



Issue 39

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# Legal Gazette

**Significant Issues  
for the  
NATO Legal  
Community**

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**'The NATO Legal Community'**

**Photo from the 2018 NATO Legal Practitioners Workshop in NATO HQ, Brussels**

## Introduction

Dear Fellow Legal Professionals and Persons Interested in NATO,

Welcome to Issue 39 of the *NATO Legal Gazette* which contains eight articles that address issues of legal significance to NATO. The first two are from presentations that merit broader distribution. Steven Hill, the Legal Adviser and Director of the Office of Legal Affairs at NATO Headquarters contributes, **Current International Law Challenges Facing NATO** from his 2017 address to United Kingdom's Government Legal Services Conference. Andres Munoz Mosquera, the Director of the Office of Legal Affairs NATO Supreme Headquarters Allied Powers, Europe (SHAPE) and the Legal Advisor of Allied Command Operations the Allied Command Operations and SHAPE Legal Advisor, provides his presentation, **Some Notes on NATO's Institutionalisation** from the 2015 Workshop, "*Tackling 21st Century Challenges Faced by International Organizations.*"

The next six articles address discrete topics of legal significance to NATO. Steven Hill and his colleague, David Lemétayer, Assistant Legal Advisor, Office of Legal Affairs have authored, **The Treaty on the Prohibition of Nuclear Weapons: A NATO View**. Jan Raats, Legal Advisor of the NATO Airborne Early Warning & Control Programme Management Agency (NAPMA) delivers, **An update on NATO cooperative Memorandum of Understand (MOU) Guidance**. Zdeněk Hýbl, Legal Advisor of the Joint Chemical, Biological, Radiological,

and Nuclear Defence Centre of Excellence (JCBRN Defence COE) presents a timely essay, **GDPR and NATO Centres of Excellence**. Major Arn Oosterveer, Legal Advisor, German-Netherlands Corps and Mrs. Kelly Telen, Legal Assistant, Joint Force Command Headquarters Brunssum share their insights on the **Legal Considerations of the Accession of France to the Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty**. Karol Karski, Head of the Department of Public International Law, Chairman of the Academic Council of the Institute of International Law, Faculty of Law and Administration, University of Warsaw, Poland and Paweł Mielniczek, Ph.D. in Law, University of Warsaw, address **The Notion of Hybrid Warfare In International Law and its importance for NATO**. We close this issue with the kind submission of Ludwig Vandder Veken, the Secretary-General of the International Society for Military Law and the Law of War who invites attention to **The Leuven Manual on the International Law Applicable to Peace Operations**, Cambridge University Press December 2017 which is open to digital access through Cambridge Core.

In 2019, we look forward to sending two thematic issues to you: Issue 40, which will address environmental topics and Issue 41, which will focus on the legal aspects of innovation. 2019 is the 70th anniversary year of signing of the North Atlantic Treaty. The *Emory International Law Review*, an open-source online publication of the Emory University Law School in Atlanta, Georgia, USA, has graciously agreed to publish a collection of essays and commentaries on specific articles of the North Atlantic Treaty contributed by noted academic authors and NATO practitioners. We will share the expected date of their publication in our next *NATO Legal Gazette*.

Many thanks for your interest in the *NATO Legal Gazette*.  
Best wishes from Belgium,

**Lewis**

Sherrod Lewis Bumgardner  
Legal Advisor  
ACT Staff Element Europe



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## Current International Law Challenges Facing NATO

by Steven Hill<sup>1</sup>

*Legal Adviser and Director, Office of Legal Affairs*

On 18 October 2017, I was invited to address the third annual international law conference held by the UK Government Legal Service (GLS).<sup>2</sup> The conference audience was composed of a wide range of UK government legal advisers. These included colleagues, not only from the Foreign Office and Ministry of Defence, but also from outside the defence and security policy sectors, who might not ordinarily work on NATO issues.<sup>3</sup> From my perspective, the event was a welcome opportunity to raise awareness about issues of concern to the wider NATO legal community, which is part of the mandate of the Office of Legal Affairs.<sup>4</sup>

<sup>1</sup> I would like to acknowledge the assistance of Nadia Marsan of the Office of Legal Affairs with the speech on which this article is based. The views expressed in this article are solely those of the author and may not represent the views of NATO, ACO or ACT.

<sup>2</sup> Tasks of lawyers in the GLS include providing legal advice to the UK government and representing it in court proceedings. For further information about the GLS, see <https://www.gov.uk/government/organisations/civil-service-government-legal-service/about>

<sup>3</sup> This led to a number of interesting interactions on the margins of my presentation. For example, lawyers from the Transport Ministry asked me whether NATO is making policy on autonomous systems (in the context of their work on regulating driverless cars), and I got the chance to ask them about issues related to military mobility.

<sup>4</sup> See Annex to DC(2011)0017; see also Steven Hill, *The Role of Legal Advisers in International Law, The Role of NATO's Legal Adviser* (Zidar and Gauci, edn. 2016).

Ultimately, in the NATO legal community, we are only as strong as our links with our Allies. States are the drivers for the development of international law and it is for them to interpret their obligations under international law. NATO legal advisers need to be in continuous dialogue with Allied legal advisers, in order to be effective in our mission to produce practical and workable legal advice. Such advice underpins collective action to combat the security challenges facing our Allies. It also helps our work greatly, when Allies articulate their national interpretation of questions of broad interest, as the Attorney General did in January 2017 on the UK position on the international law of self-defence.<sup>5</sup>

The GLS asked to hear my assessment of the international law challenges NATO currently faces. Based on my own experience with discussions at NATO HQ, my interactions with legal advisers throughout the Alliance, and reading publications such as the *NATO Legal Gazette*,<sup>6</sup> I selected four such issues<sup>7</sup> that I anticipated would be of strategic interest to the UK audience: (1) cyber; (2) NATO-EU relations; (3) detention in non-international armed conflicts (NIAC); and (4) the nuclear ban treaty.<sup>8</sup> Since my views on the nuclear ban treaty are detailed in another article in this issue,<sup>9</sup> I will limit this article to reflections on the first three topics.

## Cyber

At the 2014 NATO Summit in Wales, NATO Allies recognised that international law applies in cyberspace,<sup>10</sup> thereby setting an important marker for future work on the legal parameters applicable in the cyber context. At the 2016 NATO Summit in Warsaw, Allies adopted the Cyber Defence Pledge to strengthen and enhance the cyber defences of their national networks and infrastructures, as a matter of priority.<sup>11</sup>

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<sup>5</sup> Attorney General The Rt Hon Jeremy Wright QC MP, 'Attorney General's speech at the International Institute for Strategic Studies' (11 January 2017).

<sup>6</sup> Mr. Richard Pregent, 'Cyber Defense and Counter-intelligence', *NATO Legal Gazette* Issue 26 (September 2011), p. 13-18; Florentine J.M. de Boer, 'Examining the Threshold of "Armed Attack" in light of Collective Self-Defence against Cyber Attacks: NATO's Enhanced Cyber Defence Policy', *NATO Legal Gazette* Issue 35 (December 2014), p. 29-37.

<sup>7</sup> I certainly could have chosen other issues, as the range of legal issues facing NATO legal advisers is vast.

<sup>8</sup> For the full text of the treaty, to which this article will refer to as the 'ban treaty', see: [https://treaties.un.org/doc/Treaties/2017/07/20170707%2003-42%20PM/Ch\\_XXVI\\_9.pdf](https://treaties.un.org/doc/Treaties/2017/07/20170707%2003-42%20PM/Ch_XXVI_9.pdf).

<sup>9</sup> Steven Hill, 'The Proposed Nuclear Weapons Ban Treaty: A View from NATO', *IHL* (June 2017)

<sup>10</sup> Wales Summit Declaration, para. 72.

<sup>11</sup> Warsaw Summit Declaration, para. 71.

Allies also recognised cyberspace as a domain of operations, along with air, land, and sea.<sup>12</sup> In concrete terms, this will enable NATO's military structures to devote specific attention to protecting missions and operations from cyber threats. It will also increase their focus on cyber-related training and military planning for operations conducted in a contested and degraded cyber environment. The recognition of cyberspace as a domain does not change NATO's mission or mandate, which is defensive in nature and focused on resilience. The main objective is the protection of NATO networks (including in operations and missions) and enhancing cyber resilience across the Alliance. From a legal perspective, we are faced with two main areas of work: understanding the legal implications of declaring cyber as an operational domain and supporting the ongoing work in the setting of norms.

#### *Legal Track 1: Legal Implications of Cyber as an Operational Domain*

In 2014, NATO leaders declared that Article 5 of the North Atlantic Treaty, the collective defence clause, could be triggered by a cyber-attack. Ever since, Allies have been discussing what such a decision might entail. In this process, we had to look at classic definitions of armed attack in public international law and attempt to apply these to a variety of potential situations. At the same time, since most cyber activity occurs below the armed attack threshold, we have had to think about the peacetime legal framework for responses to cyberattacks.

At this time, there do not appear to be many views on the peacetime legal framework that many Allies are willing to share, although this is changing.<sup>13</sup> One consequence of this fact is that external academic projects, such as the *Tallinn Manual*,<sup>14</sup> often take on an outsized role in discussions. Of course, the *Tallinn Manual* does not represent the views of NATO CCD COE, its sponsoring nations, or NATO,<sup>15</sup> but it was developed under the auspices of the NATO-accredited Cooperative Cyber Defence Centre of Excellence (CCD COE) in Estonia. As NATO's non-voting observer in the group of experts that produced the new Tallinn 2.0 Manual, I can say the Manual contains much of great use, but there are other areas where I think states will want to weigh in. One aspect that interests me from the perspective of an

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<sup>12</sup> *Ibid.*, para. 70.

<sup>13</sup> See, e.g., reports submitted to the UN GGE.

<sup>14</sup> *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*

<sup>15</sup> *Ibid.*, Preamble: 'Authority of the Manual'.

international organisation is language expressing doubts about states' abilities to conduct collective or coordinated countermeasures.<sup>16</sup>

It would help if states could share more of their own views about the applicable legal framework.<sup>17</sup> At the moment, academic texts are what seems to be occupying much of this space. The UK has been a leader in this area, in particular through an important speech in 2018 by the Attorney General.<sup>18</sup> He said that it would be useful if states, especially those with advanced cyber capabilities, could say more about their views about the applicability of international law and how to analyse it. At the same time, there will certainly be challenges with advancing such a discussion, including the understandable reluctance of states to comment in a potentially binding manner, when the underlying technology is changing in such a dynamic way.<sup>19</sup> Notwithstanding these challenges, in my view, it would be useful for states to continue to produce the information about the relevant international law that applies, so that Allies can actually start testing their systems in a multilateral context, such as NATO.

### *Legal Track 2: Setting of Norms*

NATO wants to do its part in promoting a more transparent and secure cyberspace. In this spirit, the Alliance welcomes and supports the work undertaken in other international fora, including those efforts related to confidence-building measures and the development of voluntary norms of responsible state behaviour.<sup>20</sup> In the current political and legal environment around cyber, norms can go a long way in building trust between states in cyberspace to avoid militarising cyberspace and to promote responsible behaviour.

Even if not an official Alliance position, through its observer role and engagements with the CCD COE, NATO has enabled the Tallinn Manual process to move forward. However, it is now up to states to express their views, not only on the Tallinn Manual but also on some issues that are not discussed or are not appropriately or fully discussed in the Tallinn Manual.

<sup>16</sup> *Ibid.*, Section 2: 'State Countermeasures and Necessity'

<sup>17</sup> See, e.g., my remarks at the American Society of International Law 2017 Annual Meeting, 'Arms Control and the Challenges of New Technologies'

<sup>18</sup> The Rt Hon Sir Jeremy Wright MP, 'Cyber and International Law in the 21<sup>st</sup> Century,' <https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century>

<sup>19</sup> CFR, 'Why are There No Cyber Arms Control Agreements?' (2018).

<sup>20</sup> Atlantic Council, 'Confidence-Building Measures in Cyberspace' (2014), pg. 2-3; CCD COE, 'Newsletter: Norms of Behaviour for Cyberspace' (2014).

While there is no desire (or possibly need) to create new international law, the application of existing law and norms to these new technologies may still require conversation and thought.

NATO could be a natural venue for discussions about how international norms apply in the cyber area, not just in the military domain of operations but regarding broader issues relating to cyber defence. There would be value in setting cyber norms and using a multilateral organisation, such as NATO, as a vehicle (or even potentially, in appropriate cases, a driver) for such efforts. NATO's role is especially pertinent, given the immediate security implications of cyber. The recent Cyber Defence Pledge might be one place to look for ideas about norms.

### **NATO-EU Relations**

We are now in an exciting period of real cooperation between NATO and the EU. At the Warsaw Summit in 2016, NATO Secretary General Stoltenberg signed a joint declaration with Presidents Juncker and Tusk, setting out a determination to move forward together; to increase cooperation in a range of areas; and to do so in a spirit of collaboration, and not competition.<sup>21</sup> The theme has been to make the most of the means at our disposal and not waste them via duplication.

In December 2017, the joint declaration became a concrete plan with 42 practical measures across a wide range of areas, including maritime issues, exercises, defence industry and research, defence capabilities, and cyber-defence.<sup>22</sup> NATO and the EU have succeeded in implementing these measures and look forward to taking cooperation further, in new areas. Cooperation is now the norm, and not the exception.<sup>23</sup> Ten out of the 42 proposals are linked to the fight against hybrid threats. The EU and NATO, along with EU Member States and NATO Allies, will contribute to and participate in the activities of the European Centre of Excellence for Countering Hybrid Threats, in Helsinki. On cyber security, the exchange of concepts on the integration of cyber defence aspects into the planning and conduct of missions and operations has opened the door to increased cooperation in this domain. A recent Memorandum of Understanding

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<sup>21</sup> The President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization, *Joint Declaration* (2016).

<sup>22</sup> "Statement on the implementation of the Joint Declaration "(2016).

<sup>23</sup> NATO Deputy Secretary General Rose Gottemoeller, *Remarks* (Defence and Security Conference, 2017).

between NATO and EU Computer Security Incident Response Teams (CSIRTs) on information sharing and other cooperation is one example.<sup>24</sup> On defence capabilities, staffs are increasing efforts to ensure the coherence of output between the NATO Defence Planning Process and the EU Capability Development Plan.

Building on this work, the leaders signed another Joint Declaration in July 2018. Going forward, it is crucial that the EU and NATO work together to ensure cooperation and not duplication. NATO is the ultimate guarantor of Europe's collective security. At the same time, steps toward closer defence cooperation and increased defence spending in Europe are welcome and can benefit both NATO and the EU.<sup>25</sup> The legal framework is a key factor in this process, particularly when it comes to non-EU NATO Allies. Based on decisions by both the Council of Europe and the North Atlantic Council, this framework allows NATO and the EU to cooperate in full respect of the decision-making autonomy and procedures of both organisations.

### **Detention in Non-International Armed Conflict**

The matter of detention in Non-International Armed Conflict (NIAC) is one that has certainly been at the forefront of NATO's legal thinking over the years. It has been the subject of litigation in national courts.<sup>26</sup> First of all, it bears clarifying that NATO itself does not detain. Individual nations of the Alliance participating in NATO-led operations do. These nations are responsible for respecting their applicable international and domestic legal obligations.<sup>27</sup> Due to the distinct obligations of NATO Allies and partner nations participating in NATO-led operations, legal interoperability is a frequent challenge.<sup>28</sup>

Detention is a national matter within NATO, particularly as the operation in Afghanistan evolved. Following NATO's assumption of the lead for the International Security Assistance Force (ISAF) in 2003, there was a push to

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<sup>24</sup> NATO and the European Union enhance cyber defence cooperation (2016).

<sup>25</sup> NATO Secretary General Jens Stoltenberg and EU High Representative/Vice President Frederica Mogherini, *Joint Press Conference* (2017).

<sup>26</sup> *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB).

<sup>27</sup> Lt. Col. Darren Stewart, "New Legal and Operational Issues: A NATO Perspective," *Proceedings of the Bruges Collegium*, Number 39, Autumn, 2009. .

<sup>28</sup> On legal interoperability challenges in NATO, see Steven Hill and David Lemétayer, *Legal Issues of Multinational Military Operations: An Alliance Perspective*, 55 *Military Law and the Law of War Review* 13 (2016-17).

agree upon certain practical standards that might assist nations. This was a sensible and pragmatic process that attempted to deal with reasonable differences in terms of operational appetites and legal frameworks and interpretation. It was not possible to agree to such guidelines or other attempted policies regarding detainees at a headquarters level, either in Brussels or at SHAPE. Ultimately, ISAF developed a Standard Operating Procedure (SOP) that generally provided that those captured by ISAF be released or transferred to Afghan authorities within 96 hours. The SOP further provided that a detainee may be held for more than 96 hours where necessary.<sup>29</sup> In other words, the default could be exceeded. In the end, this 96 hour figure was a practical yardstick developed during the heat of combat. It is important to note that the SOP was inspired by analogous provisions in the domestic legislation of different (but not all) nations.

From a practical military operational perspective, there was value in having an SOP in the multinational military effort. Without it, we may have had many different practices applied to those detained by various nations, causing a potential lack of overall predictability. At the same time, this policy was clearly not developed by ISAF as a definitive statement of international law requirements, including the relevant United Nations Security Council Resolutions or the entirety of international humanitarian law. In my view, the SOP established a more stringent standard than required under international law. In the NATO context, it is common to establish SOPs that set higher standards than required by international law.

Some time has passed between this experience and the present. There have been a variety of international initiatives to clarify relevant matters, including the important resolution adopted at the last Quadrennial Conference of the International Red Cross and Red Crescent Movements<sup>30</sup> and other initiatives, such as the Copenhagen Process Principles and Guidelines.<sup>31</sup>

Observing the legal positions and practice of states, there are several

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<sup>29</sup> COS ISAF, SO2 MP PLANS, 'Standard Operating Procedures Detention of Non-ISAF Personnel' (2006). See: *Serdar Mohammed v. Ministry of Defence and Qasim et al. v. Secretary of State for Defence* [2014] EWHC 1369 (QB), para. 35.

<sup>30</sup> 32<sup>nd</sup> International Conference of the ICRC, 'Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty' Resolution 1 (2015).

<sup>31</sup> For a description of the Copenhagen Process, see:

[https://www.asil.org/insights/volume/16/issue/39/copenhagen-process-principles-and-guidelines-handling-detainees#\\_edn1](https://www.asil.org/insights/volume/16/issue/39/copenhagen-process-principles-and-guidelines-handling-detainees#_edn1)

conclusions on the current state of international law. First and foremost, under International Humanitarian Law (IHL), there is clear legal authority to detain in a NIAC. The debate is now less about the existence of a power to detain in IHL, and more about what the relevant limits of that power are. Detention is recognised as a legitimate feature in all forms of armed conflict, and may be authorised. This authorisation may specifically derive from a United Nations Security Council resolution (UNSCR), or it may follow the authority granted parties to an armed conflict under IHL. I also note that the International Committee of the Red Cross (ICRC) maintains the clear institutional position that there is a power to detain in a NIAC, derived from customary international law.<sup>32</sup> Furthermore, there are no inherent discrepancies between armed conflict detention and international human rights law (in particular, see Article 5 of the European Convention on Human Rights (ECHR), relating to the right to liberty and security of person). The two can be reconciled.

Experience from developing the ISAF's SOP shows that care must be taken when establishing policies in a multinational context. This includes the need to recognise the realities faced by operations in remote areas of the Afghanistan context. As NATO continues to contemplate lessons learned from the ISAF experience and consider future operational requirements, it is clear to me that NATO would benefit from working more closely with national lawyers from both foreign affairs and defence perspectives, to gain greater clarity on issues related to NIAC detention.

## Conclusion

Aside from informing conference attendees about the state of play on selected legal issues of strategic importance to NATO, my objective was to show that NATO can be a useful forum for national lawyers, as they help develop their own state's international law strategy. National lawyers should consider their NATO colleagues as a resource. I look forward to continuing the active cooperation between NATO and national legal advisers on these and other matters.

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<sup>32</sup> ICRC, 'Strengthening Legal Protection for Persons deprived of their Liberty in relation to NIAC: *Regional Consultations 2012-13*'.



(US President Harry S. Truman addresses those gathered for the signing of the North Atlantic Treaty by NATO's twelve founding members in Washington D.C. on 4 April 1949.) © NATO

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

## WORKSHOP 06 MAY 2015: "Tackling 21st Century Challenges Faced by International Organizations"

NATO Allied Command Operations  
Supreme Headquarters Allied Powers Europe (SHAPE)

### Some Notes on NATO's Institutionalisation<sup>1</sup>

by Andres B. Munoz Mosquera\*

#### Introduction

NATO is one of many examples among existing international organisations (IOs) that demonstrate the evolution and good health of

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\* 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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<sup>1</sup> This article uses majorly the works of the first part of A.B. Munoz Mosquera's doctoral thesis 'The North Atlantic Treaty Organization: an international institutional law perspective' *First Part: The North Atlantic Treaty Organization: from the United Nations Charter to a Dynamic Institutionalization*. (Pending on defense). More detailed footnoting and reference on this research and novel submissions in this article must be solicited to the author.

international institutional law. The 1951 Ottawa Agreement and the 1952 Paris Protocol give NATO its two legal personalities, which inspired NATO's three international organisations. The first is based on the 1951 Ottawa Agreement and led by the International Staff and International Military Staff, which, by charter, gives status to NATO agencies, forming the civil side of NATO. The other two have their legal framework in the 1952 Paris Protocol. These are the two Supreme Headquarters, which form NATO's military integrated structure.

The legal personality is provided by Article 10 of the Paris Protocol and is held separately by both Supreme Headquarters, i.e., Headquarters Supreme Commander Allied Transformation (HQ SACT) and the Supreme Headquarters Allied Powers Europe (SHAPE). The latter is the first NATO international organisation as recognised by France and whose first legal position was established under the 1950 Franco-American agreements.<sup>2</sup> Later, the Supreme Headquarters' position was set up by the Paris Protocol. In addition, the legal position of the subordinate bodies of both international organisations has been transferred via *ad hoc* delegation. All these NATO 'institutional pieces', and those under the Ottawa Agreement are NATO bodies and are collectively referred to as 'NATO'. NATO is, therefore, an international organisation made of three different international organisations, each of them with their own legal position. The essential components of the legal position are:

1. Legal status, consisting of legal personality, legal capacity and powers;
2. privileges and immunities; and
3. responsibility.

This article will examine NATO as the manifestation of the post-WWII concept of peace via intensive institutionalised inter-state relationships. Furthermore, this article will establish that NATO was to be capable of evolving institutionally.

*"[The drafters of the North Atlantic Treaty] did not attempt, at the outset, to draw up a blueprint of the international organization which should be set up, or lay down any hard and fast rules of procedure.*

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<sup>2</sup> 1. "[F]rance stated that for the provisional financing of SHAPE, it would extend the conditions set forth in the Franco-American agreement of 14 December 1950 and that "[t]he French delegation is perfectly conscious of the fact that SHAPE in its character of an *international organisation* is different from the Franco-American organisation. Faced with the necessity of taking provisional measures at this time it appears that it would be best to propose system which has already been proven." (emphasis added). North Atlantic Treaty Organization, 'Provision of Budget for SHAPE. Note by the Secretary', D-D(51)52, Appendix B, p. 13, 22 February 1951, [https://archives.nato.int/uploads/r/null/3/1/31054/D-D\\_51\\_52\\_ENG.pdf](https://archives.nato.int/uploads/r/null/3/1/31054/D-D_51_52_ENG.pdf), 2 March 2018.

*They realized that these could only be evolved step by step in the light of practical experience.”<sup>3</sup>*

It will first be explained how the desire for the continuous search for peace is the impulse that inspired modern international organisations. Second, it will be argued how NATO's institutionalisation can be explained through the philosophical concepts of 'idea', 'community of interest' and 'functional need'. Third, is an analysis identifying that the North Atlantic Treaty ('NAT') provisions permit, encourage or enable the dynamic institutionalisation of NATO. Finally, this article will suggest areas that require further research, illustrating the paradoxes and particularities of international institutional law applied to NATO.

### **Peace: the seed of International Organisations**

*“In a Hobbesian world, the Leviathan, the leader of a commonwealth, creates ‘our peace and defence’.”<sup>4</sup>*

International law dynamics in the twentieth century harnessed international institutions in a legal order that used “narratives of progress toward the international, a place figured as both practical and humane”,<sup>5</sup> where organisations favour peace and marginalise wars brought on by short-term arguments.<sup>6</sup>

Kant had already identified that the “state of peace [...] is not the natural state [...] which is rather to be described as a state of war”. He argued that “there is a constant threatening that an outbreak may occur. Thus, the state of peace must be established.”<sup>7</sup>

NATO is a product of this dynamic of international law, since its members have declared that they are “resolved to unite their efforts for collective defence and for the preservation of peace and security”.<sup>8</sup> The NAT

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<sup>3</sup> H. Ismay, *NATO the First Five Years 1949-1954* (Bosch-Utrecht, Utrecht, 1954), p. ix.

<sup>4</sup> T. Hobbes, *Leviathan*, The Second Part, Of Commonwealth, Chapter XVII, Of the Causes, Generation, and Definition of a Commonwealth, <[www//oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-c.html#CHAPTERXVII](http://www//oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-c.html#CHAPTERXVII)>, 3 November 2014.

<sup>5</sup> D. Kennedy, *International Law and The Nineteenth Century: History of an Illusion'* (1997) *Quinnipiac Law Review*, Vol 17:99, p. 104.

<sup>6</sup> C. Chalanouli, *Kant et Dworkin* (L'Harmattan, Paris, 2010), p. 262.

<sup>7</sup> I. Kant, *Perpetual Peace: A Philosophical Essay* (George Allen and Unwin Ltd, New York, 1903 – First edition 1795), pp. 117-118.

<sup>8</sup> North Atlantic Treaty Organization, <[www.nato.int/cps/en/natolive/official\\_texts\\_17120.htm](http://www.nato.int/cps/en/natolive/official_texts_17120.htm)>, 30 September 2014.

is the foundational document and is not a stranger to the twentieth century international law construct championed by the Charter of the United Nations. In fact, the continuous references within the Treaty's text to the purposes and principles of the Charter and to its main institution, the Security Council reveals a certain sense of 'supplemental agreement' to the Charter.<sup>9</sup> The Charter's teleological preamble establishes that peoples are resolved "to save succeeding generations from the scourge of war".<sup>10</sup>

The Charter of the United Nations is relevant to NATO in two key areas:

1. The drafters of the Charter, notwithstanding any debate and diverse approaches, seem to have given it a certain constitutional dimension.<sup>11</sup> This constitution-like feature<sup>12</sup> is observable in the preamble, Articles 1, 2 and 103, as well as in those articles related to the Security Council powers.
2. The Charter has become the *Grundnorm* for other international institutions.<sup>13</sup> Examples of these are the references to the purposes and principles of the Charter made in the constitutional documents of all international organisations of the United Nations family, as well as the European Union, the African Union, the Organization of American States, the Organization for Security and Co-operation in Europe, etc.

The NAT acknowledges the two aspects of the Charter described above. Additionally, the final communiqué of the first session of the North Atlantic Council, its first resolution made on 17 September 1949, states that "[t]he task of the council is to assist the Parties in implementing the Treaty and particularly in attaining its basic objective ... the maintenance of international peace and security".<sup>14</sup>

<sup>9</sup> E. Reid, *Time of Fear and Hope* (McClelland and Stewart, Toronto, 1977), p. 33-34. Olav Riste quotes former Norwegian Foreign minister Trygve Lie 'Norway's interests would be best served by an agreement embracing the countries bordering on the North Atlantic, on condition that it was subordinated to an international organisation ...' O. Riste, 'Norway and the genesis of North Atlantic defence cooperation', in N. Sherwen (ed.), *NATO's Anxious Birth. The Prophetic vision of the 1940s* (C. Hurst and Company, London, 1985), p. 27. Other authors as De Visscher argues that the North Atlantic Treaty 'ne s'insère ni ne s'intègre dans la Charte' in *Théories et Réalités en Droit International Public* (Pedone, Paris, 1970), p. 147.

<sup>10</sup> United Nations, <[www.un.org/en/documents/charter/](http://www.un.org/en/documents/charter/)>, 15 October 2014.

<sup>11</sup> B. Simma, *The Charter of the United Nations: A Commentary*, (Oxford University Press, Oxford, 2012 – Third Edition), p. 81. Simma references UNCIO VI, Doc785, I/1/28, 359.

<sup>12</sup> J. Crawford, *Chance, Order, Change: The Course of International Law* (Hague Academy of International Law, 2014), p. 459.

<sup>13</sup> 'As held by the ICJ in the *Nuclear Weapons* opinion, the logic of the overall system contemplated by the Charter has to be taken into account when interpreting another international organizations' Constitution'. Simma, *supra* note 12, p. 82.

<sup>14</sup> North Atlantic Treaty Organization, <[www.nato.int/docu/comm/49-95/c490917a.htm](http://www.nato.int/docu/comm/49-95/c490917a.htm)>, 5 October 2014.

The legal or political value of the first resolution of the North Atlantic Council may be contested; however, it is of significance, especially because it is the first collective decision taken by the signatories of the NAT. The resolution explicitly identifies the primary objective of the NAT, aligning it with the purposes and principles of the United Nations, more notably the key one, i.e., the maintenance of international peace and security. Regarding this first resolution, it must be noted that the International Court of Justice (ICJ) Advisory Opinion on *Certain Expenses*, states the following:

*“The primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition.”*<sup>15</sup>

This stance becomes more evident in the provisions of the NAT, which mention the expression ‘United Nations’ six times in relation to the Charter’s purposes and principles, as well as the use of force and settlement of disputes. Equally, the term ‘Security Council’ is referenced in the NATO’s *raison d’être* Article 5 and in Article 7 with the confirmation of the Charter’s primacy. It seems that the NAT provisions and the North Atlantic Council’s resolutions recognise that the Charter has created an international legal system, with UN Law prevailing over other treaties, including the NAT.<sup>16</sup> NATO’s institutionalisation found fertile soil in NAT’s references to the Charter, as well as in the 1940’s hostile international environment.

The first resolution of the North Atlantic Council shows the primacy given by the NATO members to the implementation of this noble goal. Since Article 9 of the NAT explicitly created the North Atlantic Council gave it the power to created subsidiary bodies,<sup>17</sup> this article must be considered the main enabler for NATO’s institutionalisation.

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<sup>15</sup> *Certain Expenses of the United Nations*, 20 July 1962, International Court of Justice, Advising Opinion, p. 168, <[www.icj-cij.org/docket/files/49/5259.pdf](http://www.icj-cij.org/docket/files/49/5259.pdf)>, 1 November 2014.

<sup>16</sup> L. Kaplan, *NATO 1948, the Birth of the Transatlantic Alliance*, (Rowman and Littlefield Publishers, Lanham, 2007), p. 218. See North Atlantic Council’s Press Communiqué, Washington 17 September 1949

“The task of the Council is to assist the Parties in implementing the Treaty and particularly in attaining its basic objective. That objective is to assist, in accordance with the Charter, in achieving the primary purpose of the United Nations--the maintenance of international peace and security”

<[www.nato.int/docu/comm/49-95/c490917a.htm](http://www.nato.int/docu/comm/49-95/c490917a.htm)>, 2 November 2014.

<sup>17</sup> “The Parties hereby establish a Council, on which each of them shall be represented, to consider matters concerning the implementation of this Treaty. The Council shall be so organized as to be able to meet promptly at any time. The Council shall set up such subsidiary bodies as may be necessary; in particular it shall establish immediately a defence committee which shall recommend measures for the implementation of Articles 3 and 5.”

## A philosophical approach to NATO

Hauriou's theory of institution is based on the concept of idea as a teleological mission personified in a juridical subject, which "comes into being in the constituted body".<sup>18</sup> On this note, the following has to be remembered:

"[A]t its heart NATO is an idea, an idea which has taken years to flesh out ... makes a community in the greatest sense, bred out of traditions, religions and technology that none of the other major civilizations of the world share. It has taken centuries of internecine bloodshed to make them realize that they are one."<sup>19</sup>

NATO's philosophy is based on the concepts of 'ideas', 'common interest,' and 'functional necessity'. NATO's institutions are based on 'ideas',<sup>20</sup> which go through three phases:

1. The idea evolves based on precedents and desires during the inception of the institution, regardless of its level of organised internal bodies and external capacities.
2. The idea grows with the juridical instrument or instruments that constitute it.
3. The idea settles with the continuous and dynamic practice of the institution, via the exercise of its decision-making process.

Although NATO may have started with approaches taken from idealism, the institutionalisation process continues as the idea is materialised in a text and in practice based on a "reasoned follow-through", i.e., a logical and consistent practice.<sup>21</sup> In its second and third phases, the idea behind NATO encounters the sophisticated realm of international relations with a dose of realism, as we will see in some of the examples below.

The NAT negotiations show a process run by a group of states with a 'common interest' in collective defence to avoid war. Upon the request of some of the European states engaged in the Treaty of Brussels, the United Kingdom approached the United States. For a year, the NAT negotiators held nonstop discussions via a repeated process of differentiation and exclusion of

<sup>18</sup> Hauriou's institutional theory qualifies bodies as institution-persons (note that *institution-chose* relates only to rules). These become subjects of the moral persons and come into being in constituted bodies. M. Hauriou, 'La théorie de l'institution et de la fondation' (1925) *Cahiers de la Nouvelle Journée*, N° 4, p. 100.

<sup>19</sup> North Atlantic Treaty Organization, 'Reasons and Circumstances Leading to the Signatures of the North Atlantic Treaty', RS/67/12, 19 January 1967, p. 1, <[www/archives.nato.int/](http://www.archives.nato.int/)>, 15 November 2014.

<sup>20</sup> Hauriou, *supra* note 20, p. 99.

<sup>21</sup> D. Kennedy, 'The Move to Institutions' (1987) 8:1 *Cardozo Law Review*, p. 899.

their states' individual interests. The intention was to achieve a common understanding on their collective interest, the 'common interest'. The 'common interest' resulted to be no other than the implementation of the idea of collective defence as recognised in the Charter. The NAT negotiations were an iteration of different and individual states' rhetoric about achieving peace. It was a simple, although effective, process of adjusting different views, as opposed to an instantaneous legal pact.

The inherent development of international organisations to adapt to evolving international circumstances is embedded in the principle of the 'functional necessity'.<sup>22</sup> This principle acknowledges that international organisations are created by states to carry out a specific mission for the common interest, or *finalité intégrée*, of the partnership community. This, due to the fact that the individual action of states is suboptimal, given that international organisations can 'pool' expertise and create synergies, as well as legitimacy.

Functionalism explains why international organisations evolve naturally over time using their institutions to adapt the original mission (the functions and purposes) to the changing environment of international relations. When drafting the North Atlantic Treaty, "[t]he decision to endow this alliance with institutional characteristics was designed to aid the process of adaptation".<sup>23</sup>

It appears that NATO has combined the mutual assistance function of an alliance<sup>24</sup> with stable functioning institutions, permitting states to continuously consult and collaborate over the years to address "the grave problems which affect the peace of the world".<sup>25</sup> Buteux summarised the above, stating "NATO combines the traditional functions of an alliance with the institutions, procedures, and operations of an international organization".<sup>26</sup> On this note, Jordan affirms that: "NATO stands as much in the growing tradition of functional international organization as in that of military alliances. In NATO the two are intertwined to an unprecedented

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<sup>22</sup> M. Virally, 'La Notion de Droit', *Le Droit International en Devenir, Essais Ecrits au Fil des Ans* (Presses Universitaires de France, Paris, 1990), p. 275.

<sup>23</sup> S. Kay, *NATO and the Future of European Security* (Rowman & Littlefield Publishers, Oxford, 1998), p. 34.

<sup>24</sup> S. Bergsmann, 'The Concept of Military Alliance', in Erich Reiter and Heinz Gärtner (eds.), *Small States and Alliances* (Physica-Verlag Heidelberg, 2001) p. 55.

<sup>25</sup> G. Mangone, *A Short History of International Organization* (McGraw-Hill, New York, 1954), p. 129.

<sup>26</sup> Paul Buteux, *The Politics of Nuclear Consultation in NATO 1965-1980* (Cambridge University Press, Cambridge, 1983), pp. 4-5.

extent".<sup>27</sup>

This could not have been done without the barebones institutionalisation of the NAT provisions. Smith maintains that the NAT "does contain articles and passages which suggest that even in 1949 the signatories wanted something rather more solid and permanent than a transient and unstructured military alliance".<sup>28</sup>

### **NATO: institution building**

The NAT is not self-contained, as it only counts on the barebones of a constitution, albeit with an incipient but strong institutionalisation mechanism in the North Atlantic Council's powers and Article 9. The NAT did not address questions relating to institution building, such as which bodies<sup>29</sup> developed NATO and the nature of them;<sup>30</sup> the legal position(s) of the 'Organisation' and 'Supreme Headquarters', voting and dispute resolution, tax-exemptions, etc. However, this primarily took place between 1951 and 1952, when NATO members developed explicit institutional elements complemented with general multilateral agreements.<sup>31</sup> These were later developed with basing

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<sup>27</sup> R. Jordan, *The NATO International Staff/Secretariat 1952-1957* (Oxford University Press, London, 1967), p. vii.

<sup>28</sup> M. Smith, *NATO in the First Decade after the Cold War* (Kluwer Academic Publishers, Dordrecht, 2000), p. 1.

<sup>29</sup> D. Anzilotti, 'Gli organi comuni nelle Società di Stati' (1914) 8 *Rivista di diritto internazionale*, pp. 156-164.

<sup>30</sup> NATO's institutionalization is not much known and still many think that the organization is a monolithic block. NATO is made of three different and distinct International Organizations (IOs), as confirmed by the *travaux préparatoires* and abundant jurisprudences, and these with different legal positions, i.e., the 'Organization' (known colloquially as the NATO HQ) and two Supreme Headquarters. The former governed by the 1951 Ottawa Agreement and the latter two by the 1952 Paris Protocol. The latter has a hybrid nature and requires for its completeness of the 1951 NATO SOFA and the 1951 Ottawa Agreement. On this note, supplementary agreements to these treaties are key elements for identifying the legal position of NATO bodies. See also Olson's: 'NATO has a highly decentralized structure; there is no overall NATO 'CEO'. Rather, it is divided into separate military and civilian sides, each of which is further divided into a number of individual NATO bodies or military commands reporting and accountable directly to the North Atlantic Council, rather than to the Secretary General.' In P. Olson, 'Immunities of International Organizations. A NATO View' (2013) *International Organizations Law Review* 10, pp. 420 and 423. Peter Olson, the former Legal Adviser and director of the Office of the Legal Advisor for the NATO International Staff explains this situation: "I am not the Legal Advisor for the whole of NATO, and have no hierarchical relationship with the other 100 or so legal professional throughout the Organization. Most of these are on the military side ... This office does not handle ALL the legal work for the organisation, just the IS [International Secretariat] part of it. I can't tell any other legal office or officer what their policy is or should be." 'NATO Legal Eagles', Interview to NATO International Staff Legal Advisor (2014) NATO Staff Centre Magazine 9, p. 12.

<sup>31</sup> The 1951 Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff (Ottawa Agreement), the 1951 Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (NATO SOFA) and the 1952 Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Paris Protocol). The Paris Protocol is a Protocol to and thus relying on the NATO SOFA (explicitly mentioned) and the Ottawa Agreement (implicit per *travaux préparatoires* and practice).

agreements (supplementary agreements), and other bilateral agreements, instruments and decisions.<sup>32</sup>

*“Within NATO ... there are several treaties dealing with privileges and immunities, including those of the organization itself, those of their State’s missions to NATO, those of NATO’s military headquarters and those of Member States’ military forces.”<sup>33</sup>*

The fourteen articles of the NAT inspired transformative institutionalisation, not only by being solidly rooted in the Charter of the United Nations, but also by containing elements in it that turn the majority of the articles into institutional enablers. NATO members created a forum — NATO institutions — which developed “a fully-fledged consultative and behavioural regime amongst the NATO membership”.<sup>34</sup>

The beauty of Article 9 is that its formulation sustains NATO’s institutional momentum. This is done in three ways:

1. Implementing the NAT Preamble in conjunction with Articles 1 to 13;
2. codifying an embryonic institution which later took a dynamic leap forward to develop further, as seen in the 1954 reorganisation, the strategic concepts and the continuous NATO Command Structure reorganisation efforts; and
3. establishing a bridging mechanism between the ‘momentary outburst of passion’ at the signature of the NAT and every institutional decision for its implementation. Article 9 of the NAT is the tip of NATO’s institutionalisation arrow reinforced by strong institutional enablers, such as Articles 2, 3, 4 and 5.

Furthermore, this institutional momentum is also sustained by transferring the daily decision-making from the capitals to NATO national representations and institutions headed by the North Atlantic Council. These institutions sustain the institutional momentum over time, which confirms that NATO is an international organisation undergoing a continuous institutionalisation process. The sustainability of NATO’s institutional momentum indicates a significant legal and political commitment among NATO members.

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<sup>32</sup> These are the Supplementary Agreements to the Paris Protocol and relating Exchanges of Letters, and the specific memoranda of understanding in so far as they are concluded in the fulfillment of the obligations set up in Article 3 of the North Atlantic Treaty.

<sup>33</sup> J. Wouters and F. Naert, ‘Some Challenges for (Teaching) the Law of International Organizations’ (2004), *International Organizations Law Review*, 1, p. 24.

<sup>34</sup> Smith, *supra* note 30, pp. 15-16.

Since Article 9 of the NAT did not develop the North Atlantic Council and its processes, the Council, in its first session,<sup>35</sup> established relevant institutional structures and procedures, including the rule for decision-making, unanimity. NATO applied the unanimity rule until the late 1970s and since then, uses the practice of consensus for making decisions, except for the admission of new members, per Article 10 of the NAT. What caused this development? How does this affect the question of the accountability or responsibility of international organisations? NATO's decision-making process is an indication that there are new developments that deserve study and research in international institutional law.<sup>36</sup>

These developments emerge as a consequence of the continuous evolution of international organisations and the relation between institutions and their constituents. This is all framed within the inherent dynamism of public international law. The following section provides some examples of these developments.

### **Unanimity or consensus**

The NAT did not establish a voting decision-making process for NATO's institutions daily operations. Since the Treaty was silent on any rule of procedure for the decision-making acts of the North Atlantic Council, NAT signatories adopted the principle of unanimity in the first session of the Council. This was the formula set up by Article 10 of the NAT, but only for the admission of new NATO members and not as the ordinary means for the decision-making process of NATO.

Unanimity established NATO as a pure intergovernmental organisation. The unconditional sovereignty of Member States is an essential condition of the alliance.<sup>37</sup> In principle, as Blokker submits, unanimity entices states that do not want to be outvoted and also favours the implementation of decisions, as the general support exists from their inception.<sup>38</sup> However, the grass is not greener in the gardens of unanimity. Publicists argue that unanimity pretentiously justifies equality among states, but it is actually a burden for

<sup>35</sup> North Atlantic Treaty Organization, 'Final Communiqué' 17 September 1949, <[www.nato.int/docu/comm/49-95/c490917a.htm](http://www.nato.int/docu/comm/49-95/c490917a.htm)>, 5 April 2014.

<sup>36</sup> N. Blokker, 'Comparing Apples and Oranges? Reinventing the Wheel?' (2008), *International Organizations Law Review*, 1, pp. 197-213.

<sup>37</sup> D. Bland, *The Military Committee of the North Atlantic Alliance. A Study of Structure and Strategy* (Praeger, New York, 1991), p. 7.

<sup>38</sup> H. Schermers, N. Blokker, *International Institutional Law* (Martinus Nijhoff Publishers, Leiden, 2011), pp. 547-548.

international institutions, as it reduces international cooperation to the lowest common denominator or sovereign accord. The result is that unanimity is “totally unworkable in practice”,<sup>39</sup> permitting Member States to negatively influence the functional effectiveness of the operations of international organisations.

For NATO, the unanimity rule proved unworkable in 1957 when the NAC adopted the so-called Dulles doctrine of massive, immediate atomic retaliation. For its implementation, the United States nuclear force was integrated within NATO's strategy. However, in 1962 the United States withdrew it and replaced it with McNamara's doctrine which relied on conventional forces, which was refused by France.<sup>40</sup> “Since unanimity was required in the Council, France was able to prevent the Council from rescinding its 1957 decision and formally adopting the new strategy”.<sup>41</sup> It was not until 1967, a year after the French withdrawal from the integrated military structure, that the NAC changed it. The unanimity rule provoked a lack of cooperation. Moreover, the situation evolved to the point that between 1962 and 1967 the NATO Supreme Commander Allied Powers Europe (SACEUR) applied McNamara doctrine *de facto* without any legitimation by the NAC. This situation undermined NATO's institutions and sabotaged Member States' cooperation.

The need for NATO international cooperation and strengthened institutions led NATO members gradually adopt the new practice of ‘agreement by consensus’ at the end of the 1970s.<sup>42</sup> This evolution from unanimity to consensus was also occurring in other international organisations at the same time. However, in 1959 Secretary General Spaak had already identified the shortcomings of the unanimity rule.

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<sup>39</sup> D. Bederman, ‘The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Sparte’, in Fleur Johns (ed.), *International Legal Personality* (Ashgate Publishing Limited, Surrey, 2010), pp. 346-347.

<sup>40</sup> North Atlantic Treaty Organization, J. Shea ‘1967: De Gaulle pulls France out of NATO's integrated military structure’ <[www.nato.int/cps/en/natohq/opinions\\_139272.htm](http://www.nato.int/cps/en/natohq/opinions_139272.htm)>, 4 July 2018.

<sup>41</sup> E. Stein and D. Carreau, ‘Law and Peaceful Change in a Subsystem: ‘Withdrawal’ of France from the North Atlantic Treaty Organization’ (1968), *The American Journal of International Law*, Vol. 62, No. 3, pp. 598-600.

<sup>42</sup> “A ... major change had as much impact on intra-Alliance relations as it had on the Cold War: the Harmel Report of 1967. Now forty years old, the Harmel initiative reflected the influence of the smaller members of the Alliance upon the larger powers, particularly upon the superpower, the United States. NATO's acceptance of the message in that report blunted centrifugal pressures that might have led to the Alliance's dissolution. It also set NATO on a course that ultimately led to the end of the Cold War.” North Atlantic Treaty Organization, L. Kaplan ‘The 40th anniversary of the Harmel Report’, <[www.nato.int/docu/review/2007/issue1/english/history.html](http://www.nato.int/docu/review/2007/issue1/english/history.html)>, 5 April 2015.

*"I myself believe that international organizations, whether they are universal, Atlantic, or European, will not really function well until the day when the strict rule of unanimity will have been abandoned. But one must certainly recognize that, in saying this, I or people who share this feeling are far ahead of their time."*<sup>43</sup>

Consensus came with the promise to bring reasonable stability to NATO's decision-making process. More importantly, it sought to facilitate outcomes of the NAT obligation under Article 4 on consultation. The practice of consensus represents the willingness of NATO members to avoid formal voting to adopt decisions and consequently to negotiate until an agreement is reached.<sup>44</sup> Agreement may consist of responding with silence, which is the normal answer resulting from the works of a decision-making body.<sup>45</sup> In NATO, this is known as the 'silence procedure' and used in the daily functioning of the organisation relating to decision-making. The silence procedure preserves the practice of consensus and triggers the collective desire for maintaining political solidarity in difficult situations, which is actually the natural and functional environment of NATO. Moreover, the practice of consensus generates sovereign cooperation without compromising sovereign autonomy. This procedure was key during the Kosovo bombing campaign. Solana said: "so that members could remain silent as NATO moved forward".<sup>46</sup>

Consensus is a good practice, but it is not bulletproof. Kosovo challenged NAC capacity to maintain consensus during military actions. This was shown during the three phases of the targeting process. Each phase was an escalation of the previous one and required NAC approval. With a move from military to civilian targets, controversy has grown among NATO members.<sup>47</sup> In any case, consensus has proven useful for NATO and other international organisations. What is the explanation for such evolution? Does it have any institutional meaning? A very brief answer for such evolution could

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<sup>43</sup> Spaak's speech at the Meeting of the Political Committee (B) of the Atlantic Congress, 8 June 1959. F. Beer, *Integration and Disintegration in NATO* (Ohio State University Press, Ohio, 1969), pp. 33 and 286.

<sup>44</sup> M. Virally, *L'Organisation Mondiale* (Armand Colin, Paris, 1972), p. 196.

<sup>45</sup> R. Monaco, 'Les principes régissant la structure et le fonctionnement des organisations internationales (volume 156)' *Collected Courses of the Hague Academy of International Law*. The Hague Academy of International Law (Brill, Nijhoff, Leiden/Boston, 1977), p. 140.

<sup>46</sup> R. Hendrickson, *Diplomacy and War at NATO: The Secretary General and Military Action After the Cold War* (University of Missouri Press, Columbia, 2006), p. 108.

<sup>47</sup> W. Clark, *Waging Modern War* (Perseus Books, Group, Cambridge, 2001), pp. 233-256.

be explained, most likely, by considering that this is correlative to the institutional maturity of an international organisation, as well states realising that unanimity limits the effectiveness and timely response in international cooperation.

## Conclusion

NATO, as many other contemporary international organisations, is the consequence of a little over two centuries of public international law evolution, seeking peace through international institutions. NATO is obviously a product of this dynamic of international law, since it is an organisation whose members have declared they are resolved to preserve peace and security,<sup>48</sup> and this is necessarily an evolving concept due to changing politics, technology, interests, etc.

NATO philosophical principles revolve around the concepts of 'idea', 'common interest' and 'functional necessity'.<sup>49</sup> The institutionalisation process of NATO is a three-phased process centred in an 'idea': the idea evolves, the idea grows and the idea settles. The constitutional structure of NATO and its different legal positions show that it an international organisation made of three international organisations. Further research into the particularities of NATO is necessary and contributes to a more empirical understanding of international institutional law and the law of international organisations.

Concluding these notes on NATO's institutionalisation, it is appropriate to quote Inis Claude in *Swords into Plowshares*:

*"In organizational terms, NATO is something new under the international sun. It is an alliance which involves the construction of institutional mechanisms, the development of multilateral procedures, and the elaboration of preparatory plans for the conduct of joint military action in future contingencies [...] [NATO] is a coalition consisting not merely of a treaty on file, but also of an organization in being [...] NATO is not an exceptionally advanced form of international organization, and it is by no means self-evident that NATO is destined to become the progenitor of audacious internationalist schemes. Nevertheless, it represents an impressive organizational achievement ... in that it applies ... the*

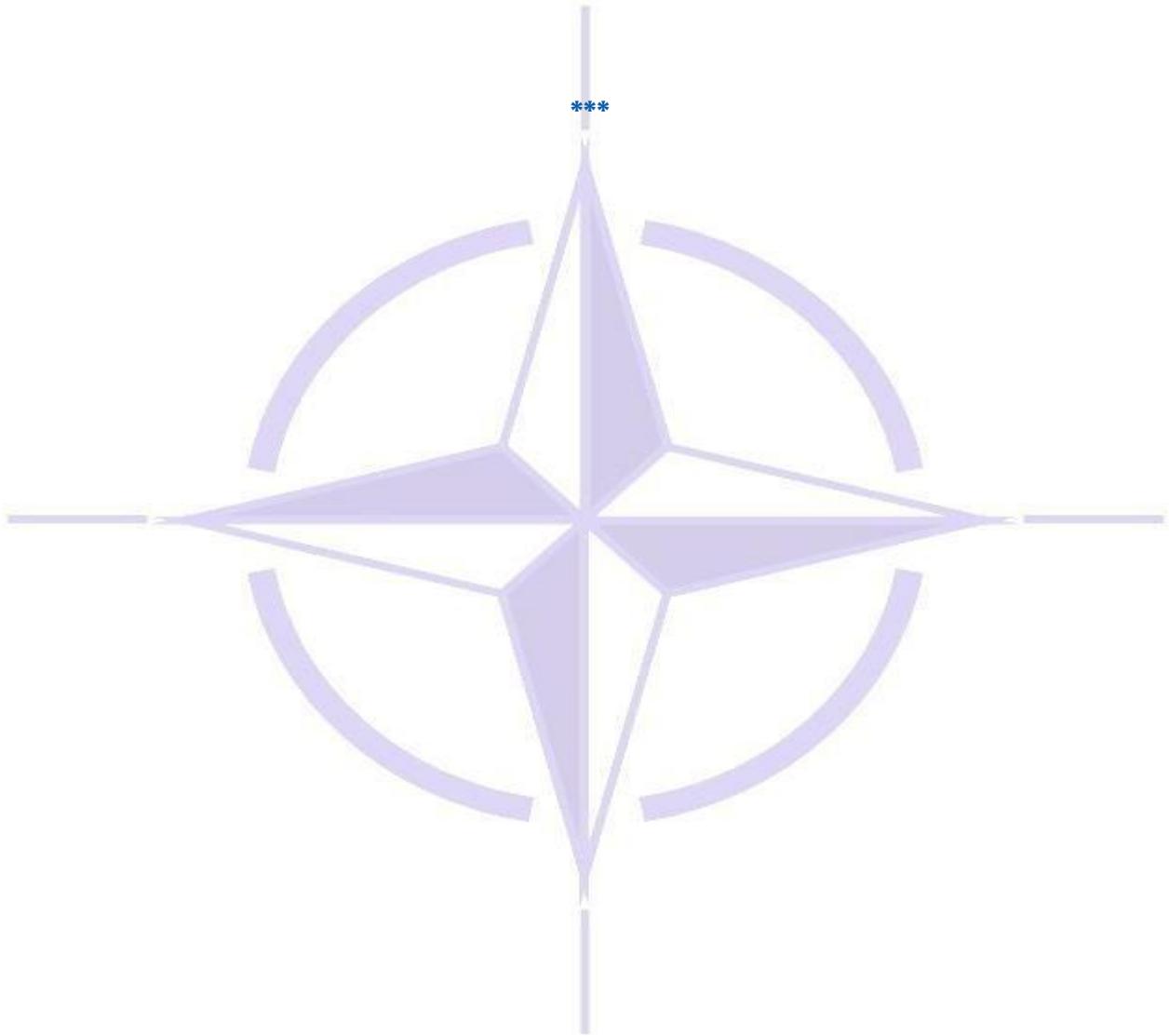
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<sup>48</sup> North Atlantic Treaty Organization, <[www.nato.int/cps/en/natolive/official\\_texts\\_17120.htm](http://www.nato.int/cps/en/natolive/official_texts_17120.htm)>, 30 September 2014.

<sup>49</sup> See Hauriou's theory of 'the institution'.

*concept of international organization for the transformation rather than the supplantation of alliances*"<sup>50</sup>

... and this is a real and live precedent for international institutional law studies.



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<sup>50</sup> Claude, *Swords into Plow Shares* (Random House, New York, 1971), pp. 266-267.



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

## An update on NATO cooperative MOU guidance.

by Jan Raats<sup>1</sup>

### Introduction

In the series of Allied Acquisition Practices Publications,<sup>2</sup> the Guidance for drafting of Acquisition Memoranda of Understanding (MOUs), the Programme MOUs - Basic considerations and the checklist of items to be

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<sup>2</sup> The Guidance Manual for Co-operative Programme Arrangements (Allied Acquisition Practices Publication 1) incorporated the Guidance for the drafting of MOUs and Programme MOUs, Basic Considerations and Checklist (Part I) and the Guidelines and Sample Provisions for Memoranda of Understanding (Part I, Samples) along with Supplements on specific topics. The Manual was updated to become the Guidance for the Negotiation and Drafting of International Co-operative Armaments Arrangements {Memoranda of Understanding (MOUs) and Programme MOUs}, AACP-1, Volume I, incorporating (updated) Basic Considerations and the (updated) Checklist as well as (updated) Guidelines and Sample Provisions along with the Supplements, now including a Tool Box 'A library of experiences and examples of current practices to help Nations drafting Memoranda of Understanding'.

considered date back to 1989, with Guidelines and Sample Provisions for Memoranda of Understanding being first published in 1997.<sup>3</sup> Many acquisitions MOUs reflect the Checklist, but particularly the Samples are very much in use when drafting an Acquisition MOU. Despite the publication dates, the Guidance turned out to still be relevant and instructive. Even the US DOD international agreements generator,<sup>4</sup> used for DOD MOU development, echoes much of what was agreed upon within NATO under the aegis of the Conference of National Armaments Directors (CNAD).

In order to secure its continued use in the future, the Guidance was updated. It also introduces lessons learned from the use of the Samples. The new way of publishing and the new elements are introduced below. Before this, however, I will first elaborate on how, as reflected in the Basic Considerations and the Guidelines and Samples, the character of the Acquisition MOU evolved within NATO, thus pushing the Acquisition MOU further away from being a legal document.

### **MOU Status**

The legal status of an MOU is relevant for enforcing the provisions of the agreed document, but also for its interpretation. At the national level, the nature of a document will affect its staffing and the way the document is negotiated.

The Basic Considerations give the CNAD approach to the status of the Acquisition MOU. Although MOUs are seen as binding documents, they are not necessarily considered *legally* binding. This, in turn, limits the value of the arrangements made in an MOU to politically<sup>5</sup> or morally binding arrangements. The legally limited character of the MOU is confirmed by the notion that MOUs “*never prevail over national law, nor can they normally preclude the application of prohibitions or restrictions imposed under national law.*”<sup>6</sup> In addition to this, the Basic Considerations now remind the future participants to take into account all applicable legislation when drafting the Acquisition MOU, such as national laws and regulations, EU Directives, etc.

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<sup>3</sup> A Guidance Manual for Co-operative Programme Arrangements, Allied Acquisition Programme Arrangements (AAP-1)

<sup>4</sup> See for use by the USA, the DOD International Armaments Cooperation Handbook 3<sup>rd</sup> Edition November 2004.

<sup>5</sup> Anthony Aust, *Modern Treaty Law and Practice*, Third Edition, page 28

<sup>6</sup> Guidance Basic Considerations and Checklist for (P)MOUs, Section I –Basic Considerations for the drafting of MOUs

Moreover, prior to signing, one is to ensure that the Acquisition MOU, as approved by all participants, is not in conflict with existing laws or other legal constraints.

Although the wording of an MOU normally establishes that it does not concern an international agreement,<sup>7</sup> some MOUs diminish their status even more by explicitly stating that *“this MOU does not constitute an Agreement under International Law.”*

All this means that, contrary to international arrangements taking precedence over national law, not only does international law take precedence over MOUs, but also national law. Considering that European Union Directives are to be incorporated within the national laws of all EU nations, in time, such directives can also indirectly take precedence over MOUs.<sup>8</sup> Depending on the participating nations, one thus is left with a lot of national law to take into account.

The approach implies, to the extent the content of the Acquisition MOU does not indicate otherwise,<sup>9</sup> that the MOUs are not considered International Agreements in accordance with the Vienna Convention. This excludes Acquisition MOUs, apart from reference by analogy, from the interpretation rules that are contained in the Vienna Convention,<sup>10</sup> making one nation's interpretation of an MOU under their national law as good as any other nation's interpretation under their national law.

Interestingly, participants consider the Acquisition MOU binding without a framework to refer to. This leaves the nations with the need to be clear about the content of an Acquisition MOU as the arrangements in it can be interpreted simply on the basis of an MOU's actual wording and its preparatory work. Therefore, the following reminder is now incorporated in the Basic Considerations:

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<sup>7</sup> Anthony Aust, *Modern Treaty Law and Practice*, Third Edition, page 31

<sup>8</sup> European Court of Justice *Adrea Francovich and Danila Bonifaci and others versus the Italian Republic*, case C-6/90, ECLI:EU:C:1991:428 and European Court of Justice *Dillenkofer and Others versus Federal Republic of Germany* Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94. ECLI:EU:C:1996:375 (the latter:) *‘Failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes per se a serious breach of Community law and consequently gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of rights whose contents are identifiable and a causal link exists between the breach of the State's obligation and the loss and damage suffered’.*

<sup>9</sup> International law defines the character of an agreement/arrangement rather on the content than on the appearance of a document.

<sup>10</sup> Vienna Convention on the Law of Treaties 1969, Art 26 *‘Pacta sunt servanda’*, and Section 3 *‘Interpretation of Treaties’*

*“In order to avoid interpretation differences, the wording of an MOU should be self-explanatory to the maximum extent possible.”*

This reminder emphasises the reiterated need to provide sufficient detail in order to avoid ambiguity.<sup>11</sup> In addition to this, it might be worthwhile retaining the preparatory work of an Acquisition MOU to support its interpretation.

For the interpretation of an Acquisition MOU in the NATO context, the effect of the Unanimity Principle<sup>12</sup> also needs to be factored in. This principle is not just considered a “corner stone of NATO”, but is also promoted for use in Acquisition MOUs for collaborative programmes conducted under the aegis of the CNAD. Interestingly, this principle allows participants to pursue different interpretations and to block a majority interpretation. For the “remaining nations”, it brings about the lowest common denominator effect when negotiating accession to, or withdrawal from a co-operative programme, or in case of termination of a programme.

As a last resort, there is the disputes clause within an Acquisition MOU. This clause requires disputes to be solved only by means of consultation among participants, without turning to third parties (outside NATO). This, in turn, brings us back to the unanimity principle. For this reason, a dispute will be resolved by negotiation instead of a clear decision. In the NATO environment, there is the complicating factor that the nations can seek resolution not just by negotiating amongst themselves, but also by bringing the issue to one of the committees or boards. The final decision, however, rests with the North Atlantic Council (NAC), as the NAC retains the final authority over any measure which implements the North Atlantic Treaty.<sup>13</sup> Chartered organisations, such as NATO civilian organisations, possess direct access to the NAC when dealing with differences of interpretation, as they are placed under the authority of the NAC by their charter.<sup>14</sup>

The Acquisition MOU, certainly with the updated Guidelines and Samples at hand, is a flexible instrument for cooperation. At the same time, however, it is moving further away from being a legal document that

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<sup>11</sup> *‘The MOUs need to contain sufficient detail to avoid ambiguity in order to lower the probability that disputes will arise over matters of interpretation.’*

<sup>12</sup> The Unanimity Principle in Co-operative Programmes, AACP-1, Part 1, Supplement 8. Also in the NATO Council *‘decisions are agreed upon on the basis of unanimity and common accord’* (NATO Website [https://www.nato.int/cps/ic/natohq/topics\\_49763.htm](https://www.nato.int/cps/ic/natohq/topics_49763.htm))

<sup>13</sup> North Atlantic Treaty, Article 9

<sup>14</sup> Regulations for NATO Procurement. Logistics or Service Organizations, C-M(2009)0079

provides certainty to its participants with regard to the success of cooperation.

### **Document Status**

Together with a NATO Standardization Recommendation<sup>15</sup> (STANREC), the new document is distributed by the NATO Standardization Office. The standard, although approved by the NATO Life Cycle Management Group, in accordance with its definition<sup>16</sup> is published with the notification that it constitutes a non-binding document employed on a voluntary basis and contains no requirement for a commitment of the nations to implement the standards listed in it. A version of the updated document is available on the NATO Standardization Office website. It can be a great reference for those involved in Acquisition MOU drafting.

### **Overview**

The Basic Considerations and Checklist of items to be considered when drafting Acquisition MOUs, as well as Guidelines for Sample Provisions for Acquisition MOUs and the Samples are incorporated in the STANREC. Additionally, a Toolbox with the following content is developed: Export Control Compliance, a Withdrawal of Contribution Arrangement, Examples on Government Services and Facilities, and a model for an Acquisition MOU between a NATO Agency and participating nations.

### **Updates**

Scope of the cooperation:

Coming from the assumption that the programme should be implemented within the scope related to the agreed ceiling amount, a minor change is inserted in the Guidance to ensure that the highest governance body, such as a Joint Steering Committee for a programme, will be allowed to change the scope of the programme, if circumstances so require. This creates flexibility within the programme, while leaving participants in control through their representatives. All need to agree on a decision regarding the scope of the amendment. This allows for a change of the amendment's scope without the need for an amendment of the Acquisition MOU.

<sup>15</sup> STANREC 4792, 24 February 2017, promulgates and recommends the Multinational Publication, MACP-1, Volume I (link: <http://nso.nato.int/nso/nsdd/CommonList.html>).

<sup>16</sup> Production, Maintenance and Management of NATO Standardization Documents (December 2015), AAP-03

### Definitions:

To secure the NATO position regarding Third Party Sales, the Use of Equipment by a Third Party, and, most importantly, to ensure the ability of NATO to act as a participant with regard to foreground and background information, the guideline now states that the concerned NATO organisation and its personnel should not be defined as a “third party” in the Acquisition MOU. This allows NATO organisations to support the participants in a programme as a cooperation partner.

### Construct of the cooperative MOU:

From the practice of cooperative programmes, a clear distinction is made between a Framework/Programme MOU and a stand-alone Acquisition MOU. The former lays out general principles, normally without financial impact, with the need to implement the cooperative project in subordinate arrangements, whilst the latter possess direct impact and has financial consequences. This reflects a lesson learned, the detailed guideline and sample on Phase MOUs or MOU Phases was updated to a more general approach.<sup>17</sup>

### Price Audits:

One of the subjects to be addressed for a cooperative project is price auditing, which is preferably performed on a reciprocal basis. A generic guideline for this government service is the “Guideline for the mutual provision of contract audits”, which has been in place for years in the Allied Acquisition Publications’ part on the contracting process for the life cycle of a cooperative programme (AACP-2).<sup>18</sup> It is helpful that this guideline is now already referred to in the Guidance for MOUs. This guideline puts in place the conditions to be taken into account by governmental entities requesting and/or providing these auditing services. Particularly the consideration on charges is important, as this concerns the consideration to perform the audits free of charge on a reciprocal basis, unless prevented by national law

### Ceiling Amount:

As far as the financial arrangement is concerned, new guidance on the ceiling amount for a programme is introduced: it refers to a Base Year

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<sup>17</sup> Also the fine line between a Framework MOU and a Programme MOU was not always ‘respected’. The guidance is now more robust: a Framework/Programme MOU versus a stand-alone Acquisition MOU.

<sup>18</sup> Guidelines on contractual Terms for Co-operative Programmes, AACP-2

amount (amount set against a defined date to cover the impact of inflation, often for substantial, multiyear projects) or to a Then Year amount (value currently and in the future; at the moment of incurring costs). The latter is more suitable for funding covering a short time period.

#### Late contributions:

On financial matters, a sample provision is introduced, making sure that in case of a late payment of contribution by a participant, any resulting added costs are for the account of the late contributor.

#### National Audits:

Regarding the International Board of Auditors for NATO (IBAN) financial audits on a Multinational Programme, managed by a NATO Agency, extended room is introduced for audits or enquiries from national audit institutions for participants' benefit. National audit institutions can obtain additional specific data or inspect records. The sample provisions allow for these national audits at a participating nation's own cost, without infringing on the rights of other participants. For NATO Agencies, it is determined<sup>19</sup> that for such national audits approval from the Agency Supervisory Board, Board of Directors, or Steering Committee is required, unless the national access is arranged for in the agency's founding agreement i.e. the Charter.

#### Claims and liability:

When dealing with liabilities and claims from participants or their personnel, some cases can be easily solved by invoking Article VIII of the NATO Status of Forces Agreement<sup>20</sup> (NATO SOFA) against the nations involved, and Article 6 of the Paris Protocol,<sup>21</sup> if applicable. This results in the applicability of the responsibilities for goods and personnel and the division thereof, as well as the waivers and limitations from Article VIII NATO SOFA. In the cases of the participating NATO Agencies (formally the NATO Procurement, Logistics or Service Organisations; NPLSOs) however, SOFA and Paris Protocol rules do not apply to them. The NPLSOs are after all subjected to the Ottawa Agreement.

When these kinds of claims and liabilities are to be covered by the

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<sup>19</sup> Regulations for NATO Procurement, Logistics or Service Organizations, C-M(2009)0079

<sup>20</sup> Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces

<sup>21</sup> Protocol on the Status of International Military Headquarters pursuant to the North Atlantic Treaty (Paris Protocol)

Section in the Acquisition MOU, the sample simply waives the claims between participants for damage caused to their personnel or property. The aforementioned waiver cannot take place if the damage is caused by recklessness, willful misconduct or gross negligence of a participant or personnel and is complemented by a new sample<sup>22</sup> that simply looks at which participant caused the cost of the liability. In such cases, it is up to that participant to deal with the costs under the applicable legislation. This second option forces the participants to determine how to divide claims or, if needed, to consult in order to reach a decision on the division.

#### Accession/withdrawal:

In case a new participant accedes to the programme, an additional consideration is introduced in the Guidance. The highest governing body needs to decide what to use the additional financial contribution for. Is it to alleviate the burden for the current participants or will the additional contribution be extra funding for programme purposes? A paragraph on the use of additional contributions, to extend the scope of the programme or to alleviate the financial burden for current participants can now be added to the Acquisition MOU section on the participation of additional nations.

In the case of a withdrawal, additional guidance has been developed from the lessons learned. This guidance touches upon topics such as the need for a reasonable notice period to be taken into account by the withdrawing participant and a notice period taking into account the budget cycle applicable to the programme. Although not that prominently displayed (the guideline gives a hint), an arrangement committing the withdrawing participants to bear any cost on contractual commitments can be of great impact. The Guidance now also contains the principle that with the termination of or the withdrawal from the programme, the overarching document continues to apply to the implementation document (unless decided otherwise).

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<sup>22</sup> To be applied in cases where a waiver of claims is prohibited by a national law and where the NATO SOFA provision cannot be applied.

## The MOU Coming into Effect:

National procedures on this subject vary. Therefore, information on completion of national staffing might be needed. The previous version of the Guidelines and Samples maintained a simple approach, according to which, the Acquisition MOU was supposed to come into effect upon the last signature; an option which is still supported by the Guidelines and Samples. A standardised approach – like the one in the Vienna Convention on Treaties, which first requires a signature – with the treaty becoming effective upon ratification is absent. In the case of Acquisition MOUs, a variety of impediments regarding their coming into force has developed.

First of all, the signature of a participant can be subject to a condition. This can be a condition on formalities, such as approval by the government and/or the parliament. Additionally, signatures can also be subject to a matter of content, such as a workshare being distributed, availability of funding at a given time, or a limitation in contribution.

A clearer condition is that the Acquisition MOU only comes into effect if a certain number of governments/ministries have signed it.

The new Guideline and Sample also cover the situation where the coming into effect is either subjected to a participant's signature, or its signature and the written confirmation of fulfilment of national internal procedures to all other participants. The Sample for this subject makes a clear distinction between two scenarios. The first scenario is reflected by the signatories that can commit at the moment of signature and for whom the MOU comes into effect with the number of signatures agreed upon. The second scenario is reflected by the situation in which the signatories need to staff, according to internal procedures. For the latter, the moment of notification is the moment the Acquisition MOU applies to them.

In situations where some nations sign the Acquisition MOU, whilst others indicate they are unable to do so, a "letter of confirmation" can be agreed upon. This concept, however, did not make it into the Guidelines and Samples. The letter of confirmation sanctions a participant's signature and commits a willing participant. At the same time, the signatories to this letter arrange for an upfront necessary amendment, to be reaffirmed in an MOU amendment.

## Toolbox

With the Guidelines and Samples in place for almost twenty years, there was also some experience to be shared on issues which were not yet covered. Four of these experiences made it into the toolbox. These are not specific guidelines or samples, but examples derived from real NATO world experiences.

### Export control:

The first example is the so called "Stockholm text", an additional text to be used on export control in an Acquisition MOU. This text was negotiated between several European nations and the United States and was designed to cover, in particular, US concerns on export control. The additions instruct the Program Office to bring issues regarding export control to the highest governance body for a Programme, in order to try to achieve a solution at that level. A second element deals with contractors and prospective contractors. The concerned participant bears the obligation to ensure that (prospective) contractors are legally bound to not use or re-transfer export controlled information beyond the purposes for which they have been authorised. If the United States is not involved, the text is not required.

### Withdrawal:

NATO programmes have experienced withdrawals by participants. Acquisition MOUs provide for a way of notifying others of one's withdrawal, the remaining liabilities, and the safeguarding of programme information. Furthermore, a best effort provision for the leaving participant to continue to work with its industry for the programme might be part of the MOU. However, the conditions under which a participant withdraws from a programme in a controlled way, are normally not provided for. Nonetheless, such conditions can be derived from the incorporated close out example. Essentially, in the example, a final contribution and abstaining from levies is set off against continued use of the programme information and an industrial return for the withdrawing nation beyond the withdrawal date.

### Government Services:

The third example shows how participants, apart from non-financial contributions (which entail that a value is put to the service), can support their programme to minimise costs. Participants can commit to providing administrative acquisition support and making available facilities, tools and

equipment, without charging the programme for it.

Acquisition MOU involving a NATO Agency:

The last example in the toolbox is a model for an Acquisition MOU, in which a NATO Agency also participates in tasks such as supporting and managing the project office, providing technical, management and procurement expertise, and administrative support and facilities. In such cases, the NATO organisation, in addition to being paid, is included in the entitlements to background and foreground information. The waiver of claims for damages to personnel or property is additionally extended to include the executing NATO organisation.

### **Conclusion**

The Basic Considerations, the Checklist and the Guidelines and Sample provisions were updated, and now include lessons learned from NATO practice. This means additional added value for these NATO documents. In addition to this, accessibility has improved with the publication as a STANREC. At the same time, this update confirms that an Acquisition MOU remains a flexible instrument for NATO cooperation, albeit providing limited certainty as to whether it is always enforceable.

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(The United Nations commenced negotiations on a Nuclear Weapons Ban Treaty on 27 March 2017)

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## The Treaty on the Prohibition of Nuclear Weapons:

### A Legal View from NATO

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#### Introduction

On 20 September 2017, the North Atlantic Council issued a rather remarkable statement. The subject was the Treaty on the Prohibition of Nuclear Weapons.<sup>2</sup> The ban treaty had been adopted by the United Nations General Assembly on 7 July 2017 by a vote of 122 in favour, one against (The Netherlands),<sup>3</sup> with one abstention (Singapore), and 69 states (including all

<sup>1</sup> This article is based in part on a presentation given by Steven Hill to the Emerging Issues Workshop at the International Institute of International Humanitarian Law in San Remo (Italy) on 6 June 2017. The authors gratefully acknowledge William Alberque's valuable insights as well as the research assistance in the preparation of that presentation by Vladimir Atanasov. The views expressed in this article are solely those of the authors and may not represent the views of NATO, ACO or ACT.

<sup>2</sup> For the full text of the treaty, to which this article will refer to as the 'ban treaty', see: [https://treaties.un.org/doc/Treaties/2017/07/20170707%2003-42%20PM/Ch\\_XXVI\\_9.pdf](https://treaties.un.org/doc/Treaties/2017/07/20170707%2003-42%20PM/Ch_XXVI_9.pdf).

<sup>3</sup> See especially the Explanation of vote of the Netherlands on the text of the Nuclear Ban Treaty, 7 July 2017, <https://www.permanentrepresentations.nl/latest/news/2017/07/07/explanation-of-vote-of-ambassador-lise-gregoire-on-the-draft-text-of-the-nuclear-ban-treaty>.

other NATO Allies and many partners) not voting.<sup>4</sup> The Council's statement came on the very same day that the ban treaty would be opened for signature at a high-profile event at the United Nations in New York.

In this statement, the Council stated that “[T]he ban treaty is at odds with the existing non-proliferation and disarmament architecture” and “disregards the realities of the increasingly challenging international security environment. At a time when the world needs to remain united in the face of growing threats, in particular the grave threat posed by North Korea's nuclear programme, the treaty fails to take into account these urgent security challenges.”<sup>5</sup> Moreover, it clarified that:

*As Allies committed to advancing security through deterrence, defence, disarmament, non-proliferation and arms control, we, the Allies nations cannot support this treaty. Therefore, there will be no change in the legal obligations on our countries with respect to nuclear weapons. Thus we would not accept any argument that this treaty reflects or in any way contributes to the development of customary international law.*<sup>6</sup>

The Council statement is remarkable for a number of reasons, not the least of which is that it is highly unusual for the Council to opine about a treaty to which NATO members have absolutely no intention of becoming a party. It is also highly unusual for the Council to so explicitly use specific international law language, in this case to clarify that nothing in the ban treaty could contribute to or constitute customary international law.

The Council statement followed statements by a number of NATO Allies raising their concerns about the ban treaty during the negotiation process, including in connection with the 7 July 2017 vote.<sup>7</sup> These concerns included the argument that the ban treaty would not properly address the global security conditions necessary to eliminate nuclear weapons; that it would not increase trust and transparency among nuclear weapon possessor states; and that it would not address the considerable technical and procedural challenges involved in nuclear disarmament verification. One overarching

<sup>4</sup> See Voting Record on Item 9, A/CONF.229/2017/L.3/Rev.1, Draft treaty on the prohibition of nuclear weapons, available at [https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/07/A.Conf\\_.229.2017.L.3.Rev\\_.1.pdf](https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/07/A.Conf_.229.2017.L.3.Rev_.1.pdf).

<sup>5</sup> North Atlantic Council Statement on the Treaty on the Prohibition of Nuclear Weapons (20 September 2017), [https://www.nato.int/cps/en/natohq/news\\_146954.htm](https://www.nato.int/cps/en/natohq/news_146954.htm).

<sup>6</sup> Ibid.

<sup>7</sup> See, e.g., Joint Press Statement from the Permanent Representatives to the United Nations of the United States, United Kingdom, and France Following the Adoption of a Treaty Banning Nuclear Weapons, 7 July 2017, <https://usun.state.gov/remarks/7892>. See also Explanation of vote NL Permanent Representation to the United Nations regarding resolution on disarmament, 27 October 2016, <https://www.permanentrepresentations.nl/documents/speeches/2016/10/27/statement-explanation-of-vote-nl-permanent-representation-to-the-united-nations-regarding-resolution-on-disarmament>.

theme was that Allies were not convinced that a ban treaty would strengthen the practical path to the reduction and elimination of nuclear weapons.<sup>8</sup> These concerns have been shared by some outside observers,<sup>9</sup> and dismissed by others.<sup>10</sup>

This Article seeks to explain the circumstances that led the Council to adopt its 20 September 2017 statement. Both the authors of this article are members of the Office of Legal Affairs at NATO headquarters, and both worked on the draft statement and the leads-up to it with policy offices in the International Staff and elsewhere in the NATO system as well as with representatives of Council delegations. The Article begins with an overview of NATO's nuclear policy approach. It then provides some background to the ban treaty and a brief description of its key provisions. Finally, it highlights some of the legal concerns that the ban treaty raised for NATO and that led to the adoption of the Council's statement.

### **NATO's Nuclear Policy Approach**

In July 2016, the Warsaw Summit Communiqué reaffirmed long-standing policy that “[a]s a means to prevent conflict and war, credible deterrence and defence is essential. Therefore, deterrence and defence, based on an appropriate mix of nuclear, conventional, and missile defence capabilities, remains a core element of our overall strategy.”<sup>11</sup>

The Communiqué further states that NATO will remain a nuclear alliance as long as nuclear weapons exist<sup>12</sup> and that Allies will ensure that all components of NATO's nuclear deterrent will remain safe, secure, and effective. The fundamental purpose of NATO's nuclear capability is to preserve peace, prevent coercion, and deter aggression.

At the same time, NATO is also committed to non-proliferation,

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<sup>8</sup> See also Remarks by NATO Deputy Secretary General Rose Gottemoeller during a panel discussion on Perspectives for a World Free from Nuclear Weapons at Vatican City, 10 November 2017, [https://www.nato.int/cps/en/natohq/opinions\\_148789.htm](https://www.nato.int/cps/en/natohq/opinions_148789.htm).

<sup>9</sup> See, e.g., Newell Highsmith and Mallory Stewart, ‘The Nuclear Ban Treaty: A Legal Analysis,’ *Survival*, 2018, Vol. 60, No. 1, pp. 129-152; Dan Joyner, ‘The Treaty on the Prohibition of Nuclear Weapons,’ *EJIL: Talk!*, 26 July 2017, <https://www.ejiltalk.org/the-treaty-on-the-prohibition-of-nuclear-weapons/>.

<sup>10</sup> See, e.g., Rideau Institute, ‘NATO Statement Decrying Nuclear Ban Treaty Full of Errors,’ <http://www.rideauinstitute.ca/2017/11/30/nato-statement-decrying-nuclear-ban-treaty-full-of-errors>; Stuart Maslen, ‘The Relationship of the 2017 Treaty on the Prohibition of Nuclear Weapons with other Agreements: Ambiguity, Complementarity, or Conflict?’, *EJIL: Talk!*, 1 August 2017, <https://www.ejiltalk.org/the-relationship-of-the-2017-treaty-on-the-prohibition-of-nuclear-weapons-with-other-agreements-ambiguity-complementarity-or-conflict/>; Treasa Dunworth, ‘The Treaty on the Prohibition of Nuclear Weapons,’ *ASIL Insights*, Vol. 21, Issue 12, 31 October 2017, <https://www.asil.org/insights/volume/21/issue/12/treaty-prohibition-nuclear-weapons>.

<sup>11</sup> Warsaw Summit Communiqué issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 8-9 July 2016, paras 51-52.

<sup>12</sup> *Ibid.*, para. 53.

disarmament and the peaceful uses of nuclear energy and follows developments in the international community in these areas with great interest. All NATO Allies are parties to the Nuclear Non-Proliferation Treaty (NPT), which is the cornerstone of international efforts to prevent the spread of nuclear weapons.

The NPT is an agreement between the 'nuclear weapon states' (i.e. the five countries that already possessed nuclear weapons when the Treaty was negotiated) and the 'non-nuclear weapons states' (i.e. the other 184 members of the treaty who agree never to receive, manufacture or otherwise acquire nuclear weapons) where the former promises to the latter to share the peaceful, civilian benefits of nuclear energy and not to permit the distinction between nuclear weapons states and non-nuclear weapons states to persist forever.

In particular, under Article VI of the Treaty, nuclear weapons states commit "to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control." The 'basic bargain'<sup>13</sup> of the NPT is to allow nuclear weapons states to maintain their privileged status only temporarily, while committing to eliminate their stockpile in the future, without mentioning any date. Nuclear weapons states also commit themselves to pursue negotiations on a treaty on general and complete disarmament under strict and effective international control.

Allies regularly emphasise their strong commitment to full implementation of the NPT.<sup>14</sup>

As recalled in Warsaw, NATO's stated policy, notably in the 2010 Strategic Concept<sup>15</sup> and the 2012 Deterrence and Defence Posture Review,<sup>16</sup>

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<sup>13</sup> David A. Kaplow, 'Nuclear Arms Control by a pen and a phone: Effectuating the Comprehensive Ban Treaty without Ratification', *Georgetown Journal of International Law*, vol. 46, 2015, p. 491-492.

<sup>14</sup> The objectives of the NPT are outlined in its three interrelated and mutually reinforcing pillars: (1) non-proliferation (Art. I, II): preventing of the further spread or transfer of nuclear weapons and technologies, or the expansion of the existing arsenals; (2) disarmament (Art. VI): furthering the goal of achieving nuclear, and general disarmament; (3) peaceful uses of nuclear energy (Art. IV): recognising the right of states to nuclear energy for peaceful purposes and promoting international cooperation. Of key importance is the safeguards system established by the Treaty under the responsibility of the International Atomic Energy Agency (IAEA) to verify compliance. See [http://www.nato.int/nato\\_static\\_fl2014/assets/pdf/pdf\\_2017\\_03/20170323\\_170323-npt-factsheet.pdf](http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2017_03/20170323_170323-npt-factsheet.pdf) and <https://www.iaea.org/sites/default/files/publications/documents/infcircs/1970/infcirc140.pdf>.

<sup>15</sup> Active Engagement, Modern Defence, Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organisation adopted by Heads of State and Government in Lisbon on 19 November 2010.

<sup>16</sup> Deterrence and Defence Posture Review, 20 May 2012, available at: [https://www.nato.int/cps/en/natohq/official\\_texts\\_87597.htm](https://www.nato.int/cps/en/natohq/official_texts_87597.htm).

“commits NATO to the goal of creating the conditions for a world without nuclear weapons”, “in accordance with the goals of the Nuclear Non-Proliferation Treaty (NPT), in a way that promotes international stability, and is based on the principle of undiminished security for all.”<sup>17</sup>

In other words, Allies are committed to the full implementation of the NPT, with full support for each of the three mutually reinforcing pillars of the Treaty: non-proliferation, disarmament, and the peaceful uses of nuclear energy. In that regard, Allies consider that the NPT provides a balanced, step-by-step approach along each of these three pillars.

NATO has contributed to this goal and objective by dramatically reducing the numbers of nuclear weapons stationed in Europe and its reliance on nuclear weapons in NATO strategy after the end of the Cold War. Indeed, since then NATO Allies have reduced their collective nuclear arsenal in Europe by more than 90 percent.

Allies have also contributed to step-by-step nuclear disarmament, for example, through ongoing support for the Comprehensive Test Ban Treaty<sup>18</sup> and the negotiation of the Fissile Material Cut-off Treaty in the Conference of Disarmament.<sup>19</sup>

Of course, progress on arms control and disarmament must take into account the international security environment, threats to the international order, and WMD proliferation threats from both states and non-state actors.

### **The Ban Treaty’s Origins**

This section reviews the series of international conferences that led to the adoption of the ban treaty text on 7 July 2017 and its opening for signature on 20 September 2017. These conferences featured varying levels of participation of NATO Allies.

#### *The Conference on the Humanitarian Impacts of Nuclear Weapons (CHINW)*

At the 2012 Preparatory Committee for the 2015 NPT Review Conference (RevCon), Switzerland delivered a joint statement on the humanitarian dimension of nuclear disarmament,<sup>20</sup> which 33 states joined.<sup>21</sup>

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<sup>17</sup> Warsaw Communiqué, para. 64.

<sup>18</sup> 183 Signatories; 166 Ratifiers (states that need to take further action for the treaty to enter into force: China, Egypt, India, Iran, Israel, North Korea, Pakistan, and the United States of America). The basic obligations of the CTBT are as follows: “Each State party undertakes not to carry out any nuclear weapon test explosion at any place under its jurisdiction, and to prohibit and prevent any such nuclear explosion at any place under its jurisdiction and its control” (Article 1(1)).

<sup>19</sup> Warsaw Summit Communiqué, para. 66.

<sup>20</sup> Acronym Institute for Disarmament Policy, available at: <http://www.acronym.org.uk/old/official-and-govt-documents/joint-statement-humanitarian-dimension-nuclear-disarmament-un-first-committee-2012>.

In particular, this document states that “It is of utmost importance that nuclear weapons are never used again, under any circumstances. The only way to guarantee this is the total, irreversible and verifiable elimination of nuclear weapons, under effective international control, including through the full implementation of Article VI of the NPT. All states must intensify their efforts to outlaw nuclear weapons and achieve a world free of nuclear weapons.”

This led to the convening of a Conference on the Humanitarian Impacts of Nuclear Weapons (CHINW) in Norway in March 2013. A second Conference was convened in Nayarit, Mexico in February 2014. Austria hosted the third CHINW in Vienna<sup>22</sup> in December 2014, attended by 158 states.<sup>23</sup> The US and UK attended the 2014 CHINW on the basis of assurances from Austria that any final statement of the conference would reflect the views of all attendees.

While the final statement<sup>24</sup> did reflect some balance, taking into account the position of nuclear weapons states, the Austrian government followed the final statement by issuing the so-called ‘Austrian Pledge’,<sup>25</sup> making the case for a legal ban on nuclear weapons. While some states were concerned, the pledge quickly gained the support of a number of states, which led to consideration on next steps in the United Nations.

#### *The Open Ended Working Group on Nuclear Disarmament*

The United Nations General Assembly established via resolution A/RES/67/56 an open-ended working group (OEWG) to develop proposals to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons.<sup>26</sup>

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<sup>21</sup> Algeria, Argentina, Austria, Bangladesh, Belarus, Brazil, Chile, Colombia, Costa Rica, Denmark, Ecuador, Egypt, Iceland, Indonesia, Ireland, Kazakhstan, Liechtenstein, Malaysia, Malta, Marshall Islands, Mexico, New Zealand, Nigeria, Norway, Peru, the Philippines, Samoa, Sierra Leone, South Africa, Swaziland, Thailand, Uruguay, Zambia, and Switzerland, and the Observer State Holy See.

<sup>22</sup> See the Website of the Federal Ministry Republic of Austria, Vienna Conference on the Humanitarian Impact of Nuclear Weapons, available at: <https://www.bmeia.gv.at/en/european-foreign-policy/disarmament/weapons-of-mass-destruction/nuclear-weapons-and-nuclear-terrorism/vienna-conference-on-the-humanitarian-impact-of-nuclear-weapons/>.

<sup>23</sup> All NATO Allies attended except France.

<sup>24</sup> See the Website of the Federal Ministry Republic of Austria, Vienna Conference on the Humanitarian Impact of Nuclear Weapons, *Report and Summary of Findings of the Conference*, available at: [https://www.bmeia.gv.at/fileadmin/user\\_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14\\_Chair\\_s\\_Summary.pdf](https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14_Chair_s_Summary.pdf).

<sup>25</sup> See:

[https://www.bmeia.gv.at/fileadmin/user\\_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14\\_Austrian\\_Pledge.pdf](https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14_Austrian_Pledge.pdf).

<sup>26</sup> See also: UNGA resolutions 67/56 of 3 December 2012, 68/46 of 5 December 2013, 69/41 of 2 December 2014 and 70/33 of 7 December 2015 on taking forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons.

The OEWG's mandate included addressing concrete, effective legal measures, provisions and norms to attain and maintain a world without nuclear weapons. The OEWG met in three working sessions in 2016 (22-26 February, 2-4 May, and 22-24 August) and submitted a report on its work and recommendations to the General Assembly at its 71st Session in October 2016.

The final report was adopted with 68 votes for and 22 against, with 13 abstentions.<sup>27</sup> None of the nuclear weapons states participated in the work of this body.

### *The 2017 United Nations Conference*

As a result of this report, the UN General Assembly's First Committee met to discuss a draft resolution proposing negotiations in 2017. That resolution was adopted on 27 October 2016 to "convene negotiations in 2017 on a legally binding instrument to prohibit nuclear weapons."<sup>28</sup>

The General Assembly plenary adopted the resolution A/RES/71/258 on 23 December 2016.<sup>29</sup> The resolution recalls that "the Treaty on the Non-Proliferation of Nuclear Weapons, which serves as the cornerstone of the nuclear non-proliferation and disarmament regime, was negotiated considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples." The resolution also stresses the "absence of concrete outcomes of multilateral nuclear disarmament negotiations within the United Nations framework for two decades, and [is] mindful also of the obligation of States to engage in negotiations in good faith on effective measures towards nuclear disarmament." It further states that "a legally binding instrument prohibiting nuclear weapons would be an important contribution towards comprehensive nuclear disarmament."<sup>30</sup>

In light of the above, the United Nations General Assembly decided to convene in 2017 a United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons leading towards their total elimination. The conference met from 27 to 31 March and from 15 June to 7 July 2017. The negotiations were chaired by Costa Rica.

On 7 July 2017, as mentioned above, the ban treaty was adopted by the

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<sup>27</sup> See: <http://www.unog.ch/oewg-ndn>.

<sup>28</sup> In favour: 123; Against: 38 (including Albania, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom, United States); Abstaining: 16 (Netherlands).

<sup>29</sup> In favour: 113; Against: 35; Abstaining: 13.

<sup>30</sup> UN General Assembly (2016) Resolution A/RES/71/258, available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/71/258](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/258).

United Nations General Assembly on 7 July 2017 by a vote of 122 in favour, one against (The Netherlands).<sup>31</sup>

Since 20 September 2017, the Treaty has been opened for signature.

### **The Ban Treaty: Key Provisions**

The ban treaty is a relatively short document, consisting of 20 articles.

The core prohibitions applicable to all parties to the ban treaty are as follow:

- Not to develop, test, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices (Article 1, para. 1(a));
- Not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices (Article 1, para. 1(b) and (c));
- Not to use or threaten to use nuclear weapons or other nuclear explosive devices (Article 1, para. 1(d));
- Not to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to state parties to the treaty (Article 1, para. 1(e)), or seek or receive any such assistance (Article 1, para. 1(f));
- Not to allow any stationing, installation or deployment of any nuclear weapons or other nuclear explosives devices in their territory or at any place under their jurisdiction or control (Article 1, para. 1(g)).
- State parties that have used or tested nuclear weapons shall have a responsibility to provide adequate assistance to affected parties, for the purpose of victim assistance and environmental remediation (Article 7, para. 6) and all parties are obligated to provide such assistance within their jurisdiction (Article 6, paras. 1-2).

When it comes to verification, the obligations vary on the status of the state party (see Article 3 for states without nuclear weapons; Article 4, para. 1 for states joining after eliminating their nuclear weapons; Article 4, paras. 2-3 for states joining while holding nuclear weapons).

Under Article 15, the ban treaty will enter into force 90 days after the deposit of the fiftieth instrument of ratification, acceptance, approval, or accession with the UN Secretary General. As of August 2018, sixty states have signed the treaty, and 14 have ratified.<sup>32</sup>

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<sup>31</sup> See Vote Name List on Item 9, A/CONF.229/2017/L.3/Rev.1, Draft treaty on the prohibition of nuclear weapons, available at: [https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/07/A.Conf\\_.229.2017.L.3.Rev\\_.1.pdf](https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/07/A.Conf_.229.2017.L.3.Rev_.1.pdf).

<sup>32</sup> UN Office for Disarmament Affairs, available at: <http://disarmament.un.org/treaties/t/tpnw>. Last checked 29 August 2018.

Article 16 forbids reservations and Article 17 foresees that each state party has the right to withdraw from the treaty if it decides that extraordinary events related to the subject matter of the treaty have jeopardised the supreme interests of its country (para. 2). Withdrawal will take 12 months after the receipt of the notification of withdrawal by the depositary. However, if at the end of this 12-month period the withdrawing state party is a party to an armed conflict, it will continue to be bound by the treaty until it is no longer party to an armed conflict (para. 3).

### **The Ban Treaty: NATO Legal Concerns**

This section seeks to set forth some legal concerns that are either reflected in the Council statement or that were part of the background to its adoption.

These concerns can be divided into several categories. First, there were concerns that the ban treaty could contradict existing international law, including specific obligations of states as well as significant prior statements relating to nuclear weapons. Second, there were broader concerns about the potential of the ban treaty to affect non-states parties such as NATO Allies, especially through the purported operation of customary international law. This section addresses those two categories in turn.

#### *Conflict with Existing Obligations under International Law*

Apart from the NATO-agreed policies described below, the ban treaty may contradict existing obligations of Member States, including the NPT but also the NATO agreed policies. It is also appears to be inconsistent with the International Court of Justice's 1996 advisory opinion on the Legality of the Threat or Use of Nuclear Weapons.<sup>33</sup>

Referring implicitly to the NPT, the Preamble affirms that there is an "obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control" (PP17). It also reaffirms the crucial importance of the NPT as the "cornerstone of the international nuclear non-proliferation regime and an essential foundation for the pursuit of nuclear disarmament" (PP18).

Article 18 of the ban treaty states that its "implementation shall not prejudice obligations undertaken by state parties with regard to existing international agreements, to which they are party, where those obligations are consistent with the treaty." This results in subordinating the NPT to the ban

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<sup>33</sup> ICJ, Advisory Opinion of 8 July 1996, Legality of the Threat or Use of Nuclear Weapons. For further discussion of the ICJ advisory opinion in the contemporary security context, see Camille Grand, 'Nuclear weapons: IHL considerations revisited, 20 years after the ICJ Advisory Opinion,' in International Institute of Humanitarian Law, *Weapons and the International Rule of Law* 210-20 (2017).

treaty and it is to be recalled that the former contemplates nuclear weapons states' possession of nuclear weapons while undertaking to pursue negotiations on nuclear disarmament consistent with Article VI of the NPT. The ban treaty could thus threaten to undermine the rationale of the NPT and the promotion of a step-by-step and verifiable way of creating the conditions for a world without nuclear weapons.

Of key importance is also the safeguards system established by the International Atomic Energy Agency (IAEA) and incorporated by the NPT to verify compliance. The ban treaty lacks credible verification mechanisms. It enshrines an outdated standard of non-proliferation by endorsing the IAEA Comprehensive Safeguards (Article 3) without also requiring the more rigorous additional protocols (or the enhanced Small Quantities Protocol). Further, the ban treaty requires states parties to designate a competent international authority to verify the elimination of nuclear weapons, which may compete and overlap with the IAEA safeguards.

Finally, the Preamble of the ban treaty states that "any use of nuclear weapons would be contrary to the rules of international law applicable in armed conflict, in particular the principles and rules of international humanitarian law." Such a statement could be read as going beyond the 1996 ICJ advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, where the court considered "it does not have sufficient elements to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules applicable in armed conflicts in any circumstances" (para. 95). Furthermore, the court "cannot lose sight of the fundamental rights of every state to survival, and thus its rights to resort to self-defence, in accordance with Article 51 of the [UN] Charter, when its survival is at stake. Nor can it ignore the practice referred to as the "policy of deterrence" to which an appreciable section of the international community adhered for many years" (para. 96).<sup>34</sup>

#### *The ban treaty and the sources of international law*

In light of the above, there are broader treaty law issues at stake. One of these questions is whether, once entered into force, the ban treaty, as such can affect third states and/or be binding to third states.

On the first aspect, the provisions of the ban treaty could be interpreted in ways that could affect NATO and its Member States. In particular, by prohibiting any industrial cooperation from a state party to the ban treaty that could be seen as assisting or encouraging anyone (states, companies, individuals) to engage in any activity prohibited under the ban treaty.

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<sup>34</sup> *Ibid.*

The ban treaty further stipulates that “[e]ach state party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a state party under this treaty undertaken by persons or on territory under its jurisdiction or control” (Article 5(2)). Hence, it cannot be ruled out that a state party could seek to take legal action against persons of a non-state party to the ban treaty.

On the second aspect, while it is a general principle of international law that treaties do not create obligations for third states,<sup>35</sup> it is not excluded for a “rule set forth in a treaty” to become “binding upon a third state as a customary rule of international law, recognised as such.”<sup>36</sup> Under such reasoning, a new norm of customary international law could then create legal obligations for states that are not parties to the agreement from which the custom would have emerged. However, the creation of the norm of customary international law is also dependent on the acquiescence of other states and the absence of protest by states with a particular interest in the matter at hand, as the ICJ has stated in its decision of the El Salvador/Honduras case.<sup>37</sup> In this context, only states that have protested its application to them by consistently or persistently objecting to the treaty will not be bound by its provisions. Those states are known as ‘persistent objectors’ under international law.<sup>38</sup> It is not exactly certain how often or how persistent an objector has to be, in order for the principle to be invoked.<sup>39</sup> However, three elements can be inferred from

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<sup>35</sup> Article 34 of the Vienna Convention of the Law of Treaties (VCLT) stipulates that “a treaty does not create either obligations or rights for a third State without its consent.” Article 35 of the VCLT outlines that an obligation arises for a third state from a treaty only if the treaty was meant to establish the obligation and “the third State expressly accepts that obligation in writing.”

<sup>36</sup> Article 38 of the VCLT.

<sup>37</sup> ICJ Reports, 1992, pp. 351, 601.

<sup>38</sup> See also: Sir Michael Wood, *Third Report on identification of customary international law*, A/CN.4/682, 27 March 2015, paras 85-95 and Draft conclusion 16, Persistent Objector. See also: *Report of the ILC*, 68<sup>th</sup> Session (2 May-10 June and 4 July-12 August 2016), A/71/10, p. 79 and Commentary p. 112 and see: Conclusion 15, Persistent Objector. Of specific interest is the finding of the ICJ in the Anglo-Norwegian Fisheries case (ICJ Reports, 1951, pp. 116, 131). In this case, the ICJ stipulated that where a state is acting contrary to an established customary rule and other states acquiesce in this, the result would then be that the state is to be treated as not bound by the original rule. Following this reasoning, states that are persistent objectors to the proposed nuclear weapons ban treaty would, in principle, not be bound by its provisions, even if there is a trend for its development as a norm of customary international law, provided that they protest to its applicability to them. In addition, in the North Sea Continental Shelf case (ICJ Reports, 1969, pp. 3, 38, 130), the ICJ has stated that state practice, “including that of States whose interests are specially affected” needed to be “both extensive and virtually uniform in the sense of the provisions invoked.” The court held that this is indispensable to the formation of a new rule of customary international law. Therefore, the practice of the states which are likely to be considered as specially affected states may be attributed a particular weight and prevent such a new rule from emerging at all (on this much debated issue, particular attention should be paid to the 1996 Advisory Opinion of the ICJ in the Legality of the Threat or Use of Nuclear Weapons. See also the Dissenting Opinion of Vice-President Schwebel, ICJ Reports 1996, p. 226, at pp. 312 and 319).

<sup>39</sup> This should be approached in a balanced and pragmatic way. At least, an objection should be expected when the circumstances are such that a (re)statement of the objection is to be expected, especially “where silken or

state practice and jurisprudence. The first element for the invocation of the principle of persistent objector is the necessity to have the objection expressed and internationally known.<sup>40</sup> The second element is the need for the objecting state to maintain its objection to a certain degree, so that it can clearly demonstrate that it had not consented to the rule, even before it was fully developed.<sup>41</sup> The third element that can be inferred with some degree of certainty is that it is irrelevant whether a state's objection has been expressed in words or action. It is up to states to decide how and where to express their objections in accordance with their own established practices or positions. There are no specific requirements of international law for how and where to invoke the principle of persistent objector.

The NAC's statement of 20 September 2017 has to be read also in this context. The risk the ban treaty could pose to the emergence of customary law justified NATO Allies objecting to the creation of such a norm, and even, should this norm emerge, to its enforceability as against states that have persistently objected to its creation.

## Conclusion

While no definitive conclusions can be drawn prior to the entry into force of the ban treaty and without any practice related to its implementation or interpretation, potential legal risks and consequences can already be identified in light of the provisions of the ban treaty.

The ban treaty will not strengthen the practical path to the reduction and elimination of nuclear weapons. Indeed, its inherent contradictions may prove to be counterproductive by building unrealistic expectations with regard to a timeline for the elimination of nuclear weapons that will not be met.

While it remains to be seen how the ban treaty might affect NATO's work in the future, the Allies' commitment to advancing security through deterrence and defence, as well as disarmament, non-proliferation and arms control, remains unchanged. The September 2017 Council statement further illustrates this commitment.

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inaction may lead to the conclusion that the State has given up its objection." See Sir M. Wood, Fourth report on identification of customary international law, A/CN.4/695, 8 March 2016.

<sup>40</sup> ICJ Reports, 1969, pp. 3, 38, 130.

<sup>41</sup> *Ibid.*



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

## GDPR and NATO Centres of Excellence

by Zdeněk Hýbl<sup>1</sup>

Legal Advisor JCBRN Defence Centre of Excellence

The General Data Protection Regulation (GDPR) has blown into our lives. It is everywhere: it pops up in our mailboxes, on our TV screens and it has become part of our daily work. But does it really apply when you are working for a NATO Centre of Excellence?<sup>2</sup>

*The Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR) applies to the processing of personal data wholly or partly by*

<sup>1</sup> The views expressed in this article are those of the author and do not necessarily reflect the official policy or position of NATO or any of its agencies, nor the JCBRN Defence COE or its sponsoring nations and contributing partner. The author wishes to thank Colonel Volker R. Quante for offering helpful and valuable comments.

<sup>2</sup> “Centres of Excellence (COEs) are international military organisations that train and educate leaders and specialists from NATO member and partner countries. They assist in doctrine development, identify lessons learned, improve interoperability and capabilities, and test and validate concepts through experimentation. They offer recognised expertise and experience that is of benefit to the Alliance, and support the transformation of NATO, while avoiding the duplication of assets, resources and capabilities already present within the Alliance.” For more details, see: [https://www.nato.int/cps/en/natolive/topics\\_68372.htm](https://www.nato.int/cps/en/natolive/topics_68372.htm), visited 28 June 2018.

automated means, as well as manual methods of processing personal data, which form part of a filing system or are intended to form a part of a filing system.<sup>3</sup> This Regulation applies to the processing of personal data by a controller (an organisation that collects data) or a processor (an organisation that processes data on behalf of a data controller) in the EU, regardless of whether the actual processing takes place in the EU.<sup>4</sup>

Personal data is any information relating to an identified or identifiable natural person.<sup>5</sup> A more readable definition of personal data can be found in the European Commission press release, which provides that personal data includes any information relating to an individual, "whether it relates to his or her private, professional or public life. It can be anything from a name, a photo, an email address, bank details, your posts on social networking websites, your medical information, or your computer's IP address."<sup>6</sup>

It has to be highlighted that the Regulation does not apply to the processing of personal data, "in the course of an activity which falls outside the scope of Union law."<sup>7</sup>

The European Union's Charter of Fundamental Rights established data protection as a fundamental right in Article 8, which states that everyone has the right to the protection of personal data concerning them.<sup>8</sup> This right is reaffirmed in Article 16 of the Treaty on the Functioning of the European Union (TFEU), which also establishes the competence of European Parliament and the Council regarding data protection. Officially now a part of EU primary law, rights to data protection set out in both the Charter and TFEU are legally binding within the scope of EU law and form the legal basis of the GDPR. Compliance with these rules shall be subject to the control of independent

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<sup>3</sup> The Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Article 2, para. 1, available at: [https://eur-lex.europa.eu/resource.html?uri=cellar:41f89a28-1fc6-4c92-b1c8-03327d1b1ecc.0007.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:41f89a28-1fc6-4c92-b1c8-03327d1b1ecc.0007.02/DOC_1&format=PDF), visited on June 24, 2018

<sup>4</sup> Ibis 3, Article 3, para. 1.

<sup>5</sup> Ibis 3, Article 4, para. 1.

<sup>6</sup> European Commission – Press Release "Commission proposes a comprehensive reform of data protection rules to increase user's control of their data and to cut costs for businesses," Brussels, dated 22 January 2012, available at: [http://europa.eu/rapid/press-release\\_IP-12-46\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-12-46_en.htm?locale=en), visited on 24 June 2018.

<sup>7</sup> Ibis 3, Article 2, para. 2(a).

<sup>8</sup> Charter of Fundamental Rights of the European Union (2000/C 364/1), available at: [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

authorities.<sup>9</sup>

Article 16(2) of the TFEU specifies who can process personal data of individuals. *“The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.”*<sup>10</sup>

Article 16 of the TFEU has to be read in conjunction with Article 39 of the Treaty on European Union (TEU), a procedural provision. The latter states that when carrying out activities relating to Common Foreign and Security Policy (Chapter 2 of the TEU), the Council shall establish rules relating to data protection and the free movement of such data, in accordance with Article 16 of the TFEU. It is once again stated that compliance with these rules shall be subject to the control of independent authorities.<sup>11</sup>

Both Treaties, as well as the GDPR, are not applicable to NATO Centres of Excellence as international military organisations are neither Union institutions, bodies, offices, agencies nor Member States. Moreover, the Regulation does not apply to the processing of personal data in the course of an activity which falls outside the scope of Union law.<sup>12</sup> The activities of NATO and its bodies fall outside the scope of Union law and, as such, NATO bodies are not bound by the Regulation.

According to the European Commission, some obligations of the GDPR (such as the appointment of a Data Protection Officer) do not apply, if the processing of data does not form an inextricable part of the controller's or processor's activities, and individuals are not put at risk.<sup>13</sup>

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<sup>9</sup> Consolidated version of the Treaty on the Functioning of the European Union, Article 16, hereinafter TFEU, available at [https://eur-lex.europa.eu/resource.html?uri=cellar:41f89a28-1fc6-4c92-b1c8-03327d1b1ecc.0007.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:41f89a28-1fc6-4c92-b1c8-03327d1b1ecc.0007.02/DOC_1&format=PDF), visited on 27 June 2018.

<sup>10</sup> Ibis 9, Article 16, para. 2.

<sup>11</sup> Treaty on European Union, Article 39, available at: [https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF), visited on 27 June 2018.

<sup>12</sup> Ibis 3, Article 2, para. 2(a).

<sup>13</sup> See the website of the European Commission: [https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/application-regulation/who-does-data-protection-law-apply\\_en](https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/application-regulation/who-does-data-protection-law-apply_en)

The relationship between EU law and public international law throws up questions relating to the extent to which international organisations, such as NATO, are bound by EU law when operating within EU Member State territories.

Article 34 of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations provides that a treaty does not create obligations or rights for a third state or a third organisation without their consent.<sup>14</sup> Although this Convention is not in force yet, a very similar provision can be found in the Vienna Convention of the Law of Treaties, which has been in force since 27 January 1980.<sup>15</sup>

The strict rule of *pacta tertiis nec nocent nec prosunt* (a treaty binds the parties and only the parties; it does not create obligations for a third state) applies to international organisations in the same way as it applies to states.<sup>16</sup> NATO Centres of Excellence are not parties to the EU, therefore GDPR rules are not directly applicable to them.

The relevant provisions of the NATO SOFA<sup>17</sup> may be useful in this discussion. Its Article II establishes the duty to respect the law of the receiving state. This does not necessarily mean that a force or its civilian component is to abide by the law of the receiving state. Rather, it calls for due regard<sup>18</sup> for the rights and duties established by the receiving state legal system. Therefore, NATO Centres of Excellence are supposed to meet the intent of national law, including EU law, and preferably adopt their own edicts in areas where required.<sup>19</sup>

It has to be mentioned that personal data protection and attempts to

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<sup>14</sup> Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Article 34, available at: [http://legal.un.org/ilc/texts/instruments/english/conventions/1\\_2\\_1986.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf), visited on June 26, 2018, not yet in force, as of 26 June 2018.

<sup>15</sup> Vienna Convention on the Law of Treaties, available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>, visited on 8 August 2018.

<sup>16</sup> Third Parties and the Law of Treaties, Malgosia Fitzmaurice, J. A. Frowein and R. Wolfrum (eds.), Max Planck Yearbook of United Nations Law, Volume 6, 2002, 37-137, 2002 Kluwer Law International, available at: [http://www.mpil.de/files/pdf1/mpunyb\\_fitmaurice\\_6.pdf](http://www.mpil.de/files/pdf1/mpunyb_fitmaurice_6.pdf), visited on 9 August 2018.

<sup>17</sup> Agreement between the Parties to the North Atlantic Treaty regarding the status of their forces, dated 19 June 1951, hereinafter NATO SOFA, available at: [https://www.nato.int/cps/en/natohq/official\\_texts\\_17265.htm](https://www.nato.int/cps/en/natohq/official_texts_17265.htm).

<sup>18</sup> Compare Concise Oxford English Dictionary, eleventh edition (revised) 2008, Oxford University Press.

<sup>19</sup> NATO Legal Deskbook, Second Edition, 2010, p. 182.

regulate this area is not a recent phenomenon. Already in 1990, the United Nations General Assembly adopted Guidelines for the Regulation of Computerized Personal Data Files.<sup>20</sup> The guidelines provide that information about persons should not be collected or processed in unfair or unlawful ways, nor should it be used for ends contrary to the purposes and principles of the Charter of the United Nations.<sup>21</sup> It is quite significant that the guidelines are not only meant for states, but should also apply to personal data files kept by international organisations. The applicability of these guidelines to international organisations may be subject to any adjustments considering data collected for internal and for external purposes.

In accordance with the guidelines, international organisations are encouraged to establish their own internal mechanisms to deal with personal data storage and management. There are many international organisations that adopted rules dealing with data protection. These included, for example, the 1980 OECD Guidelines, the 1981 Council of Europe Convention (Convention 108), the 1995 EU Directive 95/46, the 2005 APEC Privacy Framework, the 2010 Supplementary Act on Personal Data Protection of ECOWAS, and the 2016 EU GDPR.<sup>22</sup>

### **How do we deal with the situation at hand?**

On one hand, we may conclude that the GDPR is not applicable to NATO Centres of Excellences for several reasons: a) the EU legislation explicitly excludes activities falling outside the scope of EU law from its applicability. Moreover, data protection rules “relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States”<sup>23</sup> *per se* do not cover international organisations; b) public international law, mainly the Vienna Convention on the Law of Treaties, expressly forbids creating obligations or rights for third parties without their consent; c) the NATO SOFA, which by virtue of Article 3 paragraph 2 of the Paris Protocol,<sup>24</sup> is applicable to NATO Centres of

<sup>20</sup> Guidelines for the Regulation of Computerized Personal Data Files, adopted by General Assembly resolution 45/95 of 14 December 1990, hereinafter Guidelines, available at:

<http://www.refworld.org/pdfid/3ddcafaac.pdf>.

<sup>21</sup> *Ibis* 17, para. 1.

<sup>22</sup> Data Protection in International Organizations and the New UNHCR Data Protection Policy: Light at the End of the Tunnel, Alexander Beck and Christopher Kuner, published on 31 August 2015, available at: <https://www.ejiltalk.org/data-protection-in-international-organizations-and-the-new-unhcr-data-protection-policy-light-at-the-end-of-the-tunnel/>.

<sup>23</sup> *Ibis* 9, Article 16, para. 2.

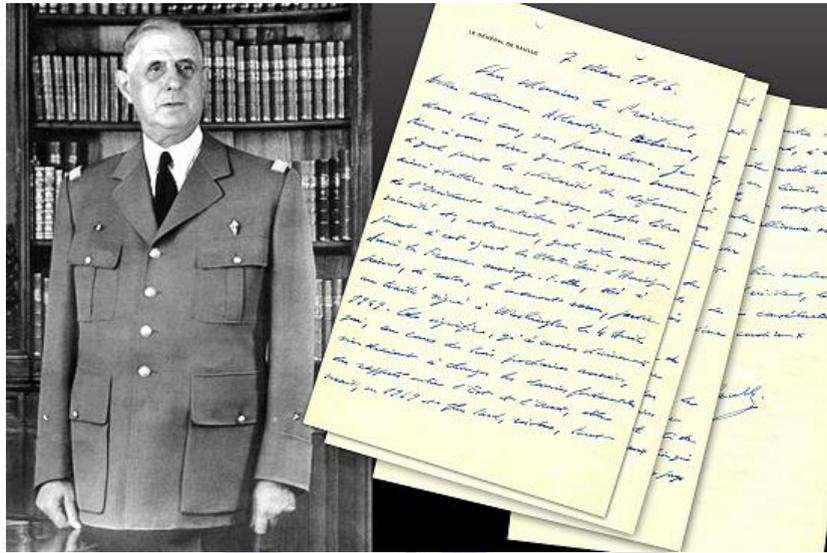
<sup>24</sup> Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty,

Excellence when granted Paris Protocol status, and articulates the duty of a force and its civilian component to respect the law of the receiving state. This means that each NATO Centre of Excellence should seek coordination and cooperation with the receiving state's legislation, where necessary, and develop its own internal rules pertaining any particular topic. In the case of personal data collection, the internal rules adopted in the form of Standing Operating Procedures or a COE Directive should not only cover internal information regarding staff members provided by sending states, but also information submitted by third parties, such as those attending courses, conferences and other events organised by a NATO Centre of Excellence.

On the other side, there is a strong demand to regulate personal data collection and provide sufficient guaranties that such data are not mishandled and misused. The solution, which is supported by both NATO SOFA and the UN General Assembly Guidelines, seems to be obvious. Any NATO Centre of Excellence operating within the territory of the EU should develop its own internal regulations for personal data protection.

Having said that, this is the way the JCBRN Defence COE will act. The Centre is currently working on the JCBRN Defence COE Data Protection Directive, which should provide a sufficient and solid background for the personal data protection. By adopting the Directive, the Centre will fulfil its duty to respect the receiving state's law and the overarching demand to protect personal data.

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President De Gaulle's Original Handwritten Letter to US President Lyndon B. Johnson,  
Source: [www.nato.int](http://www.nato.int)

## Legal Considerations of the Accession of France to the Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty

by Major Arn Oosterveer LL.M. and Mrs. Kelly Telen LL.M.<sup>1</sup>

### Introduction

After a 49 year absence, the French Republic re-joined the NATO integrated military structure on 11 September 2016. This date was no coincidence; President Nicolas Sarkozy forecast this outcome when he gave formal notice of the plan in 2009 at the NATO Strasbourg-Kehl Summit that celebrated the 60th anniversary of the North Atlantic Alliance. The legal mechanism by which France accomplished this historic and strategic result was its accession to the Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty<sup>2</sup> of the Agreement

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<sup>2</sup> [Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty](#), Paris, 28 August 1952 (hereinafter referred to as "the Paris Protocol").

between the Parties to the North Atlantic Treaty regarding the Status of their Forces, better known by the name of the Paris Protocol<sup>3</sup>. This article is about the past political actions that produced results with current legal effect that NATO and national personnel should be aware of. This article will briefly discuss the 1966 decision by President Charles de Gaulle to withdraw France from the Alliance integrated military structure and the process initiated by President Nicolas Sarkozy for the return of France. A short overview follows to describe the Paris Protocol and concludes with comments on the practical legal benefits of France resuming “its full role in NATO”<sup>4</sup> as a party to the framework of NATO.<sup>5</sup>

### **The French Republic withdrawing from the NATO integrated military structure**

As an original member of the North Atlantic Alliance, the French Republic deeply invested in the creation of the North Atlantic Alliance Treaty Organisation (NATO) centred in France. In 1951, France housed General Dwight Eisenhower, the first Supreme Allied Commander Europe (SACEUR), while building the new Supreme Headquarters Allied Powers Europe (SHAPE) on the estate of the Château d’Hennemont in Rocquencourt, a suburb of Paris.<sup>6</sup> In 1952, NATO Headquarters moved from London to Paris and the majestic Palais de Chaillot (across from the Eiffel Tower) where the Paris Protocol was drafted.<sup>7</sup> In the following year, the NATO Headquarters Allied Forces Central Europe (HQ AFCENT), and its land, air, and naval components were accommodated in offices in the former royal and imperial Palace of Fontainebleau.<sup>8</sup> France signed the Paris Protocol in 1952 and provided its formal consent to be bound and ratification to be bound in 1955<sup>9</sup>. However,

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<sup>3</sup> [Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, London, 19 June 1951](#) (hereinafter referred to as “the NATO SOFA”).

<sup>4</sup> Speech by President Nickolas Sarkozy Address to a joint meeting of the United States Congress; 7 November 2007. <https://www.c-span.org/video/?202148-1/french-president-address&start=1253>. (last visited 12 September 2018.)

<sup>5</sup> For the list of treaties created by the North Atlantic Alliance see: <https://www.state.gov/s/l/treaty/depositary/index.htm#NORTH>.

<sup>6</sup> For a description of how SHAPE arrived at Rocquencourt see, TEACHING NATO’S CHILDREN: THE FIRST SHAPE SCHOOL IN ROCQUENCOURT at [https://www.nato.int/cps/en/natohq/declassified\\_154865.htm?selectedLocale=en](https://www.nato.int/cps/en/natohq/declassified_154865.htm?selectedLocale=en)

<sup>7</sup> Pictures of events at NATO Headquarters in Palais de Chaillot may be found at the NATO webpage: [https://www.nato.int/cps/en/natohq/photos\\_121598.htm](https://www.nato.int/cps/en/natohq/photos_121598.htm). (last visited 24 September 2018)

<sup>8</sup> See AFCENT History at:

[https://www.usarmygermany.com/Sont.htm?https&&www.usarmygermany.com/units/HqUSAREUR/USAREUR\\_AFCENT.htm](https://www.usarmygermany.com/Sont.htm?https&&www.usarmygermany.com/units/HqUSAREUR/USAREUR_AFCENT.htm) (last visited 12 September 2018).

<sup>9</sup> See: Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty at <https://www.state.gov/documents/organization/85631.pdf> (last visited 24 September 2018).

just eleven years later France denounced<sup>10</sup> its ratification<sup>11</sup>.

The reason for this dramatic reversal was President Charles de Gaulle's disagreement with the United States concerning the role of France in the Alliance<sup>12</sup> and nuclear strategy<sup>13</sup>, a discord which had been simmering for a while. The consequence was France withdrawing forces from the NATO military structure in 1966 and the required departure of the French-hosted NATO integrated military commands, their international personnel, and families to other North Atlantic Alliance Member States in 1967.<sup>14</sup>

However, despite the withdrawal of French forces from the NATO military command structure, the practical implications were surprisingly limited, despite the scale of moving 100,000 personnel and more than one million tons of supplies and equipment out of France.<sup>15</sup> Two reasons produced this outcome. First, "[b]ecause of the political, geographic, and military position of France, the overriding consideration on the part of the United States and other members was to preserve a link between that country and NATO, and to minimise the military and political consequences of the rupture."<sup>16</sup> Second, France's withdrawal was only partial. In the French Aide

<sup>10</sup> The legal framework governing denouncements or withdrawals from treaties is provided by the Vienna Convention on the law of treaties (with annex), Concluded at Vienna on 23 May 1969. See Article 70. 'Consequences of the Termination of a Treaty'

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (a) Releases the parties from any obligation further to perform the treaty; (b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect."

At <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> (last visited 24 September 2018).

<sup>11</sup> The French authorities denounced the Protocol in a Note Verbal sent to the US Department of State on 30 March 1966. See: 'French denunciation of Protocol on status of NATO Military Headquarters' *International Legal Materials*, vol. 5, no. 3, 1966, pp. 440–441, JSTOR, JSTOR, [www.jstor.org/stable/20690063](http://www.jstor.org/stable/20690063) (last visited 24 September 2018).

<sup>12</sup> Letter of C. De Gaulle to Lyndon B. Johnson, 7 March 1966, at <https://www.cervens.net/legionbbs123/showthread.php?2285-De-Gaulle-and-NATO> (last visited 31 January 2017); see also Alice L. Conklin et al, *France and Its Empire Since 1870*, 2<sup>nd</sup> ed., 2014, chapter 11.

<sup>13</sup> The prevailing view of other NATO Nations was that France would be pursuing an independent policy regarding its nuclear arsenal. <http://www.history.com/this-day-in-history/french-withdraw-navy-from-nato> (last visited 31 January 2017).

<sup>14</sup> NATO HQ and SHAPE were relocated from Paris to Brussels, respectively Mons, Belgium; HQ JFCBS, then called AFCENT, went from Fontainebleau, France to Brunssum, the Netherlands, celebrating their 50<sup>th</sup> Anniversary at location in 2017.

<sup>15</sup> General Lemnitzer, SACEUR, estimate 16 NATO LETTER 5, (January 1968).

<sup>16</sup> Law and Peaceful Change in a Subsystem: "Withdrawal" Of France From the North Atlantic Treaty

Memoire of 10 March 1966, France stated it would remain a member of the North Atlantic Alliance, "as long as it appears to be necessary."<sup>17</sup> As Professor Jan Klabbers observed, "France managed to justify its behaviour in legal terms by distinguishing between the original treaty and the organization founded on the treaty; it remains a party to the former, but not the latter.<sup>18</sup> ...[N]othing in the treaty prohibit[ed] such a move, and in the end it seemed like a wise compromise to everyone involved; NATO without France does not make too much sense...".<sup>19</sup> Recognising the desire to keep French forces in Germany, in 1967 an agreement between the former SACEUR, General Lyman Lemnitzer, and the French Chief of Staff, General Charles Ailleret (the Ailleret-Lemnitzer Accord of August 1967)<sup>20</sup> was reached. This permitted France to re-enter the NATO military fold. This document served as a basis for cooperation, "...with the relevant French commanders to prepare plans and rules to be applied should the French Government decide, in time of crisis, to commit its Forces to act jointly with those of its Allies."<sup>21</sup> Consequently, notwithstanding France being absent from the integrated command in NATO, French military personnel and forces continued to participate in NATO operations and exercises for the remainder of the 20<sup>th</sup> Century.

By 2008 the French President Nicolas Sarkozy was able to argue that it is futile to continue boycotting the NATO command, given that France remained an active political and military participant. He convinced the French public that returning to the integrated military structure of NATO was to the nation's benefit.<sup>22</sup> By increasing French presence and influence in the Alliance, President Sarkozy sought to enhance the European defence project of the European Union (EU) whilst diminishing the appearance of competition between the EU and NATO. To advance this approach, President Sarkozy

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Organization, Vol 62 AJIL 1968, p.625.

<sup>17</sup> French Note to U.S. of March 10, 1966. 54 Department of State Bulletin 536 (4 April 1966).

<sup>18</sup> Jan Klabbers, *An Introduction to International Institutional Law*, 2<sup>nd</sup> edition, 2009, p. 112.

<sup>19</sup> *Ibid.* p. 240.

<sup>20</sup> See the August 10, 1967 Exchange of letters between SACEUR and the French Commander-in-Chief concerning cooperation with French Forces in Germany at: <https://archives.nato.int/exchange-of-letters-between-saceur-and-the-french-commander-in-chief-concerning-cooperation-with-french-forces-in-germany-lemnitzer-ailleret-agreement> (last visited 24 September 2018). Also, Sten Rynning, *Changing Military Doctrine: Presidents and Military Power in Fifth Republic France, 1958-2000*, 2002, p. 54.

<sup>21</sup> See: Annex C Exchange of letters between SACEUR and the French Commander-in-Chief concerning cooperation with French Forces in Germany <https://archives.nato.int/exchange-of-letters-between-saceur-and-the-french-commander-in-chief-concerning-cooperation-with-french-forces-in-germany-lemnitzer-ailleret-agreement> (last visited 19 November 2018).

<sup>22</sup> The Guardian, Sarkozy to announce French return to NATO military command, 11 March 2009, source: <https://www.theguardian.com/world/2009/mar/11/sarkozy-france-nato-military> (last visited 31 January 2017).

announced that France would become a full participant in the NATO integrated military structures, during the Strasbourg-Kehl Summit in April 2009.<sup>23</sup> Heads of State and Government participating in the meeting of the North Atlantic Council in Strasbourg/Kehl warmly welcomed this decision.<sup>24</sup> On 18 July 2012,<sup>25</sup> the French President asked a former Minister of Foreign Affairs, Mr Hubert Védrine, to report<sup>26</sup> on the full participation of France in NATO integrated military structures. The conclusion of this report and the related White Paper<sup>27</sup> was that accession<sup>28</sup> to the Paris Protocol was the most logical step.

By 2016 France was ready to take this step. Preparatory notes of the French Parliament show<sup>29</sup> that accession to the Paris Protocol was in equal part due to two factors. First of all, France had successfully reintegrated into the NATO military command structure following the 2009 Summit. Secondly, the Paris Protocol did not mention the unique circumstance of a former State Party wishing anew to establish, "on the international plane its consent to be bound"<sup>30</sup> by the treaty. On 21 April 2016, the French Parliament adopted the

<sup>23</sup> "After 43 Years, France to Rejoin NATO as Full Member" at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/11/AR2009031100547.html> (last visited 31 January 2017).

<sup>24</sup> Strasbourg / Kehl Summit Declaration Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Strasbourg / Kehl. 4 April 2009. See [https://www.nato.int/cps/en/natohq/news\\_52837.htm](https://www.nato.int/cps/en/natohq/news_52837.htm) (last visited 14 September 2018).

<sup>25</sup> France National Assembly, Report done on behalf of the Foreign Affairs Commission on the Bill adopted by the Senate authorising the accession of France to the Protocol [on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty](#), 29 March 2016, source: <http://www.assemblee-nationale.fr/14/pdf/rapports/r3615.pdf> (last visited 6 August 2018)

<sup>26</sup> Hubert Védrine, Report for the President of the French Republic on the Consequences of France's return to the NATO's integrated military command, on the future of transatlantic relations and the outlook for the Europe of Defence: [www.ambafrance-uk.org/Vedrine-Report](http://www.ambafrance-uk.org/Vedrine-Report) (last visited 31 January 2017).

<sup>27</sup> French White Paper on Defence and National Security, 29 April 2013, source: <http://www.defense.gouv.fr/english/content/download/206186/2393586/file/White%20paper%20on%20defence%20%202013.pdf> (last visited 31 January 2017). France issued its fourth ever defence White Paper on Defence and National Security which describes the most recent defence reform of the French Armed Forces and in which France reaffirms its commitment to NATO. *c.f.* Jean-Marie Collin, "The Role of NATO in the French White Paper and implications for nuclear arms control", October 2013, source: [http://www.basicint.org/sites/default/files/nuclearpolicypaperno15\\_fin.pdf](http://www.basicint.org/sites/default/files/nuclearpolicypaperno15_fin.pdf) (last visited 31 January 2017).

<sup>28</sup> See Article 2, Use of terms, Vienna Convention on the law of treaties (with annex), concluded at Vienna on 23 May 1969: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> (last visited 24 September 2018).

<sup>29</sup> French Act **2016-482 of 20 April 2016 authorising the accession of France to the Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty**, *JORF* n 0094 of 21 April 2016, source: <https://www.legifrance.gouv.fr/eli/loi/2016/4/20/MAEJ1524523L/jo/texte> (Last visited 31 January 2017)

<sup>30</sup> Hubert Védrine, Report for the President of the French Republic on the Consequences of France's return to the NATO's integrated military command, on the future of transatlantic relations and the outlook for the

Act to accede to the Paris Protocol by relying on a unique article in its domestic law.<sup>31</sup> The North Atlantic Council approved the French proposal by consensus on 1 July 2016, permitting France to deliver its Note of Accession to the United States as the treaty repository for the Paris Protocol on 12 August 2016.<sup>32</sup>

### Overview of the Paris Protocol

One of the strengths of the Alliance lies within its integrated military capability of its Member States. However, effective and coherent multinational military cooperation requires an integrated command and control capability. The preamble of the Paris Protocol names this NATO capability, international military Headquarters' and supports it with a functional legal framework that was recognised as necessary late in the drafting of the NATO SOFA. The question was raised whether the NATO SOFA would also apply to NATO Military Headquarters. At the time, SHAPE and the Headquarters Supreme Allied Commander Atlantic (HQ SACLANT) already existed. It was decided not to expand the NATO SOFA, and instead conclude a separate protocol to the NATO SOFA,<sup>33</sup> giving status to NATO international military headquarters and their staff. The Paris Protocol extends NATO SOFA provisions to be applied to NATO International Military Headquarters (IMHQs), whilst providing privileges and immunities specific to such Headquarters. This includes:

- Status and immunities of Headquarters and authority to grant status under the protocol;
- Definition of staff categories and of dependents of such staff members;
- Exemption from taxation of the Headquarters as well as directing authority to tax the income of staff members;

The NATO SOFA regulates the status of military personnel and members of the civilian component in connection with their official duties, and their dependants.<sup>34</sup> The Paris Protocol defines the status enjoyed by IMHQs

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Europe of Defence

<sup>31</sup> [https://www.legifrance.gouv.fr/jo\\_pdf.do?id=JORFTEXT000032433850](https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000032433850) (last visited 21 November 2016).

<sup>32</sup> See Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty at <https://www.state.gov/documents/organization/85631.pdf>. (last visited 13 September 2018).

<sup>33</sup> [Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces](#) (hereinafter referred to as "the NATO SOFA"), 19 June 1951.

<sup>34</sup> For in-depth understanding on the NATO SOFA, *c.f.* Hartov, M. *NATO Status of Forces Agreement:*

established pursuant to the North Atlantic Treaty, partly by making applicable NATO SOFA provisions to IMHQs and their personnel. The NATO SOFA determines the status of NATO member states and their armed forces when they are present in their official capacity on the territory of another Member State and with the consent of that state.<sup>35</sup> It establishes modalities for entry and departure of said territory (Art. III), the use of driving permits (Art. IV), wearing uniforms and carrying arms (Art. V and VI). It also foresees conditions for the jurisdictional competence of states (Art. VII), modalities for claims processing (Art. VIII), as well as the applicable conditions for customs and fiscal matters (Art. X to XIII).

Similar to the NATO SOFA, the Paris Protocol is an international agreement among NATO Member States,<sup>36</sup> with the primary aim to define and regulate the legal status of IMHQs and that of its staff members within the North Atlantic Treaty area. The Paris Protocol regulates the legal relationship between an IMHQ and its host NATO member state while also granting status to IMHQs when they conduct activities in the territory of other NATO members.

### **Scope and definitions**

Article I of the Protocol is reserved for definitions. Article II mentions its subject: it applies to Allied Headquarters in the territory of a Party to the present Protocol in the North Atlantic Treaty area, subject to the provisions of the Protocol meaning with all its necessary clarifications and amendments.

The Paris Protocol in paragraph (c) of Article I defines an “Allied Headquarters” as any Supreme Headquarters and any international military Headquarters set up pursuant to the North Atlantic Treaty, which is immediately subordinate to a Supreme Headquarters. The two Supreme Headquarters are currently Supreme Headquarters Allied Powers Europe (SHAPE) and Headquarters, Supreme Allied Commander Transformation (HQSACT), the successor command of the Headquarters of the Supreme

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*Background and a Suggestion for the Scope of Application:* in *Baltic Defence Review* No. 10 Volume 2/2003, p. 45-64, source: [http://www.baltdefcol.org/files/files/BSDR/BDR\\_10.pdf](http://www.baltdefcol.org/files/files/BSDR/BDR_10.pdf) and Andres Munoz-Mosquera and Mette Prassé-Hartov, Chapter 37 Legal Issues Related to International Military Headquarters, *The Handbook of the Law of Visiting Forces*, 2<sup>nd</sup> edition, 2018, Dieter Fleck, editor.

<sup>35</sup> For full overview: Lazareff, S., *Status of Military Forces under current International Law*, Leiden, 1971.

<sup>36</sup> All NATO member states have ratified the Paris Protocol, except Canada, which signed the Paris Protocol but did not ratify it. France ratified the Paris Protocol in 1955 but, as earlier stated, denounced its ratification in 1966.

Allied Commander Atlantic (HQSACLANT). The immediately subordinated IMHQs of SHAPE enjoying status under the Paris Protocol presently include the two Joint Force Commands: Headquarters Allied Joint Force Command Brunssum and Headquarters Allied Joint Force Command Naples; and the three single service commands: Headquarters Allied Maritime Command Northwood (MARCOM), Headquarters Land Command Izmir (LANDCOM) and Air Command Ramstein (AIRCOM). The subordinated IMHQs of HQSACT are the Joint Warfare Centre (JWC) Stavanger, Norway; Joint Force Training Centre (JFTC) Bydgoszcz, Poland; and the Joint Analysis and Lessons Learned Centre (JALLC) Lisbon, Portugal.

Article V foresees in the issuance of an IMHQ personal identity card to be produced on demand. Article VI prescribes conditions of application of article VIII of the NATO SOFA on tort claims. Article XII authorises an IMHQ to hold currency of any kind and to have accounts in any currency. Article XIII states the principle of inviolability of archives and other official documents on IMHQ premises or in possession of a duly authorised person. Paragraph 1 of Article XIV of the Protocol foresees that the North Atlantic Council ('NAC') may decide on the application in whole or part of the Protocol to any international military Headquarters or organisation established pursuant to the North Atlantic Treaty but not meeting the definition of Article I. If the term "international military headquarters" refers to the definition of Article I of the Protocol, then the concept "international military organisation" is larger and has the ability to encompass all of NATO multinational military structure.

### **Legal and fiscal status**

Article X of the Paris Protocol vests the legal capacity of IMHQs in one of the two Supreme Headquarters, now either Supreme Headquarters Allied Powers Europe (SHAPE) or Headquarters Supreme Commander Transformation (HQ SACT). This article permits those Supreme Headquarters to make contracts and acquire and dispose of property and to delegate authority to their subordinate headquarters to act on their behalf. The implementation of this capacity may be subject to specific arrangements by the receiving state. Article XI enables the two Supreme Headquarters to engage in legal proceedings and awards Allied Headquarters (as defined in Article I) with immunity from execution, save for investigation into offences and offences of a customs or fiscal nature. The fiscal and customs exemptions as foreseen in Article VIII are similar to those of other international organisations. The Headquarters are exempted from duties and taxes

affecting expenditures in the interest of common defence and for their official and exclusive benefit. Whilst the decision to host an IMHQ is vested in the state offering to become the seat of an IMHQ, the authority to grant status is held by the North Atlantic Council. The Supreme Headquarters are authorised under Article XVI to conclude agreements with the individual NATO states to supplement the Protocol with regard to detailing the implementation thereof on their territory.

The customs exemptions foreseen in Article XI NATO SOFA are applicable to Allied Headquarters. Article IX pertains to the disposal of assets and the restitution of immovable property after being of use to an Allied Headquarters. The product of disposal is re-divided between the Parties pro rata to their contributions to the capital costs of the headquarters.

### **Legal coverage of civilians and military and their dependents**

Article IV states the rights and obligations of headquarters vis-à-vis the civilian and military personnel attached to or employed by an IMHQ for privileges and immunities. This article foresees the IMHQ staff benefits from privileges and jurisdiction as mentioned in Article VII NATO SOFA, but that the execution of that jurisdiction is for the state to whose military law the person is subject.

The obligations imposed by the NATO SOFA in matters of arrest, investigation, collection of evidence, indemnification regulations, rights, taxes and fines are incumbent upon the IMHQs and the sending state. Jurisdiction however, remains with the sending state.

In case of claims for compensation as foreseen in Article VI, for the damaging actions committed off-duty and for the non-authorised use of a service vehicle, the obligations normally imposed on the sending state are incumbent upon both the Allied Headquarters and to any NATO state whose service members or civilian employees are assigned to the IMHQ.

Article VII, paragraph 1 is the conduit by which fiscal exemptions in the receiving state as foreseen in Article X of the NATO SOFA are applicable to members of the force and civilians attached to an IMHQ by a sending state and their dependents. Article VII, paragraph 2 provides conditions and exemptions from income taxes for NATO International Civilians (defined as a distinct category of employees). Article VIII, paragraphs 2 and 3 details the customs and duty-free exemptions enjoyed by staff members of an Allied Headquarters.

## Dispute settlement and final provision

Article XV of the Paris Protocol provides for the dispute settlement in negotiation between parties without recourse to any outside jurisdiction. The issues that cannot be settled in this manner are brought before the NAC, save conditions to the contrary.<sup>37</sup>

Concerning the final provisions, Article XVI of the Paris Protocol states that Articles XV and XVII to XX of the NATO SOFA are integrally applicable to the Paris Protocol, but in the way that the Paris Protocol may be independently reviewed, suspended, ratified, exceeded to, denounced or extended.<sup>38</sup>

## Legal and political aspects of France accession to the Paris Protocol

The benefits of the 2016 accession of France to the Paris Protocol were immediately tangible. It returned to NATO International Military Headquarters (IMHQs) and the NATO International Civilians (NICs) employed by these IMHQs the legal status both enjoyed in France from 1955 to 1967. At the time France was not a party to the Paris Protocol, short term or case-by-case solutions concerning the legal status of IMHQ employed civilians or IMHQ property (such as vehicles or equipment) when in the territory of France were required. For instance, the military members of this IMHQ could piggy-back on the NATO SOFA as they equally hold a status as military personnel, leaving the NICs without a privileged legal status and a limited freedom of movement during exercises in or transiting France. Another workaround consisted of falling back on specific arrangements, such as those between SHAPE (and its subordinate IMHQs) and the French Armed Forces. In addition, the scope of the standing Host Nation Support Memorandum of Understanding on Exercises between Bi-Strategic Commands and France<sup>39</sup> is broad enough to cover nearly every eventuality. A third approach was to conclude bilateral arrangements for each particular visit, or to commercially insure IMHQ employed civilians when driving through France. With accession, these

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<sup>37</sup> *c.f.* Dieter Fleck, "[The Handbook of the Law of Visiting Forces](#)", Edition 2001, Oxford University Press, p. 316.

<sup>38</sup> For in-depth understanding on how various NATO treaties interconnect and their implementation, *c.f.* NATO Legal Deskbook, *o.c.*, p. 108. <https://info.publicintelligence.net/NATO-LegalDeskbook.pdf> (last visited 16 November 2018).

<sup>39</sup> Memorandum of Understanding between the Minister of Defence of the French Republic and Supreme Headquarters Allied Powers Europe and Supreme Allied Command Transformation regarding the Provision of Host Nation Support for the Execution of NATO exercises, "the Paris MOU", signed 6 October 2008, *nyr.*

exercises are, thankfully, no longer needed. Administrative simplicity and legal certainty now exist where complexity previously reigned.

Additionally, should France desire, it could seek Paris Protocol status for already activated headquarters present in France such as the NATO-certified Headquarters Rapid Reaction Corps-France (RRC-FR) located in Lille. Presently, the RRC-FR is a technical arrangement-based entity created in 2006. The current status recognised by France to foreign military personnel serving at the RRC-FR, is based on the NATO Status of Forces Agreement and a multilateral technical agreement.<sup>40</sup> With the accession of France to the Paris Protocol, should it wish, activation of RRC-FR as an IMHQ by the North Atlantic Council becomes possible under Article XIV of the Paris Protocol. However, the domestic determinations necessary to produce such an action, as it was for President de Gaulle, remains a sovereign decision of France.

## Conclusion

The 2016 accession of France to the Paris Protocol is historically, legally, and practically significant. Via this action, France recognised the status, privileges, and immunities of more than 50 NATO Command Structure, Force Structure, Centres of Excellence, and Training Establishments entities located in 26 nations. For NATO IMHQs with personnel working in or travelling through France, legal clarity, uniformity, and the ending of alternative arrangements are all positive results that arise from France returning as a State party to the Paris Protocol and benefit all member nations of NATO.

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<sup>40</sup> Technical Arrangement between the Ministers of Defence of BEL, ITA, NLD, ESP, and FRA, the Federal Ministry of Defence of DEU, the GRC Ministry of National Defence, the Ministry of Defence of BLG, the Minister of National Defence of POL and ROM, the Department of Defense USA, the Chief of TUR general staff, the Secretary of State for Defence for Great Britain of the UK and Northern Ireland and SHAPE concerning the manning, funding, administration and support of the Headquarters Rapid Reaction Corps France (HQ RRC-FR) as Headquarters NATO Rapid Deployable Corps (HQ NRDC), 23 August 2006, source: NATO LAWFAS (members only):[https://lawfas.hq.nato.int/RC/Basic%20documents/TA\\_HQ%20RRC-FRA%20AS%20NATO%20HQ%20NRDC.pdf](https://lawfas.hq.nato.int/RC/Basic%20documents/TA_HQ%20RRC-FRA%20AS%20NATO%20HQ%20NRDC.pdf)



(The European Centre of Excellence for Countering Hybrid Threats was officially inaugurated in the Finnish capital Helsinki in October 2017. It is neither an EU nor a NATO body but a freestanding legal entity) © NATO

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## The notion of hybrid warfare in international law and its importance for NATO

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### Introduction

In November 2017, the GLOBSEC<sup>3</sup> NATO Adaptation Initiative Steering Committee adopted a view that without “embarking on a more far-reaching

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<sup>3</sup> Based in Bratislava, GLOBSEC is an independent, non-partisan, non-governmental organisation that builds on the successful work done by the Slovak Atlantic Commission (est. 1993). Its main goal is to shape the global debate through conducting research activities and connecting key experts on foreign and security policy. See <https://www.globsec.org/about/>

process of adaptation”, “NATO risks falling behind the pace of political change and technological developments.” According to the Committee, such process should encompass “a future war strategy that fully integrates hybrid warfare, cyber war, counter-terrorism and hyper war, and the continuum between them.”<sup>4</sup> To develop a comprehensive approach to modern warfare threats, NATO needs a consensus on what are the legal implications of identifying a conflict as hybrid warfare.

In handbooks on international relations, there are lots of types of warfare, such as global, total, nuclear, conventional, hybrid, guerrilla, civil and fourth-generation warfare and low intensity conflict.<sup>5</sup> Although international law rarely defines these terms, mere identification of a conflict as falling within these categories may show how international law will apply.

In this article, we provide some interpretations which could help NATO officials and national billets to find common ground on legal issues concerning hybrid threats. We will examine the characteristics of hybrid warfare, why this term is used, its legal significance and whether international law could benefit from introducing a legal definition.

### **Characteristics of Hybrid Warfare**

To determine whether certain norms of international law apply to hybrid warfare, we need to clarify its characteristics first. The word ‘hybrid’ shows something of mixed ancestry,<sup>6</sup> a combination of mismatched or even mutually exclusive parts and components.<sup>7</sup> Like a vehicle powered by an internal-combustion engine and battery, in hybrid warfare, military objectives are achieved by mixing two or more types of warfare.<sup>8</sup> The term hybrid warfare was probably first used in 1998 by Robert G. Walker, who defined it as

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<sup>4</sup> *One alliance. The future tasks of the adapted alliance* (GLOBSEC NATO Adaptation Initiative 2017), p. 6-8. <<https://www.globsec.org/wp-content/uploads/2017/11/GNAI-Final-Report-Nov-2017.pdf>> accessed 10 December 2017.

<sup>5</sup> P Ostaszewski, *Międzynarodowe stosunki polityczne. Zarys wykładów* (Książka i Wiedza 2010), p. 401-2.

<sup>6</sup> And more originally – ‘an animal or plant resulting from a cross between genetically unlike individuals. Hybrids between different species are usually sterile’. <<http://www.collinsdictionary.com/dictionary/english/hybrid>> accessed 27 November 2016.

<sup>7</sup> <<http://sjp.pl/hybryda>> accessed 27 November 2016.

<sup>8</sup> See S Bachmann, A Mosquera, ‘Lawfare and Hybrid Warfare-How Russia is Using the Law as a Weapon’ (2015) 102 *Amicus Curiae*, available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2841277](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841277)> accessed 29 November 2016, p. 1.

comprising special and conventional operations.<sup>9</sup> But as Captain Alex Deep writes, “utilizing a combination of conventional and irregular methods to achieve a political objective is consistent with older forms of conflict”.<sup>10</sup>

There are two basic descriptions of hybrid warfare. First, the Russian Chief of the General Staff, Gen Valery Gerasimov, wrote: “[i]n the 21st century we have seen a tendency toward blurring the lines between the states of war and peace. Wars are no longer declared and, having begun, proceed according to an unfamiliar template (...) The role of non-military means of achieving political and strategic goals has grown, and, most times, they have exceeded the power of force of weapons in their effectiveness.”<sup>11</sup> Second, according to United States General James Conway, Admiral Gary Roughead and Admiral Thad W. Allen, such conflicts are “increasingly characterized by a hybrid blend of traditional and irregular tactics, decentralized planning and execution, and non-state actors using both simple and sophisticated technologies in innovative ways.”<sup>12</sup> We could conclude at this point that, “[i]n practice, any threat can be hybrid as long as it is not limited to a single form and dimension of warfare.”<sup>13</sup> But instead, we will analyse why certain conflicts are described as hybrid.

As an example of hybrid warfare, Todd Greentree from the University of Oxford pointed to American support for the anti-communist opposition in Nicaragua in the 1980s. Among hybrid methods, he listed: covert subsidising of the insurgent group Contras,<sup>14</sup> keeping U.S. military forces on permanent exercise and posing a menace from nearby Honduras, pumping funds into the underdeveloped region, “desultory diplomatic negotiations mollifying regional actors” and “information operations aimed at the homeland audience, featuring images of Soviet tanks headed toward Harlingen, the first

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<sup>9</sup> R Walker, *SPEC FI: the United States Marine Corps and Special Operations* (Calhoun: The NPS Institutional Archive, 1998), p. 4. See also T. Mockaitis, *British Counterinsurgency, 1919-1960* (Macmillan Press 1990), p. 3.

<sup>10</sup> See A Deep, *Hybrid War: Old Concept, New Techniques* (Small Wars Journal, 2015) <<http://smallwarsjournal.com/jrnl/art/hybrid-war-old-concept-new-techniques>> accessed 27 November 2016.

<sup>11</sup> V. Gerasimov, *The Value of Science in Prediction* (Military-Industrial Kurier, February 27, 2013).

<sup>12</sup> *A Cooperative Strategy for 21st Century Seapower* (Washington, DC: US Marine Corps, US Navy, US Coast Guard, 2007), p. 6 <[https://www.ise.gov/sites/default/files/Maritime\\_Strategy.pdf](https://www.ise.gov/sites/default/files/Maritime_Strategy.pdf)> accessed 16 January 2017.

<sup>13</sup> <<http://www.nato.int/docu/Review/2015/Also-in-2015/hybrid-modern-future-warfare-russia-ukraine/EN/index.htm>> accessed 26 November 2016. See also *A Cooperative Strategy for 21st Century Seapower* (2007) <[https://www.ise.gov/sites/default/files/Maritime\\_Strategy.pdf](https://www.ise.gov/sites/default/files/Maritime_Strategy.pdf)> accessed 30 November 2016, p. 6.

<sup>14</sup> See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. ICJ Reports 1986, para. 111.

American city at the southern tip of Texas.”<sup>15</sup>

Dr David E. Johnson is one scholar who uses the term ‘hybrid warfare’ to describe the 2006 Israel-Hezbollah war. In his analysis, he pays particular attention to the fact that “hybrid opponents only increase the challenges the joint force — especially ground forces — might face” and lists insights into how these challenges could be addressed in military terms.<sup>16</sup> Marcin Piotrowski, from the Polish Institute of International Affairs, goes even further and calls this conflict “the model of a hybrid threat,” with Hezbollah being a “State within a State”, receiving substantial support from Iran and Syria, having a conventional arsenal “unseen among other terrorist groups”, mixed with unconventional capabilities to carry out terrorist attacks.<sup>17</sup>

Next, Scott Jasper and Scott Moreland describe the Islamic State as a hybrid threat for four reasons: “transnational aspirations, blended tactics, structured formations, and cruel use of terror.” They describe it as employing “a combination of conventional and non-conventional tactics combined with terrorism and criminal activities” and comprising “a mix of professional soldiers, terrorists, guerrilla fighters and criminal thugs.” As opposed to trying to pretend it complies with international law, as a hybrid threat, the so-called Islamic State “cynically views international laws as a constraint upon its adversaries that can be exploited.”<sup>18</sup>

Another current example of hybrid warfare is the Russian military intervention in the Ukraine. Gen. Philip M. Breedlove used the term ‘hybrid warfare’ both with respect to the occupation of Crimea and to the war in Donbass. As he said, “one of the first aspects of the hybrid war is to attack credibility and to try to separate a nation from its support mechanisms.” Among methods used to achieve political objectives, he pointed out

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<sup>15</sup> <<http://warontherocks.com/2015/04/america-did-hybrid-warfare-too/>> accessed 10 December 2017.

<sup>16</sup> D Johnson, *Military Capabilities for Hybrid War. Insights from the Israel Defense Forces in Lebanon and Gaza* (Rand Corporation, 2010), pp. 1 and 7-8.

<[http://www.rand.org/content/dam/rand/pubs/occasional\\_papers/2010/RAND\\_OP285.pdf](http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP285.pdf)> accessed 27 November 2016.

<sup>17</sup> M Piotrowski, *Hezbollah: The Model of a Hybrid Threat* (2015) 24 PISM Bulletin <[https://www.pism.pl/files/?id\\_plik=19320](https://www.pism.pl/files/?id_plik=19320)>. See also A Jacobs, G Lasconjarias, *NATO’s Hybrid Flanks. Handling Unconventional Warfare in the South and the East* (NATO Defense College Research Paper No. 112, 2015), p. 3-4.

<sup>18</sup> S Jasper, S Moreland, *The Islamic State is a Hybrid Threat: Why Does That Matter?* (Small Wars Journal, 2014), p. 1-3 < <http://smallwarsjournal.com/printpdf/18345>> accessed 27 November 2016. See also A Jacobs, G Lasconjarias, *NATO’s Hybrid Flanks. Handling Unconventional Warfare in the South and the East* (NATO Defense College Research Paper No. 112, 2015), p. 4-6.

especially a) different tools to create and sustain a false narrative;<sup>19</sup> b) the way the military tools were used and hidden to bring about ambiguity and problems with recognising, characterising and attributing employment of the military;<sup>20</sup> c) economic tools allowing pressure to be brought upon economies and on energy.<sup>21</sup> In parallel to these events, Lithuanian president Dalia Grybauskaitė said that Lithuania was “already under attack” in terms of informational war, propaganda and cyber-attack.<sup>22</sup>

To sum up, hybrid warfare reflects a wide range of activities that state and non-state actors undertake in order to gain military and political advantages. The above examples show only a part of the possible dimensions of hybrid warfare, which also include intelligence or sabotage, among other elements. One common denominator for hybrid warfare, as opposed to the traditional, is a “blurring of the distinction between military and civilian.”<sup>23</sup> Aurel Sari puts it even more explicitly, saying there is “a tendency toward blurring the lines between the states of war and peace.”<sup>24</sup>

### **How Does Hybrid Warfare Influence the Applicability of International Legal Norms?**

It is important to establish whether current methods of hybrid warfare render the international legal framework obsolete, or only indicate a need for a modern interpretation. This section will examine the above-mentioned types of hybrid warfare, this time assessing their basic international legal consequences.

#### State-driven Hybrid Warfare:

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<sup>19</sup> See also H Reisinger, A Golts, *Russia's Hybrid Warfare. Waging War below the Radar of Traditional Collective Defence* (NATO Defense College Research Paper No. 105, 2014)

<<http://www.ndc.nato.int/news/news.php?icode=732>> accessed 29 November 2016

<sup>20</sup> See G Lasconjarias, J Larsen (eds), *NATO's Response to Hybrid Threats* (NATO Defense College, 2015), p. 163-187 <<http://www.ndc.nato.int/news/news.php?icode=886>> accessed 27 November 2016.

<sup>21</sup> <<http://smallwarsjournal.com/blog/nato-commander-breedlove-discusses-implications-of-hybrid-war>> accessed 27 November 2016. See also M Ruhle, J Grubliauskas, *Energy as a Tool of Hybrid Warfare* (NATO Defense College Research Paper No. 113, 2015) <<http://www.ndc.nato.int/news/news.php?icode=803>> accessed 30 November 2016.

<sup>22</sup> <<http://warontherocks.com/2015/04/the-problem-with-hybrid-warfare/>> accessed 27 November 2016.

<sup>23</sup> A Jacobs, G Lasconjarias, *NATO's Hybrid Flanks. Handling Unconventional Warfare in the South and the East* (NATO Defense College Research Paper No. 112, 2015), p. 2.

<sup>24</sup> A Sari, *Legal Aspects of Hybrid Warfare* <<https://www.lawfareblog.com/legal-aspects-hybrid-warfare>> accessed 29 November 2016.

Keeping armed forces on permanent exercise and as a threat of the use of force is contrary to the prohibition of threat or use of force enshrined in Art. 2(4) of the UN Charter.<sup>25</sup> As the International Court of Justice (ICJ) stated, whether a signalled intention to potentially use force is a 'threat' — as interpreted in Art. 2(4) of the UN Charter — depends on various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Art. 2(4).<sup>26</sup> However, Jan Klabbers notes that Art. 2(4) "is not entirely "waterproof"", as "the prohibition only affects the activities of states in their international relations" and "hence, as a legal matter, the use of force within states is not captured."<sup>27</sup> But if such a demonstration of military power is one reason for territorial loss or the overthrow of government in another state, it is indefensible under international law, as "any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter."<sup>28</sup>

According to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the UN Charter, every state has the duty to not organise or encourage the organisation of irregular forces or armed bands including mercenaries, for incursion into the territory of another state.<sup>29</sup> That said, there are substantial doubts as to when such use of force amounts to an armed attack. UN General Assembly Resolution 3314, also invoked in the *Nicaragua case*,<sup>30</sup> in Art. 3(g) qualifies as an act of aggression "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."<sup>31</sup>

Following this test, the ICJ found that the Contra force had, at least at one period, been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities

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<sup>25</sup> *Charter of the United Nations* (1945) 1 UNTS XVI.

<sup>26</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, para 47.

<sup>27</sup> Jan Klabbers, *International law* (Cambridge University Press, 2013), p. 191.

<sup>28</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, U.N. Doc. A/RES/25/2625 (1970).

<sup>29</sup> *Ibid.*

<sup>30</sup> *Nicaragua v. United States of America* (n ?), para 195.

<sup>31</sup> *Definition of Aggression*, United Nations General Assembly Resolution 3314 (1974).

without the multi-faceted support of the United States.<sup>32</sup> However, despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf.<sup>33</sup> In this respect, the line between war and peace as well as between aggression and non-aggression, is indeed blurred.

Diplomatic negotiations — although they may cause concern for regional actors — are not prohibited, as long as a reached agreement is not unlawful. The arrangement must not create rights or obligations conflicting with the UN Charter, as according to Art. 103, obligations under the Charter prevail.

Finally, whether an information operation aimed at the homeland audience is lawful, could be answered by reference to the non-intervention principle enshrined in Art. 2(7) of the UN Charter. To qualify the intervention as internationally wrongful, it must meet all the following requirements: a) “be intended to change the policy of the target State,”<sup>34</sup> b) refer to matters that fall within its domestic jurisdiction,<sup>35</sup> and c) “use methods of coercion in regard to such choices, which must remain free ones.”<sup>36</sup> It also prohibits threat of coercion.<sup>37</sup>

For an interference to reach a threshold of coercion, it would be necessary to combine two elements: an actual ability to change the policy of the target state, and a will to use that power against its sovereignty. However, without a means of subordination — the will would be meaningless. Vanuatu imposing economic sanctions on the United States to compel action against Poland would fail because there is no actual coercive ability to impose this course of action. Even in cases of economic dependency, the will to subjugate is not always present. In theory, Italy could easily deprive the microstate of San Marino of access to food and supplies and enforce anything it wants. Putting these two extreme examples together: the higher capabilities of influence, the lower threshold of what constitutes coercion.

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<sup>32</sup> *Ibid.*, para 111.

<sup>33</sup> *Ibid.*, para 109.

<sup>34</sup> M Jamnejad and M Wood, *The Principle of Non-intervention. Current Legal Developments* (Leiden Journal of International Law, 22/2009), p. 371

<sup>35</sup> Helsinki Final Act 1975, section 1 (a), VI

<sup>36</sup> *Nicaragua v U.S.*, op.cit., para 205

<sup>37</sup> P. Kunig, *Intervention, Prohibition of* (Max Planck Encyclopedia of Public International Law, 2008), para 5

Irregular forces and non-conventional methods of warfare are not illegal by their very nature. However, as mentioned above, every state has the duty to not organise or encourages the organisation of irregular forces or armed bands including mercenaries, for incursion into the territory of another state. With respect to non-conventional methods of warfare, their use is lawful as long as the applied weapon is not prohibited and such activity does not infringe other principles of international humanitarian law (IHL).<sup>38</sup>

Furthermore, every state has the duty to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organised activities within its territory directed towards the commission of such acts, when these acts involve a threat or use of force.<sup>39</sup> Art. 51(2) of Additional Protocol I to the Geneva Conventions 1949 prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population.”<sup>40</sup>

The Tallinn Manual of the International Law Applicable to Cyber Warfare defines cyber warfare: “[a] cyber operation constitutes a use of force when its scale and effects are comparable to non-cyber operations rising to the level of use of force.” “Cyber operations falling below the use of force threshold are more difficult to characterise as a violation of the principle of non-intervention. Acts meant to achieve regime change are often described as a clear violation. So too is coercive “political interference.” When such actions are taken or facilitated by cyber means, they constitute prohibited intervention. Cases in point are the manipulation by cyber means of elections or of public opinion on the eve of elections, as when online news services are altered in favour of a particular party, false news is spread, or the online services of one party are shut off. As always, the decisive test remains coercion.”<sup>41</sup>

#### Non-state Actors engaging in Hybrid Warfare:

<sup>38</sup> For a compilation of relevant norms, see International Committee of the Red Cross’ Customary IHL Rules, available at: <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul)> accessed 30 November 2016.

<sup>39</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, U.N. Doc. A/RES/25/2625 (1970).

<sup>40</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977) 1125 UNTS 3.

<sup>41</sup> M Schmitt (ed.), *Tallinn Manual of the International Law Applicable to Cyber Warfare* (Cambridge University Press 2013), p. 45 <<https://www.peacepalacelibrary.nl/ebooks/files/356296245.pdf>> accessed 29 November 2016. See also E Crawford, *Virtual Battlegrounds: Direct Participation in Cyber Warfare* (Sydney Law School Legal Studies Research Paper No. 12/10, 2012) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2001794](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2001794)> accessed 29 November 2016.

What actions can be taken against a violent non-state actor? The 9/11 attacks showed that Art. 51 of the UN Charter can no longer be understood as confined to attacks attributable to states. In this respect, it is pointed out that interpretation of the right to self-defence is of evolving nature.<sup>42</sup> In his analysis, D. Bethlehem stated that after 9/11, it was undisputed that the right to self-defence extends to the non-state actors. As a basis, he pointed out UN Security Council Resolutions 1368 and 1373 of 2001,<sup>43</sup> which affirmed the legality of invoking Art.5 of the North Atlantic Treaty in conjunction with Art. 51 of the UN Charter against non-state actors committing acts of international terrorism.<sup>44</sup> According to Sir Daniel Bethlehem's view, the armed attack from non-state actors should be 'imminent or actual', the armed action in self-defence should be necessary and proportionate to the threats such an attack pose and used only as a last resort in circumstances in which no other effective means are reasonably available.<sup>45</sup>

However, the main concern in this area refers to the practical outcome of self-defence. Bethlehem proposes that, "[a]rmed action in self-defence may be directed against those actively planning, threatening, or perpetrating armed attacks as well as those regarding whom there is a strong, reasonable, and objective basis for concluding that they are taking a direct part in those attacks through the provision of material support essential to the attacks."<sup>46</sup> A state must not take armed action in self-defence against a non-state actor in the territory or within the jurisdiction of another state without the consent (express or implied) of that state, unless "there is an applicable resolution of the UN Security Council authorising the use of armed force under Chapter VII of the Charter or other relevant and applicable legal provision of similar effect." According to the author, the requirement for consent does not apply if there is a reasonable and objective basis for concluding that the third state is colluding with the non-state actor, or is otherwise unwilling to effectively restrain the armed activities of the non-state actor. Here, the threatened state

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<sup>42</sup> M. Scharf (2013), *Customary International Law in Times of Fundamental Change, Recognizing Grotian Moments*, Cambridge University Press, p. 183-184. Nowadays, this evolving nature *i.a.* entails postulates to accommodate cyber-attacks for self-defence purposes. See N. Tsagourias (2012), 'Cyber attacks, self-defence and the problem of attribution' (2012) 17(2) *Journal of Conflict & Security Law* 243-4.

<sup>43</sup> U.N. Doc. no S/RES/1368 (2001) and U.N. Doc. no S/RES/1373 (2001).

<sup>44</sup> *The North Atlantic Treaty* (1949) 34 UNTS 243. See

<[http://www.nato.int/cps/en/natohq/topics\\_110496.htm](http://www.nato.int/cps/en/natohq/topics_110496.htm)> accessed 16 January 2017.

<sup>45</sup> D. Bethlehem (2012), 'Principles Relevant to the Scope of State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors', 106 *American Journal of International Law* 775.

<sup>46</sup> *Ibid.*

may need to act in self-defence, if they are left with no other available effective means to prevent an imminent or actual armed attack.<sup>47</sup>

Other scholars claim that although Art. 51 of the UN Charter “does not explicitly state that an “armed attack” must be committed by a state, its framework was intended to govern relations between states.” This approach assumes that although an “armed attack” is not limited to the acts of the regular armed forces of a state, “grave attacks by non-state actors can qualify as “armed attacks” provided such conduct is attributable to a state.”<sup>48</sup>

While reconciling the above-mentioned interpretations, we conclude that armed attacks can come from actors other than states, but acts of self-defence within the jurisdiction of another state requires balancing the right to self-defence with the principle of territorial sovereignty and the prohibition of the use of force. The above cited literature distinguishes between three different scenarios: (1) the other state gives consent; (2) the armed attack is attributable to the other state; (3) the armed attack is not attributable to the other state, but the consent requirement does not operate. The first two situations allow the application of general principles governing the right to self-defence. When it comes to the third scenario, it should be remembered that military intervention without consent constitutes an interference with the principle of territorial sovereignty and the prohibition of use of force. In this case, it is necessary to establish legal basis that outweigh these norms in given circumstances (e.g. the UN Security Council resolution).<sup>49</sup>

Along with the question of self-defence, there is also an issue with the legality of targeted killings or drone strikes. Tomasz Ostropolski mentions the possible emergence of some terrorist crimes as falling under universal jurisdiction. Nonetheless, his conclusion is that currently “it is impossible to precisely determine the substantial scope” of its applicability.<sup>50</sup> These doubts can be illustrated by reference to the killing of Osama Bin Laden, where US Navy Seals violated Pakistani territorial sovereignty, but at the same time

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<sup>47</sup> *Supra*.p.776.

<sup>48</sup> G. Nayak, R. Chhaba (2012), *The Right of Self-Defence under International Law*, “International, Transnational & Comparative Criminal Law eJournal,” z. 6, nr 1, p. 3-4

<sup>49</sup> See M. Hakimi, ‘Defensive Force against Non-State Actors: The State of Play’ (2015) 91(1) *International Law Studies* and J. Paust (2010), ‘Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan’, 19(2) *Journal of Transnational Law & Policy* 279-80.

<sup>50</sup> T Ostropolski, *Zasada jurysdykcji uniwersalnej w prawie międzynarodowym* (EuroPrawo, 2008), p. 83.

acted reasonably given the threat he was posing and the risk of having him slip away in case of any hesitation. Furthermore, international public opinion regarded it as an American success rather than illegal activity. As a matter of fact, both could be true. The bottom line is that to serve as a useful tool of international peace and security, the law should be applied in a way that the perpetrator, not the victim, is restrained.

### **Should Hybrid Warfare be Defined Under International Law?**

The term hybrid warfare is not used in international legal provisions. Even law of war manuals, including American and British publications, do not mention this concept at all.<sup>51</sup> As illustrated in the previous section, it refers to a military strategy rather than to a certain type of warfare, separable from its other categories. Defining the 'hybrid threat' only as a threat, not limited to a single form and dimension of warfare, would hardly bear any legal usefulness. In a legal sense, assuming that the word hybrid "refers to the means, not to the principles, goals, or nature of war" is an oversimplification.<sup>52</sup> While most conflicts involve more than one aspect of warfare, these conflicts defined as 'hybrid warfare' have something more in common.

There are two main categories of hybrid threat: First, a strong state, usually a regional power, which needs to intervene in the internal affairs of a weaker state, but due to various material and political costs, cannot afford to enter an open war. Second, a weak entity — often a non-state actor — which aims to influence (an)other state(s) to an extent unreachable without employing coercion, while being completely or predominately incapable of waging open war. Especially in first category, one of the purposes of employing hybrid methods is to circumvent the law and bring into question its applicability. Actors falling within the second category often demonstrate disregard for international law, hiding behind the sovereignty of the state of their seat and exploiting the lack of possibility to wage a conventional war against them.

### **Conclusion: A Solution for NATO**

As "the very aim of hybrid warfare is to keep war below the radar of

<sup>51</sup> *Law of War Manual* (U.S. Department of Defense, 2015); *The Joint Service Manual of the Law of Armed Conflict* (U.K. Joint Service Publication 383, 2004).

<sup>52</sup> <http://warontherocks.com/2015/04/the-problem-with-hybrid-warfare/>

traditional collective defence”,<sup>53</sup> we would like to propose a way to address this issue on the NATO level. As argued, it is technically possible to wage hybrid warfare without an armed attack triggering the right to self-defence. This does not mean that the states being subject to such actions are defenceless, but rather that such dangers require the so-called ‘flexible responsiveness’.<sup>54</sup> In case one method merely constitutes a breach of non-intervention principle, it is possible to employ countermeasures. Moreover, even if there are doubts as to whether certain actions reach the threshold of coercion, the retaliatory measures can be justified as retorsion<sup>55</sup> or countermeasures.<sup>56</sup> Particularly, in the case of states too weak to employ retorsions to effectively deter the perpetrator, the idea would be to call allies to apply collective retorsions or counter-measures. For NATO, it can be done through consultations on territorial integrity, political independence or security threats under Article 4 of the North Atlantic Treaty.

Poland has applied the above-mentioned countermeasures as a response in the case of the Night Wolves, a biker gang tied to Vladimir Putin. As the Night Wolves had participated in hybrid warfare in Crimea<sup>57</sup> and Donbass,<sup>58</sup> their plan of a Moscow-Berlin rally to celebrate the anniversary of victory over the Nazis, was barred by Polish Foreign Minister in 2015.<sup>59</sup> However, motorcycle enthusiasts and fans of rock music are in every society,

<sup>53</sup> A Jacobs, G Lasconjarias, *NATO’s Hybrid Flanks. Handling Unconventional Warfare in the South and the East* (NATO Defense College Research Paper No. 112, 2015), p. 8  
<<http://www.ndc.nato.int/news/news.php?icode=798>> accessed 29 November 2016.

<sup>54</sup> S Bachmann, G Kemp, ‘Aggression as organized hypocrisy? – how the war on terrorism and hybrid threats challenge the Nuremberg legacy’ (2012) 30 Windsor Y B Access Just 235, p. 254.

<sup>55</sup> See J Davis, *Continued Evolution of Hybrid Threats. The Russian Hybrid Threat Construct and the Need for Innovation* (The Three Swords Magazine 28.2015), p. 24.  
<[http://www.jwc.nato.int/images/stories/threeswords/CONTINUED\\_EVOLUTION\\_OF\\_HYBRID\\_THREATS.pdf](http://www.jwc.nato.int/images/stories/threeswords/CONTINUED_EVOLUTION_OF_HYBRID_THREATS.pdf)> accessed 29 November 2016. Also, M Schmitt (ed.), *Tallinn Manual of the International Law Applicable to Cyber Warfare 2.0* (Cambridge University Press 2017), p. 116. ‘Rule 20 – Countermeasures (general principle) A State may be entitled to take countermeasures, whether cyber in nature or not, in response to a breach of an international legal obligation that it is owed by another State...4. The fact that countermeasures involve acts that would otherwise be unlawful also distinguishes them from retorsion. Retorsion refers to the taking of measures that are lawful, albeit ‘unfriendly.’ See Articles on State Responsibility, International Law Commission, Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 annex, UN Doc. A/RES/56/83 (12 December 2001).chapeau to Chapter II of Part 3, para. 3 of commentary.

<sup>56</sup> M Schmitt (ed.), *Tallinn Manual of the International Law Applicable to Cyber Warfare 2.0* (Cambridge University Press 2017), p. 116. ‘Rule 21 – Purpose of countermeasures Countermeasures, whether cyber in nature or not, may only be taken to induce a responsible State to comply with the legal obligations it owes an injured State.’

<sup>57</sup> <http://time.com/11680/crimea-russia-putin-night-wolves/>

<sup>58</sup> <https://www.theguardian.com/world/2015/apr/25/poland-anti-russian-night-wolves-zaldostanov-motorcyclists-red-army>

<sup>59</sup> <https://www.bbc.com/news/world-europe-32452276>

and the Night Wolves exploit divisions as to whether they pose a serious threat. They travelled through other NATO Member States, with effects such as propaganda actions and a military-style camp with tanks in Slovakia.<sup>60</sup> The case of Night Wolves shows a clear need of collective response, which has been proposed, though little had been done in the past four years.<sup>61</sup>

While the current sanctions imposed by the NATO Member States on Russia are an example of such measures, a step further would be to make use of Articles 3 and 4 of the North Atlantic Treaty to produce coordinated individual and collective countermeasures against certain aspects of hybrid warfare which do not amount to an armed attack. To develop better hybrid responses, NATO and its member states are working with the European Union and the European Centre of Excellence for Countering Hybrid Threats to conduct strategic discussions and exercises.<sup>62</sup>

Although consensus is always challenging to reach on difficult issues, we propose a solution with respect to threats coming from state and non-state actors. In cases where it is not possible to invoke the right to self-defence in order to enter the territory of a state where a violent non-state actor has a seat, an obligation to render allied assistance could refer either to countermeasures against a state supporting that actor, or to a contribution to the capabilities of a state attempting to fight such violent non-state actors within its territory. At the same time, it should be made clear that all obligations to render allied assistance, also refer to direct actions against a violent non-state actor, as long as it is consistent with the UN Charter. Therefore, our conclusion is that rather than introducing a separate definition of hybrid warfare, it is desirable to ensure that existing international law provides sufficient tools for maintaining international peace and security.

Nowadays, the main symptom of hybrid warfare is engaging in hostilities, while reaffirming that no state of war exists. Although a situation called hybrid warfare always comprises some form of aggression, under international law, such acts may be as well categorised as 'unfriendly acts', which do not reach the threshold of aggression, as defined in the UN General Assembly Resolution 3314. Thus, despite actual aggression, the term 'war'

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<sup>60</sup> <https://www.rferl.org/a/night-wolves-putin-bikers-slovakia-military-camp-/29385437.html>

<sup>61</sup> <https://www.foreignaffairs.com/articles/russian-federation/2018-10-15/how-putins-favorite-biker-gang-infiltrated-nato>

<sup>62</sup> <https://www.hybridcoe.fi/what-is-hybridcoe/>

becomes blurred. Next to, for instance, 'trade war,' 'informational war' etc., the term 'hybrid warfare' is sometimes a way to avoid using the term 'war' itself.

We summarise the possibilities of reaction as follows: a) if the threshold of aggression under international law is met, states can invoke individual or collective self-defence; b) if there is no aggression, but other international legal norms have been violated, NATO Member States can use countermeasures in fulfilment of their obligations under Article 3 of the North Atlantic Treaty or, after reaching consensus on collective action to protect their territorial integrity, political independence or security from threats. The threat of collective self-defence, or countermeasures, is one of the main factors to deter a perpetrator.

Foreseeability of law allows to focus on identifying which measures are adequate to address hybrid threats. The future NATO war strategy needs to cover a lot of practical solutions allowing its Member States to "deter and defend against the full array of hybrid threats," and to provide a collective response "quickly enough to short-warning and ambiguous hybrid attacks."<sup>63</sup> Next to reaching the ability to employ adequate measures, NATO needs to safeguard their usefulness by adopting an early delegation of authority,<sup>64</sup> and to coordinate with other international entities, such as the European Union.<sup>65</sup>

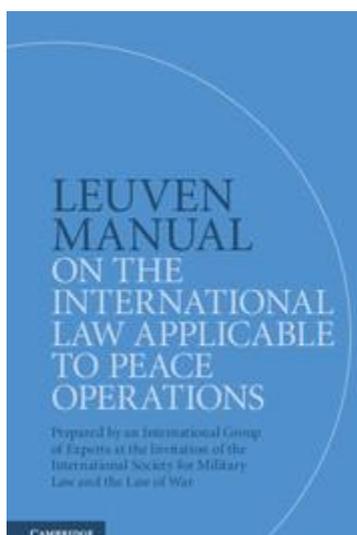
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<sup>63</sup> *One alliance. The future tasks of the adapted alliance* (GLOBSEC NATO Adaptation Initiative 2017), p. 15. <<https://www.globsec.org/wp-content/uploads/2017/11/GNAI-Final-Report-Nov-2017.pdf>> accessed 10 December 2017.

<sup>64</sup> *ibid*, p. 16.

<sup>65</sup> *Future war NATO? From hybrid war to hyper war via cyber war* (GLOBSEC NATO Adaptation Initiative 2017), p. 17.



## The Leuven Manual on the International Law Applicable to Peace Operations<sup>1</sup>

by Ludwig Van Der Veken,<sup>2</sup>  
Secretary-General of the International Society for Military Law  
and the Law of War

### Introduction

The Leuven Manual on the International Law Applicable to Peace Operations was prepared by an international Group of Experts at the invitation of the International Society for Military Law and the Law of War. The project was notably inspired by the 1994 *San Remo Manual* on armed conflicts at sea, the 2010 *HPCR Manual* on air and missile warfare, and the 2013 *Tallinn Manual* on the international law applicable to cyber warfare. Similarly to the others, the Leuven Manual is also intended to serve both practitioners and academics. It is aimed at senior policy makers at both the national and intergovernmental organisation level, at senior military officers involved with the planning and conduct of Peace Operations, and at the academic community involved in research and teaching related to such missions.

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<sup>1</sup> Cambridge University Press, December 2017. Open digital access through Cambridge Core <https://www.cambridge.org/core/books/leuven-manual-on-the-international-law-applicable-to-peace-operations/2EE56DA5473FF72F2FA6A28E1E4E0DF0>

<sup>2</sup> The views expressed in this article are those of the author and do not reflect the official policy or position of NATO or any of its agencies.

## Scope and Approach of the Manual

The Leuven Manual covers 'consensual' peace operations, both of the traditional peacekeeping variety and of multidimensional peace operations which include aspects of peacekeeping and peacebuilding, and support for the political process of conflict resolution. The Manual is therefore a discrete work that comprehensively addresses the application of international law in peace operations. This output is intended to be of assistance to states and international organisations involved in planning and conducting peace operations.

The Manual devotes attention to the various stages of the planning and conduct of peace operations conducted by both the United Nations (UN) and by regional organisations and other arrangements. It attempts to address all relevant issues, with a particular focus on those which required further research and clarification in doctrine, and where useful or necessary it offers policy recommendations, notably where the law is silent or unclear.

Its authority rests in its bringing the relevant law and associated good practices together in a structured and accessible form of rules to which all members of the Group of Experts have subscribed. The Manual consists of 'black letter rules' (145 in total) and an accompanying 'commentary'. The black letter rules reflecting existing law are phrased so as to reflect legal obligation ('shall', 'must', 'have to' ...). Best practices as reflected in the black letter rules are phrased in conformity with applicable law but are distinguished from positive legal obligations by use of appropriate language such as 'should' rather than 'shall'. The black letter rules reflect a consensus of the participating experts. The commentary devotes attention to the application and interpretation of the black letter rules and reflects the input of the Group of Experts.

Observers from the UN, the International Committee of the Red Cross (ICRC) and from a number of regional organisations and arrangements participated in the discussions during the drafting of the black letter rules and commentary and were given the opportunity to provide specific comments and input on matters directly related to the policies and practice of their respective organisations, some of which are included as appendices to the Manual.

The involvement of the UN's Office of Legal Affairs (OLA), Department of Peacekeeping Operations (DPKO) and Department of Field Support in the

project was agreed upon in New York on 19 March 2014. Mr Luke Mhlaba (OLA) and Mr Jens Andersen (DPKO) were designated as the UN Observers to the Group of Experts. Throughout the project the UN Observers gave invaluable comments and inputs from UN experts in their personal capacity for specific chapters.

NATO sent an Observer to the Group of Experts (Dr. Petra Ditrichova-Ochmannová from the Legal Office at Allied Command Transformation Staff Element Europe until 2014, and Mrs Antoaneta Boeva from the Office of Legal Affairs at NATO Headquarters as of 2015). These experts also contributed to specific chapters: Dr. Ditrichova-Ochmannová supported by the Ministry of Defence of the Czech Republic, and Mrs Boeva in her personal capacity.

The involvement of the African Union (AU) in the project was secured in June 2015 in the framework of an expert meeting hosted in Yaoundé (Cameroon), and Mr Bright Mando (Office of the Legal Counsel) and Col. Cheick F. Mady Dembele (Peace and Security Department) were designated as the AU Observers to the project.

The European Union (EU) did not formally designate an Observer to the project, but EU expertise was available thanks to the participation in a personal capacity of Dr. Frederik Naert (Legal Service of the Council of the EU). Furthermore, the project could count on the participation of the Director of the European Security and Defence College, Mr Dirk Dubois, a member of the Manual's Advisory Board.

The ICRC's Observer was Dr. Tristan Ferraro, who played an active role in commenting on the IHL-related chapters.

The project was managed by a Project Management Team, headed by the Society's Assistant Secretary-General, Mr Alfons Vanheusden. He was assisted by two Assistant Editors (Mr Marco Benatar and Mr Remy Jorritsma, both from the Max Planck Institute Luxembourg for Procedural Law) and by two Project Management Team Advisors (Captain Suzanne Appelman from the Dutch Military Legal Service and Dr. Aurel Sari from Exeter University). All five of them also participated in the drafting of rules and commentary.

The project's Senior Academic Advisors were Dr. Dieter Fleck, Professor Terry Gill, and Air Commodore (ret.) Dr. Bill Boothby, three well-known scholars. They advised and, where necessary, assisted in the recruitment of suitable and qualified members of the Group of Experts specialised in the law and practice of peace operations. They also acted in the capacity of

General Editors of the Manual, along with Alfons Vanheusden, ensured the overall quality and cohesion of the Leuven Manual, provided input concerning the structure of the Manual, and participated in the drafting of rules and commentary.

The Project Management Team and Senior Academic Advisors requested selected experts to form the project's Group of Experts. These contributors were responsible for submitting pieces of publishable quality within the agreed time limits and framework set by the project plan.

The Group of Experts was supplemented by the Advisory Board. This Advisory Board provided viewpoints and offered its advice on best practices. They did not have a vote in relation to the content of black letter rules or commentary, although their views were given all due consideration.

Support was provided by the respective governments and institutions by covering the costs of their participating experts or hosting project-related meetings. Their support is acknowledged in the Leuven Manual. This support was essential, and the Society's annual budgets covered the necessary additional funding for the project.

### **Dissemination and Way Ahead**

The Leuven Manual was endorsed by the Boards of the International Society for Military Law and the Law of War on the occasion of their spring 2017 meetings in Stockholm. When the Society completed the work on the Leuven Manual's first edition, it also completed a so-called Dissemination Plan for the Society's internal use, to define and prioritise actions to make the Leuven Manual known to the world. Meanwhile, many of the actions described in this Dissemination Plan have been implemented.

The Leuven Manual has been sent to the leadership of the UN, the EU, NATO, the AU and the ICRC. Furthermore, it has been sent or given to other authorities, organisations etc., including at the national level.

In February, the Society launched the Leuven Manual in New York, in the presence of the UN Undersecretaries-General for Legal Affairs, for Peacekeeping Operations, and for Field Support. Cambridge University Press supported the event. Another event relating to the Leuven Manual took place at the Geneva Centre for Security Policy on 11 May 2018, for the international community present in Geneva. In March 2018 the Manual was also presented in Lviv to a Ukrainian audience, including the Ukrainian

military, as well as to the 'Africa Military Law Forum' convened in Oberammergau with support of US EUCOM. At the end of October 2018, Professor Gill presented the Leuven Manual to an Italian audience in Taranto at an event organised by the Italian Group of the Society. On 12 November 2018, the Leuven Manual was presented at the new NATO Headquarters in Brussels in the presence of NATO's Deputy Secretary-General Mrs. Rose Goettemoeller. Furthermore, on 30 November 2018, Assistant Editor Remy Jorritsma presented the Leuven Manual in Cameroon's capital, Yaoundé. The latter event served a mainly African audience.

Many of the Leuven Manual's chapters have been discussed at three recent activities of the International Society for Military Law and the Law of War. Participants received the Leuven Manual as part of their conference package at the Congress in Lisbon in May 2018; at the second 'Silent Leges Inter Arma' Conference held in Bruges last September; and in Dublin in November 2018, where the Society co-organised an event with its Irish Group, the Defence Forces Ireland, and the Irish Centre for Human Rights.

Subject to confirmation, there will be further presentations of the Leuven Manual in 2019, notably in South Korea's capital Seoul, at an international event organised by the Army Judge Advocate General's Office. There is also an informal offer to present the Leuven Manual to a Latin American audience. Again, this would be for 2019, and it requires further planning.

In 2019, the Society also wants to refresh contacts with the Integrated Training Service of the UN to find out how the Leuven Manual can make its way into peacekeeping training centers all across the world. In this context, it also intends to prepare a scenario-based "Leuven Manual presentation package" to facilitate teaching and exercises on the basis of the Manual. The Leuven Manual could indeed be an interesting tool in staff exercises, for instance.

In order to reach the widest possible readership translation of the Leuven Manual into other UN languages is envisaged. The work on the French version is moving along smoothly under the leadership of Mrs. Laurence De Graeve. The French version is expected to be available by the summer of 2019. For the Spanish version, the Society can count on the support of Spanish, Chilean and Peruvian colleagues. A few months ago, Chinese colleagues also expressed an interest in translating the Leuven Manual into Chinese.

The Society recently explored new themes that could be included in a future second edition of the Leuven Manual: Indeed, in Bruges it discussed the protection of the environment in peace operations, and in Dublin the topic of the protection of personal data in peace operations featured on the agenda.

Indeed, the Leuven Manual is intended to be a living reference work of the International Society for Military Law and the Law of War. This means that a second edition is envisaged at some stage, that a Group of Experts will update it regularly as appropriate and feasible, and that the Society is already making use of its academic events to explore themes that could be added to the Leuven Manual someday. In other words, the Leuven Manual is here to stay. That is also why it is so important that readers and users send their feedback and suggestions for improvement to the Society.

By the end of 2019, the Society will publish the first edition of the Leuven Manual under the Open Access formula on its website. The contract with Cambridge University Press allows for that. Training institutions can order paperback copies of the Leuven Manual for training purposes via the Society at a special reduced rate. As stated in the Leuven Manual, all revenues derived from the publication of the Manual will be used in furtherance of the objectives of the International Society for Military Law and the Law of War, with priority given to Manual-related activities. Please note also that all office holders of the Society do their work *pro bono*. They do not receive any salary or other financial compensation for their work for the organisation. The same holds true for all contributors to the Leuven Manual.

### Concluding Remarks

Peace Operations have become an indispensable tool in the maintenance of international peace and security. They have garnered general support and have booked notable successes over the years, notwithstanding some marked failures. They are faced by significant challenges to their successful implementation. At a more strategic level, there is a degree of innate tension between the 3 basic principles governing peace operations (consent; impartiality; and limited use of force) on the one hand and the need for effective responses, including the need to protect civilians within mission capabilities, on the other hand.

The Leuven Manual aims to provide authoritative legal guidance in meeting some of these challenges and is made up of 21 chapters, covering

among others the legal framework and mandates in peace operations and relations between troop-contributing nations as well as status of forces and status of mission agreements; applicability of human rights treaties, IHL, Host Nation's domestic law, and the law of Sending States. The Manual also captures how mainstreaming gender considerations protection of civilians and Rule of Law currently are being addressed in peace operations. Topics such as use force, detention, and conduct and discipline are also covered, alongside discussions on accountability and responsibility, civil liability of Sending States and international organisations regarding damage caused to third parties in peace operations, and the law relating to individual criminal responsibility under international law in relation to peace operations

None of these chapters is the result of the exclusive work of one contributor as the Group of Experts jointly worked on all chapters. As a consequence, the Leuven Manual is not an 'edited volume'. The Manual is a product of the International Society for Military Law and the Law of War. Given the informal process through which this publication was produced, the participation of experts in an individual capacity, and the agreed status of the Observers to the project, the views expressed in the Manual do not necessarily represent those of any institution, organisation or government with which the members of the Group of Experts & Observers are or were affiliated.



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