4 in sorting out what is required and from which agencies by researching the laws of nations whose roads the exercise is using/traversing through.

Lastly, an unforeseen issue with crowd control also came up during the exercise.⁹⁴ During some stops, 2d Cavalry Regiment displayed their vehicles for local civilians, who at times would push or shove to get a closer look or even enter the vehicles. Soldiers were unsure what control measures they

⁸⁹ <https://www.washingtonpost.com/news/checkpoint/wp/2015/03/24/in-show-of-force-the-armys-operation-dragoon-ride-rolls-through-europe/>.

⁹⁰ <http://www.stripes.com/news/dragoon-ride-will-send-us-troops-through-eastern-europe-in-show-of-support-1.334021>.

⁹¹ 2d Cavalry Regiment Dragoon Ride After Action Report (AAR) (8 May 2015) (on file with author).

⁹² 2d Cavalry Regiment Dragoon Ride After Action Report (AAR) (8 May 2015) (on file with author).

⁹³ Army Europe Regulation 55-1, United States Army Motor Vehicle Operations on Public Roads (24 May 2005), available at <http://www.imcom-europe.army.mil/webs/docs/safety/aer55-1.pdf>.

⁹⁴ 2d Cavalry Regiment Dragoon Ride After Action Report (AAR) (8 May 2015) (on file with author).

could use at those points. The proactive LEGAD can work with the Provost Marshal and J3/G3 during the planning phase of the exercise to produce appropriate rules of engagement pertaining to crowd control. During an exercise, such as in this instance, a LEGAD would also need to be part of any rules of engagement working group to modify, publish, and ensure distribution of any newly implemented rules of engagement pertaining to the exercise.

Conclusion

In all stages and aspects of exercise preparation and execution, a LEGAD's knowledge and experience are keys to success. For instance, as part of the legal preparation for exercises it is always useful to identify which standing status treaties apply to the visiting forces to confirm a framework exists to support the planned exercise activities. This inventory does not solve all practical problems, but does provide the international legal context of addressing the practical issues. Furthermore, the ability to work well together with a LEGAD's own staff, as well as building relationships with other attorneys in the international military legal community⁹⁵ ensures the LEGAD knows about potential issues in a timely manner (before the exercise) and has the resources and contacts to solve problems as they arise (during the exercise). Understanding the purpose and structure of the NATO exercise program, being familiar with the numerous legal actions that must occur in organizing logistical support, and keeping abreast of recent legal issues in exercises will make the LEGAD a force multiplier on any NATO staff.

⁹⁵ See generally, Commander Wiesław Goździewicz, *Training a Combat Legal Advisor: Tactical Level Observations and Lessons Identified from Trainings and Exercises*, NATO Legal Gazette, Issue. 36 (Nov. 2015), at 28 (Commander Wiesław Goździewicz, Polish Navy, is the Legal Advisor in Joint Force Training Centre (JFTC), Bydgoszcz, Poland).

NATO SPOTLIGHT



Name: Scott Walters

Rank/Service/Nationality: Lt Col/Army/U.S.

Job title: Chief LEGAD

Primary legal focus of effort: Oversight and management of an outstanding staff of legal professionals.

Likes: Restoring classic American and European sports cars from the 1960's and early 1970's.

Dislikes: Endless meetings!

When in Naples everyone should: Sample some of the wonderful local cuisine (Naples is the birthplace of pizza), relax on one of the numerous local beaches, and visit the ancient city of Pompeii.

Best NATO experience: It is difficult to choose one, but my best experiences so far have been traveling to our subordinate elements in the Balkans (Serbia, Kosovo, FYROM*, Bosnia and Herzegovina) and meeting with the staff, leadership, and legal teams.

My one recommendation for the NATO Legal Community: Step away from your computer periodically, get out of the office, and have some face to face discussions with your counterparts in other offices, commands, and organizations.

**Turkey recognises the Republic of Macedonia with its constitutional name.*



Name: David Lemetayer

Rank/Service/Nationality: NATO Civilian, French

Job title: Assistant Legal Adviser, Office of Legal Affairs - NATO IS

Primary legal focus of effort: Providing legal advice at NATO HQ

Likes: Belgian comics & chocolates

When in Brussels everyone should: Go to Maison Antoine in Etterbeek to have at least one portion of their famous fries with a Trappist beer.

Best NATO experience: Enjoy a break with colleagues on a Friday afternoon at the Staff Centre

My one recommendation for the NATO Legal Community: Stay connected and exchange views. Teamwork is the key.



Name: Nick Wobma

Rank/Service/Nationality: OF-2 (Kapitein)/ Army / The Netherlands

Job title: Assistant Legal Advisor

Primary legal focus of effort: Reinforce the NCI Agency Legal Office as their POC in MONS. Specific focus on Cyber legal issues.

Likes: Traveling the globe, Belgian Beers, Japanese Karaoke, Festivals, Movies and Series, Video games (especially those involving world conquest ☺), Amsterdam and yes, cats.

Dislikes: Rainy days in June, nightlife in Mons, waiting times (in general), mosquitos.

When in Mons (Cultural Capital 2015), everyone should: Definitely enjoy the beautiful mines. When I found out that these mines were part of Mons Cultural Dominance I... I will stop here. Seriously, Mons has a nice winebar near the Grand Place and Tripadvisor can guide one to a plethora of nice restaurants. When booking a hotel in the city book Dreamz, it has a great restaurant and live music in a nice ambience. What I liked best of Mons so far, aside from the obvious Grand Place, is the little cult cinema (a lot of English movies) close by the grand place.

Best NATO experience: Along with colleague Kerstin Mueller won the Legal Trophy for Locked Shields 2016!

My one recommendation for the NATO Legal Community: Stay in touch!



Name: Danja Bloecher

Rank/Service/Nationality: OF-4/Legal Branch of the German Armed Forces/ German

Job title: German Legal Advisor at NATO SCHOOL OBERAMMERGAU

Primary legal focus of effort: It changes constantly but mostly advising on military law, contracts and personell issues as well as teaching in several courses

Likes: The mountains around OBERAMMERGAU as they provide all kinds of sporting activities

Dislikes: Traffic jams

When in Oberammergau everyone should: Get outside and enjoy the beautiful surroundings

Best NATO experience: Being the LEGAD to Commander TAAC-North Afghanistan

My one recommendation for the NATO Legal Community: Enjoy the experience! You will meet new people and tasks everyday

HAIL & ...

Bienvenue...

ACCI	Ms Parchman, Michele
HQ AIRCOM Ramstein	WgCDR Berry, Hannah
HQ LANDCOM Izmir	LTC Halling, Jessica
HQ MARCOM Northwood	Lt Cdr Melvin, John
HQ SACT	LCDR Andrews, James ("JP")
	Mr Mielniczek, Pawel
NATO CIS Group	LtCol Robertson, Richard
NATO HQ/IS	Mr Lemetayer, David
NATO School (O'gau)	Ms Bloecher, Danja
	SGM Achhammer, Mario
NAEW&C - Geilenkirchen	Ms Ponta, Adina
NCI Agency	Capitaine Pendriez, Nicolas
SHAPE	CAPT Perrin, Jean-Emmanuel
	Mr Baillat, Jean Michel
	Ms Green, Laura
	Ms Juarez, Margarita
	MAJ Bandza, Martynas
	Sergeant Guillard, Yannick



... FAREWELL

Bon Voyage...

ACCI	Mr Pregent, Richard (Dick)
CAOC Torrejon	Cpt Suberviola, Jose Ramon
CCD COE	Cpt Glorioso, Ludovica
HQ AIRCOM Ramstein	Cpt Pison, Cyrille
HQ LANDCOM Izmir	LTC Miller, Jeffrey
HQ MARCOM Northwood	Cdr Logette, Chris
	LtCDR Clark, Oliver
JALLC	COL Castel, Gilles
JFC Naples	LTC D'Andrea, Pietro Mario
NAPMA	Mrs Wiekken, Yvonne
NATO CIS Group	LtCol Bell, Anthony
NATO School (O'gau)	SGM Klaiber, Bjorn
NCI Agency	Cpt Prevoteau, Jean Luc
	OR 7 Rohel, Gregory
SHAPE	CAPT Baillat, Jean Michel
	SCH Briand, Lydia
	Mr Cambazard, Victor
	Ms Chalanouli, Nikoleta



UPCOMING EVENTS OF LEGAL INTEREST...

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



The second iteration for 2016 of the **NATO Operational Law Course** is scheduled for the week of **5 to 9 December 2016**. The course aims to provide in-depth training and practical exercises focused on legal issues faced during NATO military operations. For the full course description, please follow this link: [NSO OPLAW COURSE](#)

The first iteration for 2017 of the **NATO Legal Advisors Course** will take place from **27 to 31 March 2017**. The course aims to provide military and civilian legal advisors, in national or NATO billets, an understanding of legal aspects of NATO operations and activities. For the full course description, please follow this link: [NSO LEGAL ADVISOR COURSE](#)

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



The International Committee of the Red Cross and the College of Europe organize every year the **Bruges Colloquium on International Humanitarian Law**. The 17th Edition of the Bruges Colloquium will take place from **20-21 October**

2016 and this year's theme will be "Terrorism, Counter-Terrorism and International Humanitarian Law". More information are available on the website: <https://www.coe-icrc.eu/en>



...at the NATO Rapid Deployable Corps-Greece (NRDC-GRC), Thessaloniki, Greece:

The NRDC-GRC and the Multinational Peace Support Operations Training Centre (MPSOTC) co-organise a Law of Armed Conflict (LOAC) Seminar titled "**Operationalizing the Law of Armed Conflicts**", which will be held in Thessaloniki Greece, from **22 to 25 November 2016**. For further information, please contact NRDC-GRC Legal Advisors, Maj Vasileios Karatzias, v.karatzias@hrfl.grc.nato.int or Capt Irini Pantzou, i.pantzou@hrfl.grc.nato.int





...at the Cooperative Cyber Defence Centre of Excellence, Estonia:

The CCD COE in Tallinn, Estonia offers, twice per year, a course on **International Law of Cyber Operations**. The second course for 2016 is scheduled for the week of **28 November to 2 December 2016**. The course provides a practice-oriented survey of the international law applicable to cyber operations involving States.

For more information on how to register for the courses, please visit: <https://ccdcoe.org/event/law-course.html>

...at the Cooperative Cyber Defence Centre of Excellence, Estonia:



The **9th International Conference on Cyber Conflict (CyCon)** will take place in Tallinn, Estonia on the **30 May- 2 June 2017**. The CyCon will focus on the 'core' aspects of cyber security. More information are available on the conference website: <https://ccdcoe.org/cycon/index.html>

...of NOTE



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<http://www.act.nato.int/publications>

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