

NATO LEGAL DESKBOOK

Second Edition

2010

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Foreword to the Reader

Dear Reader,

This is the Second Edition of the NATO Legal Deskbook, a revised, updated and re-structured version of the 2008 Edition.

We try to provide as much information as possible realizing that the Deskbook needs continuous review.

In the next edition, expected in 2011, we plan to include among others the following topics: interpretation of Article 5, maritime operations, counter-insurgency, targeting, direct participation in hostilities, private military and security companies, gender issues, etc.

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Introduction

NATO leads efforts to bring stability in its ongoing missions in the Balkans, Afghanistan, and Iraq.

Legal Advisers serve as key members of a Commander's staff in the complex legal and political environment that NATO operates. The challenges NATO Commanders and legal adviser face to fulfil mandates, accomplish missions, and support the rule of law in embryonic and fragile democratic governments requires discussion, understanding and the documentation of practical solutions.

The NATO Legal Deskbook is published by the Office of the Legal Adviser, Allied Command Transformation Staff Element Europe (Mons) with the active support and help of the Office of the Legal Adviser, Headquarters Allied Commander Transformation (HQ SACT, Norfolk, USA) and the Office of the Legal Adviser, Supreme Headquarters Allied Powers Europe (SHAPE, Mons, Belgium), as well as many legal advisers in NATO and in the Member States or in other official or academic positions outside NATO.

Why a NATO Legal Deskbook?

Two re-occurring themes surface in after-action reports from exercises and operations. The first is that NATO Commanders and staffs naturally and increasingly turn to the Legal Advisers to help plan, execute, coordinate, evaluate, and support the assigned mission. The second is that no single doctrinal resource exists in NATO to assist legal practitioners in the fulfilling of this task. Although several Alliance members have produced such guides, before the NATO Legal Deskbook none existed for Legal Advisers and legal personnel assigned to NATO commands.

Whether doctrinally ready or not, the Alliance calls upon NATO Legal Advisers and staffs to advise and, often, help direct the execution of the legal component of a mission or mandate. NATO owes these attorneys, paralegals, and legal personnel, who work under often austere and demanding conditions, practical guidance in the form of a comprehensive resource that provides an overview and insight on the legal regime that forms NATO practice. Fulfilling this need is the genesis, purpose and rational for this practitioner's guide.

What this Deskbook is not:

This Deskbook is not NATO policy or military doctrine for legal support to operations.

The Deskbook intends to reflect as closely as possible the policies and practice of NATO in legal matters, however, the Deskbook is not a formally approved NATO document and therefore shall not be deemed as reflection of the official opinion or position of NATO.

The practitioner's guide is not intended to offer guidance or advice to other military professionals involved in operations. It was written by Legal Advisers for Legal Advisers and legal staff. Its scope and purpose is limited to providing the military legal subject matter experts assistance in the accomplishment of the mission. While others may find the guide helpful, they should understand it is not a tutorial. Fundamental legal principles, standard practices of interpretation, and basic legal practices are assumed as matters already known by its intended audience: the Legal Adviser, legal assistant, or paralegal.

This practitioner's guide does not offer an all-inclusive formula on how to advise a NATO commander on any particular aspect of the law, nor is it intended to supplant national guidance. Instead, the guide pre-supposes that Legal Advisers will continue to find themselves providing legal support to operations and missions in a variety of different circumstances, environments, and locations. The guide and its contents must therefore be flexible and geographically universal in application.

What this Deskbook is:

There was much debate and discussion among the authors of its first edition (2008) on the final form and content. Was it to use the typical "pilot's checklist" type of format popular in military circles? Should it follow the traditional after-action report format and only provide a brief summation of issues faced and the reasons for the successes and failures of Legal Advisers who have participated in particular operations? Should it be an introduction and synopsis of the key issues and overall themes on the current status of the law from the perspective of the national military, government, and academic circles?

In the end it was decided to combine all three of the above formats. Although the checklist approach has great utility for the time sensitive and result oriented military officer acting in accordance with standard procedures or well-known

doctrine, the use of such checklists and matrixes, success could not be ensured without practitioners understanding why they were implementing the measures on the list.

It was also determined that it would be insufficient to produce a work that was a mere recitation of recent lessons learned from Legal Advisers who had participated in operations. While useful for understanding what we have accomplished (and failed to accomplish) to date – standing alone such lessons identified reports often lack the refinement and comprehensive analysis to truly assist the legal practitioner.

It was also decided that it would be impractical to make the Deskbook a legal text to academically debate the pros and cons of the different types and approaches. While a solid foundation in legal theory is necessary for the insightful and innovative practitioner, theory without practice is faith without works – empty and meaningless.

It is hoped that the NATO Legal Deskbook will serve as an educational resource for Legal Advisers and staff who are preparing to practice in the field. Even if the guide only serves as an introductory resource to further their professional education on the topic – it will have served a vital purpose.

Finally, it is also hoped that the introduction of this guide will serve as a catalyst to begin a more meaningful debate within NATO on the resourcing, responsibility, and doctrinal development of the NATO legal community. An explicit goal is to build a community identity and ethos. It is hoped that in ten years there will exist a comprehensive body of NATO legal doctrine and publications that will build upon the suggestions, ideas, and principles put forth in guides such as this. However, even if such forthcoming doctrine and guidance are completely different from those presented in this publication – it is hoped that the publishing and the disseminating of a regularly updated Deskbook may lead in some small way to the eventual true azimuth.

~ The Editors ~

Abbreviations used in the Deskbook

AAP	Allied Administrative Publication		Conflicts (Protocol II), adopted at Geneva 8 June 1977
AAR	after-action review	APOD	airport of debarkation
AC	“(North) Atlantic Council”- -prefix - committees subordinated to the NAC are identified by a code beginning with “AC”	BICES	Battlefield Information, Collection and Exploitation Systems
ACE	Allied Command Europe	Bi-SC Directive	Strategic Command Directive signed by both Strategic Commander (SACEUR and SACT)
ACE DIR	Allied Command Europe Directive (before renamed for ACO)	BOD	Board of Directors
ACHR	American Convention on Human Rights	BUDFIN	Budget and Finance
ACLANT	Allied Command Atlantic	C2	command and control
ACO	Allied Command Operations	CAOCs	Combined Air Operations Centres
ACOS	Assistant Chief of Staff	CAS	close air support
ACT	Allied Command Transformation	CBC	Civil Budget Committee
AOR	Area of Responsibility	CC	component command
AP	Allied Publication	CE	Crisis Establishment
AP	Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace regarding the Status of their Forces. Done at Brussels June 19, 1995.	CEPMA	Central Europe Pipeline Management Agency
AP I	Additional Protocol I to the Geneva Convention of 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted at Geneva 8 June 1977	CFSP	Common Foreign and Security Policy (EU)
		CHOD	Chiefs of Defence
		CIMIC	Civil-Military Cooperation
		CITES	Convention on International Trade in Endangered Species of Fauna and Flora
		CIVCOM	Committee for Civilian Aspects of Crisis Management (EU)
		CJFSOCC	Combined Joint Special Operations Component Command
AP II	Additional Protocol II to the Geneva Convention of 1949, Relating to the of Non-International Armed	CJTF	Combined Joint Task Force
		C-M	Council Memorandum

CMC	Chairman of the Military Committee	Convention	Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques
CMCM / DCMCM	(Deputy) Chairman of the Military Committee Memorandum	EOL	Exchange of Letters
CMPD	Crisis Management and Planning Directorate (EU)	ESDP	European Security and Defence Policy
COE	Centre of Excellence	EU	European Union
CONOPS	Concept of Operation	EUMC	EU Military Committee
COR	Concept of Requirements	EUMS	EU Military Staff
COR	Concept of Requirements	EUNAVFOR	European Union-led naval force
COREPER	Committee of Permanent Representatives (EU)	EXCON	Exercise Control
CPCC	Civilian Planning and Conduct Capability (EU)	FAP	Further Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace regarding the Status of their Forces. Done at Brussels December 19, 1997. / Further Additional Protocol
CSDP	Common Security and Defence Policy (EU)		
DESIG	Designated (person, object, target referred to in ROE)		
DGE	Directorate General External Relations (EU)		
DIMS	Director of the International Military Staff	FC	Financial Controller
DIMS/BUS	DIMS Business Letter	FRAGO	fragmentary order
DJTF	Deployable Joint Headquarters	FRP	financial rules and procedures
DMS	Document Management System	FYROM	Former Yugoslav Republic of Macedonia (Turkey recognizes the former Yugoslav Republic of Macedonia under its constitutional name.)
DO/DIMS	Demi-Official DIMS Letter		
DPC	Defence Planning Committee	GC I	Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, signed at Geneva on 12 August 1949
DPP	Defence Planning Process (for NATO nations)		
EAPC	Euro-Atlantic Partnership Council	GC II	Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, signed at Geneva on 12 August 1949
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms		
ECtHR	European Court of Human Rights	GC III	Convention (III) relative to the Treatment of Prisoners
ENMOD	Convention on the		

	of War, signed at Geneva on 12 August 1949	IG	Inspector General
GC IV	Convention (IV) relative to the Protection of Civilian Persons in Time of War, signed at Geneva on 12 August 1949	IHL	International Humanitarian Law
		IHR / HR	international human rights law
GFAP	Dayton General Framework Agreement for Peace	IMHQ's	International Military Headquarters
GM	General Manager	IMS Staff Memorandum	IMSTAM
HICON	higher control	IMS)	International Military Staff
HNS	Host Nation Support	International Military Staff Memorandum	IMSM
HNSA	Host Nation Support Agreement		
HONB	Head of NATO body	International Military Staff Working Memorandum	IMSWM
HQ SACT	Headquarters Supreme Allied Commander Transformation		
		IS	International Staff
HR	Human Rights	ISAF	International Security Assistance Force
HRO	Human Rescue Operations		
HSG	Headquarters Support Group	JALLC	Joint Analysis & Lessons Learned Centre
IBAN	International Board of Auditors of NATO	JFCs	Joint Force Commands
IC	Infrastructure Committee	JFTAGs	Joint Functional Area Training Guides
ICC	International Criminal Court	JFTC	Joint Force Training Centre
ICCPR	International Covenant on Civil and Political Rights	JIA	Joint Implementation Arrangement
ICRC	International Committee of the Red Cross	JIA	Joint Implementation Agreement
ICTR	International Criminal Tribunal for Rwanda	JWC	Joint Warfare Centre
ICTY	International Criminal Tribunal for the former Yugoslavia	KFOR	Kosovo Force
IEO	initial-entry operations	LIVEX	live exercises
IFOR	NATO-led Implementation Force (IFOR - Operation Joint Endeavour - 20 Dec. 1995 - 20 Dec. 1996) in Bosnia and Herzegovina	LoA	NATO Level of Ambition
		LOAC	law of armed conflict
		LWR	Local Wage Rates
		MBC	Military Budget Committee
		MBC	Military Budget Committee

MC	Military Committee	NC3A	NATO Consultation, Command and Control Agency
MC	Military Committee document		
MCM	Military Committee Memorandum	NCPR	NATO Civilian Personnel Regulations
MEL/MIL	main events/incidents lists	NCS	NATO Command Structure
MILREPs	Military Representatives	NCSA	NATO Communications and Information Systems (CIS) Services Agency
MMR	Minimum Military Requirement	NEO	non-combatant evacuation operations
MOU	Memorandum of Understanding	NETMA	NATO European Fighter Aircraft and Tornado Development, Production and Logistics Management Agency
MSDS	Material Safety Data Sheets		
NA5CROs	Non-Article 5 Crisis Response Operations		
NAC	North Atlantic Council	NFR	NATO Financial Regulations
NACMA	NATO Air Command and Control Management Agency	NGO	non-governmental organization
NAF	Non-Appropriated Funds	NHMO	NATO HAWK Management Office
NAHEMA	NATO Helicopter Design and Development Production and Logistics Management Agency	NIC	NATO International Civilians
NAMA	NATO Airlift Management Agency	NID	NAC Initiating Directive
		NIMP	NATO Information Management Policy
NAMEADSMA	NATO Medium Extended Air Defence System Design and Development, Production and Logistics Management Agency	NNAG	NATO Naval Armaments Group
		NOA	Note of Accession
NAMSA	NATO Maintenance and Supply Agency	NPG	Nuclear Planning Group
		NPLSOs	NATO Procurement, Logistics or Service Organizations
NAPMA	NATO Airborne Early Warning and Control Production Management Agency	NRF	NATO Response Force
		NSA	NATO Standardization Agency
NATO IMHQ	NATO International Military Headquarters		
NBA	NATO Battlefield Information, Collection and Exploitation Systems Agency	NSSC	NATO SPECIAL OPERATIONS COORDINATION CENTRE

NSHQ	NATO SPECIAL OPERATIONS HEADQUARTERS		August 1952)
NSIP	NATO Security Investment Programme	PARP	Partnership for Peace (PfP) Planning and Review Process (for PfP nations)
NSO	NATO School Oberammergau	PE	Peace Establishment
OCE	Officer Conducting the Exercise ODE* Officer directing the Exercise	PERMREPs	Permanent Representatives
ODE	Officer directing the Exercise	PfP	Partnership for Peace
OSE	Officer Scheduling the Exercise	PfP SOFA	Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces / Brussels, 19 June 1995 / PfP Status of Forces Agreement
OPCOM	operational command		
OPCON	operational control	PK	Peacekeeping
Operational and Maintenance	O&M	PMG	Political-Military Group (EU)
OPLAN	Operations Plan	PMSCs	Private Military and Security Companies
OPLAN	operation plan	PO(201x)xxx	Private Office paper
OPLAW	operational law	POLAD	Political Advisers
OPP	operational planning process	POPs	Persistent organic pollutants
OPRs	Office of Prime Responsibility	POW	Prisoner of War
OPSEC	operations security	PSC	Political and Security Committee (EU)
OSCE;	Organization for Security and Cooperation in Europe	PSO	Peace Support Operations
OT	observer/trainer	ROE	Rules of Engagement
Ottawa Agreement	Agreement on the Status of the North Atlantic Treaty Organisation, National Representatives and International Staff (Ottawa, 20 Sep. 1951) This agreement on the status of NATO headquarters and subordinate civilian entities is often referred to as the.	ROEAMPS	amplification of ROE
		ROEAUTH	ROE authorization
		ROEIMPL	ROE Implementation message (a communication implementing the ROE in a specific operational context)
		ROEREQ	ROE Request message
Paris Protocol	Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Paris, 28	ROESUMS	summaries of ROE which have already been approved or modified.
		RTA	NATO Research and Technology Agency

SACEUR	Supreme Allied Commander Europe			Fusion Centres
			SOI	Statement of Intent
SACLANT	Headquarters of the Supreme Allied Commander Atlantic		SOI	Statement of Intent
			SOP	Standing Operational Procedures
SACT	Supreme Allied Commander Transformation		SOR	Statement of Requirements
			SpecOps	Special Operations
SC	(United Nations) Security Council		SPOD	seaport of debarkation
SCs	Strategic Commanders		SRB	Senior Resource Board
SECGEN	Secretary General		SRB	Senior Resources Board
SFOR	NATO-led Stabilisation Force (SFOR) in Bosnia and Herzegovina		STANAG	Standardization Agreement
			TA	Technical Arrangement
SG/HR	High Representative for the CFSP (EU)		TCN	Troop Contributing Nation
			TCSOR	Theatre Capability Statement of Requirements
SHAPE	Supreme Headquarters Allied Powers Europe		UNMIK	UN Mission in Kosovo
SHAPE	Supreme Headquarters Allied Powers in Europe		UNPROFOR	United Nations Protection Force
SHAPE DIR	Directive issued by SHAPE		UNSC	United Nations Security Council
SLA	Service Level Agreement		UNSCR	United Nations Security Council Resolution
SME	Subject Matter Expert		VAT	Value Added tax
SOF	Special Operation Forces		WAN	Wide-Area Network
SOFA / NATO SOFA	Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (London, 19 June 1951)		WEU	Western European Union
SOFFC	Special Operations Forces			

PART I
THE DEVELOPMENT AND ORGANIZATION OF NATO
AND
THE OVERVIEW OF NATO BODIES

References and suggested reading:

- "60 Years of NATO" <http://www.nato-bookshop.org>
- Agreement on the Status of the North Atlantic Treaty Organisation, National Representatives and International Staff, signed in Ottawa on 20th September 1951, Ottawa Agreement
- AJP-01Ed. (C), Allied Joint Doctrine
- Bruno Simma (Editor) : The Charter of the United Nations: A Commentary / OUP Oxford; 2 edition (12 Sep 2002)
- Charter of the United Nations, 1945
- Dieter Fleck (ed.) The Handbook of The Law of Visiting Forces Oxford University Press(UK) (July 5, 2001)
- Lawrence S. Kaplan: NATO 1948: The Birth of the Transatlantic Alliance
- Lawrence S. Kaplan: The Long Entanglement: NATO's First Fifty Years
- Dr. Gregory W. Pedlow, SHAPE Historian: The Evolution of NATO's Command Structure, 1951-2009 (<http://www.aco.nato.int/page209264641.aspx>)
- MCM-236-03 on the Concept for Centres of Excellence
- NATO Declassified , DVD, <http://www.nato.int/ebookshop/video/declassified/>
- NATO structure including the military side is found at: <http://www.nato.int/cps/en/natolive/structure.htm>
- North Atlantic Treaty, 1949
- Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Paris, 28 August 1952), Paris Protocol
- The NATO Handbook (ISBN 92-845-0178-4 - HB-ENG-0406 - NATO 2006)

Editorial note:

This part of the Deskbook provides a brief discussion on the development of NATO based on the core documents governing the organisation and the legal status of its primary components. An exhaustive presentation on NATO's civilian and military structures and supporting organisations and entities can be found in THE NATO HANDBOOK.

A. A BRIEF HISTORY OF NATO

By the adoption of the United Nations Charter in 1945, the basic rules on the law of use of force between states were laid down in an international treaty.

The main purpose of the establishment of the United Nations was to prevent armed conflicts. That is expressly formulated in the preamble and in Article 1:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

Article 51 of the UN Charter provides the basic rule of self-defence as an exception from the prohibition of the use of force in inter-state relation:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.

Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

By this, the notion of individual and collective self-defence that had already existed in customary international law and in state practice was reasserted.

The North Atlantic Treaty was signed in April 1949 by representatives of twelve nations,¹ and later ratified by all twelve nations. The North Atlantic Treaty Organisation (NATO) is not mentioned by name in the North Atlantic Treaty. The genesis of the Organisation can be traced to the establishment of the North Atlantic Council in Article 9 of the Treaty, which authorized other subsidiary bodies.

"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 organised 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."

HISTORICAL BACKGROUND

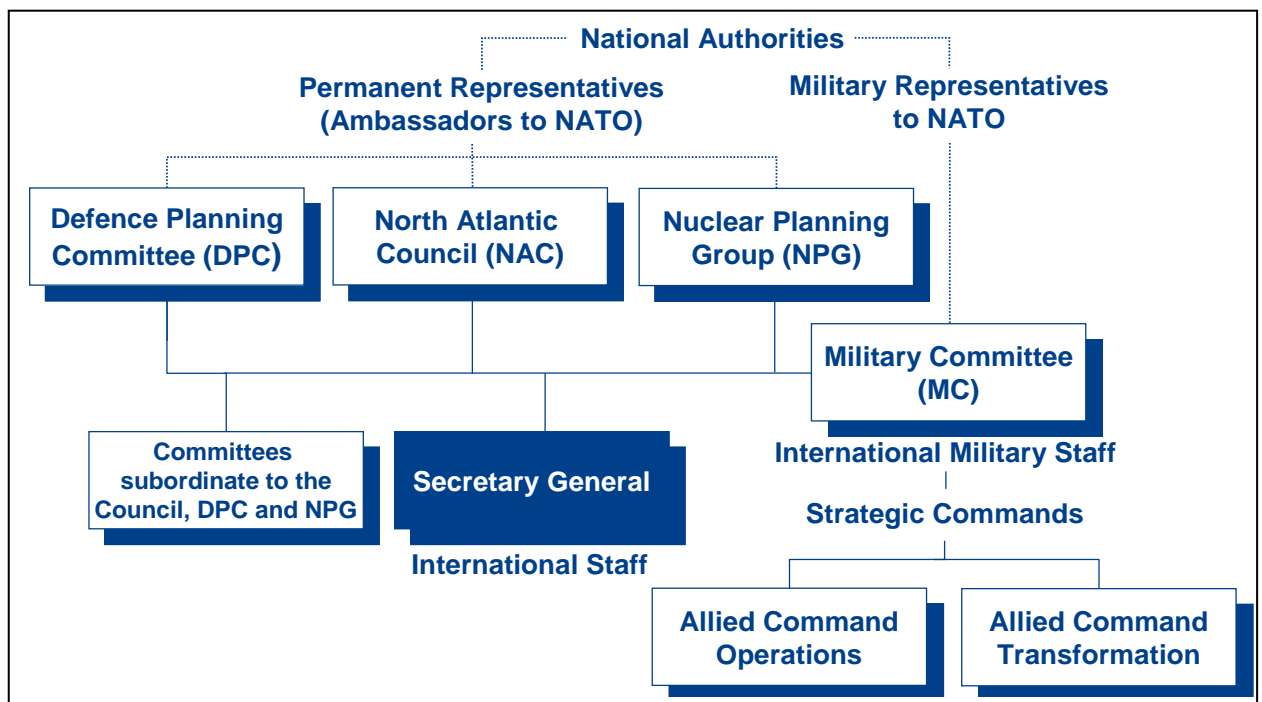
At the first session of the Council it was decided that the Foreign Ministers would comprise the "normal" membership of the Council. This was soon followed by creation of the "Council Deputies" (meaning deputies representing their Foreign Ministers) who were to remain in permanent session. At the time, this was in

¹ Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom, and the United States.

London where a permanent international working staff had already been established.

A few years later, as part of reorganization, a Council comprised of Permanent Representatives appointed to it by each member state replaced the Council Deputies. The Council, relocated to the Paris area, was to remain in permanent session with effective powers of decision.

On the military side, several of the NATO countries, particularly the United States, had armed forces serving on the territories of other NATO countries in connection with the operations of the North Atlantic Treaty. It also became clear that the military security of the NATO countries required creation of an integrated military force under a Supreme Commander supported by an international staff. This led to the Council confirming General Eisenhower as Supreme Allied Commander Europe (SACEUR), who chose a site near Paris for the Supreme Headquarters Allied Powers Europe (SHAPE).



B. NORTH ATLANTIC COUNCIL (NAC) AND THE INTERNATIONAL STAFF (IS)

The North Atlantic Council is the principal decision-making body within NATO. It brings together high-level representatives of each member country to discuss policy or operational questions requiring collective decisions. In sum, it provides a forum for wide-ranging consultation between members on all issues affecting their security.

The North Atlantic Council (NAC) has effective political authority and powers of decision. It is the only body that was established by the North Atlantic Treaty under Article 9. The NAC is invested with the authority to establish "such subsidiary bodies as may be necessary" for the purposes of implementing the Treaty.

The NAC, therefore, is the principal decision-making body that oversees the political and military process relating to security issues affecting the Alliance. The Defence Planning Committee and the Nuclear Planning Group have comparable authority for matters within their specific areas of competence.

Items discussed and decisions taken at meetings of the Council cover all aspects of the Organisation's activities, and are frequently based on reports and recommendations prepared by subordinate committees at the Council's request. Equally, subjects may be raised by any one of the national representatives or by the Secretary General.

To provide a frame of reference regarding the staffing of documents and the decision-making process for both the NAC and the IS, a brief description of the civilian structure at NATO HQ follows.

1. Organizational Structure

NATO Headquarters is the political headquarters of the Alliance and the permanent home of the North Atlantic Council (NAC). The NAC is composed of representatives of Alliance members, called Permanent Representatives (PERMREPs), at Ambassadorial level. The NAC, under the Chairmanship of the Secretary General (SECGEN), discusses and approves NATO policy. At regular intervals the Council and other senior level policy committees (principally the Defence Planning Committee (DPC) and the Nuclear Planning Group (NPG)) meet in Brussels, or in other Alliance capitals, at higher levels involving Foreign Ministers, often called "Ministerials."

From time to time at summit meetings, heads-of-state appear on behalf of their nations. The decisions taken by each of these bodies fully represent the agreed policy of the member countries, irrespective of the level at which they are taken. Subordinate to these senior bodies are specialised committees, also consisting of officials representing their countries. The committee structure provides the Alliance its consultation and decision-making capability, ensuring that each member nation is represented at every level and in all fields of NATO activity.

2. NATO Staff

NATO Headquarters houses the Secretary General (SECGEN or SG) and the International Staff (IS). The Secretary General is chief executive of NATO, responsible for promoting and directing the process of consultation and decision-making within the Alliance. He is chairman of the NAC, the Defence Planning Committee (DPC), and other senior NATO committees. SECGEN also directs the IS which supports the work of the NAC and its subordinate committees.

Members of the IS, while drawn from member countries, are responsible to the Secretary General and owe their allegiance to the Organisation. The International Staff of about 1,300 civilian members is organized into several divisions, directorates, and subordinate bodies.

The work of the Council is prepared by committees with responsibility for specific areas of policy. Committees play a key role in policy development.² Most of the primary committees are identified by letter codes, such as DRC for the Defence Review Committee.

There are numerous supporting subordinate committees. Many of the subordinate committees are identified by a code beginning with "AC."³ Knowing the committee codes is very useful for searching the Document Management System, for understanding documents codes, and for accessing committee documents on other web sites.

² The NATO Handbook summarizes the membership, role, primary subordinate committees, and primary source of staff support for nearly 40 principal NATO committees. <http://www.nato.int/docu/handbook/2001/hb1301.htm>

³ For example, the NATO Security Committee is identified as AC/35. The AC/35 code is used to identify documents originated by the committee. Thus, many of the documents published in the 2002 revision to NATO security documents have identifiers of AC/35-xxx. The Committee index also shows AC/35(AHWG/FRNSP), the Ad Hoc Working Group on the Fundamental Review of NATO Security Policy.

Committee names and codes are generally arranged in a hierarchical fashion. For example:

The NATO Naval Armaments Group (NNAG) has the code of AC/141 or AC/141(NNAG).

- Subordinate to the NNAG is Naval Group 1 on Above Water Warfare, with a code of AC/141(NG/1).
- A sub-group of NG/1 is Sub-group 11 on Maritime Aspects of Theatre Ballistic Missile Defence (MTBMB). Following the hierarchical approach, the code is AC/141(NG/1-SG/11).

The best single source for ascertaining committee letter abbreviations and AC/xxx codes is the List of NATO Committees and Working Groups. This listing, about 50 pages long, is accessible directly from the NATO HQ WAN page. It includes committees and groups of the International Staff, the International Military Staff, the NATO Standardization Agency, and Steering Committees.

3. National Staffs and Representatives

Each member nation is represented on the NAC by an Ambassador, often called a Permanent Representative (PERMREP). PERMREP's are supported by a national delegation composed of advisers and officials who represent their country on different NATO committees. The delegations, with permanent offices at NATO HQ, are similar in many respects to small embassies. Examples provided later in this chapter demonstrate the working relationship between national delegations and the NATO staff. This is the civilian or political side of a nation's representation, the military side is represented at the Military Committee.

C. MILITARY COMMITTEE (MC) AND INTERNATIONAL MILITARY STAFF (IMS)

As previously mentioned, NATO Headquarters also houses national Military Representatives (MILREPs), the Chairman of the Military Committee (CMC) and the International Military Staff (IMS).

1. Military Committee (MC)

The Military Committee (MC) is the senior military authority in NATO. The MC works under the overall political authority of the North Atlantic Council (NAC), the Defence Planning Committee (DPC) or the Nuclear Planning Group (NPG). The Military Committee assists and advises the NAC, the DPC and the NPG on military matters. The Military Committee also provides military guidance to the NATO Strategic Commanders (SCs), whose representatives attend its meetings. The International Military Staff (IMS) supports the work of the Military Committee, preparing and following up its directions.

The MC comprises the Chiefs of Defence Staff of each member nation that contributes forces to the integrated NATO commands.⁴

The MC normally convenes three times a year at the level of Chiefs of Defence (CHOD). Two of these meetings occur in Brussels (April/May and November/December) and one (in September) is hosted by NATO members on a rotational basis. The MC meets in

⁴ France, until its 2009 decision on return despite having not been participating in the military structure, the defence planning and nuclear matters, - has still played a full part in the work of the MC with corresponding rights and responsibilities but with some limitations subject to its position. Iceland, having no military establishment, is represented by a civilian official. In order to function continuously with effective power of decision, each country has appointed in Brussels a permanent Military Representative (MILREP) who represents his Chief of Defence during the year.

permanent session in NATO Headquarters, Brussels, at the level of the MILREPs in principal following the weekly NAC meetings.

2. The Role of the Chairman

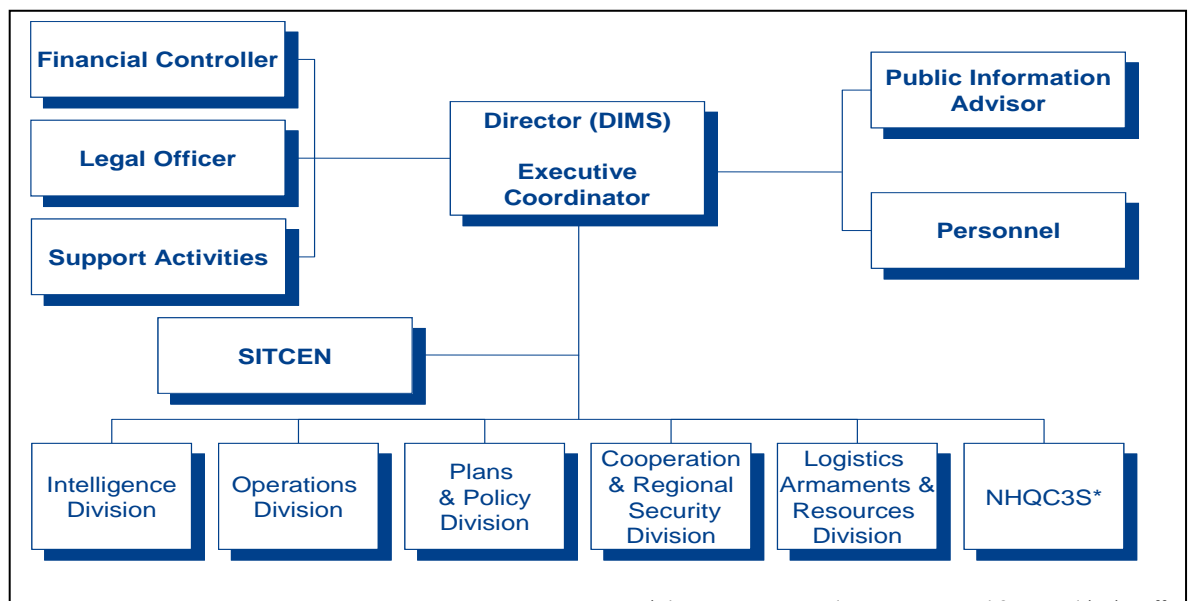
The Chairman of the Military Committee is elected by the NATO chiefs of defence, normally for a three-year term. He represents their consensus-based views as the principal military adviser to the Secretary General, the North Atlantic Council and other senior NATO organisations. He guides the Committee's agenda and deliberations, listening to views and working to reconcile divergent national positions or policy differences to fashion advice that all can agree to.

Each nation possesses an equal voice in the discussion and decisions of the military committee. All member nations provide the personnel and financial resources needed to conduct its operations and other activities. As the Alliance's top officer and most senior military spokesperson the Chairman visits operations and allied and partner countries to explain NATO's role and military work and to maximize NATO military capabilities and efficiencies. The Chairman is assisted by a Deputy Chairman.

3. International Military Staff (IMS)

The International Military Staff is the executive agency of the Military Committee. It provides staff support to the Military Committee and is responsible for the preparation of assessments, studies and other papers on NATO military matters. The IMS, under the Director of the International Military Staff (DIMS), is responsible for planning, assessing and recommending policy on military matters for consideration by the Military Committee, as well as ensuring that the policies and decisions of the Committee are implemented as directed.

The IMS provides the essential link between the political decision-making bodies of the Alliance and the NATO Strategic Military Commanders (SACEUR and SACT) and their staff. The IMS comprises approximately 380 military personnel. It is, therefore, considerably smaller than the IS which has about 1,300 staff members. IMS personnel come from all member nations, with the exception of Iceland, which has no military establishment. The IMS is organised into five functional divisions (plans and policy; operations; intelligence; co-operation and regional security; and logistic, armaments and resources) as well as a number of branches and support offices.



D. THE LEVELS OF INTERNATIONAL MILITARY HEADQUARTERS (IMHQ's)⁵

In the NATO context, commands are established by the NAC. The procedure of establishment is usually followed by the act of the NAC called "activation" which gives the HQs international status under the Paris Protocol.⁶

This procedure of establishment is based on the authority found in Article 9 of the Washington Treaty that allows the NAC to establish subsidiary bodies.⁷

In peacetime, this occurs when the Military Committee (MC) proposes to the North Atlantic Council approval for the activation or reorganization of a military body. The NAC considers the request together with a report from the Military Budget Committee (MBC) concerning possible financial implications. Normally the NAC grants international status to a NATO military body that:

- (1) possesses international status,
- (2) conducts an identified NATO mission that is truly international in character,
or
- (3) is comprised of an organization substantially multinational in character.

This can mean that the organization is part of the International Peacetime Establishment authorized by the Military Committee and approved by the NAC or be composed of multinational manning in accordance with a MOU agreed by participating nations. Being a subordinate activity of a military body receiving international funding does not automatically confer international funding. On an exceptional basis, the NAC may decide to grant international financing to a NATO military body that does enjoy military status or to limit or withhold such financing from a body with international status.

Automatic international status is granted to military bodies identified in either Article 1(b) of the Paris Protocol for a Supreme Headquarters or equivalent strategic command; or in Article 1(c) of the Paris Protocol for an international military headquarters immediately subordinate to a Supreme Headquarters.

1. Supreme Headquarters

The military structure within NATO was reorganized as announced in mid-2003.

NATO's new military command structure is leaner, more flexible, more efficient, and better able to conduct the full range of Alliance missions. This structure is a major component of the transformation of NATO. Closely related is the creation of a robust, rapidly deployable NATO Response Force (NRF). These are two major commitments made by Allied leaders at NATO's November 2002 Prague Summit.

As before, there are three tiers of command: strategic, operational, and the tactical or component level. The greatest reductions have been at the component level, where 13 headquarters have been reduced to six. Coupled with reductions at the operational level, there has been a total reduction from 20 to 11 command headquarters.⁸

⁵ A detailed description of the NATO Command Structure is available in the ALLIED JOINT DOCTRINE AJP-01(C) - paragraph 0227-0234.

⁶ Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Paris, 28 August 1952). Detailed discussion of the Paris Protocol can be found in the subsequent chapters.

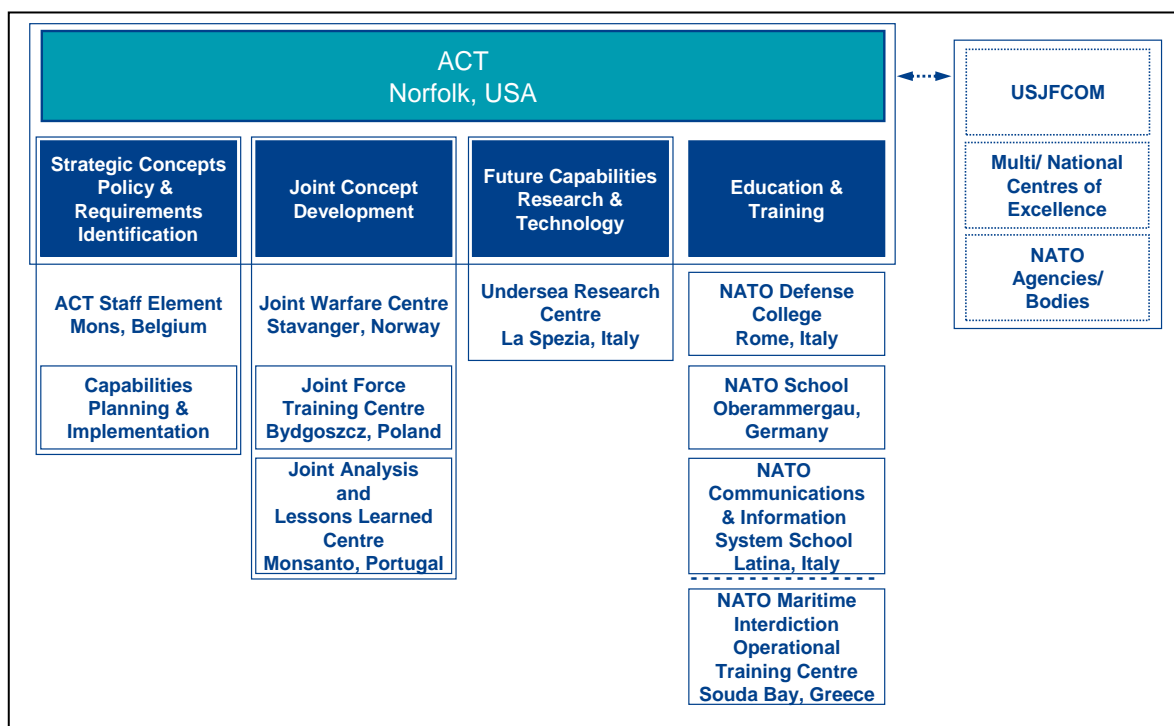
Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Paris, 28 August 1952). Detailed discussion of the Paris Protocol can be found in the subsequent chapters.

ers.

The new command structure is based on functionality rather than geography. At the strategic level, there is now only one command with an operational function, Allied Command Operations, commanded by Supreme Allied Commander Europe (SACEUR). It performs the duties previously undertaken by Allied Command Europe and Allied Command Atlantic. The latter has now become Allied Command Transformation (ACT). Commanded by Supreme Allied Commander Transformation (SACT), it is responsible for promoting and overseeing the continuing transformation of Alliance forces and capabilities, especially through training and development of concepts and doctrine.⁹

At the top or first level are “Supreme Headquarters,” defined in Article 1 b. of the Paris Protocol. Historically there were two, those being the Supreme Headquarters Allied Powers in Europe (SHAPE), Headquarters of the Supreme Allied Commander Atlantic (SACLANT). These HQs are commonly referred to as strategic headquarters or as being at the strategic level.

Allied Command Atlantic (ACLANT) has become Allied Command Transformation (ACT).¹⁰ Of legal note is that the Headquarters of the Supreme Allied Commander Atlantic, the legal entity created by the Paris Protocol, was disestablished by the NAC. Using the authority in the Paris Protocol to create supreme headquarters, Headquarters Supreme Allied Commander Transformation (HQ SACT) was then established. The commander is known as SACT (Supreme Allied Commander Transformation).¹¹



Similarly, Allied Command Europe (ACE) became Allied Command Operations (ACO). Supreme Allied Commander Europe (SACEUR) retained that title, as did SHAPE

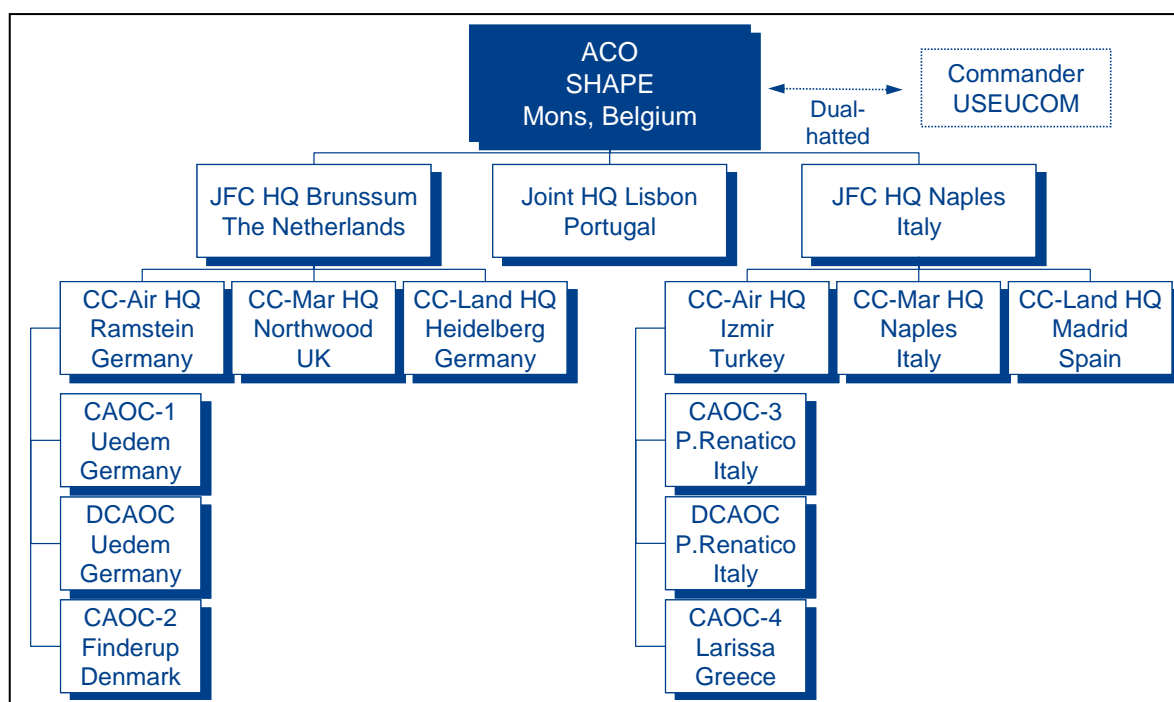
1 list of the NATO structure including the military side is found at: <http://www.nato.int/cps/en/natolive/structure.htm>

⁹ Both commands were headed by dual-hatted US commanders until September 2009, when the SACT position was filled by General Abrial of France. SACEUR continues to be dual-hatted as the commander of the US European Command, which shares many of the same geographical responsibilities.

¹⁰ This occurred on June 19, 2003.

¹¹ For the illustration: the HQ in Norfolk is HQ SACT, whereas the command collectively is ACT; also the illustration covers not only the ACT command structure, but the wider community.

(Supreme Headquarters Allied Powers Europe). The change was effective 1 September 2003. SHAPE, the sole entity with juridical personality within ACO, retained its name in light of existing treaties, international agreements, and contracts.¹²



2. Allied Headquarters

Supreme Headquarters, and any IMHQ set up pursuant to the North Atlantic Treaty (which is immediately subordinate to a Supreme Headquarters), are referred to collectively as “Allied Headquarters” in the Paris Protocol.

Under the current military structure, therefore, the second level “allied headquarters,” for purposes of the Paris Protocol, are Joint Force Commands (JFCs), one in Brunssum, the Netherlands, and one in Naples, Italy. JFCs conduct operations from their static locations or provide a land-based Combined Joint Task Force (CJTF) headquarters and a robust but more limited standing Joint Headquarters (JHQ), located in Lisbon, Portugal, from which a deployable sea-based CJTF HQ capability can be drawn.

3. Other NATO Military Headquarters

But what does the Paris Protocol say about the legal status of further subordinate command headquarters? Article 14 provides the mechanism to extend the Protocol to other headquarters or organisations:

“The whole or any part of the present Protocol or of the Agreement may be applied, by decision of the North Atlantic Council, to any international military Headquarters or organisation (not included in the definitions in paragraphs b. and c. of Article 1 of this Protocol) which is established pursuant to the North Atlantic Treaty.”¹³

¹² For the illustration: the HQ in Mons is SHAPE, whereas the command collectively is ACO.

¹³ For a discussion of the historical development of this provision, see Johnson in Fleck, where he discusses the related questions of international funding and international status.

A former Legal Adviser for SHAPE provided the following discussion of the impact and application of Article 14¹⁴:

“As noted above, the term “Allied Headquarters” used in Art. 1, para. C. is a term of art limited to NATO IMHQ at the first and second tiers of the command structures of each *supreme* command. Paragraph 1 of Art. 14 permits NATO IMHQ at levels below the second tier to have some or all of the provisions of the Paris Protocol applied to them, but the provision does not say that by according some or all of the provisions of the Protocol to a third or fourth tier NATO IMHQ that that headquarters becomes an “Allied Headquarters.” One might thereby conclude that NATO IMHQ at third and fourth tiers of the command structure are not intended to be treated as “Allied Headquarters” for each and every provision of the Protocol where “Allied Headquarters” is mentioned. In practice, when the NAC has taken action to activate a NATO IMHQ at the third or fourth tiers, it merely approved applicability of the Paris Protocol without any particular comment. The intention most probably was that such NATO IMHQ were indeed to be considered as “Allied Headquarters” for all purposes. The issue has never been called into question, more than likely because bilateral stationing agreements, by express provision in one formulation or another, widen the definition “Allied Headquarters” to include all NATO IMHQ within the receiving state which are subordinate to their supreme IMHQ.”

According to other views, this could leave an interesting question of whether a NATO military activity granted international status pursuant to Article 14 gains its own juridical personality, separate from a superior Supreme Headquarters, with capacity to acquire property and enter into contracts and other agreements, or whether it still derives legal personality and authority from that of the Supreme Headquarters.

The position that a NATO military entity under Article 14 had its own juridical personality would be based on the argument that the NAC had extended all provisions of the Paris Protocol to it without exception, thus extending Article 10 as if the entity were a Supreme Headquarters. On the other hand, this would result in the anomalous situation that operational commands would derive their legal authority to act from the Supreme Headquarters while lower level commands would have their own legal personality.¹⁵ Some documents from the drafting of the Paris Protocol also suggest that the drafters envisioned juridical personality residing with the Supreme Headquarters with subordinate headquarters acting for the Supreme Headquarters.

The component or tactical level consists of six Joint Force Component Commands (JFCCs), which provide service-specific - land, maritime, or air - expertise to the operational level. Although these component commands are available for use in any operation, they are subordinated to one of the Joint Force Commanders. For the Joint Force Command in Brunssum, there is an Air Component Command in Ramstein, Germany; a Maritime Component Command in Northwood in the United Kingdom; and a Land Component Command in Heidelberg, Germany. For the Joint Force Command in Naples, there is an Air Component Command in Izmir, Turkey; a Maritime Component Command in Naples; and a Land Component Command in Madrid, Spain.

In addition to these component commands, there are four static Combined Air Operations Centres (CAOCs) - in Uedem, Germany; Finderup, Denmark; Poggio Renatico, Italy; and Larissa, Greece; and two deployable CAOCs - in Uedem and Poggio Renatico. As the deployable CAOCs need to exercise their capability to mobilise and deploy, the current facilities at Torrejon Air Base in Spain are the primary site for training and exercising in that

¹⁴ Max Johnson in Dieter Fleck (ed.) *The Handbook of The Law of Visiting Forces* Oxford University Press(UK) (July 5, 2001)pp 314-315.

¹⁵ This is, however, how some nations have applied the activation in their national legislation.

region. A small NATO air facility support staff is stationed at Torrejon to support this capability.

Example of a CAOC

The Combined Air Operations Centre-Five (CAOC5) is one of the five Operations Centres under the Component Command-Air (CC-Air), placed in Izmir (Turkey). CAOC5 is a Multinational Command and Control Headquarter for air operations. Today, CAOC5 is composed of a Multinational Staff with personnel assigned from thirteen NATO Nations.

CAOC5 operates from Poggio Renatico Air Base, collocated with the Italian Operational Air Force Command (COFA). CAOC5 is the Command and Control (C2) Centre for all NATO air operations over Italy, the Balkans theatre, Hungary and since 29 March 2004, Slovenia. CAOC5 operates directly under the CC-Air Commander, which is the Southern Europe Commander of NATO Air Forces.

During peacetime, CAOC5 is responsible for the Air Defence and Air Policing of Italy, Slovenia and Hungary through the RADAR network, MISSILE systems and AIRCRAFT located within these Countries.

In addition, CAOC5 is responsible for the planning and execution of air operations in support of peace and stability operations in the Balkans. During crisis or war time, CAOC5 will plan, direct and coordinate tactical air operations, air defence, and Theatre Missile Defence (TBMD), through the direction of the Air Component Commander.

E. OTHER TYPES OF ENTITIES IN THE NATO STRUCTURE

There are other types of organizations which in the strict sense of the Paris Protocol are not *International Military Headquarters*. Usually they are the so called *MOU organizations*, whereas cooperating nations establish the organization by signing a Memorandum of Understanding and offering its services for the NATO. As a recent practice in NATO, organisations other than international military headquarters are usually established initially by sponsoring nations, which is the origin of multinational sponsorship. Then, by fulfilling necessary requirements upon the request of either the sponsoring nations (like in case of COEs) or one of the SCs, the NAC decides to activate, that means that the NAC shifts the entity's status under the Paris Protocol.

Even if they are not international military headquarters in the sense of Paris Protocol, they can be either military headquarters or other military bodies. NAC derives this authority from Article 9 of the Washington Treaty and Article 14 of Paris Protocol that allows the North Atlantic Council to apply the provisions of the SOFA and the Paris Protocol to other organizations, as well.

Activation by the NAC gives the entity status under Paris Protocol, but does not change the internal affairs of the organization therefore does not change the original membership, sponsorships and responsibilities.

As it is discussed a few paragraphs above, it is not crystallized yet in the literature and practice of these organisations, whether the activation by NAC would give them international legal personality. It is fair to say, however, that absent clear guidance, legal personality in international and domestic level depends on the status that was granted to the organisation by the founding nations.

Also, activation does not necessarily mean that these entities are automatically part of the military structure and hierarchy of NATO. This depends on other arrangements and intention of the parties establishing the foundation documents.

Such MOU organisations are, for example, the NATO School in Oberammergau, Germany, the NRF Headquarters, and the numerous Centres of Excellence.

1. The NATO School

The NATO school has a special status in that regard that it was established by the United States and Germany.

History of NATO School

The academic activity began in 1953 in the framework of a "U.S. Army Special Weapons School." In 1974 Germany and the United States signed an agreement on the School and renamed it. In 1975 a Charter of the School was issued by SHAPE, wherein the School was defined as an activity under the operational control of SHAPE. On 17 June 2003 HQ SACT was activated by the NAC. By this, HQ SACT assumed all obligations and tasks to which SHAPE was a party, which included subordination of NSO to HQ SACT.

Subordination was stated in the Memorandum of Agreement between HQ SACT and SHAPE concerning the Transfer of Authority over the NATO School (SHAPE) signed on 27 June 2003.

Later NATO School was activated as an international military organization under Article 14 of Paris Protocol by the NAC on 15 September 2004.

For the status of the School and its personnel, the two actions – the activation and the subordination of HQ SACT – makes it clear that apart from NATO SOFA also Paris Protocol will apply to the School and its personnel. However, practically the Paris Protocol is difficult to be applied in itself. Since HQ SACT assumed the obligations by its activation in all agreements to which SHAPE was a party, to the extent it is applicable, HQ SACT and its subordinated organisations are subject to the 1967 SHAPE – Germany Agreement which supplements the Paris Protocol in regard to NATO HQs on German territory.

2. Centres of Excellence

The Centres of Excellence, although granted international status in accordance with Article 14 of the Paris Protocol, are nonetheless multinational bodies, manned and funded by the sponsoring nations. Their manning tables are not approved by NATO authorities and are not counted in the overall NATO PE structure. Nor do the manning tables count against the international manpower ceiling and are, therefore, not subject to the relevant NATO rules. (AAP-16 Manpower Policies and Procedures)

MCM-236-03 on the Concept for Centres of Excellence details the expectations towards a Centre of Excellence (COE).

A COE is a nationally or multinationally sponsored entity which offers recognised expertise and experience to the benefit of the Alliance, especially in support of transformation. It provides opportunities to enhance education and training, to improve interoperability and capabilities, assisting in doctrine development, and/or to test and validate concepts through experimentation.¹⁶

A COE is not part of the NATO Command Structure (NCS), but forms part of the wider framework supporting NCA. The following are applicable to a COE:

¹⁶ Another document, IMSM-0416-04 deals with the criteria for the accreditation of the COEs.

- involvement in COE activities is open to all Allies. Access by Partners, other nations and international organisations to COE products and services is the responsibility of sponsoring Nations, taking into account security requirements;
- infrastructure, operating and maintenance costs are nationally or multinationally funded; COE can be manned on a national or multinational basis;
- a COE is to conform with appropriate NATO procedures, doctrines and standards;¹⁷
- COEs are co-ordinated by SACT in a supporting network, thereby encouraging internal and external information exchange to the benefit of the Alliance;
- the overall responsibility for COE co-ordination and employment within NATO lies with SACT in co-ordination with SACEUR;
- clear relationships are established between the COE and the appropriate SC through agreed legal arrangements to ensure the activities of a COE are accredited, co-ordinated and mutually reinforcing;
- ACT assumes the lead on behalf of NATO for development of MOUs that define the service delivered by the COE, the roles, responsibilities and lines of authority between the COE (-structure) and NATO (i.e. clear relationships);
- Technical Arrangements (TAs) are to be established to amplify and provide additional details not covered in the more general MOU.

The special case of Eurocorps

The Eurocorps located in Strasbourg, France was founded and is sponsored by Belgium, France, Germany, Luxembourg and Spain. These countries signed a treaty on the establishment and status of the Eurocorps.

The Eurocorps signed an agreement with SHAPE on the cooperation and possible commitment to NATO operations.

¹⁷ This is stated by the MCM document. However, there is a discussion among the legal community whether an entity not established by NATO and not being part of the NATO command structure can be subjected to NATO procedures, doctrines and standards, or this is rather only a request to the COE. In practice the question is whether a directive issued by one or both SCs shall be applied by the COE automatically or it depends on other arrangements.

PART II
DECISIONMAKING
AND
DOCUMENT MANAGEMENT

References and suggested reading:

- EXS(2000)061, 4 August 2000, Guidelines for Creation, Formatting and Processing Correspondence and Documents of the NATO HQ International Staff.
- AAP-03 Ed. (I) DIRECTIVE FOR THE DEVELOPMENT AND PRODUCTION OF NATO STANDARDIZATION AGREEMENTS (STANAGs) AND ALLIED PUBLICATIONS (APs)

DECISION MAKING

By way of introduction, readers are reminded that decision-making within the Alliance is accomplished by Consensus & Consultation.

Consensus has been accepted as the sole basis for decision-making in NATO since the creation of the Alliance in 1949. This principle remains in place. The Alliance is politically controlled by the North Atlantic Council, in whatever form it meets. Facilitating the process of consultation is one of the NATO Secretary General's main tasks.

The principle of consensus means that there is no voting on a matter, but rather that a decision can be made only if all 28 members are in agreement.

Agreement is reached by common consent, meaning that decisions are accepted by each member country, without having any formal objection and which is still in line with the member country's (national) policies. This means that when a "NATO decision" is announced, it is the expression of the individual and collective will of all the sovereign states that are members of the Alliance.

This principle is applied at every committee level, and demonstrates clearly that NATO decisions are collective decisions made by its member countries, which leads to the fullest possible engagement. Sometimes member countries agree to disagree on an issue.

On the one hand, this negotiation process is rapid since members consult each other on a regular basis and therefore often know and understand each other's positions in advance. On the other hand, however, consensus can sometimes be difficult to achieve. The process is complicated and time consuming, with each member nation having different executive and legislative relations. It is also the case that the issues before the NAC are often complex in nature. Twenty eight nations with different historic backgrounds, perspectives and reputations will each have to ensure those interests and perspectives are honoured. Interaction is also necessary with other organizations both within and outside of NATO. Different information, intelligence and perceptions apply. Ideally, the process works best when each nation understands that they should keep each other informed on intentions and policies

In order to make consensus more achievable, several key steps are often required:

- Distribution of all available information and intelligence to all nations;
- Distribution of national views to all other nations;
- Effective chairmanship of working groups or committees; and a
- Willingness to compromise on the part of national representatives and staff.

MC decisions are made unanimously; there is no agreement by majority. When nations hold divergent views, negotiation continues until a unanimous agreement has been attained. It should be noted, however, that when the MC gives advice to the Secretary General or the NAC/DPC, more than one opinion or option may be submitted. Unanimity in the MC is necessary only when the Committee makes a decision on a given subject.

The silence procedure is generally used to seek agreement or approval on paper, to seek other action on urgent matters, or to avoid burdening the MC agenda with items that do not require discussion in order to save time for more pressing business. The silence procedure is a mechanism by which recipients of the document -- the Military Representatives of the Nations (MILREPs or MilReps) -- have the option whether or not to make a response to the originator within the designated time.

MilRep actions in response to a silence procedure include the following:

- Silence no response (considered a formal response agreeing with the proposal).

- Requesting an extension to the silence deadline.
- Expressing an interpretation or understanding of the document in question, thereby commenting, but not breaking silence. (Such comments may not be included in a revision of the document).
- Breaking Silence, such as by raising objections or proposing amendments.

Six steps to agreed military advice

When NATO political authorities are considering military action, such as the ISAF operation in Afghanistan, a critical part of the information needed to make informed decisions that all nations can agree to comes from its military authorities. The North Atlantic Council receives regular briefings and reports, and at each key stage the Military Committee is called on to give advice, and to provide direction to NATO Military Authorities.

Step 1

The North Atlantic Council tasks the Military Committee to produce military advice that can be agreed upon by Chiefs of Defence of all nations.

Step 2

The International Military Staff, in support of the Military Committee, translates the political guidance into military direction and tasks one or both Strategic Commands with providing their best military advice on how to organise and conduct what has been asked for, including an assessment of the personnel and financial resources required.

Step 3

The input from the Strategic Command(s) is provided to the Military Committee (i.e. to the nations) for consideration, usually with an initial assessment by the International Military Staff.

Step 4

The Military Representatives provide their response and advice from a national standpoint. Twenty-eight views need to converge into consensus advice that can be passed to the North Atlantic Council.

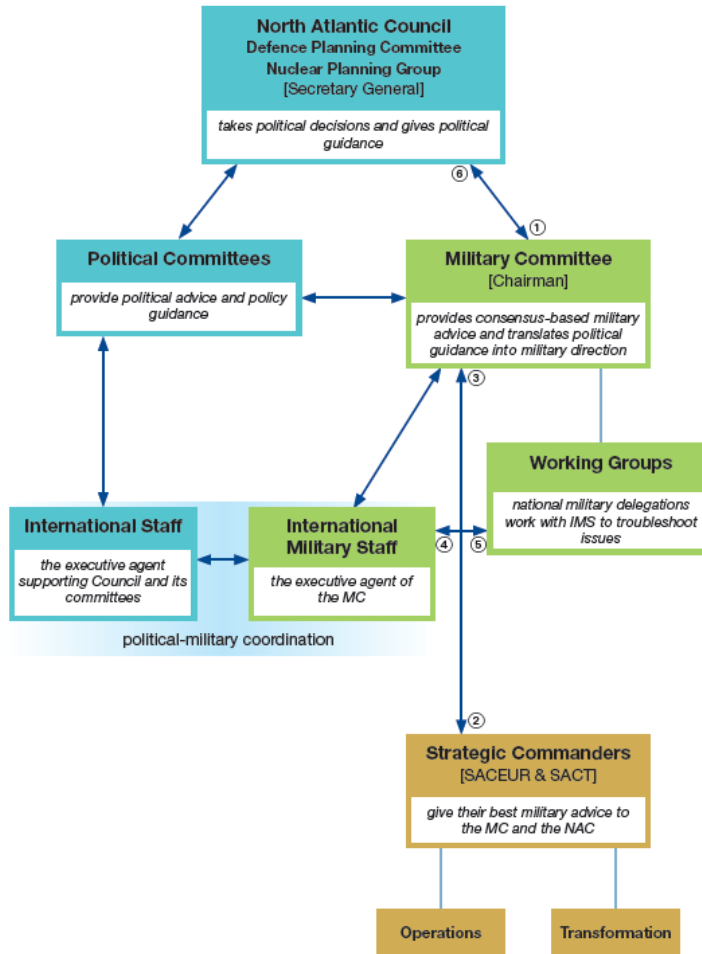
Step 5

Consensus is rarely immediately achieved on complex undertakings, and working groups meet regularly to troubleshoot and work through issues. Staff from national military delegations work under an IMS chairman, as well as with subject matter experts.

Step 6

The final agreed product, plus the initial advice from the Strategic Command(s), is then sent to the North Atlantic Council to inform their deliberations, consultations and decision-making. This is a continuous process for every activity, be it an operational plan, a conceptual paper or a policy proposal.

How military decisions are arrived at in NATO



Two-way arrows show continuous circle of consultation and guidance.

DOCUMENT MANAGEMENT

A. BACKGROUND

Legal advisers are trained in and accustomed to turning to their national sources of laws, regulations and policies in the normal course of providing legal advice. In most instances, national laws and regulations are compiled and indexed in an official code or other series of publications. Legal advisers are also well-versed in the application of court decisions within their legal systems.

NATO does not have a single, formal legislative system. And, for the most part, courts do not provide interpretative decisions.¹⁸ Nonetheless, NATO has, from its beginning, established and promulgated policies and regulations to co-ordinate and to standardize matters within the Organisation and between NATO nations on NATO-related topics.

NATO also has numerous documents detailing policies and procedures regarding relations with external nations, persons and entities; from procedures for commercial contracts to the release of NATO information. The challenge for NATO legal advisers is to understand the complex web of documents dealing with NATO policies and procedures, including how to determine the status, validity, and applicability of a given document. This chapter is designed to introduce NATO legal advisers to the primary systems of NATO documents, and to provide tools for locating documents and determining their status. Given the sheer volume and variety of NATO documents, this chapter must refer the reader to other sources for more detailed discussions of many NATO documents.¹⁹

B. NATO HQ ON THE WIDE-AREA NETWORK

Before delving into the web of NATO HQ documents, this paragraph introduces the NATO HQ homepage on the Wide-Area Network (WAN), and the NATO HQ Document Management System (DMS) and other data resources available on the WAN.

1. NATO HQ Home page on the NATO Wide-Area Network (WAN)

The NATO HQ home page on the NATO WAN²⁰ has numerous useful links. Contained here are links to the following document resources discussed in this Deskbook:

- The NATO Document Management System (DMS), discussed in the next paragraph.
- The electronic index of Military Committee (MC) and International Military Staff (IMS) documents.
- A STANAG and Allied Publication (AP) database, including extensive information about the status of the document, with many full-text documents.
- The full text of agreements and policy documents (e.g. NATO SOFA, Paris Protocol, PfP SOFA) by means of a “mirror” to the NATO HQ unclassified Internet site.²¹ This site can be used to “copy and paste” selected text.

¹⁸ Decisions of the NATO Appeals Board, regarding interpretation and application of NATO's Civilian Personnel Regulations (CPR's) are the exception.

¹⁹ For example, Allied Administrative Publication - 4 (AAP -4); NATO STANDARDIZATION AGREEMENTS AND ALLIED PUBLICATIONS, lists over 40 categories of Allied Publications, each with its own abbreviated designation, such as AACP (Allied Publication on Acquisition Practices) and AMEPP (Allied Publication on Maritime Environmental Protection). This handbook will not list and discuss each type of Allied Publication, but provides references to sources that a legal adviser can consult for detailed information. See the discussion under “STANAGs and APs” later in this Section.

²⁰ The address for the NATO HQ page on the WAN is <http://www.hq.nato.int/>

Numerous other resources can be reached from the NATO HQ home page including:

- A link to a searchable database of NATO acronyms
- Links to other NATO WAN webs
- The NATO Handbook
- Full text of the Civilian Personnel Regulations

2. Identifying and Obtaining Copies of Pertinent NATO HQ Documents

This can be quite challenging, even with the improvements brought about by the NATO HQ DMS, the IMS home page and index and the MC documents.

As noted at the outset, there is no central index of NATO documents (and this Deskbook has, in this regard, only covered a limited portion of possibly pertinent documents). A Legal Adviser looking for documents on a given subject will likely need to use assorted tools to determine whether pertinent documents exist and to obtain copies of existing documents.

It is often prudent to consult with a staff member with expertise in the field in question for information on existing relevant documents. Any such documents could be out of date, however, so prudence dictates that further searching may be required.

The activity registry/secretariat/administrative office should also be consulted when trying to identify or obtain copies of pertinent documents.

If looking for possible NATO HQ level documents, the NATO DMS would be a logical place to begin a search. A search of the MC index and IMS documents would also be advisable.

It is sometimes helpful to do a WAN or Internet search using an appropriate search engine

The general category of Allied Publications - discussed later in this Deskbook - is subdivided into over 20 subcategories by type of AP. The folders on this site contain only selected documents, and they may not be current. Nonetheless, finding reference to an out-dated publication may be of great use in searching for more current guidance.

C. THE NATO DOCUMENT MANAGEMENT SYSTEM (DMS)

The on-going development of the NATO DMS is a major step to improve access to NATO HQ documents. Before the advent of the DMS, there was no effective index of NATO HQ documents to identify pertinent documents which were distributed in paper form. The NATO DMS provides a searchable, electronic index of most NATO HQ documents. It also gives access to the full text of some documents.

Critical to the DMS is the use of standardized templates in the preparation of documents. When templates are used, key fields of information will automatically be captured by the DMS. These key fields, which provide a profile of each document, including a unique document identifier (usually describing the type of document and an abbreviation of the source committee or office), date, title, and other standardized information. The automatic capture of this data into the DMS allows searches of this document profile data.^{22 23}

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²¹ The Internet address is <http://www.nato.int/docu/basics.htm>.

²² Some of the documents shown in the search results within Appendix I-A:2 (regarding activation of NFS Deployable Corps HQs) are discussed in the later paragraphs on MC and IMS documents.

²³ A more detailed User Manual is also available from a link on the NATO DMS web page.

D. DOCUMENTS

1. NAC and International Staff (IS) Documents

The conduct of business at NATO HQ is largely based on written communications. To facilitate and standardize the creation, control, and tracking of these communications, general guidelines for routine documents and correspondence have been established.²⁴ The system for document identification describes in general terms where in the staffing and review process a particular document fits. The guidelines also simplify the creation of IS documents through templates and standardized conventions, and allow for automated capture of index information into the NATO HQ Document Management System (DMS), described above.

Generally speaking, each document is labelled as to the document type, indicated on the first page, in uppercase bold, right aligned and positioned on the same line as the date. Immediately below the document type, and appearing as part of the header on every page, is the document reference or name. The document reference must allow for a complete and unique identification of the document including whether it is a revision, a corrigendum, an action sheet, an addendum, a part, or other special category. It is optional whether the reference contains an indication of the year of issue.

The following table lists common abbreviations used in identifying documents generated within NATO Headquarters by the North Atlantic Council, NATO Committees, the International Staff and the International Military Staff, along with samples of how they appear in a complete document reference or name. Frequently, in order to find a NATO document or understand its application, these abbreviations must be understood:

Common Abbreviations	
	MEANING and COMMENTS/SAMPLE
AC	“(North) Atlantic Council”--prefix used, with following numbers, to identify committees supporting the NAC and documents generated by the committees (e.g. AC/35 refers to the NATO Security Committee and documents it generates, such as AC/35-D/2004, representing a document prepared by AC/35)
ADD	Addendum: for adding supplementary information to the initial document. A sample Addendum title would be, AC/000-N/256-ADD1 [ADD1 signifies this is the first Addendum].
AS	Action Sheet communicates action taken on the initial document. Often used to advise of action taken on a document distributed under the silence procedure, including a break of silence. For example, the Action Sheet to PO(2002)140. An Action Sheet typically indicates that it is part of, and shall be attached as the top sheet to, the base document.
C-M	Council Memorandum: Used for NAC final documents. For example M(2002)49, 17 June 2002, “Security Within the North Atlantic Treaty Organisation (NATO)” is the core policy document on security, superseding C-M(55)15(Final).

²⁴ See EXS(2000)061, 4 August 2000, Guidelines for Creation, Formatting and Processing Correspondence and Documents of the NATO HQ International Staff.

Common Abbreviations	
COR	Corrigendum: to correct or change information in the initial document. A sample reference for a Corrigendum to a Notice would be, AC/322(NC/3-REPS)N/000-COR1.
C-R	Council Summary Record
D	Document: Finished documents, no longer subject to review and can be referred to for future business (see also M and C-M). A sample reference for a Document would be, AC/999-D/000 [the "D" signifies "Document"]
DS	Decision Sheet. A sample reference for a Decision Sheet would be, AC/XXX(SG/3)DS/000
EXS	Executive Secretary: EXS(2000)061 is "Guidelines for Creation, Formatting and Processing of Correspondence and Documents of the NATO HQ International Staff," 4 Aug 2000
ISM	International Staff Memorandum
M	Memorandum
N	Notice: Documents of an administrative or purely temporary nature
PO	Private Office of SECGEN: PO documents are used by SECGEN to distribute documents to PERMREPs under the silence procedure. For example, PO(2002)140.
WP	Working Paper

Following are real examples of how the two lines described above, "document type" and "document reference", appear in the upper right corner on the first page of a NAC or IS document. Note that there are variations to the labelling norms. For example, "Decision Sheets" of the NAC are published with an "N" identifier and "Documents" of the Council are identified as "M" for memorandum. These samples also show variations for labelling action sheets.

Explanation	DOCUMENT TYPE Document Reference (from actual documents)
A Decision Sheet (DS), dated 6 JAN 03, for the NATO Naval Armaments Group (AC/141).	DECISION SHEET AC/141-DS/88
A decision sheet (DS), dated 6 January 2003, from the Policy Coordination Group (PCG), Military Committee Working Group (Operations) in KFOR/SFOR Format, held on 19 Dec 2002. Note the inclusion of the year of the meeting in the document name.	DECISION SHEET PCG(KFOR-SFOR)DS(2002)0020

Explanation	DOCUMENT TYPE Document Reference (from actual documents)
A Working Paper (WP), supplemented up through Addendum 2 (ADD2), of the Defence Review Committee (DRC), issued in 2003.	WORKING PAPER DRC-WP(2003)0004-ADD2
A Document issued by the Executive Secretariat, dated 4 August 2000.	DOCUMENT EXS(2000)061
From the Private Office (PO) of the Secretary General to PERMREPs, on 2 Sept 2002.	PO(2002)140 Silence procedure ends: 12.00 hrs on 10 September 2002
Document of 21 MAR 2000, from the NATO Committee for Standardization (AC/321) to NCS representatives, proposing approval of approach to staffing of proposed Terms of Reference.	DOCUMENT AC/321-D/30 Silence Procedure ends: 07 Apr 2000 18:00
Action Sheet of 13 April 2000 advising that one nation requested an extension of silence and later broke silence.	DOCUMENT AC/321-D/30, ACTION SHEET
Corrigendum (COR 1), dated 11 Oct 2000, changing paragraph text in revision 3 of document AC/321-D/30.	DOCUMENT AC/321-D/30 REV 3, COR 1
<p>An Action Sheet (AS), dated 14 JAN 2003, from the Infrastructure Committee (AC/4), on the document AC/4(PP)N/1972(Revised Final), dated 10 JAN 1968, as later supplemented by 3 addenda.</p> <p>Note that the base document, issued in 1968 and still valid, has basically the same naming scheme as in current use. Also note that 1972 is not the year of the document, but a sequential number. AC/4(PP) now includes the year in the document name, such as AC/4(PP)N(2002)149, with 2002 indicating the year of issuance.</p>	ACTION SHEET AC/4(PP)N/1972(REVISED)(FINAL)-ADD3-AS1
From SECGEN to PERMREPs, submitting NATO Rules of Engagement, MC 362/1, for approval under silence procedure.	SG(2003)0857(INV) 14 July 2003 Silence Procedure Ends: 1200 hrs, Tuesday 22 July 2003

Explanation	DOCUMENT TYPE Document Reference (from actual documents)
From SECGEN distributing NSO Charter for approval by the NAC. Dated 1 Aug 2001.	DOCUMENT C-M(2001)57 Silence Procedure ends: 14 Aug 2001 18:00
Action Sheet dated 20 Aug 2001 advised that on 14 Aug 2001 the NAC, under the silence procedure, approved the Charter of the NATO Standardization Organization provided under C-M(2001)57.	ACTION SHEET to Document C-M(2001)57

2. Military Committee (MC) and International Military staff (IMS) Documents

NATO Legal Advisers often have to refer to, or comment on drafts or revisions of, IMS and MC documents. This section describes the primary types of documents used by the IMS and MC, explains the most common abbreviations, and describes the normal process for document development, review, and approval. IMS internal procedures group documents into three categories of IMS General Documents, MC Generated Documents, and IMS Support Documents. The following paragraphs describe the features and uses of the documents in each of these categories that a Legal Adviser is most likely to encounter.

3. IMS Generated Documents

- (1) **IMSWM** (International Military Staff Working Memorandum). IMSWMs are primarily used as a cover on a draft MC document or IMSM that is being circulated for agreement under the silence procedure.²⁵ When an IMSWM is used with the silence procedure, not replying to a document is considered to be a formal response. An IMSWM may also be used to circulate discussion papers, reports or other documents for formal notation, or to forward an IMSM/MC document for formal comment; in such an instance, the silence procedure is not used. IMSWMs are sequentially numbered each year. An example is IMSWM-180-02.
- (2) **IMSM** (International Military Staff Memorandum). An IMSM is used by DIMS to promulgate information, views, guidance, taskings or instructions, both within the IMS and to outside addressees including MODs, MilReps, SCs, other NATO HQs, and agencies. An IMSM is not used to seek formal agreement to a draft or proposed course of action when MilReps are action addressees. IMSM-0257-01, for example, distributed the Index of Current Military Committee Documents on 5 April 2001.
- (3) **IMSTAM** (IMS Staff Memorandum). An IMSTAM is used for correspondence on routine, non-policy matters. An IMSTAM often deals with routine business of committees or working groups. The IMSTAM is used both inside HQ NATO, and with authorities outside HQ NATO. IMSTAMs are sequentially numbered, on an annual basis, by the originating Division. The IMSTAM reference shows the abbreviated name of the originating Division in parentheses, followed by a 3-digit number allocated sequentially by the Division, and ends with a 2-digit

²⁵ The only correct wording for noting the silence procedure is "Agreement (or approval) will be assumed unless the action officer is notified to the contrary by (time) on (date)."

designation for the year. Examples are: IMSTAM(OPS)-097-03 and IMSTAM(PERS)-321-03.

- (4) Other IMS generated documents are the DIMS Business Letter (**DIMS/BUS**) and the Demi-Official DIMS Letter (**DO/DIMS**). For information on these types of documents, see IMSSOP-1.

4. Military Committee Generated Documents

- (1) **MCM** (Military Committee Memorandum). An MCM is used to issue agreed MC views, guidance, requests, advice or instructions for immediate or short-term use on short-term policy matters. It remains extant until the issue under consideration has been finalised or superseded. A draft MCM is circulated under cover of an IMSWM for agreement under silence procedure. MCMs are normally signed by DIMS "for the Military Committee." MCMs are also used to forward documents of a more permanent nature to the NAC for approval. ²⁶
- (2) **MC** (Military Committee document). A Military Committee document contains long-term policy which has been agreed by the MC (and NAC/DPC where necessary). It remains in force until superseded or cancelled. MC documents are identified by the number they bear. The document number is assigned by the IMS Registry, Document Control Office; numbers are not grouped by subject.²⁷ In the case of an amended MC document, a sequential number is added (e.g. MC 57/3). A draft MC would be issued under cover of an IMSWM.
- (3) Covering documents (Decisions Sheets). Following action by the Military Committee, a MC document would be sent out under cover of a **Military Decision Sheet** if it requires political confirmation by the NAC/DPC. A **Final Decision Sheet** is used after NAC/DPC action is complete; or when a MC document has been agreed by the Military Committee on a subject that falls within its remit and does not need to be forwarded to the Secretary General for NAC/DPC consideration.
- (4) Other Military Committee generated documents are the Chairman of the Military Committee Memorandum (**CMCM**) and the (**DCMCM**). For information on the use of these types of documents, see IMSSOP-1, available on the IMS page on the NATO WAN.

5. IMS support documents

These include Background/Decision Briefs, Speaking/Handling Briefs, Action Sheets, Message Forms, Fax Forms, Document Changes and Corrigenda. See IMSSOP-1 for information and samples of these documents.

6. Status of IMS documents

As noted above, the WAN homepage for the IMS can be reached from the NATO HQ Intranet web page. On the IMS web page one can track current IMS documents. More importantly, there is direct access to the electronic index of Military Committee documents, which has replaced the former paper issuances of the Index of Current Military Committee Documents.²⁸ The electronic index eliminates the need to scan the entire paper index looking for pertinent documents by allowing an electronic search for a key word or phrase.

²⁶ MCMs addressed to the Secretary General have to be translated into French.

²⁷ For example, MC 361, 27 Nov 1996, addresses "SACLANT Capability Package 9B4040 'Intelligence Support'." MC 362/1, familiar to many Legal Advisers, is "NATO Rules of Engagement." The next sequential MC is MC 363, 31 Jul 1996, regarding a SHAPE capability package.

²⁸ The printed indexes are maintained under cover of an IMSM.

The index provides details on the documents, including the status of all current MCs and MCMs.²⁹

E. MC AND IMS STAFF PROCEDURES

1. Issue Consideration

When an issue is raised formally for consideration by the MC, the most common methods for addressing the issue are to:

- Circulate it out of committee as a written paper (most likely a draft MC, MCM or IMSM), and usually under cover of an IMSWM;
- Include it on the agenda for a MC meeting, either by the IMS or at the request of a nation; or
- Raise it under "Any Other Business" at a MC meeting, either as a pre-notified item or without prior notification.

2. Military Committee Actions Common Military Committee actions on an issue or proposal are:

- (1) **NOTED** by the Military Committee means the MC has received information in some written or other form, in or outside of an MC meeting, for information only and requiring no further action by the MC. Notation by the MC does not imply agreement by the MC.
- (2) **AGREED** by the Military Committee indicates its concurrence or assent by consensus. If one or more members have not joined consensus agreement, the MC cannot be deemed to have agreed. Issues may be referred for MC agreement by circulating a paper or proposal (often a draft IMSM covered by an IMSWM, under silence procedure). Short-term or less important matters may be raised during a meeting, and are deemed to be agreed if no objection is raised. Agreement by the MC does not necessarily require subsequent formal action.
- (3) **APPROVED** by the Military Committee constitutes final and formal agreement on matters that are within its remit without reference to other authority. Such agreement will normally result in the issue or revision of an approved MC document, or formal notification to an SC or other subordinate authority giving direction or approval for follow-on action or activity.
- (4) **ENDORSED** by the Military Committee represents the MC's formal agreement on matters that require subsequent political consideration, usually by the NAC/DPC.

F. EXAMPLES OF NATO HQ STAFFING

Following are outlines of actual processes used to draft, staff, and approve policy documents. These samples are offered to demonstrate the various methods employed to develop and promulgate policy while showing how the various NATO HQ documents are used. Note that many documents are not included in these outlines: selected documents

²⁹ Status of a particular MC might be reported in the index as:

- Approved by NAC
- Approved by DPC
- Taken Note by NAC/DPC
- Approved by MC
- Sent to SECGEN for info

are listed to demonstrate the use of various documents and to reflect variations in policy staffing and development.

Example 1: MC 362/1, NATO Rules of Engagement. This example demonstrates variations in the use of IMSWMs to circulate drafts of MC 362. It also shows the process for NAC approval and final MC action.

DOCUMENT	DATE	PURPOSE
IMSWM-226-02 IMSWM-226-02 SD 1	Jul 09, 02 Sep 05, 02	Issued drafts of MC 362/1
IMSWM-407-02	Dec 02, 02	Issued draft of MC 362/1
Numerous national comments and other documents interspersed throughout the drafting process		
MCWG(OP)-002-03	Mar 18, 03	Report of meeting of 3/14/03
IMSWM-058-03 IMSWM-058-03 SD 1 IMSWM-058-03 SD 2 IMSWM-058-03 SD 3 IMSWM-058-03 SD 4 IMSWM-058-03 SD 5 IMSWM-058-03 SD 6 IMSWM-058-03 SD 7	Feb 07, 03 Mar 20, 03 Apr 11, 03 May 05, 03 May 09, 03 May 30, 03 Jun 19, 03 Jun 24, 03	Used to issue for comment successive study drafts of MC 362/1
MC 362/1 MILDEC	Jun 30, 03	MC Military Decision
SG(2003)0857(INV) Action Sheet	Jul 14, 03	Requests NAC approval of MC 362/1 under silence Advises of approval under silence procedure
MC 362/1 FINAL	Jul 23, 03	Issuance of approved MC 362/1

Example 2: MC 469, NATO Military Principles and Policies for Environmental Protection. This example shows the interplay between the IS, IMS, working groups and national delegations. Note that the final product is an MC that was not approved by the NAC.

DOCUMENT	DATE	PURPOSE
An Environmental Protection Policy NATO Inter-Staff Working Group (EPP NIS WG) was formed to respond to urgings from the SC's and NSA for development of a NATO policy on EP		
EPPNISWG(2002)4	Mar 14, 02	Asked for comments on draft

DOCUMENT	DATE	PURPOSE
IMSWM-180-02	Jun 12, 02	Submitted to MC the draft prepared by inter-staff EPP NIS WG
Comments from nations recommended that national staffs be invited to participate in further development before any future draft submitted to the MC. MC formally agreed on transformation from NATO staff-only forum (the EPP NIS WG) to an ad hoc working group with national representation.		
IMSM-673-02	Oct 29, 02	Explains transformation of the inter-staff EPP NIS WG into MC AHWG (EPP). ³⁰
MCAHWG(EPP) -002-02	Dec 10, 02	Distributes summary sheet of 12/5/02 meeting and revised draft MC 469 Asks national reps for comments on draft by 4/11/03 Extends comment deadline to 4/30/03 at request of a nation
MCAHWG(EPP)-002-03	Feb 13, 03	
MCAHWG(EPP)-002-03	May 25, 03	
IMSWM-252-03	Jun 04, 03	Circulates to MILREPs draft MC 469 for approval under silence
MC 469 (Final)	Jun 30, 03	Publishes MC approval of MC 469, and forwards to NAC for information. "Clears" IMSWM-252-03
SG(2003)0949(INV)	Aug 11, 03	Circulates MC 469 to NAC for information

Example 3: C-M(2002)23, Revision of C-M(55)15(Final)--"Security Within the North Atlantic Treaty Organisation." This example demonstrates development of NATO-wide policy by the IS and component committees. It also shows NAC policy being disseminated by means of C-M documents as opposed to the MC in example 1, above. This also demonstrates that there may be a series of C-Ms and supporting directives on certain broad subjects.

DOCUMENT	DATE	PURPOSE
C-M(2007)0118-AS	January 28, 2007	NATO Information Management Policy (NIMP), "umbrella" document for information policies within the Alliance
Efforts by various bodies, including:		
- AC/35 (NATO Security Committee)		
- AC/35(AHWG/FRNSP) (Ad Hoc Working Group on the Fundamental Review of NATO Security Policy)		
- AC/35(WG/1) (Working Group no. 1 on ADP Security)		

³⁰ MCAHWG(EPP) stands for Military Committee Ad Hoc Working Group on Environmental Protection.

DOCUMENT	DATE	PURPOSE
C-M(2001)3	Jan 31, 02	Asks NAC to devolve responsibility to the NSC to approve future supporting directives to revised NATO Security Policy
C-M(2002)23 ACTION SHEET	Mar 14, 02 May 15, 02	Submits core policy document, to be issued as a C-M, and four supporting directives to be issued as AC/35 documents - Reports NAC approval
C-M(2002)49	Jun 17, 02	Issues NAC policy on Security within the North Atlantic Treaty Organisation (NATO)
C-M(2002)50	Jun 17, 02	Issues NAC policy on Protection Measures for NATO Civil and Military Bodies, deployed NATO Forces and Installations (Assets) against Terrorist Threats. (combined with C-M(2002)49, supersedes C-M(55)15(Final))
AC/35-D/2000 AC/35-D/2001 AC/35-D/2002 AC/35-D/2003 AC/35-D/2004 AC/35-D/2005	Jun 17, 02 Jun 17, 02 Jun 17, 02 Jun 17, 02 Jun 17, 02 Jun 17, 02	Security Policy directives
C-M(2002)60 Action Sheet on C-M(2002)60	Jul 11, 02 Jul 24, 02	"The Management of Non-Classified NATO Information"
NOS/1(2002)55	Aug 30, 02	Issues Compendium of Security Policy Documents and Supporting Directives

Example 4: C-M(2001)57, Charter of the NATO Standardization Organization This example lists a few of the documents involved in the drafting and approval of the charter for the NATO Standardization Organization.

DOCUMENT	DATE	PURPOSE
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DOCUMENT	DATE	PURPOSE
AC/321-D/30 ³¹	Mar 21, 00	Documents related to NCS agreement on and follow-on action regarding proposed Terms of Reference (TORs) for NCS, NCSREPs, NSSG (NATO Standardization Staff Group), and NSA (NATO Standardization Agency)
AC/321-D/30, ACTION SHEET	Apr 13, 00	
AC/321-D/30, REV 1	Apr 13, 00	
AC/321-D/30, REV 2	May 26, 00	
AC/321-D/30, REV 3	Jul 07, 00	
AC/321-D/30, REV 3, COR 1	Oct 11, 00	
NSSG(I)-WP/1	Jul 18, 00	Working paper from NATO Standardization Staff Group (NSSG) distributing draft 5 of charter
AC/321(NCSREPS)-WP/2	Aug 01, 00	Distributes draft 7 of NSO charter for review at 9/6/00 meeting
C-M(2001)57	Aug 01, 01	SG forwards NSO Charter for approval by NAC under silence procedure
Action Sheet to C-M(2001)57	Aug 20, 01	Reports NAC approval

G. MILITARY COMMAND DIRECTIVES AND POLICIES

As with many national military organizations, the NATO military headquarters also issue directives, manuals and forms. This paragraph highlights key aspects of the military directive system within ACO/ACE³², and provides tips regarding on-line access to military directives.

ACO Directives System: ACO has a long-established and well organised system for issuing directives applicable throughout ACO.³³ A notable feature of the ACO directive system is the serial numbering system: all directives are identified by a two-part number, with the basic number in the first part chosen from the 28 established numbers corresponding to identified general subjects. Thus, all directives on the same general subject will begin with the same numbers. The same numbering systems are employed for SHAPE directives and those issued by the former International Headquarters Support Command (IHSC), now the Headquarters Support Group (HSG). The following table lists selected basic numbers and corresponding general subjects that are likely of interest to Legal Advisers. The table also includes a small selection of actual ACE, SHAPE and IHSC directives that are either directly applicable to all activities and personnel within ACO or that may be of interest to a Legal Adviser exploring the given subject.

³¹ AC/321 is the code assigned to the NATO Committee for Standardization (NCS), and it appears here as part of the document designation.

³² The formal title of Allied Command Europe (ACE) has been changed to Allied Command Operations (ACO). Many directives still bear the designation of "ACE Directive" or "AD," not having been reissued to reflect the new title. Both ACO and ACE are thus used in this section.

³³ Details on preparation of ACO directives are provided in ACO Directive 30-1, 28 September 1999.

Basic Number	General Subject	Sample Directives
5-	Miscellaneous	* SHAPE DIR 5-4, Taxes and Tenant Liabilities in Belgium, 30 May 1984 * SHAPE HSG DIR 5-35, Indebtedness, 4 Feb 1999
10-	Organisations, Boards and Committees	* SHAPE DIR 10-13, Administrative Boards of Inquiry, 5 July 1999
15-	Administrative Practices	* SHAPE DIR 15 -3, Preparation of Meetings, Conferences, presentations, and meetings 19 December 2008
40-	Personnel (General)	* ACE DIR 40-007, Standards of Conduct, Relationships with Contractors, and Disclosure of Information, 19 Feb 1992 ³⁴
45-	Personnel (Military)	* ACO DIR 45-1 (or 45-001), Allied Command Europe Military Personnel Management and Administration, 4 Aug 2002 * SHAPE Supplement to ACO DIR 45-001, 24 Apr 2003
50-	Personnel (Civilian)	* ACO DIR 50-1, Management and Administration of NATO Civilian Personnel, 25 Sep 2000 * SHAPE DIR 50-3, International Civilian Personnel Disciplinary Procedures, 12 Apr 1999 * ACO DIR 50-7, Temporary Employment of Civilian Personnel, 17 Mar 1997
60-	Finance and Procurement	* SHAPE DIR 60-2, Fund-Raising / Solicitation Requests, 4 Nov 1998 * ACO DIR 60-53, Tax Exemption and Customs Clearance, 30 Nov 1987 * ACO DIR 60-54, Acceptance of Gratuities, 13 March 1988 * SHAPE HSG Directive 60-58, Acceptance of Gratuities and Standards of Conduct (02 October 2002)
100-	Installation	* SHAPE DIR 100-12, Activities and Events on the SHAPE Installation, 27 September 2004

Indexes of Military Directives: ACO, as well as the regional commands, maintain indexes of their directives. The ACE index is ACE Directive 00-1. The SHAPE Supplement to ACE Directive 00-1 is the index to SHAPE Supplements and to SHAPE directives. The Index of Northern Region and AFNORTH Publications appears in Northern Region Pamphlet

³⁴ Note that there is room for variations in the subject-numbering system. For example, ACE DIR 60-54 addresses Acceptance of Gratuities, closely related to the subject of ACE DIR 40-007.

(NRP) 30-100. RHQ AFSOUTH Directive 00-1 is the Index to Regional Headquarters (RHQ) Allied Forces Southern Europe (AFSOUTH) Serial Publications.

On-line Access to Directives and Indexes: provides information on accessing ACO and regional command directives and indexes on the NATO WAN.

H. STANDARDIZATION PROCEDURES

Standardization Procedures including the development, preparation, production and updating of standardization documents, are detailed AAP-03(I).³⁵

The NATO Standardization Agency (NSA) mission is to “initiate, coordinate, support and administer standardization activities conducted under the authority of the NATO Committee for Standardization (NCS). The NSA is also the Military Committee’s lead agent for the development, coordination and assessment of operational standardization.”

The NSA pursues this mission with two types of standardization documents: Standardization Agreements (STANAGs) and Allied Publications (APs).

A NATO Standardization Agreement is defined as the record of an agreement among several or all the member nations to adopt like, or similar, military equipment, ammunition, supplies and stores; and operational, logistic and administrative procedures.

An Allied Publication is defined as an official NATO standardization document which some, or all, NATO nations agree to use as a common implementing document and which is distributed down to user level.

Following are significant characteristics of STANAGs and APs.

1. STANAG Features

- a. **STANAG Development.** A STANAG may be developed based on top-down instructions or bottom-up proposals. In either case, an appropriate tasking authority (TA)³⁶ would nominate a custodian³⁷ and have responsibility for development and further processing of a draft STANAG, normally by means of a working group³⁸.
- b. **Participation.** Implicit in the definition of a STANAG is that, generally speaking, all NATO nations need not be party before promulgation of a STANAG. Nations may choose not to participate in the development of standards.³⁹ Consensus/unanimity is required for all STANAGs covering Key/Capstone documents derived from the MC and those pertaining to Policy documents.⁴⁰
- c. **Ratification.**⁴¹ Following development, the TA initiates the ratification procedure, circulating the draft to participating nations for ratification. National replies to a request ratification include:
 - i. Ratifying
 - ii. Ratifying with Reservations⁴²

³⁵ AAP-03 Ed. (I) DIRECTIVE FOR THE DEVELOPMENT AND PRODUCTION OF NATO STANDARDIZATION AGREEMENTS (STANAGs) AND ALLIED PUBLICATIONS (APs)

³⁶ Paragraph 109, AAP-3(H), identifies bodies with authority delegated authority as tasking authorities. TAs may in turn delegate this function to subordinate bodies, under paragraph 109.2.

³⁷ The role of the custodian is addressed in Paragraph 205 of AAP-3(H).

³⁸ See Paragraph 204 of AAP-3(H) for a brief discussion of working groups.

³⁹ Paragraph 202.5 of AAP-3(H)

⁴⁰ Paragraph 113.2 of AAP-3(H).

⁴¹ Paragraph 207, AAP-3(H), details the ratification process for a STANAG.

⁴² Paragraph 208, AAP-3(H), explains “reservations” and “comments” by nations.

- iii. Ratifying - Not Implementing
 - iv. Not Participating
 - v. Not Ratifying
- d. Promulgation. A STANAG, whether a stand-alone document or a cover STANAG for an AP⁴³, will normally be forwarded by the TA for promulgation when at least the majority of participating nations have ratified. Director NSA has the authority to promulgate STANAGs.⁴⁴
 - e. Implementation. This is the fulfilment by a nation of its obligation under the STANAG as described in its ratification reply.⁴⁵ STANAGs are not generally distributed down to the user level and therefore require additional implementation. The national or service publication(s) that incorporate the contents of the STANAG are known as implementing documents.
 - f. STANAG Identification. STANAGs are identified by four-digit numbers, under the control of the Director NSA. For ease of reference, numbers are generally allocated based on the cognizant NSA board or group.⁴⁶
 - g. Important Points:
 - STANAGs are most commonly referred to simply by name, without a date or indication of the degree of support by NATO nations. Caution needs to be exercised regarding the applicability of a STANAG based on ratification and implementation status.
 - Consider, for example, ratification and implementation information on STANAG 2234, a covering STANAG on AJP 4.5 and not of a level to require consensus/unanimity. The STANAG was promulgated 11 Dec 2001. 17 nations ratified, with reservations made by four nations. As of September 2003, NSA reported implementation achieved by only 5 of 18 nations (Iceland not included).
 - Another example is STANAG 7141, promulgated 5 November 2002 based on ratification by 12 nations (one with reservations). As of September 2003, implementation was reported by only one nation.

2. Allied Publication (AP) Features:

APs generally follow the procedures described above for STANAGs, with the following notable exceptions:

- APs are categorized and referenced by topics, such as "ACCP" for Allied Acquisition Practices, and "AAP" for Allied Administrative Publications. A full list of AP categories is provided in AAP-4, NATO Standardization Agreements and Allied Publications, an index of standardization documents.
- APs are identified by means of a title reflecting the contents and are referenced by an abbreviated, alpha-numeric, designation according to

⁴³ About 70% of APs require national agreement to be formally stated by means of a covering STANAG, according to Paragraph 401.1 of AAP-3(H).

⁴⁴ For an additional information on promulgation and promulgation criteria, see Paragraphs 111.4, 202.8, 202.9, and 209 of AAP-3(H)

⁴⁵ Paragraph 210.1 of AAP-3(H).

⁴⁶ Paragraph 206, AAP-3(H), has more information on the identification of STANAGs.

its subject area, followed by a number assigned consecutively within each series. Sample designations are AAP-3 or AJP-4.

- APs are not subject to ratification. If national agreement needs to be formally stated, then a cover STANAG is prepared and it is the document on which nations record their ratification positions.⁴⁷

3. Standardization Publications on the NATO WAN

The NSA has an extensive database of information on STANAGs and APs on the NATO WAN.

⁴⁷ See paragraph 401.1 and 403.7 of AAP-3(H).

PART III
INTRODUCTION
TO THE LAW OF INTERNATIONAL ORGANIZATIONS AND
TO KEY NATO LEGAL DOCUMENTS

References and suggested reading:

- Agreement on the Status of the North Atlantic Treaty Organisation, National Representatives and International Staff, signed in Ottawa on 20th September 1951, Ottawa Agreement
- Amerasinghe, Principles of the institutional law of international organizations, 2nd Edition (2005);
- B.A. Garner [Ed.], Black's Law Dictionary, West Group, St. Paul, Minn. ,1999;
- Branno v. Ministry of War, 1954, Italian Court of Cassation, 22 ILR p. 756;
- Bruno Simma (Editor) : The Charter of the United Nations: A Commentary / OUP Oxford; 2 edition (12 Sep 2002)
- Charter of the United Nations, 1945
- Ian Brownlie, Principles of Public International law (1998), p.665;
- ICJ: Advisory Opinion, Interpretation of the Agreement of March 25, 1951 between the WHO and Egypt (1980) I.C.J. Reps 73, para 89-90;
- ICJ: Certain Expenses Case (1962 ICJ Reports, p.151);
- ICJ: Reparation case, the Effect of Awards Case (1954 ICJ Reports, p.47);
- ICJ: Reparations for Injuries Case 1949 I.C.J., Advisory Opinion;
- Institutions and Relations Internationales, 3rd edition, 1985, 275, as quoted in ILCYB (1985 II), 106;
- Lauterpacht, The Development of the Law of International Organization by the Decisions of International Tribunals, 152 RdC (1976 IV);
- M.K. Yassen, Création et personnalité juridique des organisations internationales, in R.-J. Dupuy (ed.), Manuel sur les organisations internationales 33-55 (1988) at 43.;
- Nuclear Tests Case (Australia v. France) (1974) in I.C.J. Reps., paras. 42 ff.;
- Philippe Gautier, The Reparation of Injuries Case Revisited: the legal personality of the European Union, Max Planck Yearbook of United Nations Law, pp. 331-361.;
- R. Jennings and A. Watts (eds.), Oppenheim's International Law, 1992, 19.;
- Reinisch, International Organizations before National Courts, Cambridge, C.U.P., 2000;
- Reuter, International Institutions, pp. 216-218;
- Sands and Klein, Bowett's Law of International Institutions, 5th Edition (2001);
- Schermers and Blokker, International Institutional Law, 4th Edition (2003), p. 4 para. 7;
- UNRRA (United Nations Relief and Rehabilitation Administration) v. Dann 1950, 16 ILR p. 337.
- Vienna Convention on the Law of the Treaties; Report on the Law of Treaties, ILCYB (1956 II), 108;

A. GENERAL INTRODUCTION TO THE LAW OF INTERNATIONAL ORGANIZATIONS

The activities of international organisations are governed by law, including obligations under general rules of international law, under their constitutions and under international agreements.⁴⁸ The sources of such legal obligations are the “internal law” and the “external law.”⁴⁹

1. Internal law

Each international organisation has its own governing law which derives from its constituent instrument, its decisions, its adopted resolutions and its established practice. The internal sphere of functioning covers all activities related to the taking of decisions, the making of rules and the establishing of regulations and staff rules, which govern the functioning of the organisation, including for example employment regulations.⁵⁰

Nevertheless this does not exclude the contingency that a common law of international organisations may exist⁵¹ and that cross-influencing might occur due to that fact that most institutional problems are comparable.⁵²

The constituent instrument of an international organisation is nearly always a treaty, in rare cases an act of one or more existing international organisations. Art. 5 (3) of the 1969 Vienna Convention of the Law of Treaties states that its rules apply to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within the international organisation without prejudices to any relevant rules of the organisation. This indicates that relevant rules of the organisation are prior-ranked.

The important institutional acts of an international organisation can be normative or procedural and range from formally binding acts to explicitly non-binding ones as such. The legal consequence of any act is determined by the constituent instrument and by obligations arising outside the organisation, e.g., by international law. The institutional acts themselves cause obligations which might limit possible actions. Those acts adopted by the organs of an international organisation are subject to the hierarchy based upon the powers of these organs and might become part of the applicable law within the internal legal order of the organisation.⁵³

2. External law

International organisations are also governed by rules arising outside the organisation itself: the rules of international law (in particular treaties and customs) and the rules of national law. Those regulate activities aiming at influencing the environment primary in member states and their conduct in reciprocal relations of the international organisation.⁵⁴

⁴⁸ I.C.J. Advisory Opinion, Interpretation of the Agreement of March 25, 1951 between the WHO and Egypt (1980) I.C.J. Reps 73, paras. 89-90.

⁴⁹ Sands and Klein, *Bowett's Law of International Institutions*, 5th Edition (2001), p. 441 para. 14-001.

⁵⁰ Amerasinghe, *Principles of the institutional law of international organizations*, 2nd Edition (2005), pp. 272 ff.

⁵¹ See Reuter, *International Institutions*, pp. 216-218; Amerasinghe, pp. 16-19, 397-402; Lauterpacht, *The Development of the Law of international Organization by the Decisions of International Tribunals*, 152 RdC (1976 IV);

⁵² Schermers and Blokker, *International Institutional Law*, 4th Edition (2003), p. 4 para. 7;; Lauterpacht, *The Development of the Law of international Organization by the Decisions of International Tribunals*, 152 RdC (1976 IV); Sands and Klein, p. 17 para. 1-030.

⁵³ Sands and Klein, p. 455 para. 14-031 f.

⁵⁴ Amerasinghe, p. 273.

3. General international law

International organisations, being an international personality, are bound by the rules of international law, to include conventional and customary rules. Conventional and customary law may accord privileges and immunities to international organisations which are necessary to fulfil their purposes and functions.

Furthermore international organisations may, by possessing legal personality, enter into treaty relationships. Moreover, they are bound by the rules and principles of general international law such as rules of customary international law concerning their activities. Examples include the protection of fundamental human rights, protection of the environment, and the performance of activities in maritime areas and in outer space.⁵⁵ In addition they are subject to general principles of law common to national legal systems. Those principles may include procedural rules and needs, proportionality, legitimate expectation and equity.⁵⁶

4. National law

In certain cases national law can equally govern relations between one international organisation and a private person, between two international organisations, or between one international organisation and a state. This is due to the fact that international organisations are located within the territory of one state or that their activities might have close connection with the national legal system. National law is usually applicable to contractual relations and also to non-contractual obligations.

B. OVERVIEW OF NATO LEGAL FRAMEWORK

The Washington Treaty, the founding document of NATO, was adopted in 1949. In 1950 it was decided to reorganise NATO in order to have an international staff, as well as an integrated military force under a supreme commander and to establish SHAPE in Europe.

It was these developments of the North Atlantic Treaty Organisation, including a permanent civilian Council as well as the national and international military presence that created the necessity for some form of multilateral agreement to define the status of NATO civilian and military personnel in the countries where they were present for the performance of their duties. It was also necessary to define the juridical status of the Organisation itself vis-à-vis the national law of the various countries in which the Council or its subsidiary civilian or military bodies were present or operating. These considerations resulted in the three principal NATO agreements on status:⁵⁷

- Agreement on the Status of the North Atlantic Treaty Organisation, National Representatives and International Staff. (Ottawa, 20 Sep. 1951) This agreement on the status of NATO headquarters and subordinate civilian entities is often referred to as the Ottawa Agreement.
- Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces. (London, 19 June 1951) This agreement is commonly referred to the NATO Status of Forces Agreement, the NATO SOFA, or merely the SOFA.
- Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Paris, 28 August 1952). This agreement, a protocol to the NATO SOFA, is commonly called the Paris Protocol.

⁵⁵ Sands and Klein, p. 458 para. 14-037.

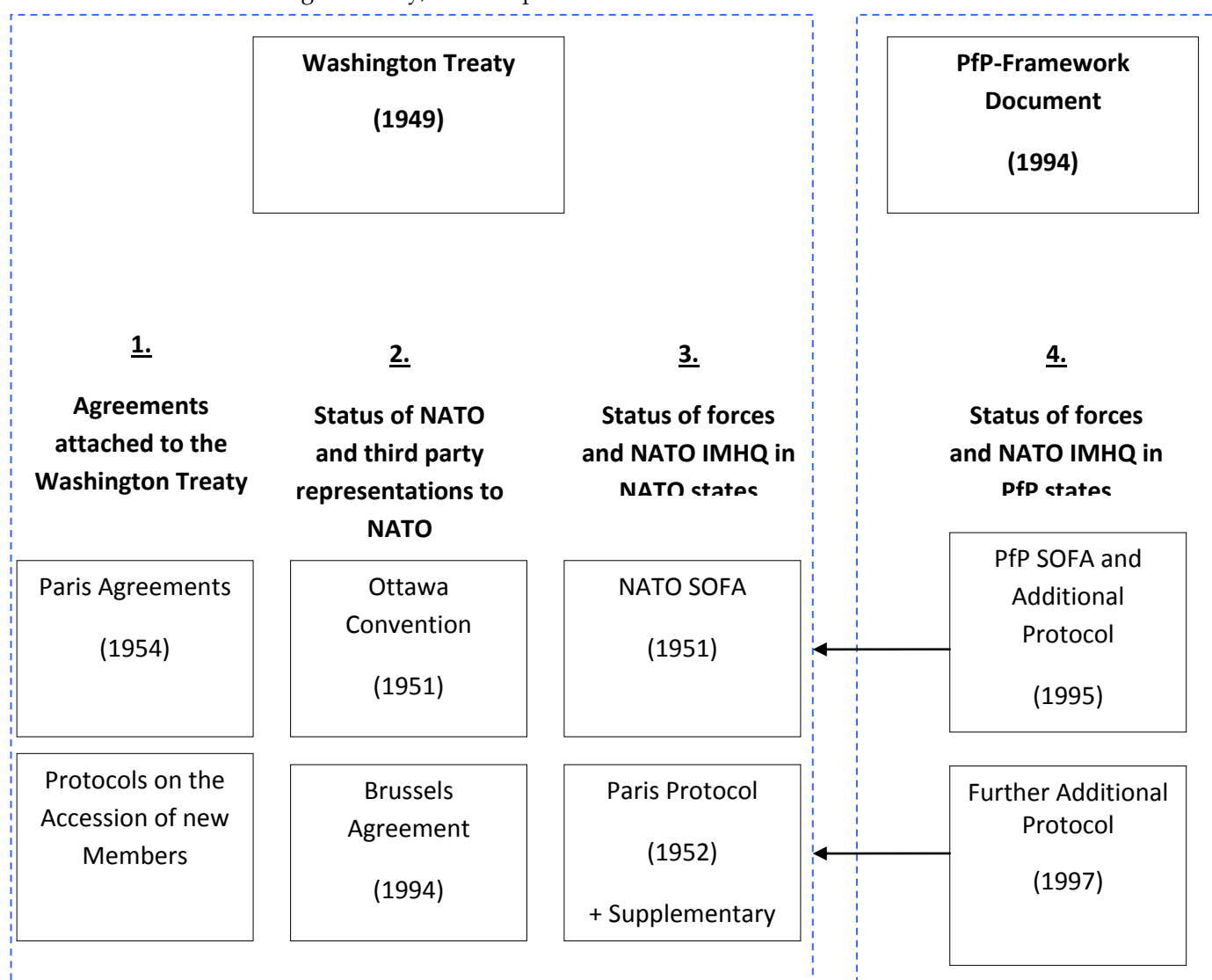
⁵⁶ See *Nuclear Tests Case (Australia v. France)* (1974) in I.C.J. Reps., paras. 42 ff.

⁵⁷ For a full list of treaty level agreements in NATO context see (1) the Chapter on Treaty law, international agreements and NATO practice, and (2) the ANNEX on the list of all NATO agreements.

After the breakup of the Warsaw Pact, NATO introduced the Partnership for Peace (PfP) Framework Document (1994). The document states that NATO will co-operate in a number of areas with non-NATO states, and that the co-operation will include planning, training and exercises. The document - in this context - put next to Washington Treaty is the PfP Framework document. It should be noted that - besides that the PfP Framework Document is not a treaty - the PfP Framework provides the basis for cooperation only; it does not include or provide wording similar to the Washington Treaty and, as such, it does not substitute or copy the obligations amongst NATO members.

Following the increasing number of PfP activities in the mid nineties, the need to conclude agreements in facilitation of the co-operation between NATO States and PfP States became apparent. From 1994 a new group of documents were concluded providing status to forces taking part in PfP activities.

The documents are listed below and for the sake of illustration three pillars are listed under the Washington Treaty, and one pillar under the PfP Framework Document:



C. THE TREATY PILLARS:

1. First pillar – Agreements attached to the Washington Treaty

The 1st pillar consists of agreements attached to the Washington Treaty, such as the accessions of new member States in addition to the original members are attached.

As we saw, Article 51 of the UN Charter reasserted the right of self-defence in the inter-state relations. The core provisions in the North Atlantic Treaty are based on the collective self-defence with express references to the UN Charter. Accordingly, the Washington Treaty Preamble, Article 1 and Article 5 provide that:

The Parties

[...]

They are resolved to unite their efforts for collective defense and for the preservation of peace and security.

They therefore agree to this North Atlantic Treaty:

Article 1

The Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

[...]

Article 5

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

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

Article 5 is the central Article of the Washington Treaty. This is the express provision which expresses the NATO nations' inherent right of collective self-defence as set out in the UN Charter - the rights of states to come to the defence of another, where only the latter is the victim of an armed attack.

This provision states that the right of collective self defence applies to member states. This is the basis of the Washington Treaty as a mutual assistance treaty.

It also refers to a geographical area in Europe or North America, although NATO now becomes involved in out of area operations. (Note that 'it' is the member nation, not the NAC.) Any NATO response to an armed attack will be a politically determined response.

2. Second pillar - Status of NATO and the national representatives

The 2nd pillar (below the Washington Treaty) relates to the status of NATO as an international organisation (the civilian headquarters in Brussels, the political bodies, and the NATO agencies) and the status of the international staff and the national representations to NATO.

For NATO members, the status is defined in the Ottawa Agreement (September 1951). The Ottawa Agreement announces explicitly that it does not apply to any military headquarters established by NATO or to any other military bodies – unless so decided by the North Atlantic Council. In very broad terms the Agreement defines NATO as a legal entity under international law. Furthermore, in addition to providing NATO with a legal personality, the Ottawa Agreement defines the immunities and privileges to be granted to NATO, to the international staff (not full diplomatic immunity) and to the national missions established to NATO (full diplomatic immunity).

In 1994, in connection with the introduction of the PfP Framework Document, it was decided to invite PfP states to post national missions to NATO. In order to define the status of those missions, an agreement – the Brussels Agreement (September 1994) – was concluded between NATO member states. The Brussels Agreement grants equivalent status to missions representing PfP states as conferred to missions of NATO states. PfP states are not signatories to the agreement, but upon accession to NATO, the new NATO members are required to sign the Agreement.

3. Third pillar – Status of forces and headquarters

The 3rd pillar records agreements regarding the status of forces and international military Headquarters within NATO.

The two main documents in this category are the NATO Status of Forces Agreement concluded in June 1951 and the Paris Protocol on the Status of International Military Headquarters (August 1952). The NATO SOFA defines the status of forces when NATO states are sending and receiving troops as a genuine part of the co-operation within the alliance. The NATO SOFA defines the bilateral relations between a sending and a receiving state in a multinational treaty.

Both the NATO SOFA and the Paris Protocol are supplemented by agreements concluded amongst Nations (NATO SOFA) and between Supreme Headquarters and individual Nations (Paris Protocol).⁵⁸

4. Fourth Pillar – Partnership for Peace

The 4th pillar is linked to the PfP Framework Document, and lists the agreements concluded in support of PfP. While the PfP Framework Document is not an agreement in the legal sense, it is the foundation of the PfP co-operation that covers a broad spectre of activities, depending on the wishes and capabilities of the involved countries. The cooperation is the result of and driven by political commitments, a shared understanding of the values on which NATO is founded. In 1997, the Euro-Atlantic Partnership Council (EAPC) was created to replace the NACC and to build on its achievements, paving the way for the development of an enhanced and more operational partnership.

The EAPC and the PfP programme have steadily developed their own dynamic, as successive steps have been taken by NATO and its Partner countries to extend security cooperation, building on the partnership arrangements they have created.

The formal basis for the Partnership for Peace is the Framework Document, which sets out specific undertakings for each Partner country.

Each Partner country makes a number of far-reaching political commitments to preserve democratic societies; to maintain the principles of international law; to fulfil obligations under the UN Charter, the Universal Declaration of Human Rights, the Helsinki Final Act and international disarmament and arms control agreements; to refrain from the threat or use of force against other states; to respect existing borders; and to settle disputes peacefully.

⁵⁸ The NATO SOFA and the Paris Protocol are discussed in detail in the following chapter of the Deskbook.

Specific commitments are also made to promote transparency in national defence planning and budgeting to establish democratic control over armed forces, and to develop the capacity for joint action with NATO in peacekeeping and humanitarian operations.

The Framework Document also enshrines a commitment by the Allies to consult with any Partner country that perceives a direct threat to its territorial integrity, political independence, or security. Cooperation is tailored to the Partner Nations' individual requirements but may include:

- Efforts to maintaining the capability and readiness to contribute to operations under the authority of the United Nations and/or the responsibility of the OSCE;
- Military relations with NATO, for the purpose of joint planning, training and exercises, aimed at strengthening the ability of PFP nations to undertake various missions (peacekeeping, search and rescue, humanitarian operations, and others as may subsequently be agreed);
- Development, over the longer term, of forces that are better able to operate with those of the members of the North Atlantic Alliance.

Launched at the November 2002 Prague Summit, Individual Partnership Action Plans (IPAPs) are open to countries that have the political will and ability to deepen their relationship with NATO. An IPAP should clearly set out the cooperation objectives and priorities of the individual partner country, and ensure that the various mechanisms in use correspond directly to these priorities.

In addition to the Brussels Agreement, the agreements that regulate the status issues in activities in cooperation with PFP countries are the following:

- Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces / Brussels, 19 June 1995
- Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace regarding the Status of their Forces. Done at Brussels June 19, 1995
- Further Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace regarding the Status of their Forces. Done at Brussels December 19, 1997

D. GENERAL INTRODUCTION TO THE LEGAL PERSONALITY OF INTERNATIONAL ORGANIZATIONS

1. Legal personality on international level

International law presupposes that legal personality is a prerequisite for the capacity to bear rights and obligations. It is increasingly recognized that while the indicia for legal personality of international organization has been drawn from the incidents of statehood, international organizations are not merely states writ large and that rights and duties resulting from their personhood are not identical to that enjoyed by states.⁵⁹ Given that international organizations are "secondary subjects" of international law, their creation and their actual existence flows from the will of other international legal persons.

Having international personality means that the international organization possesses rights, duties, powers and liabilities as distinct from its members or creators on the international plane and in international law.

⁵⁹ Ian Brownlie, *Principles of Public International law* (1998), p.665.

THE EXAMPLE OF OTTAWA AGREEMENT

Preamble of the Ottawa Agreement states that regulating of the status is in the interest of the functions:

“Considering that for the exercise of their functions and the fulfilment of their purposes it is necessary that the North Atlantic Treaty Organization, its international staff and the representatives of Member States attending meetings thereof should have the status set out hereunder,”

The assertion that an international organization has legal personality is generally accepted, unless there is clear evidence to the contrary.⁶⁰ Taking into consideration diverse guidance given by definitions of international organization, by using the common denominators offered by commonly used definitions,⁶¹ an international organization may be described as an autonomous entity, set up by a constituent instrument, which expresses independent will through common organs and has capacity to act on the international scene.⁶²

It is legitimate to maintain that international personality is a necessary attribute of an international organization⁶³ and it simply reflects the autonomy of the organization to act on its own.

The legal personality can be conferred:

- Explicit recognition by conventional means – in the constituent document of the international organization.
- Implicitly – approach introduced by the International Court Of Justice in the Reparations⁶⁴ case based on the observation that of the conferment of specific legal capacities on the organization as such and of particular functions which could not practically be carried out if the organization did not possess juridical personality in the international sphere.
- The international legal personality is associated with certain criteria, the existence of which endows the organization with personality on the basis of general international law.⁶⁵

HISTORICAL BACKGROUND

The debate about the legal personality of an international organization was for a long period fuelled by the assumption that international legal personality was the hallmark of sovereign powers. The recognition that there was no necessary link between international personality and sovereignty, on one hand, and the appreciation of an increasing role for international organization, on the other, gradually resulted in the general acceptance that these organizations possess or could possess a separate legal personality with consequential effects in the international and domestic legal orders.⁶⁶

⁶⁰ M.K. Yassen, *Création et personnalité juridique des organisations internationales*, in R.-J. Dupuy (ed.), *Manuel sur les organisations internationales* 33-55 (1988) p 43.

⁶¹ The Vienna Convention on the Law of the Treaties; Report on the Law of Treaties, *ILCYB* (1956 II), 108; *Institutions and Relations Internationales*, 3rd edition, 1985, 275, as quoted in *ILCYB* (1985 II), 106.

⁶² Philippe Gautier, *The Reparation of Injuries Case Revisited: the legal personality of the European Union*, *Max Planck Yearbook of United Nations Law*, 331-361.

⁶³ R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 1992, 19.

⁶⁴ *Reparations for Injuries Case 1949 I.C.J.*, Advisory Opinion. This case was confirmed by the ICJ's "Certain Expenses" Case of 1962.

⁶⁵ The criteria required to identify such personality are: 1. A permanent association of states, with lawful objects, equipped with organs, 2. A distinction, in terms of legal powers and purposes, between the organization and its member states, 3. the existence of legal powers exercisable on international plane and not only within the national systems of one or more states. See for example, Ian Brownie, *Principles of Public International law*, (1998), p.679.

⁶⁶ Reinisch, *International Organizations before National Courts*, Cambridge, C.U.P., 2000.

The advisory opinion given by the International Court of Justice in 1949 concerning the “Reparation for injuries suffered in the service of the United Nations” is the leading case on the international legal personality of international organizations. In its decision, the Court considered that the functions and rights conferred to United Nations by its constituent instrument were such that they necessarily implied the attribution of international personality to the organizations.

Whether powers are explicit or implied, what makes a difference is whether they are vested in the organization as a legal person or in the individual member states collectively.

Legal personality has no pre-determined content in international law.⁶⁷ Its attribution does not authorize an international organization to perform specific categories of acts.⁶⁸

The precise scope of rights and duties will vary according to what may be reasonably seen as necessary, in view of the purposes and functions of the organization to enable fulfilment of tasks. Thus the test is a functional one; reference to the functions and powers of organization exercised on the international plane, and not the abstract notion of personality, will give guidance on what powers may properly be implied and what is the degree of the legal personality of an organization.⁶⁹ The difference between attribution of personality, on one hand, and the specific capacities, on the other, emerges from the constitutive instruments of some organizations.

The attribution of implied powers is a result of liberal interpretation of the purposes and functions of an organization; the organization is treated as dynamic institution, evolving to meet changing needs, being further removed from the original language of its constituent treaty.

Whether flowing from a constituent instrument or implied instrument, the international legal personality of an international organization is based upon the will of the funders; it is opposable to its members, since these are bound by the very instrument from which this personality flows.

Legal Personality and Juridical Personality

Both Legal Personality and Juridical Personality are often used interchangeably. Juridical implies “relating to law; legal”⁷⁰. For example, a natural person is a non-juridical entity, contrary to an organisation having juridical personality. Legal Personality is “the legal conception by which the law regards an artificial entity as a person”⁷¹. In the general language it is more common to refer to legal personality, while in the domestic affairs of the host nation it is referred to as juridical personality.

As already mentioned in the Chapter on The Development and Organisation of NATO Overview of NATO Bodies, the juridical status (vis-a-vis national law) of the organisation has been established in the Ottawa Agreement and the Paris Protocol.

2. Legal personality on non-international level

The proclamation of the power of an international organization to act as an autonomous legal person in a national legal order is contained in the vast majority of

⁶⁷ Lauterpacht, *The Development of the Law of International Organizations by Decisions of International Tribunals*, 152 RCADI (1976-IV) 407; U.N.J.Y (1957) 165, para.5.

⁶⁸ International Court of Justice, Advisory opinion, reparation case.

⁶⁹ This line of reasoning came up in one way or another in various cases dealing with international personality of international organization. See, for example, the Reparation case, the Effect of Awards Case (1954 ICJ Reports, p.47), the Expenses Case (1962 ICJ Reports, p.151), WHO Agreement Case (1980 ICJ Reports, p.73).

⁷⁰ B.A. Garner [Ed.], *Black’s Law Dictionary*, West Group, St. Paul, Minn., 1999.

⁷¹ B.A. Garner [Ed.], *Black’s Law Dictionary*, West Group, St. Paul, Minn., 1999.

constituent documents. These are often supplemented by more specific instruments specifying the legal status and immunities and privileges of the organization, or by bilateral treaties with the host state to further define the organization's legal status in the host country. These instruments commonly delimit the organization's personality in the domestic sphere, the capacity to conclude contracts, acquire and dispose of property and to institute legal proceedings.

Regarding the domestic capacity to perform legal acts under national law, as a rule, the constituent document provides for it. In this case member states are under an obligation to recognize the legal personality of the international organization in their legal system.

If it can be established that in international law that an organization has personality, then the national courts would recognize the legal personality of the organization in the national law.⁷²

STATE PRACTICE

Certain States, such as the UK, which require that the treaties be implemented by legislation in order to become enforceable in their legal systems, recognize the organization by incorporating the constituent instrument in their law.

USA, Germany and Austria, which automatically give effect in their national law to treaties to which they are parties, would recognize the legal capacity of the organization in their legal system without incorporation.

EXAMPLE OF DOMESTIC LEGAL PERSONALITY CLAUSE

Article 1 section 1 of the Convention on the Privileges and Immunities of the United Nations stipulates that the United Nations shall possess juridical personality. It shall have the capacity to contract; to acquire and dispose of immovable and movable property; and to institute legal proceeding. This provision specifies the more general functional personality clause of Article 104 UN Charter according to which the Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

THE EXAMPLE OF OTTAWA AGREEMENT

The Ottawa Agreement expressly uses the term *juridical personality*:

"Article IV

The Organization shall possess juridical personality; it shall have the capacity to conclude contracts, to acquire and dispose of movable and immovable property and to institute legal proceedings."

International organizations need to enter in broad variety of private law contracts in order to perform their day to day operations. In recent practice most sales, rental and service contracts between international organizations and private parties are governed by national law. The question which national law applies to a particular relationship is a question of private international law or conflict of laws. Since international organization enjoys the same party autonomy to determine the applicable law as other private parties, it is normally the law expressly or implicitly chosen by parties.

⁷² There are many examples of the courts admitting that international organizations had legal personality in the national system (e.g. when filing claims), on the basis that they had international legal personality. In Italy NATO has been held to have legal personality, because it had international legal personality. See, *Branno v. Ministry of War*, 1954, Italian Court of Cassation, 22 ILR p. 756. In *UNRRA (United Nations Relief and Rehabilitation Administration) v. Dann* the Supreme Court of Netherlands held that the question of personality was one for international law and not for municipal law, and therefore the UNRRA had personality and capacity to act. See, 1950, 16 ILR p. 337.

THE EXAMPLE OF THE OTTAWA AGREEMENT

While NATO has juridical personality in the domestic affairs, it has immunity from certain legal proceedings:

“Article V

The Organization, its property and assets, wheresoever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case the Chairman of the Council Deputies, acting on behalf of the Organization, may expressly authorize the waiver of this immunity.

It is however, understood that no waiver of immunity shall extend to any measure of execution or detention of property.”

PART IV
KEY NATO LEGAL DOCUMENTS
ON THE STATUS OF FORCES AND HEADQUARTERS

References and suggested reading:

- Agreement between the parties to the North Atlantic Treaty regarding the status of their forces. Done at London June 19, 1951. (NATO SOFA)
- Agreement to Supplement the NATO SOFA with respect to Foreign Forces stationed in the Federal Republic of Germany between West Germany (BRD) and Belgium, Canada, France, Netherlands, U.K. and U.S. (03 August 1959, amended in 1971 and 1981, and extended to be applied throughout the unified Germany by exchange of notes in 1994)
- Allied Joint Publication 4.5 on Host Nation Support
- Anthony Aust, *Modern Treaty Law and Practice* (Cambridge 2000)
- Cour de Cassation Belge (JT, 1977, 438 –cites par Jean Salmon., Cours ULB de droit des gens, tome I, édition 1992/1993, p. 89)
- Dieter Fleck (ed.), *The Handbook of the Law of Visiting Forces*, Oxford University Press, 2001
- Dixon & McCorquodale: *Cases and Materials on International Law* (2nd edition, 1995);
- EEC COMMISSION REGULATION (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ L 253, 11.10.1993, p. 1) (Implementing Provisions of the Customs Code)
- EEC Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value-added tax: uniform basis of assessment / *OJ L 145, 13.6.1977, p. 1-40* (EU 6th VAT directive, 15.10)
- EEC COUNCIL REGULATION (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (Community Customs Code)
- EU Council Directive 2006/112/EC on the common system of value added tax
- Ian Brownlie, *Principles of Public International Law*, 5th Edition, Oxford, pp. 372-375.
- MacLean, *Textbook on Public International Law* (1st edition, 1997)
- Mette Prassé Hartov: NATO Status of Forces Agreement: Background and a Suggestion for the Scope of Application; *Baltic Defence Review* No. 10, Vol. 2/2005.
- MS(J)-R(51) 9, Summary Record of a Meeting of the Working Group on Status (Juridical Subcommittee), 23 February 1951, the Blue Book p. 120.
- MS-D(51) 11(R) Status of Forces Agreement – Revised Text, 20 February 1951.
- NATO Logistic Concept
- NATO-Spain Supplementary Agreement, dated 28 February 2000
- Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty. Done at Paris August 28, 1952. (Paris Protocol)
- Serge Lazareff, *Status of military forces under current international law* (A.W. Sijthoff/Leyden 1971)
- STANAG 6007 Financial Principles and Procedures for Provision of Support within NATO 19 September 1996
- Status of Forces Agreements and U.N. Mandates: What authorities and Protections do they provide to U.S. personnel? Hearing before the Subcommittee on International Organizations, Human Rights, and Oversight of the Committee on Foreign Affairs, House of Representatives, February 28, 2008 (Serial no. 110-153)
- Travaux Préparatoires, Summary of meeting of the Council Deputies, 2 March 1951, D-R(51)15;
- Vienna Convention on Diplomatic Relations, 1961
- Webster's Handy Dictionary, Oxford University Press, 1992

A. INTRODUCTION

Peacetime stationing of troops abroad is a more recent development, which has coincided with the adoption of the United Nations Charter and its limitations to the right of states to use force. Whereas friendly transit has been applied through history⁷³ the stationing of foreign troops has normally been associated with occupation.

In Post World War II Europe, a number of factors came into play. Through the creation of military alliances, and as the occupied western states re-established independence, the occupation forces evolved into invited guests. With presence came the need to determine the status of these forces and of the international military headquarters to which they referred.

The immunities and privileges of foreign forces have roots in the concept of state immunity. Soldiers and forces, when present on foreign territory with consent of the receiving State were usually considered to be – using a modern term - state agents. In customary international law certain immunities have been provided, beginning from the ancient empire through the crusader troops transiting Europe up to the World War II and till today. The immunities relate mainly to immunity from jurisdiction and the corresponding right for the visiting force to exercise disciplinary powers over the members of the force. Practice varies from absolute immunity to functional immunity, and to facilitate the presence of visiting forces more States pursue Status of Forces Agreements to express their common understanding and operationalise the status of the visiting force⁷⁴. This trend may in part be rooted in the existence of the NATO SOFA and the extended application which it has been subject to especially with the joining of new NATO members and the introduction of the Partnership for Peace SOFA. However, the practice of concluding SOFAs are not only related to NATO.⁷⁵

As previously identified the PfP SOFA and the Further Additional Protocol are transition documents through which the application of the NATO SOFA and the Paris Protocol are presented. Accordingly, the following chapters regarding the NATO SOFA and the Paris Protocol do not elaborate specifically on the PfP SOFA and the Further Additional Protocol, but are equally relevant to the extended application so provided.

⁷³ Lazareff, p. 7-8, *Status of military forces under current international law*, 1971

⁷⁴ For a more recent commentary on customary international law, see Ian Brownlie, *Principles of Public International Law*, 5th Edition, Oxford, pp. 372-375.

⁷⁵ For US examples, see *Status of Forces Agreements and U.N. Mandates: What authorities and Protections do they provide to U.S. personnel?* Hearing before the Subcommittee on International Organizations, Human Rights, and Oversight of the Committee on Foreign Affairs, House of Representatives, February 28, 2008 (Serial no. 110-153).

B. NATO SOFA

The NATO Status of Forces Agreement (NATO SOFA) will be discussed in greater detail due to its central role in supporting NATO activities. The NATO SOFA has, apart from adjustments to currencies, remained unchanged since it was signed in 1951, and it is unique as it is one of the few multilateral status of forces agreements. Its multilateral nature is considered one of the strengths of the agreement, and to quote one of the first commentaries of the NATO SOFA, Mr. Serge Lazareff:

“Within this framework...the presence of foreign Forces loses its appearance of “occupation”...every NATO State is theoretically in a position to send forces abroad as well as to receive forces...All the NATO States have a common concept of the main legal and administrative principles...the practical difficulties resulting from the conclusion of a series of bilateral agreements would have been considerable and would have necessitated cross negotiations between all States of the Alliance”

1. Preamble

The preamble was adopted and worded on a French initiative⁷⁶, defining the purpose and scope of the NATO SOFA. The important point submitted in the preamble is that the NATO SOFA defines the status of any force, which might be sent abroad to serve in another NATO Nation.

The Preamble declares in general terms that the Agreement is concluded *between the Parties to the North Atlantic Treaty*. The reference to the North Atlantic Treaty does not imply that any signatory to that treaty automatically becomes a Party to the NATO SOFA. States acceding to the North Atlantic Treaty need to separately accede to the NATO SOFA in accordance with the procedures laid down in the NATO SOFA, Article XVIII, paragraph 3, and any conditions adopted by the Council in accordance with the said Article (see comments to Article XVIII).

The preamble also reaffirms the principle of *consent*, i.e. that the admission of a foreign force is subject to approval (“arrangement”) of the receiving sovereign power: The sending of forces requires the consent of the receiving Party. Nothing in NATO legal framework confers any rights to allied States to deploy forces to the territory of another allied without the consent of that State. Despite the integrated military co-operation, the principle of consent has remained unchanged. Accordingly, the NATO SOFA does not affect the (national) decision to send forces, nor does it decide on the special formalities or conditions under which the forces might be disembarked or take up their duties in the receiving State, but leaves it to the Parties to conclude separate agreements on the entry and facilities (here understood as the conditions for disembarkation and for taking up stationing) and any other specifics such as the number of troops, the character of the arms to be brought into the receiving State, the use of weapons, and designated border crossing areas. As an example, NATO and PfP exercises are conducted upon invitation from the receiving State – the status of the forces derive from the NATO SOFA and the details on host nation support, movement

⁷⁶ At the negotiations in April 1951, the French delegation noticed that the draft text did not prejudge the formalities related to the decision of entry or stationing of forces. Neither did the text state the exact purpose of the Agreement. The ratification instrument submitted by the United States of America includes the following statement: *It is the understanding of the Senate, which understanding inheres in its advice and consent to the ratification of the Agreement, that nothing in the Agreement diminishes, abridges, or alters the right of the United States of America to safeguard its own security by excluding or removing persons whose presence in the United States is deemed prejudicial to its safety or security, and that no person whose presence in the United States is deemed prejudicial to its safety or security shall be permitted to enter or remain in the United States.*

co-ordination etc. are set out in ad hoc or standing arrangements (i.e. STANAGS, AJPs, MOUs or similar arrangements) to which the receiving State is a party⁷⁷.

The Preamble furthermore includes a *clarification* that the NATO SOFA is not applicable to receiving State forces or civilian components, and it provides for *amplifications*. The understanding of the drafters was that the text of the NATO SOFA does not prejudice questions related to the entry or stationing of forces or making facilities available to visiting forces. The recognition of the right of sovereigns to conclude additional agreements has not given rise to discussions. A number of agreements are concluded bilaterally in the course of NATO SOFA, e.g. between United Kingdom and Canada, and between France and the Netherlands. The most extensive number agreements concluded pursuant to the NATO SOFA are, by far, the agreements concluded by Germany (BRD) with the post-occupational powers⁷⁸. Yet, the wording “...in so far as such conditions are not laid down by the present Agreement...” has, however, provoked discussion. Does this statement indicate that Parties to the NATO SOFA are limited to only concluding agreements where the NATO SOFA is silent or does the Preamble authorise Parties to conclude separate agreements as they may decide – and eventually deviate from the NATO SOFA? The first approach (complementing the text) could be supported by the objectives of the agreements mentioned above and it is the interpretation offered by Serge Lazareff⁷⁹. However, agreements have been concluded deviating from the NATO SOFA by e.g. conferring rights of the sending State back to the receiving State. Although some of the Agreements specifically recognise that they are complementing, not derogating from SOFA⁸⁰, other agreements refers to the NATO SOFA Preamble and derogate from the text of the SOFA⁸¹.

2. Article I

This Article defines the terms "force", "civilian component", "dependant", "sending State", "receiving State", "military authority" and "North Atlantic Council". Equally important, this Article defines the functional application of the NATO SOFA.

(1) "Force"

The definition of "force" includes collective units (“force”) as well as individual members of the force (“members of the force”). It was decided, however, that military personnel accredited under the Vienna Convention on Diplomatic Relations would not come under the NATO SOFA. This is not stated directly, but it was agreed that such personnel would fall under the escape clause in the definition (“...provided that the two Contracting Parties concerned may agree that certain individuals, units or formations shall not be regarded as constituting or included in a 'force' ...”). The issue of whether or not the NATO SOFA would apply to forces in transit or on leave was discussed throughout the drafting of Article I. The discussions concluded that personnel in transit come under the agreement and as do personnel on leave, if they are taking their leave in the State to which they are posted. A further application can be rendered either unilaterally by a Contracting Party or by agreements between the Parties.

⁷⁷ Some Partner Nations may still require a different procedure to be applied, many of them due to legal regimes adopted after the Cold War.

⁷⁸ Fleck (ed.), pp. 349-364

⁷⁹ Lazareff, p. 75

⁸⁰ Lazareff, pp.74-75, *ibid*, gives as examples Dutch-French Agreements on Camp La Courtine from 1959 and 1960, and Agreements concluded between Belgium-Canada and Belgium-U.K. (undated).

⁸¹ An example is the German Supplementary Agreement. The Preamble of the Supplementary Agreement states that the “[new] arrangements shall be based on the [NATO SOFA]”. It does not state that the NATO SOFA applies or has a prior position. The reason could be that West Germany at the time had not acceded to NATO SOFA. The preamble continues: “...supplemented by such provisions as are necessary in view of the special conditions existing in regard to the forces stationed in the Federal Republic of Germany.” And paragraph 4 of the Preamble states that such supplementation is authorised under NATO SOFA: “[NATO SOFA] also provides for separate arrangements supplementary to that Agreement.”.

Nationality is not a condition to be met as a “member of a force”, and the question of how to deal with members of a force, who carry dual citizenship (i.e. citizenship of both the sending and the receiving States) may look unresolved⁸², however a thorough reading of the Articles show that the issue is addressed specifically.

Finally, the member of the force must be present on the territory of another Contracting Party on official duties. This is a repetition of the preamble (receiving State personnel are not deriving status from the NATO SOFA) and moreover implies that:

- a. The force must be operating in the North Atlantic Treaty area. By its wording it appears to be a geographical limitation, referring to the area of the North Atlantic Treaty as defined in the Washington Treaty, Article 6. However, the geographical limitations set out in NATO SOFA, Article I, are further limited by Article XX⁸³;
- b. Be present in the receiving State on official orders. The drafters deliberately refrained from referring to “NATO” duties in order not to limit the functional application; yet it has been argued that only official duties related to NATO are covered by the meaning. However, if one looks at the preparatory works it becomes evident that this was not the intention of the drafters to in anyway limit the application of the NATO SOFA; it was subject to discussions and the conclusion was clear – the NATO SOFA was to apply no matter the context in which NATO members were to cooperate. In a more current perspective this seems equally adequate. There are extensive military operations within the Alliance (and between Alliance members and PfP Nations), the basis of which are bilateral agreements or agreements initiated by a group of Nations which are not always declared as NATO activities. However, given the language of the NATO SOFA, combined with the clear directions provided by the drafters and taking into account that activities are a result of the general military co-operation that has grown out of the Alliance, promoting the general co-operation and defensibility of the Alliance in accordance with Article 3 of the Washington Treaty⁸⁴, it is suggested that the NATO SOFA always apply by “default”. This is to be understood as when Parties to the NATO SOFA send or receive forces, including individual members of a force, it is on the assumption that NATO SOFA applies, no matter the nature of the visit or the stationing. It is implicit that NATO SOFA does not apply if the status of the force or of the member of the force is defined by other arrangements and accepted as such by the receiving State (e.g. through a diplomatic accreditation). As the activity is subject to the consent of the receiving State, that Party must be expected to object to the default clause if it disagrees with the assumption.

Once the force (units, individuals) are permitted to enter the territory of the receiving State under the NATO SOFA (i.e. in connection with official duties and within the geographical limitations adopted in the NATO SOFA), the SOFA applies equally to persons who are on leave in the country in which they are stationed.

(2) "Civilian Component"

The definition of civilian component states four conditions to be met to be as a member of a civilian component:

- a. Be civilian;
- b. Accompany a force;
- c. Be in the employ of the armed service;
- d. Fulfill the conditions of nationality.

⁸² Exceptions made, e.g. in Article III, paragraph 5.

⁸³ See comments to Article XX.

⁸⁴ For a more elaborate discussion of the applicability of NATO SOFA and summary of the drafting, see Mette Prassé Hartov: NATO Status of Forces Agreement: Background and a Suggestion for the Scope of Application; Baltic Defence Review No. 10, Vol. 2/2005.

The first criterion does not give rise to comments – it covers personnel, who are not entitled to wear uniform. **The second criterion** is more complicated; when does the civilian component *accompany a force* – and what if the civilian component deploys before the force in order to make sufficient preparations before the arrival of the force? It seems to be contradictory to the overall aim of the SOFA if civilian employees are excluded from the NATO SOFA because they deploy separately from the force. Therefore it is assumed that this criterion is overruled by **the third criterion** – that the personnel must be *in the employ of the armed services of the sending State*. Although this criterion seems obvious, state practice on employment of support personnel varies greatly, but it is commonly accepted that contractors (understood as non-governmental, non-military companies or individuals provided to the force under a contract between the force and a commercial firm) are not covered by the definition. Accordingly, some states are keen to conclude agreements to ensure that categories of civilians not directly employed by the armed services are included in the definition of civilian component. **The fourth criterion concerns nationality**. To come under the protection of the NATO SOFA, members of a civilian component must be a national of a NATO state⁸⁵, and not be stateless. Furthermore, the person may not be a national of **or** an ordinarily resident in the receiving State. The first two requirements are rooted in security screening considerations. The third requirement was adopted to ensure that the person does not escape jurisdiction or enjoy the customs and fiscal benefits of being a member of a civilian component. In regard to dual citizenship, i.e. if a member of a civilian component holds citizenship (dual nationality or holding two or more passports) of both the sending State and the receiving State, that member may be considered to be a receiving State national, when he is in the receiving State, and may thus be excluded from the definition. To overcome this some countries have concluded special agreements providing that dual nationals are considered nationals of the sending State.

(3) “Dependent”

Two categories of persons are recognised as “dependents” under the NATO SOFA: The spouse and the child of a member of a force or civilian component, when the child is dependent on his or her support.

The legalities of the relationship is not the subject of the NATO SOFA but the word “spouse” does indeed translate to “wife or husband”⁸⁶ and it more than indicates that the relationship has to be formalized in or recognized as formal by the sending State. The receiving State shall accept the legitimacy of the relationship and even if the matrimonial institution does not exist in the receiving State unless international private law of the receiving States dictates differently (e.g. if the relationship goes against the *ordre public* of the receiving State). *Anderson/Burkhardt*⁸⁷ advise sending States to be cautious not to send dependants to a receiving State if the relationship between the member and his or her dependant constitutes a violation of the criminal law of the receiving State, unless, of course, a bilateral understanding is in place ensuring that the receiving State will not prosecute the dependant or the member.

The English version excludes, if taken very literally, children of the spouse from the definition of “children” (“...depending on him or her for support...”). The French text on the other hand, if translated literally, excludes children who are dependent on either of the spouses for support as well as children of single parents (“...qui sont à leur charge...” – “...depending on them for support...”). In practice both children dependent on the member of the force or civilian component and/or his or her spouse are covered by the definition⁸⁸, including adopted children and children of previous marriages of either the member or the spouse, also in case the member or spouse does not have custody over the child, assuming

⁸⁵ The SOFA requires citizenship of a State “Party to the North Atlantic Treaty”.

⁸⁶ Webster’s Handy Dictionary, Oxford University Press, 1992

⁸⁷ Anderson/Burkhardt, in Fleck (ed.) p. 58.

⁸⁸ Lazareff, *ibid*, p. 95.

that the non-custodial parent remains legally responsible (under sending State law) for supporting and providing for the child⁸⁹.

The definition does not fix an age limit for when a “child” is to be considered as such, the criteria is entirely attached to the dependence and each case is to be justified although minority of age always presumes dependence. “Dependence” is primarily understood as financial interdependence; however the degree of dependence is not made clear. In practice this has not given rise to cases.

Article I, 1 (c) does not include other family members. To compensate some states have through agreements broadened the scope of Article I, 1 (c); other States provide a broader understanding in their implementing legislation leaving it by and large to the sending States to determine who will qualify. The common feature of the wider definitions is that factual dependants are included in the definition, i.e. persons/relatives who are in fact dependent on a member of the force or a member of the civilian component.⁹⁰

The definition in Article I, 1(c), does not address the question of nationality or dual citizenship. The issue is, like for members of the force and of the civilian component, addressed in each of the articles. Neither does the definition indicate the standing enjoyed under the NATO SOFA – the status is defined (or not defined and thereby, erroneously left to the receiving State law) in the text of the subsequent articles. The general picture is that dependants are largely treated as other foreigners with the few exemptions listed below. Unless waived by the receiving State, dependants are subject to visa requirements and immigration regulations, and they become subject to receiving State law (driver’s license, tax on income earned in the receiving State). The drafters of the NATO SOFA clearly expressed an expectation that the participating States would seek legislation or administrative regulations to seek to ease the regime to be conformed to by civilians and dependents⁹¹, and several NATO Nations have adopted either supplementary arrangements or introduced national regulations extending the category of dependents to include other family members and providing effective status that support their presence and thus the presence of the force in the receiving State.

The Article furthermore defines “sending State” and “receiving State” in a straightforward manner; it defines the term “military authority”, which is significant in regard to Article VII (jurisdiction), and defines the “North Atlantic Council” by reference to the Washington Treaty, Article 9, by which the Council is established.

3. Article II

Respect of local law

Visiting forces enjoy a certain level of immunity from of receiving State legislation through international law on state immunities, as the visiting force represents the sovereign powers of a foreign state (and its property), unless immunity is waived ad hoc or in international agreements⁹². Furthermore visiting forces do not form a private law or a public

⁸⁹ See also Anderson/Burkhard, in Fleck (ed.) p. 58.

⁹⁰ Similarly, the language of the NATO SOFA and Paris Protocol is adjusted in correspondent Supplementary Agreements. An example is that made in the NATO-Spain Supplementary Agreement, dated 28 February 2000: “Dependant” as defined in Article 1, paragraph 1(c) of the Agreement, shall also include a parent of a member, or of the spouse of such a member, who is financially, or for other reasons of health, dependent upon and support by such a member, who shares the quarters occupied by such a member, and who is recognized as a dependant of such members by the military authorities of Spain. Upon approval of the Parties to the present Supplementary Agreement, other family members may be considered as dependants when warranted by special circumstances.

⁹¹ Travaux Préparatoires, p. 130, Summary of meeting of the Council Deputies, 2 March 1951, D-R(51)15; report of the Chairman of the Working Group: “...it was the hope of the Working Group that certain administrative measures be taken to reduce formalities once entry had been effected”.

⁹² Absolute vs restrictive/qualified immunity, see Dixon & McCorquodale: Cases and Materials on International Law (2nd edition, 1995); MacLean, Textbook on Public International Law (1st edition, 1997)

law body, and in some countries the lack of clear categorization gives rise to particular difficulties in terms of defining which rules to apply to visiting forces (or to multinational military entities).

NATO SOFA, Article II, provides an obligation for the visiting force and its members and their dependents to respect the law of the receiving State and to abstain from any activities contrary to the spirit of the NATO SOFA and in particular to refrain from engaging in political activities. There is an obligation put on the sending State to see to this. During the drafting of NATO SOFA, the content of Article II was not much debated; the NATO SOFA was shaped along the lines of the Brussels Treaty Agreement (the WEU SOFA), which had similar language, but in a less prominent place of the Agreement and it attached only to “members of the force”. In regard to drafting the NATO SOFA, the discussions related to jurisdiction (reflected in comments to VII), claims (VIII), the liabilities of a sending State and if a receiving State eventually could bring a sending State into court in the receiving State.

The Article has been subject to academic discussions but in practice it is understood that visiting forces are not bound by an obligation to comply with the laws of the receiving State, but respect of local law requires that the visiting force seeks to coordinate and cooperate with the receiving State in those areas where there are discrepancy between the operational requirements of a visiting force and local law. Moreover, it has been understood that in some areas the receiving State may be requested to act on behalf of or represent the visiting force in matters where it would be difficult for the visiting force to act according to local law. One example is holding certain authorisations, which may be obtain and observed only through the assistance of the receiving State.

The NATO SOFA subsequently identifies areas, in which receiving State law is applicable. In some areas, such as employing a local workforce (local wage rate employees, in NATO parlours), receiving State law regulates the relation between the Force and the local employees, including of health, safety and other employment laws.

It is important to note that respecting the local law does not imply to be subject to the receiving State organization as an international treaty cannot be interpreted unilaterally by way of authority as the international treaty is the result of the free will of two contracting parties. A party is not bound by the unilateral interpretation, by way of local legislation, of the other contracting party⁹³.

Furthermore, the interpretation of an international treaty cannot be done by reference to the national legislation of one of the contracting Parties as the only admissible interpretation is that that comes from the context of the agreement, genesis and preparatory works. Otherwise, what would be the significance and applicability of an international agreement if the contracting parties interpret its provisions following notions of their own national legislations? In this vein, the terms used by the drafters of an international agreement have to be interpreted in accordance with the willing and common intention of the contracting Parties and not with the meaning that could have under the national legislation of any of the contracting Parties. This is confirmed by Article XVI of the NATO SOFA: “All differences...relating to the interpretation or application of this Agreement shall be settled by negotiation...”

In the following areas, the NATO SOFA provides a choice of law or establishes specific rules.

- Article III (entry/exit/visa) Article IV (drivers' license)
- Article VI (possession of (service)arms)/
- Article VII (criminal offences - punishable by R/S or S/S law)

⁹³ Cour de Cassation Belge (JT, 1977, 438 –cites par Jean Salmon., Cours ULB de droit des gens, tome I, edition 1992/1993, p. 89)

- Article VIII (settlement of claims under R/S law) Article IX (local purchases, by individuals/by the force; use of buildings, grounds, facilities and related services; employment of LWR; access to medical care)
- Article X (taxation, exemption of S/S members of the force/civilian component from tax in R/S on salaries and emoluments paid to them in that capacity) Article XI (customs; import/export/use of goods for the force/individuals; official documents under seal; goods purchased in R/S and exported; customs and border arrangements)
- Article XIII (cooperation with and assistance to S/S customs/fiscal authorities to prevent abuse of privileges)
- Article XIV (foreign exchange regulations of both R/S and S/S apply to the force/individuals)

4. Articles III - VI

Upon entering and leaving a receiving State NATO SOFA exempts the members of the visiting force (but not civilians or dependants) from passport, visa, and immigration control, on the condition that they hold a travel order that conforms with the specifics detailed in NATO SOFA and can present that and their national (military) ID. This is a practical measure to ease the passing of borders without visa and passport, but it does not constitute a right to enter a country and in some countries it is required to notify in advance of entry, just as the receiving State may require to countersign the travel order, and request that individuals are removed by the sending State from the territory of the receiving State.

As for the travel order the drafters foresaw a need for NATO Nations to exchange specimens of national ID-cards and for developing a common format for travel orders. The exchange of specimens was not, as far as this author is informed, effectuated, but a format for a travel order was distributed in the Allied Movement Publication. It should, however, be recalled that in as much as a template may exist the travel order is a national document, issued by the sending State and should conform with Article III, paragraph 1, and has to be accompanied by the national ID card of the holder, which additionally has to hold the information defined in the Article.

The drafters of the NATO SOFA discussed if the visa and passport waiver should be extended to civilians and dependents, but the majority of drafting Nations did not support that approach but expressed that "...it was the hope of the Working Group that certain administrative measures might be taken to reduce formalities to a minimum once entry had been affected."⁹⁴ More Nations have taken such measures and introduced separate visa regimes or waived requirements to comply with residency and registration requirements.

Article III, paragraph 4, provides an obligation for the sending State to inform the receiving State if members of the force or civilian component either leave the employment with the sending State without being repatriated or absent themselves from the service. In paragraph 5 is the right of the receiving State to request the removal or expulsion of members of the visiting force and their dependents, the exemption being that this cannot be extended to persons, who are nationals of the receiving State.

Article IV obligates the receiving State to accept a drivers license issued to a member of the force or civilian component by the authorized sending State authorities without further tests, or - based on such a license - issue its own drivers license to that person. The latter does not translate into "exchanging" a driver's license issued by the sending State for a receiving State license, but the receiving State may wish to provide additional proof of driving in addition to that held by the member. Moreover, it should be noted that the Article does not extend to drivers licenses held by dependents, and supplementary agreements often address

⁹⁴ Travaux Préparatoires, p. 130, D-R(51)15, Summary record of a Meeting of the Council Deputies, 2 March 1951 (report from the Working Group).

this to ensure that also dependents enjoy this status most commonly on the condition that they are of driving age under receiving State legislation.

The wearing of uniform is addressed in Article V, paragraph 1. Two opinions were tabled in the Working Group drafting the NATO SOFA 1) a proposal to include specific rules; exceptions to the rules should be subject to consultations between the military authorities of the sending and receiving State, and 2) include a general principle that members of the armed forces should wear uniform. The Article ended up somewhere in between due to discussions on whose regulations the members of the force were to follow – those of the sending or receiving State, the compromise being that an agreement may be reached between the sending and the receiving State with regard to individual members and wearing of civilian clothes. Accordingly, individuals (members of the force) shall normally wear uniform.

It is the understanding of this author that the requirement is linked to the performance of their official duties in the receiving State as stated in a travel order (Article III, paragraph 2.a.), unless otherwise established either by agreements or under receiving State regulations. The individual members of the force are required to comply with sending State regulations on wearing of uniform and civilian dress, e.g. restrictions on wearing a uniform outside the military compound. However, the receiving State may communicate to the sending State specific requirements (or sensitivities) based on the conditions applicable to its military personnel in this regard, which are to be observed by the visiting forces. This author feels safe, based on the lack of practice to the contrary, to assume that if the receiving State wishes to invoke its rights under Article V, paragraph 1 that State has to explicitly inform the sending State of the regulations to be observed⁹⁵.

With regard to regularly constituted units or formations the requirement to wear uniform is clear and understandable. Units/formations are to wear uniforms while crossing frontiers. The NATO SOFA does not define the terms "regularly constituted units or formations", however, based both the subject of Article V and on drafters' discussions on the possible use of the term "contingent" and the unwillingness to extend any such definitions to include civilians, it is obvious that only members of the force make up units/formations. One could reasonably link it to the use of collective movement orders in Article III, paragraph 2.b. This does not provide a definition but merely an expectation that whenever members of the force travel in groups on collective orders then they are required to identify them as such and wear uniforms, unless otherwise stipulated. Accordingly, in my opinion Article V, paragraph 1 institutes an obligation for the receiving State to generally allow the wearing of uniforms of foreign forces in its territory, and to inform the sending State of any restrictions (based on receiving State regulations). It similarly obligates the sending State to ensure that visiting forces, when appearing in the territory of the receiving State, normally (see above) wear uniform, and to ensure that constituted units and formations wear uniforms when crossing borders. In view of a modern application, the latter seems more pronounced of the two obligations.

Under Article V, paragraph 2, service vehicles are normally required to be provided with a national, standard marking in accordance with sending State procedures, be it a flag or a letter code. The extent of the obligation is not much debated, but the possibility to reach other agreements has become increasingly relevant with attacks by terrorist targeted at certain Nations, the interest here being that the receiving State remains informed and consents to the presence of the visiting force and of any deviations from the requirements described in the Article.

The carrying of arms by foreign troops is often subject to some sensitivity – the territorial sovereignty of the receiving State has to be conformed to along with the need for the sending State to perform its functions, being invited („consent”) to participate in an activity in the receiving State. NATO SOFA, Article VI provides that the members of the visiting force are entitled to carry their arms (note: ammunition is not mentioned specifically

⁹⁵ This assumption is only valid in so far as the wearing of civilian dress does not constitute a criminal offence, in which case Article VII would prevail, but this seems to more of an academic line of thinking.

but is anticipated to be implied) „subject to their orders” i.e. when on duty and so prescribed by their orders. It is left to the discretion of the sending State to prove and approve the orders, be it in the Travel Order in which case the order is provided in writing, yet general requirements to confirm the orders in writing would go beyond Article VI. The receiving State is required to act under the general rule of non-interference, but may, if there are special, compelling reasons, request the sending State to either refrain from carrying or put a limit on the number of arms. The Article stipulates that the sending State shall „give sympathetic considerations” to such a request, i.e. a responsive agreement needs to be put in place and the consent of the receiving State to accept the presence of the visiting force may be dependent on such an agreement. With regard to private arms, such arms (and artefacts) are subject to receiving State law regarding possession, storage, use, import, export etc.

5. Article VII – Criminal jurisdiction [to be developed]

6. Article VIII – Claims [to be developed]

7. Articles IX – XI – Support to be provided by the receiving State and fiscal privileges

Articles IX-XI of NATO SOFA, covers a very broad area, and are often referred to as the economic and fiscal provisions: The support to be provided by the receiving State to the visiting force and its members, the tax- and duties facilities to be provided, and the exemptions from duties on import of goods and supplies, re-export and export goods (or transit through the receiving State), and disposal of such items in the receiving State.

In terms of the scope of application, it is reminded that Article XI mainly speaks to “duty”, yet in some cases makes specific reference to taxes (see paragraph 11 on petrol, oil and lubricants, as well as paragraphs 2 and 5, which addresses road taxes) and with the definition adopted in Article XI, paragraph 12, it has to be assumed that “duty” is more than excise, customs and other indirect taxes; it is as identified in paragraph 12 “... all [other] duties and taxes payable on importation or exportation...” except for charges for provided services. Article X, paragraph 3, excludes that the exemptions provided in Article X extend to such “duties” defined in Article XI, paragraph 2.

The **support to be provided by the receiving State** to the visiting force and its members under the NATO SOFA is laid down in Article IX, paragraphs 3 - 7, and partly in Article XI, paragraph 10:

- Article IX, paragraph 3 describes the obligations of the receiving State to make available certain facilities and services. The receiving and sending States are anticipated to conclude arrangements to regulate the terms of use, however, the receiving State shall strive to offer terms similar to those governing accommodation and billeting of similar receiving State personnel. If no arrangement or contract is concluded, the law of the receiving State shall determine the rights and obligations associated with the use or occupation of the facilities and services.
- Paragraph 4 goes on to recognise that the visiting force may employ local workforce, and 1) the receiving State has to aid the visiting force in its requirements through employment exchanges; 2) the employment is governed by receiving State law (determination of wages; calculating, deducting, and making payments to tax, pension, and social schemes; employment contracts and associated rights and obligations; protection of the workforce which today especially translates into standards and measures on health and safety); and 3) such workers do not become "members of the visiting force's civilian component and is thus not entitled to any status or privileges".

- In paragraph 5 is provided access to medical and dental treatment for the members of visiting forces (military and civilian) and their dependents, if the visiting force does not have adequate facilities of its own at the place it is stationed in the receiving State. Thus, the right for the visiting force to bring and operate such facilities is implied. Article IX, paragraph 5 does not require the receiving State to provide free access to medical and dental care; medical and dental care is to be provided on the same conditions as comparable personnel of the receiving State. It is often subject to discussion how this is to be translated into a modern context of social contributions, health insurance schemes, EU regulations on medical services and reimbursements, however practical solutions are usually embedded in administrative arrangements regulating host nation support and the access to receive emergency care (and at no charge) is rarely - if ever - debated.
- A more overlooked area of support is found in paragraph 6 - the receiving State is, upon request of the visiting force and subject to specific arrangements, expected to grant travelling facilities and concessions to the members of the visiting force (civilian and military) - i.e. provide a lower fare.
- Article IX, paragraph 7, defines the minimum terms of payment for services and facilities; payments are to be made promptly and in the local currency. At the same time it is anticipated that further agreements be concluded to that effect.
- Article XI, paragraph 10, was included to facilitate the effective movement of forces across borders and to avoid delays when crossing borders by troop formations. The provision in itself does not imply an obligation for the receiving State to allow border crossing outside international border crossing points, neither does it exempt the forces from customs procedures and search, it merely calls for special arrangements, and such arrangements, including simplified procedures, forms, and process for movement and customs coordination, are nowadays found in the NATO Allied Movement Publications.

With regard to purchases in the receiving State by the visiting force and apart from petrol, oil and lubricants, which in accordance with Article XI, paragraph 11 are to be provided free of all duties and taxes for use in official vehicles, aircrafts, and vessels, the NATO SOFA does not provide for general tax or duty exemptions for the visiting force (Article IX, paragraph 8)⁹⁶. The visiting force and civilian component may be required to facilitate procurement to be done in the receiving State through receiving State authorities; the background of this provision (Article IX, paragraph 2) is understandable perhaps especially during the times it was drafted, but is not usually evoked. The individual members are permitted to purchase “locally goods necessary for their own consumption, and such services as they need, under the same conditions as the nationals of the receiving State”, Article IX, paragraph 1.

Article IX, paragraph 8, goes on to state that the article does not provide for exemptions from taxes or duties, which are chargeable under receiving State fiscal law on goods and services⁹⁷. The provisions in Article IX are not very different than those applied to diplomatic staffs accredited under the Vienna Convention⁹⁸, but just as it is the case for diplomatic representations and their staff, it is anticipated that the receiving State provides additional facilities to the sending State force, civilian component and the staff members (be it *ex gratia* or as part of an agreement) to minimise the costs of the sending State and relieve the staff members from the inconvenience of serving abroad, and this anticipation is build into

⁹⁶ Supplementary Agreements (SA) provide for tax exemptions for the visiting force as well as limited or full exemption from value added tax and excise duties on private purchases made on the local market (i.e. outside canteens established under NATO SOFA, Article XI, paragraph 4). The practices in terms of products, limitations on quantity, and methods of exemption (waiver of VAT upon purchase, repayment through shop, or reimbursement through VAT/customs authorities) vary from nation to nation.

⁹⁷ Article XI, paragraph 11, is an exemption to this rule.

⁹⁸ Vienna Convention on Diplomatic Relations, Article 34.

more NATO policies (see below, use of training facilities and provision of Host Nation Support).

Moreover, exemptions from receiving State taxes may equally promote local procurement over import; in accordance with Article XI, paragraphs 2, 4 and 8, the visiting force is entitled to import, export, and re-export, free of all taxes (as defined in Article XI, paragraph 12), its equipment, vehicles, and provisions for the support of the force. The term "import" is understood to include withdrawal from customs warehouses or customs custody, in so far as the goods are not grown, produced or manufactured in the receiving State (Article XI, paragraph 12). There are procedures to be observed, and the import is, apart from official documents under seal and carried by couriers (Article XI, paragraph 3), not completely exempt from inspection by the receiving State:

Article XI, paragraph 2, deals with the import of service vehicles of a force under its own power and when transported. The paragraph is completed by an annex to the NATO SOFA, the Triptique, which is the vehicle passport certifying the ownership and the usage of the vehicle with regard to being operated in the receiving State. Some NATO Nations utilise the Triptique as a proof for self insurance of official vehicles and permit that the Triptique substitutes mandatory insurance against third-party liability, but more generally the Triptique certifies the import and the operation of a foreign service vehicle (and with sending State registration plates) in the receiving State. Additionally, Article XI, paragraph 2, exempts service vehicles from road taxes.

Article XI, paragraph 4, covers more areas; it authorises a force to import equipment and it allows a force to import provisions for the use of its force:

- As for equipment the applicability of the paragraph does not depend on whether or not the equipment is owned by the force; the equipment has to be for the use of the force, similarly to Article VIII, paragraph 1, in which it is recognised that the ownership of military equipment or equipment used by the forces not necessarily rest with the armed service or the force, and the Contracting Parties embrace more than the armed forces: "Each Contracting Party waives all its claims against any other Contracting Party for damage to any property ***owned by it and used by*** its land, sea or air armed services" (in bold and underlined by the author). So, the litmus-test is on use, not ownership⁹⁹.
- The import, export, and re-export of official equipment from Nations within EU and to Nations outside the EU – and back – is facilitated by Form 302¹⁰⁰. The form has to be duly signed, issued, and serialized, and implementation in national legislation is thus required.
- NATO SOFA, Article XI, paragraph 4, gives the Force the right to establish canteens and messes¹⁰¹ and to import¹⁰² reasonable quantities¹⁰³ of goods and

⁹⁹ The EU 6th VAT directive, 15.10, reads along the same lines: "supplies of goods and services ... effected within a Member State, which is a party to the North Atlantic Treaty and intended for the use of the forces of other States, which are parties to that Treaty or of the...when such forces take part in the common defence effort".

¹⁰⁰ Form 302 is a NATO Form recognised in European Community legislation as a Community transit document in Articles 91(2) and 163(2) of the [Community Customs Code](#) and Article 462 of the [Implementing Provisions of the Customs Code](#).

Through a procedure of authenticating the EU Form 15.10., a force located in a (Host) State, which is also an EU member, can obtain VAT exemptions (waiver or reimbursement) on official and private purchases made in another EU country different than the Host State, on the condition that the purchased items are exported (i.e. to the Host State). In this case it is left to the Host State authorities to certify that the goods/services, for which exemption from VAT is requested, comply with conditions of tax exemptions set out in the Host State. A similar EU document exists for reimbursement of excise duty.

¹⁰¹ The terms are as found in the EU Council Directive 2006/112/EC on the common system of value added tax, Art. 151.1. The term "canteen" refers to a retail shop where authorized personnel can make purchases. It is an entity, which uses the Force's or Headquarters' legal personality while engaged in the resale of goods and services to personnel entitled to tax and duty exemptions. A

supplies free of duty for the “exclusive use of the force and, in cases where such use is permitted by the receiving State, its civilian component and dependants”. The provision allows the import of provisions free of duties and the use (consumption by, resale to) the members of the force.

As for individual members of the force or civilian component, Article X exempts their salaries and emoluments paid to them as such members from income tax in the receiving State (but not in the sending State). They are equally exempt from receiving State taxes on their moveable property, the rationale for both exemptions being that such members are not considered to be taking up domicile (become legal residents) in the receiving State; they are in the receiving State due to their official functions and receive (and factually generate) their income in the sending State. This is an important distinction and it applies as long as the members and their dependants are in the receiving State in their official capacity, and the length of their stay can therefore not be used by receiving State authorities to claim taxation on income due to their service or on their movable property. However, should a member of a visiting force, civilian component or their dependants receive any other income due to employment in or enterprises operated in the receiving State, such income is not exempt from taxation in the receiving State (Article X, paragraph 2), just as receiving State nationals are not exempt (Article X, paragraph 4)¹⁰⁴.

Members of the force and of the civilian component are under Article XI, paragraph 5, entitled to import free of duties their household goods upon their first arrival to the receiving State or the first arrival of their dependants. “First arrival” is often understood to mean within the first six months of taking up service, but differences occur as to how Nations understand the term. It is not required that the household goods are already used or in use, just as it should be recalled that this is an exemption from taxes and duties, but not from customs declaration and inspection. Individual members are also entitled to import, free of duties, their privately owned vehicles for the use of themselves and their dependants (Article XI, paragraph 6). As such, this right does not attach to the dependants, but the dependants have a right to use the vehicles so imported. There is no limitation on the number of vehicles that can be imported, neither is there an obligation for the receiving State to exempt privately owned vehicles from road taxes.

Article XI, paragraphs 1, 7, 8, and 9 seek to balance the interests of the sending and receiving States. Exemptions and fiscal entitlements are provided in support of the visiting force and to facilitate its mission, and there is a corresponding requirement that entitlements are managed to avoid abuse and any reverse effects on the local economy. Accordingly, and unless so stated in the NATO SOFA (or subsequent supplementary agreements) “...members of the force and of the civilian component as well as their dependants shall be subject to the laws and regulations administered by the customs authorities of the Receiving State...” (Article XI, paragraph 1).

The scope of the exemptions is further defined in Article XI, paragraph 7 (no further exemptions than those already provided are to be expected under the provisions of Article XI). Article XI, paragraph 8, addresses the disposal of goods imported by the force and civilian component or by their members, the main rule being that since imported goods are exempt from duties under the assumption that they are brought in temporarily or for the consumption of the force (and civilian component and dependants, where permitted), the goods are to be re-exported. Form 302 would serve as the certificate for re-export of goods

“mess” is understood as a facility for serving meals and beverages, and for socializing, and is often in military terms referred to as cafeteria, dining facility, and club.

¹⁰² Local purchases to supply the force (i.e. through a canteen) are authorised in NATO SOFA, Article IX, paragraph 2, however, the provision itself does not exempt (nor express an anticipation of exemption – compare with Paris Protocol, Article 8, paragraph 1) the visiting force from local taxes or duties.

¹⁰³ The sending State decides alone if the quantities are reasonable but the receiving State has a right of control as well the right to authorise or to refuse or to restrict the sale of these goods to the civilian component and the dependants, but it cannot impose any taxes or duties on the import.

¹⁰⁴ Yet double-taxation agreements may kick in and resolve the matters.

brought in under paragraph 4 or vehicles imported not under their own power (paragraph 2.b); the triptique for service vehicles operating under their own powers (paragraph 2.a), and a customs declaration may similarly be required to facilitate re-export of privately owned vehicles and personal effects and furniture imported in accordance with paragraphs 5 and 6.

If the receiving State law so permits the imported effects may be disposed off in that State but only in accordance with its laws (e.g. customs control; follow procedures for removing goods from duty-exemption regimes by paying tax and duties). Similarly, goods procured in the receiving State by the force, civilian component, and their members can be exported in accordance with the laws of the receiving State (paragraph 9). Both paragraph 8 and 9 require particular attention if a force (and civilian component) is stationed in the receiving State for a longer period of time, and the provisions often present challenges because the force is inclined to do its procurement locally, yet the receiving State laws may not necessarily (or consistently) support disposals, donations, or provide for procedures for removing stolen or scrapped items from the regime of customs and tax exemptions.

Equally embedded in these provisions is the notion that fiscal privileges granted by or subsequent to NATO SOFA are subject to receiving State law, and is as such not absolute. Privileges granted to members of the force or civilian component are provided as a part of the status they enjoy under the NATO SOFA (or the Paris Protocol and a Supplementary Agreement), and are permitted in support of the sending State. The status is negotiated and agreed to by the receiving and sending States. Thus, the status attaches to the sending State; it is not accorded to the individual, and the administration remains with the force (or sending State). Consequently, the sending State may revoke privileges, just as the sending State is obliged to cooperate and assist local customs and fiscal authorities to prevent abuse and conduct enquiries (NATO SOFA, Articles XII and XIII¹⁰⁵). In order to safeguard privileges (and stay within the limitations agreed with the hosting State), the sending State would need to manage the rights. The force, being the keeper of the privileges and acting as the (good) steward, has the right (and obligation) to regulate and administer the application of privileges, and thus provide good stewardship of the privileges, which should include introducing control mechanisms to prevent abuse, revoking or suspending privileges partly or in full in case of abuse¹⁰⁶. These observations apply equally to status and privileges granted to International Military Headquarters under the Paris Protocol and in supplementary agreements

The referenced provisions of the NATO SOFA are, in a current context, considered the minimum provisions and within the Alliance concepts of Host Nation Support have overtaken both the basic requirements stated in the NATO SOFA and the vehicles for requesting, organising and reimbursing support. Most prominently are NATO Logistic Doctrine and the subordinate Allied Joint Publication 4.5 on Host Nation Support. In this context the principle that no State shall derive revenue from hosting activities is particularly important and has led to identifying certain categories of host nation support that are to be provided free of charge, and has supported requests for general waivers (or reimbursement) of taxes on goods and services procured in the receiving State. On the more practical level, the Allied Movement Publications detail the coordination, information

¹⁰⁵ NATO SOFA, Article XII provides that “the customs or fiscal authorities of the Receiving State may, as a condition of the grant of any customs or fiscal exemption or concession ... require such conditions to be observed as they deem necessary to prevent abuse.” NATO SOFA, Article XIII, imposes the additional obligation on the “authorities of a force”, “to render all assistance within their power to ensure the payment of duties, taxes and penalties payable by members of the force or civilian component or their dependents.”

¹⁰⁶ An example of verbalizing the requirement for exercising stewardship is found in the 1959 Supplementary Agreement for Germany, Article 66, which allows entitled personnel to import or receive as shipments private motor vehicles and other goods for their personal use or consumption during their deployment to Germany. The German Customs authorities may however, upon suspicion, request the designated authorities of the sending State to confirm that the goods are intended for personal use, i.e. the sending State is the holder of the privilege and the privilege comes with an obligation to control and prevent abuse.

exchange, formats, and procedures to be applied upon crossing borders and transporting military personnel and equipment within Alliance territory.

Similarly, NATO Nations have adopted Standardization Agreements (STANAG) regarding mutual support and cooperation. The example used here is that of commonly operating facilities:

- STANAG 6002, Principles and procedures for the conduct and financing of training assistance
- STANAG 6003, Principles and procedures for the financing of the establishment and operation of common training facilities
- STANAG 6007 Financial Principles and Procedures for Provision of Support within NATO 19 September 1996

8. Article XII – XV – Cooperation regarding customs and fiscal regulations

NATO SOFA, Article XI, paragraph 1, is fairly explicit with regard to the obligations of the sending States. As for the exemptions: Documents under official seal are exempt from customs inspections, but the courier is not (necessarily); official vehicles crossing on triptique are exempt from customs inspection, but not the drivers and searching of vehicles would seem to conform with the spirit of the NATO SOFA, i.e. if the search is to prevent customs offences (other offences are not covered by the provision); crossing of borders of units / formations (Article XI, paragraph 10) is subject to special arrangements which may include decisions to abstain from customs search (for this it is recommended to consult the Allied Movement Publication). As for import under NATO SOFA, Article XI, paragraph 4, this author assumes that when the procedure set out in the paragraph (deposit of documents etc) is followed then there is no general requirement for customs inspection of the equipment or provisions brought in by the Headquarters or Force; if an offence is suspected then NATO SOFA, Article XIII, would require the authorities of the respective Headquarters or sending and receiving States would cooperate, just as NATO SOFA, Article XII, allows the receiving State to impose certain restrictions on the goods grown or manufactured in the receiving State.

With regard to the second part of NATO SOFA, Article XI, paragraph 4, import of goods and provisions to be distributed to the members of the force (and to members of the civilian component and dependents when so permitted) shall not include substances or articles which are prohibited in the receiving State unless specifically authorised or licensed. It is, however, left to the discretion of the sending State to determine if imported quantities are "reasonable", yet the receiving State may exercise the right of control. In respect of personal effects and privately owned vehicles, the privilege is to import free of taxes, not free of customs control. The need for cooperation is elaborated in Lazareff and summarised: "The whole of Art. XI is well-balanced, granting the force and their members privileges allowing them to fulfill their mission and to prevent them from being penalised by the fact that they are assigned abroad. In addition, these provisions should normally not lead to any abuse, and such seems to be the case in practice."

9. Articles XVI – XX – Final clauses and territorial application

Article XVI addresses settlement of disputes and differences and is based on three principles:

- differences occur only between the Parties;
- differences are settled by negotiation without recourse to outside jurisdiction (except for the arbitration envisaged in Article VIII); and
- unresolved differences are referred to the North Atlantic Council.

The Article was adopted by the Juridical Subcommittee with the comment that the Article excludes the parties from referring matters under the SOFA to the International Court of Justice, unless “*all parties agreed to do so*”. In the meeting of the Working Group on Status on 27 February 1951, the wording of the Article was changed on a Dutch suggestion in order to avoid disconcerting the jurisdiction of the International Court of Justice and extend the decision to the North Atlantic Council on whether or not to refer a matter to the International Court of Justice: “*...it would then be in the competence of the Council when a dispute reached them to refer it to the International Court of Justice if they were unable to reach agreement and if they thought this a wise thing to do.*”.

Article XVI applies to all differences that may arise in respect of the interpretation and application between the Parties to the NATO SOFA (individuals excluded), except for the cases envisaged under Article VIII (disputes on whether or not acts are committed in duty or if the use of vehicles is authorised), which are subject to separate arbitration. Differences are to be settled “between them”, i.e. between the disagreeing Parties, by negotiation. If the disputing Parties cannot reach a settlement through “direct” negotiations, the case is referred to the North Atlantic Council.

The Article has never been invoked, and, except for the jurisdiction of the International Court of Justice it has not given rise to any major (academic) speculations.

Article XVII on revision is short and appears to be very straightforward: Contracting Parties can request revisions, at any time, and requests are to be forwarded to the North Atlantic Council. The provision was not subject to lengthy debate by the drafters; the first draft¹⁰⁷ was presented in conjunction with Article XVI in February 1951¹⁰⁸.

Article XVII has not been used. It is supplemented by Article VIII, paragraph 2.f., which has been invoked in order to adjust the currencies set out in Article VIII, paragraph 2.

Article XVIII addresses the ratification, the coming into force of, and accession to the NATO SOFA. The Article does not fix a deadline for ratification or for the deposit of ratification instruments - it only abets the signatory States to *deposit their ratification* “as soon as possible”. The model of *entering into force* upon the ratification by four signatory States was introduced in order to promote the implementation of SOFA. The NATO members at the time signed the NATO SOFA all together, in London on 19 June 1951. Despite the efforts of the drafters, NATO SOFA only entered into force on 23 August 1953, between France (the first State to ratify), Norway, Belgium and U.S. All the signatory States had ratified the NATO SOFA by 1955, including the (then) two new members of the Alliance, Turkey and Greece¹⁰⁹. In accordance with its repeated statements during the drafting Iceland signed but did not immediately ratify; Iceland ratified the NATO SOFA effective 2007. NATO SOFA is open to *accession*. Paragraph 3 sets a precondition and a procedure for the process of acceding to NATO SOFA; NATO SOFA is only open for accession to those States, which have acceded to the North Atlantic Treaty, and only upon the approval of the Council, which may attach (more) conditions to the accession.

Once invited, the NATO SOFA comes into force thirty days after the deposit of the instrument of ratification¹¹⁰. A list of signatures, ratifications and reservations to NATO SOFA and to the PfP SOFA is available on: www.state.gov/s/l/treaty/depositary (U.S. Department of State, Office of the Legal Adviser, Treaty Affairs).

¹⁰⁷ MS-D(51) 11(R) Status of Forces Agreement – Revised Text, 20 February 1951.

¹⁰⁸ MS(J)-R(51) 9, Summary Record of a Meeting of the Working Group on Status (Juridical Subcommittee), 23 February 1951, the Blue Book p. 120.

¹⁰⁹ For a systematic reading of the process of ratification of NATO SOFA and the discussions in the Council, see Lazareff, pp. 425-429.

¹¹⁰ For the rules on calculating the days between deposit and entry into force, see Anthony Aust, *Modern Treaty Law and Practice* (Cambridge 2000) pp. 135-136.

NATO SOFA is not concluded for a limited period of time nor does it state any conditions for its termination¹¹¹. However, Article XIX, paragraph 1, states that any of the Contracting Parties are free to unilaterally **withdraw** from the NATO SOFA (denounce), the only condition being that the NATO SOFA has been in force for four years. It is unclear, why the term of four years was chosen, rather than 10 or 20 years (compared with the North Atlantic Treaty), but it is most likely that it merely stems from duplicating the Brussels Agreement. It is suggested that the condition applies from the time the SOFA is effective with regard to the withdrawing Party. Article XIX, paragraph 2 states that **denunciation** is to be notified in written form to the depositary state (U.S.), which then informs the other Contracting Parties. Paragraph 3 delays the denunciation by one year counted from the date of receipt of the notification. After the one-year delay the NATO SOFA ceases to be in force with regards to the withdrawing Party but it remains in force in respect of the remaining Contracting Parties. Unfortunately the SOFA does not address if it remains in force in case the number of Contracting Parties drop below four (i.e. below the number of Parties required for the NATO SOFA to enter into force, Article XVIII, paragraph 2). Thus, if the number of Parties is reduced below the number necessary for entry into force, and if this is considered to be a problem, the remaining Parties are of course free to decide if they want to withdraw individually or terminate collectively.

Article XX defines the territorial application of NATO SOFA. The North Atlantic Treaty, Article 6, states that the North Atlantic Treaty area consists of the territories of the NATO States in Europe and North America, the territory of Turkey and the islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer. Forces, vessels and aircraft of the NATO states are also representing “a territory” in so far they are stationed in or over the said territories or in the Mediterranean Sea¹¹². NATO SOFA, however, only applies to the metropolitan territory of the Contracting Parties.

Although NATO SOFA Article I states that the NATO SOFA applies whenever one Party is present in the territory of another Party in the North Atlantic Treaty Area (i.e. the area defined in the North Atlantic Treaty), Article XX states that the SOFA is only applicable on the “**metropolitan territories**” of the Parties. NATO SOFA does not define “metropolitan areas”, but it is assumed that it means the mother territories of the Parties, and that only colonies are excluded from the definition.

Other contradictions could be mentioned in regard of the geographical application. Article I, paragraph 1 (a) refers to “*the territory of another Contracting Party in the North Atlantic Treaty area*”, Article I, paragraph 1(e), defines the “receiving State” without making any exceptions to overseas territories or colonies. Along the same lines Article VIII, paragraph 2, speaks of damage caused to property “*located in its territory*”, and same article, paragraph 5, talks of “*causing damage in the territory of the receiving State*”. Lazareff suggests that since Article XX states that SOFA only applies in the metropolitan area, the other articles must be read with this reservation in mind¹¹³.

In order to bridge between the definition in the North Atlantic Treaty and the wording in the SOFA, the drafters included paragraph 2, whereby parties **unilaterally can extend the geographical area of application**. The U.K. used the clause since Malta and Gibraltar (but not Cyprus) – all U.K. colonies at the time – were covered by the North Atlantic Treaty, but excluded from NATO SOFA by virtue of Article XX, paragraph 1. However, the UK only extended the use of SOFA in the non-metropolitan areas towards a number of countries (Malta, Cyprus: US; Cyprus: France, Malta, Gibraltar: Italy, Greece, Turkey)^{114, 115}

¹¹¹ In accordance with the Vienna Convention on the Law of Treaties (1969), Article 54 (b) the Parties can, at any time, consent to the termination of the agreement.

¹¹² The reference to the territory of Turkey was added in 1952, when Turkey (and Greece) joined the Alliance and the definition was further modified in 1963, when the French departments of Algeria were excluded.

¹¹³ Lazareff, *ibid*, p. 440.

¹¹⁴ Lazareff, *ibid*, p. 442.

A walkthrough the current border cases are given in *The Handbook of the Law of Visiting Forces*¹¹⁶. It concludes that:

- NATO SOFA does not apply to **Hawaii**, which became a U.S. State in 1959; the North Atlantic Treaty does not extend to that territory (acquired territory becomes a part of the treaty area, provided it fits into the definitions in Article 6 - and Hawaii does not).
- NATO SOFA applies to the Aleutian Islands, which acquired U.S. statehood in 1959 since the Islands are a part of another U.S. State, Alaska.
- The application in Greenland is discussed¹¹⁷.
- The Canary and Balearic Islands have home-rule jurisdiction, but form a part of metropolitan Spain, and NATO SOFA therefore applies.
- Portugal has made an explicit reservation to the SOFA stating that SOFA does not apply to the Azores.

10. Signature of the Agreement

The Council Deputies, representing all the Allied, at the time: Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, U.K. and USA signed NATO SOFA in London on 19 June 1951.

The NATO SOFA was concluded in one original, in the English and French languages, both texts being authoritative.

¹¹⁵ A recent example: The nations participating in the Strategic Airlift Capability (SAC) initiative decided that the location of the main operating airbase will be Hungary, which is also the flag nation for the aircraft operated by the SAC.

The Criminal Code of Hungary provides on the Territorial and Personal Scope that (Section 3)

(1) Hungarian law shall be applied to crimes committed in Hungary, as well as to acts committed by Hungarian citizens abroad, which are crimes in accordance with Hungarian law.

(2) The Hungarian law shall also be applied to criminal acts committed on board of Hungarian ships or Hungarian aircraft situated outside the borders of the Republic of Hungary

Accordingly, and since the NATO SOFA does not apply outside the metropolitan territory of the Member States, a crime committed on board a SAC aircraft registered by Hungary would be subject to Hungarian jurisdiction. To address this situation the Hungarian government has extended the scope of NATO SOFA, PfP SOFA, and the US-Hungarian OMNIBUS agreement to apply to activities on board SAC aircrafts: "the Government of the Republic of Hungary declares that the laws and legal regulations of the Republic of Hungary in force - including relevant international treaties [...] will apply on board of aircraft [...] within the framework of the Memorandum of Understanding "140/2009. (VI. 30.) Government Decree (Hungarian Gazette / Magyar Közlöny 91. Szám 2009. június 30.

¹¹⁶ Mr. de Vidts in Fleck pp. 241-249. SOFA does not apply to Gibraltar, in Fleck, p. 245

¹¹⁷ Danish legislation clearly states that NATO SOFA applies both in Greenland and to the Faeroe Islands. However, Denmark has submitted a reservation to the PfP SOFA that this treaty does not apply to Greenland and the Faeroe Islands.

C. PARIS PROTOCOL

Late in the drafting of the NATO SOFA (end of April 1951) the question was raised whether the NATO SOFA would apply to NATO Military Headquarters as well as national forces.

At that time SHAPE was located in France, and French officials had already taken the initiative to start negotiations with SHAPE on SHAPE status in France. Consequently, it was decided not to expand the NATO SOFA and instead conclude a Protocol to the NATO SOFA on the status of NATO military headquarters.

The Protocol on the Status of International Military Headquarters set up Pursuant to the North Atlantic Treaty – in daily referred to as the Paris Protocol – was signed in Paris in August 1952. The Paris Protocol is directly linked to the NATO SOFA and it allows NATO SOFA provisions to be applied – directly or tailored – to NATO International Military Headquarters.

The Paris Protocol was necessary because, up until this agreement, there was no treaty that referred specifically to the military headquarters. The NATO SOFA covers the visiting forces from individual sending nations, while NATO International Military Headquarters (IMHQ) are excluded from the application of the Ottawa Agreement. The Paris Protocol provides, then, the status for such International Military Headquarters and has several sections which are similar to provisions of the Ottawa agreement, while in other provisions invoking and making applicable articles of the SOFA.

This section will provide a very brief overview of the Paris Protocol. A more thorough assessment and analysis of the Paris Protocol can be found in Chapter V, Section 1 of The Handbook of the Law of Visiting Forces.¹¹⁸

1. Purpose and preamble

Where the NATO SOFA regulates the interests of sending and receiving State respectively, the Paris Protocol set out to balance the interest of the receiving State and the Alliance as such and the preamble mentions the very purpose of the Protocol “. . . to define the status of Allied Headquarters and the personnel thereof. . .”, and the areas of applicability –“...within the North Atlantic Treaty Area...” The Preamble thus establishes the expectation that the Alliance would have to have International Military Headquarters located in at least some of the Member States.

What all International Military Headquarters have in common is that they are not the emanation or extension of a single sovereign state and it goes without saying that they are not supra-national. They are simply creatures of treaty, developed in order to implement and further the purposes of the North Atlantic Treaty.

States consent to host International Military Headquarters, and thereby generally consents to hosting the agreed staff (for NATO Command Structure entities the agreed manning is usually described in the Peacetime, Crisis, or Emergency Establishment) as well as activities of that headquarters, which falls within its mission as it may be described in the activation order or related documents (for example NATO documents on command structure) and / or in subsequent agreements relative to the hosting and provision of support of the Headquarters.

With regard to the specific activities, the host State should receive regular information on planned activities that may involve presence of further military or evoke Host Nation Support responsibilities. This may be done by forwarding the annual programme of work for information or through regular coordination. Furthermore, Headquarters are

¹¹⁸ Fleck , p. 625.

usually required to inform the host State of any increase in manning and to provide information regarding attached personnel and their dependants.

2. Key Definitions and Terms – Articles 1 - 3

As in any international agreement it is necessary to define the key terms that appear in the Protocol. These are found in Article 1 of the Protocol, and accordingly:

- “The Agreement,” when used in Paris Protocol, refers to the NATO SOFA.
- The phrase “Supreme Headquarters” referred originally to SHAPE and SACLANT and any equivalent International Military Headquarters (IMHQ) which might be established. Today the term refers to SHAPE and HQ SACT.
- “Allied Headquarters” refers in the definition to both the Supreme Headquarters and to the immediately subordinate Headquarters.
- “NAC” refers to The North Atlantic Council as defined in the North Atlantic Treaty.

Article 2 stipulates both the geographical areas wherein the Agreement was to apply to “Allied Headquarters” as well as the persons to whom the terms of the Protocol (and through it, many provisions of the NATO SOFA) would apply. A Nation must have ratified the Protocol for it to be geographically applicable to its territory, however it is not a requirement that a Nation is a party to the Protocol for its personnel to enjoy status in a Nation which is a party to the Protocol; status is granted to members of the force and of the civilian component employed by parties to the North Atlantic Treaty or by an Allied Headquarters, and to their dependents (defined in Article 3, see comments just below). Article 2 reiterates the condition asserted in Article I of the NATO SOFA: “when such personnel are present in any such territory in connection with their official duties or, in the case of dependents, the official duties of their spouse or parent.”. Interestingly, the Paris Protocol makes this specific to both members of the force and civilians, whereas the NATO SOFA only articulates this criterion in connection with the definition of a force, whereas it in the definition of civilians is implied through the assumption that the civilian component accompanies the force.

Article 3 complements the definitions found in Article I of the NATO SOFA.

The term “**force**” refers to personnel attached to the International Military Headquarters who belong to the armed services of any party to the North Atlantic Treaty. This definition is different from the definition found in NATO SOFA, which requires that, to be considered part of the force, personnel must be “in the territory of another contracting party...”. Whereas the NATO SOFA excludes receiving State military personnel the Paris Protocol includes them. Moreover, the term “attached” covers any person, who subject to his/her order is assigned to an International Military Headquarters, no matter if assigned to the staff per agreements regarding the manning of that Headquarters, or is present at the Headquarters on temporary duty (TDY/TAD), on the condition that the person otherwise falls within the Paris Protocol.¹¹⁹

The term “**force**” does not apply to personnel attached to an International Military Headquarters from non-NATO nations, because those nations are not party to the North Atlantic Treaty. Other agreements, most notably the Further Additional Protocol, address such individuals. However and as noted above, the Paris Protocol covers personnel of a State party to the North Atlantic Treaty, even if that State is not a party to the Paris Protocol itself.

“**Civilian Component**” includes nationals of a party to the North Atlantic Treaty who are not nationals of or ordinarily resident in the receiving State and who are either attached to the headquarters and employed by armed service of a Party to the North Atlantic Treaty, or are employed by the International Military Headquarters. International employees,

¹¹⁹ The practice is described in Max Johnson’s chapter on the status of IMHQs in Dr. Fleck’s Handbook (p. 272).

apart from nationals of and persons ordinarily resident in the hosting State, are part of the civilian component, but local nationals hired as such are not. The duty to inform the host Nation about the number of personnel assigned is obvious, however it must be remembered that personnel deployed from an International Military Headquarters are not to be considered as having been reassigned from the Headquarters. They are still members of the International Military Headquarters, and their families are still entitled to privileges.

The term “**Dependents**” means essentially the same in the NATO SOFA and Paris Protocol. As for the term “spouse”, see comments to NATO SOFA, Article I. Possible differences in the legal understanding of the term may be reconciled in Supplementary Agreements. It is also possible to expand the definition to cover other family members, and other members of the household, subject to either determination by the sending State of such persons as dependents, or predetermination by the host State.

The language in Article 2 provides that the status applies “when such personnel are present...in the case of dependents, in connection with the official duties of their spouse or parent” and it maintains status for the family members of the military member temporarily deployed. On a case-by-case basis families can apply for permission to stay in the Host Nation and retain privileges even after the member has left the country, e.g. to allow children to finish the school year. Recent Supplementary Agreements provides for a procedure to facilitate such applications.

3. Rights and Obligations of International Military Headquarters – Article 4

An International Military Headquarters is, through Article 4, considered a force, and by extension a Sending State with the certain obligations. Article 4 of the Paris Protocol covers the basic rights and obligations of the International Military Headquarters and its personnel, providing that in general, these can be determined by substituting International Military Headquarters for the “sending State” in the NATO SOFA except with regard to the following:

- Just as with visiting forces under the NATO SOFA, the International Military Headquarters and their personnel must *respect* (as opposed to obey) host Nation law. As discussed in the comments to NATO SOFSA, Article II, this does not extend to an application of host State in all situations, but rather institutes the principle that such law should be considered and taken into consideration in developing Headquarters’ policies. With regard to personnel employed locally (local wage rate, employed under Article IX of the NATO SOFA), the obligation to comply with host State law also extends to an International Military Headquarters by virtue of Article 4 of the Paris Protocol.
- The sending State has criminal and disciplinary authority;
- Both the sending State and the International Military Headquarters must:
 - inform the hosting Nation when personnel are no longer part of an International Military Headquarters but have not repatriated (NATO [SOFA, Article III, paragraph 4](#));
 - assist in investigations and arrests; (NATO [SOFA, Article VII](#))
 - not misuse “official duty” determination and cooperate in claims (NATO [SOFA Art VIII](#)) and
 - cooperate in customs enforcement and investigations (NATO [SOFA Art XIII](#))
- The sending State is responsible for expulsion ([SOFA Art III](#)) and subject to foreign exchange regulations; ([SOFA Art XIV](#)).
- “Official duty” determinations are the International Military Headquarters responsibility for civilian employees of the International Military Headquarters, otherwise such determinations are the sending state responsibility

4. ID cards – Article 5

As noted above, Article 5 of the Paris Protocol requires that every member of an International Military Headquarters shall have a personal ID card issued by the Headquarters. In this regard, the key term is “member” of the Headquarters. “Member” is not defined per se – logically it would refer to members of the force and the civilian component. However, the Article does not preclude nor does it include civilian members, Local Wage Rate or dependents from being issued an ID card by the Headquarters, yet the purpose of such cards and the card introduced in Article 5 may have been perceived differently by the drafters. SHAPE issued “dependents’ card” already at the time of negotiating the Paris Protocol. Yet, the drafters saw no need for dependents or civilians to receive a “headquarters ID card” the reason being that it was introduced in the drafting of the Paris Protocol as a mean to identify members of the International Military Headquarters in conjunction with a travel order.

At the same time, the drafters worded Article 4, paragraph c, requiring that the ID card required to be presenting upon crossing of borders is that of the sending State. This discrepancy is not clarified in the drafting protocols, but current practice as well as a logical reading of the Protocol supports that the Headquarters ID card mainly serves internal purpose rather than identification to external authorities, since the military staff members (and the civilians in the employ of the sending State) remains national assets and subject to the jurisdiction of that State and correctly should identify him or herself accordingly. This does of course not exclude or exempt the military staff members (or any other member of the Headquarters) to present the Headquarters ID card on request. Because NATO SOFA, Article III, paragraph 1, is limited to military personnel – members of an International Military Headquarters civilian component and all dependents must have a valid passport and where applicable visa to facilitate the entry into and exit from of receiving states.

The entry into a host State and waiver of visa or provision of a separate visa regime is usually addressed in the Supplementary Agreement, just as the more recent Supplementary clearly identifies the requirement that rest upon a hosting State to recognise that an International Military Headquarters is an international organisation and thus that its personnel are members of such an organisation. Still, transit through or exit from a third State of dependents and spouses of certain nationalities may pose a problem /challenge depending on the different international regimes (e.g. Schengen agreement). In this regard a good cooperation with local authorities is important, as effective liaison and cooperation can on occasion overcome deficiencies (see also comments to NATO SOFA, Article III).

5. Claims – Article 6

Since International Military Headquarters either have their own legal personality or exist in the legal personality of their higher Supreme Headquarters, and since members of a NATO International Military Headquarters by their acts or omission, can engage the legal liability of those Headquarters, [Article 6 of the Paris Protocol](#) outlines how to handle these claims.

NATO SOFA waiver of claims by the contracting Parties applies to the International Military Headquarters as to visiting forces, with the following clarifications:

- Claims, involving the use of NATO owned or NATO operated vehicles will be settled under the Paris Protocol, Article 6, and thus in accordance with NATO SOFA, Article VIII. These principles apply also if the vehicle is involved in a claims process outside the State on whose territory the Headquarters is residing, but in a Nation, which is party to the Paris Protocol (or the Further Additional Protocol to the PFP SOFA).
- NATO is self-insured with regard to the operation of official vehicles for mission-related purposes (on-duty). The self-insurance was introduced as a policy by MBC in decisions passed in the early 60's, and is rooted in the claims provisions

of the Paris Protocol and NATO Status of Forces Agreement. The policy, which is reflected in HQ SACT and SHAPE financial instructions or manuals provides in practical terms that the Supreme Headquarters and their subordinate Headquarters principally do not take out commercial insurance to cover the operation of official vehicles, whereas vehicles owned by or operated by Morale and Welfare Activities are expected to hold appropriate insurance (i.e. keep the NATO activity free from liabilities and financial damages). The concept of self-insurance provides an obligation to meet any liabilities which such a Headquarters may be met with and to fund the repair or replacement of vehicles should they be damaged or stolen.

- A possible third-party claim caused by the conduct (act or omission) of a military staff member (or a civilian staff member assigned by a Nation) generally is not a matter between the Headquarters and the individual staff member. The staff member represents his/her Nation, and the claim would have to be processed by the Nation involved. Also, an individual member/employee of the sending State forces may be considered a third-party and address a claim against the IMHQ or a sending Nation. **However**, when a claim fall within NATO SOFA Article VIII, paragraphs 6 (ex gratia settlement of non-scope claims caused outside duty) or 7 (unauthorised use of official vehicles) then the sending State remains the responsible Party to whom the claim is to be addressed, not the International Military Headquarters (Paris Protocol, Article 4, paragraph d), which only will be responsible for its own employees and only so as stipulated by international public law or national law (local wage rate).
- NATO Financial Regulations impose an obligation on Headquarters to seek redress if international property is lost or damaged due to wilful misconduct or gross negligence. This is relevant mainly with respect to damages caused by NATO international civilians (or a local employee, depending on the applicable laws), however, if the property is lost due to unauthorised use of vehicles **and** caused by wilful misconduct or gross negligence, there may equally be a claim raised against other (uniformed or civilian assigned) staff members. Otherwise the settlement of claims will follow the process set out in the NATO SOFA and Paris Protocol.

As is the case under the NATO SOFA, disagreements can arise from actions of military attached to International Military Headquarters as to whether the causal actions were within scope of NATO duties and whether the individual was engaged in Headquarters or NATO duties or was involved in national business. This must be determined at the time of the damage, whether the owner or the user of the property is legally liable.

6. Taxation – Articles 7 and 8

Article 7, paragraph 1, deals with the taxation of military and civilian personnel attached to an International Military Headquarters. The NATO SOFA excludes taxation on the salary and emoluments of members of a visiting force and civilian component by the receiving State. There is a distinction between the treatment afforded to military and those civilians attached to a NATO International Military Headquarters by sending States in contradiction to NATO international civilians, who are *directly* employed by the International Military Headquarters and in categories determined by the North Atlantic Council. Military and attached civilians are exempt from receiving State taxation on their income and emoluments paid to them in that capacity and on their moveable property, but are not exempt from taxation in the sending State. NATO international civilians, employed by an International Military Headquarters and thus paid by NATO international funds, are by virtue of Article 7, paragraph 2 exempt from taxes in any State party to the Protocol, unless other arrangements are made by “sending State” or their “home” State.

The Paris Protocol, Article 8, paragraph 1, provides that “For the purpose of...., these Headquarters shall be relieved as far as practicable from duties and taxes...in the interest of

common defence and for their official and exclusive benefit; each Party shall enter into negotiations with any International Military Headquarters operating in its territory for the purpose of concluding an agreement to give effect to this provision.” The paragraph builds on the anticipation that further agreements be concluded, and there are more agreements concluded with NATO (and PfP) Nations such as Supplementary Agreements and standing Host Nation Support Agreements, however, the opinion of this author is that in fact no explicit agreement is required: In public international law exist the rule that international organisations are exempt from taxes in the hosting State in order to ensure the independent status of the international organisation and due to the principle that one State should not derive revenue from hosting an international organisation. Additionally and equally important, NATO member Nations have adopted and expressed the policy that no member Nation should derive revenue from hosting Alliance activities¹²⁰, which effectively would constitute the agreement and do away with the anticipation (and highly impractical solution) that each International Military Headquarters should hold agreements with each of the member Nations to give effect to Article 8, paragraph 1. The tax exemptions are confirmed in Supplementary Agreements concluded between a Nation hosting a Headquarters and the Supreme Headquarters to whom the Headquarters is subordinated.

Article 8, paragraph 2, extends the fiscal entitlements of NATO SOFA, Article XI, to International Military Headquarters and provides the Headquarters with the importation rights (vehicles, equipment), the use of the NATO SOFA Triptique is extended, but of practical importance are in particular NATO SOFA, Article XI, paragraph 3 (exemption of official documents from customs exemption), paragraph 4 (import and resale of provisions), paragraph 8 (disposal), and paragraph 11 (petrol, oil and lubricants):

- Paragraph 3 - Customs inspections of official documents: See comments below (Customs).
- Paragraph 4 - Canteen, Cafeteria, and Messes: This provision entitles the Headquarters to import its equipment free of taxes, as well as provisions for distribution and use by its military members, and where so agreed with the host Nation, to members of the civilian component and dependents. The distribution is usually done through messes (dining - possibly against payment), canteens (shops/outlets), and clubs (servings, support social entertainment - against payment). The provisions are by virtue of the Paris Protocol, Article 8, paragraph 3, available to all military members, including those attached by the hosting State. Broader access is sought in Supplementary Agreements to extend access to civilian staff members and to dependents, and for practical reasons allow all persons invited onto the Headquarters premises access to the cafeteria, no matter if the cafeteria operates without taxes.

The right of the State attaching personnel to an International Military Headquarters to set up similar national facilities and import provisions in support of its military members exist independently, and that State is required to conclude arrangements directly with the host Nation on extending the access to such provisions to members of their civilian component and dependents.

EU Directives and Value Added Tax and on Customs recognise the exemptions mentioning goods and services for the supply of NATO Member forces and their

¹²⁰ The most prominent is NATO Logistic Concept and related documents (for example Allied Joint Publication 4.5 on Host Nation Support), but also STANAG 6007 is an understanding amongst the (participating) NATO Nations on the financial principles regarding logistic support. As such, it does not involve or address International Military Headquarters but it captures - in a nation-to-nation context - the general principle restated in Supplementary Agreements as well as in NATO Logistic Concept that no profit or loss should be made by a supporting Party in providing support, generally only incremental costs (as defined in the STANAG) should be recovered, certain overhead costs should not be charged, no lease is to be charged for use of for land and buildings owned by a supporting Party, and where permitted by NATO SOFA, other NATO Agreements, or national law support will be provided free of all duties, taxes and similar charges. It is to be noted that discussions on application and reciprocity is reflected in the reservations to the STANAG.

accompanying civilian staff or supplying their canteens and messes. EU has in an exchange of opinion between the Belgium Mission to NATO and the EU Commission in 1998 stated that exemptions extend to PfP Nations.

- Paragraph 8 – Disposal: Goods imported by the Headquarters or its members tax-free are to be re-exported as described in the paragraph, and may only be disposed of in the host Nation in accordance with the law in force in that Nation.
- Paragraph 11 – Petrol, oil and lubricants (POL): Special arrangements shall be made by the receiving State so that fuel, oil and lubricants for the use in service vehicles, aircraft and vessels of a force may be delivered free of all duties and taxes. The obligation for a host Nation to exempt a Force or an International Military Headquarters from taxes on POL is the only exemption from taxes on purchases made in the host Country and is independent of bilateral arrangements or supplementing agreements.

The Paris Protocol, Article 8, paragraph 3, entitles military staff members and members of the civilian component, except for nationals of host Nation unless they belong to the armed services of a sending State other than the host State, to – free of taxes – import their household effects and privately owned vehicles (see comments to NATO SOFA, Article XI, paragraphs 5 and 6).

With regard to customs, the NATO SOFA requires the sending and receiving States to cooperate in this matter, and this obligation is extended to International Military Headquarters by the Paris Protocol, Articles 4 and 8, paragraph 2; in some matters (NATO SOFA Article XIII) obligations rest with both the Headquarters and the sending State (see comments to NATO SOFA).

7. Disposal of International Military Headquarters Assets

Article 9 addresses the disposal of any assets no longer required by an International Military Headquarters or NATO.

Because the International Military Headquarters are based on NATO common funding, any assets obtained in that manner have come from the Nations through the Military Budget Committee and, accordingly proceeds from any disposal of these assets would go back there. In addition to Article 9, both SHAPE and HQ SACT financial instructions and manuals provide detail regulations on disposals and accounting of property.

Land, buildings or fixed installations provided free of charge by the host Nation shall be handed back to the host Nation when no longer required by the International Military Headquarters. Any loss or gain in value will be credited or debited to the Parties in proportion with what the parties have contributed to the capital cost of the headquarters.

8. Juridical Personality and Immunities

Article 10 of the Paris Protocol addresses legal personality and related issues. Each Supreme Headquarters has juridical personality, which includes the ability to enter into contracts, the buying and selling of property, etc. In the Terms of Reference setting forth the authorities and functions of a subordinate Headquarters, there may be authority delegated for the subordinate Headquarters to carry out legal acts. But without explicit permission, only Supreme Headquarters can enter into legal commitments and thus commit NATO funds. Bi-SC Directive 15-23 (Policy on Legal Support) provides instructions from the Supreme Headquarters to subordinate entities as to which actions require further permission, review of or coordination with the Supreme Headquarters, and Bi-SC Directive 15-3 (International Agreements) directs negotiations and conclusion of international agreements.

In accordance with Article 11, a Supreme Headquarters immunity is limited and a Supreme Headquarter may engage in legal proceedings as a claimant or defendant. The Supreme Headquarters (or, if so authorised, an Allied Headquarters) and the receiving State

may furthermore agree to make the exercise of any such legal capacity subject to special arrangement. Often Supplementary Agreements establish that the receiving State, if necessary, will appear in court on behalf of the Headquarters.

Under Article 13 International Military Headquarters' archives and documents are inviolable, no matter if the documents are kept within the Headquarters or carried by authorized personnel. Any release of documents or records is done as a matter of consent of the Supreme Headquarters, not as the result of any legal requirement. Moreover, no measures of execution or measure of seizure or attachment can be taken against the property or funds of an International Military Headquarters except when the Headquarters and hosting State cooperate either in securing evidence in criminal cases or in support of host State investigation of customs or fiscal offences. Additionally, the immunity from customs search and inspection granted under the NATO SOFA, Article XI, paragraph 3, extends to International Military Headquarters through the Paris Protocol, Article 8, paragraph 2.

9. Budget and Currency Matters - Article 12

The International Military Headquarters have to be able to operate an international budget. They are permitted to hold currency, and can also open bank accounts. This is intended to ease the ability of the International Military Headquarters to handle its finances without incurring exchange fees and other administrative costs.

10. Other Provisions

Article 14 provides that the North Atlantic Council may create more International Military Headquarters and apply this Protocol to them.

If an entity is granted status under Article 14 and if no explicit reservations are stated in this decision, the entity is provided the status similar to that provided in the Paris Protocol to Allied Headquarters. The activation under Article 14 is not reserved to organisations established by Nations outside the command structure . Once activated and granted international status, both Allied Headquarters and International Military Organisations enjoy the same status under the Paris Protocol (unless NAC provides specific comments to the contrary). In Supplementary Agreements one term is sought to encounter for all – sometimes using “International Military Headquarters” as the common term; other agreements use “Allied Headquarters” as the denominator –both being equally correct.

International status is granted to entities which are established by NATO Nations outside NATO Command Structure such as a Centres of Excellence (COE) and similar MOU-organisations. Such entities are considered to form part of NATO command activities without being included in the command structure. However, this is not without exception as the NATO CAOCs through reviews of the NATO Command Structure have remained within the Command Structure but manned and funded by participating Nations rather than by international funds¹²¹. MOU-organisations remain under control and are resourced by the Nations establishing them, but NAC may decide to grant them international status under the Paris Protocol. The affiliation between the MOU-organisation and the Supreme Headquarters, under whose mission it is created, is typically described in the concept provided by the Military Committee for the organisation and in subsequent arrangements, be it functional or command and control¹²². A Supreme Headquarters will not subsume any responsibility for the actions of such entities, but they will in some areas come under the purview of the Supreme Headquarters as they will enjoy status under the supplementary agreement to which the Supreme Headquarters are Parties. Misuse of the privileges would thus become a

¹²¹ See CAOC Uedem Fact Sheet on http://www.airn.nato.int/BRTE_V/factsheets/pdf/AIRN_FACTSHEET_CAOC_UEDEM_NU.pdf

¹²² See ACT homepage, News: 1/16/2009, Centres of Excellence – A pool of expertise for NATO. HQ SACT provides coordination of the works; for other MOU-organisations the arrangements amount to command and control.

matter initially between the State hosting the entity and the Supreme Headquarters. In some areas non-command structure entities, no matter if international status is granted by NAC, will need to function on terms other than those provided in the Paris Protocol or Supplementary Agreements either because the Paris Protocol reserves status to the Supreme Headquarters (for example juridical personality) or because the matters fall outside the role, which the Supreme Headquarters may have towards such entities. Those matters should (and are) be addressed in documents specific to the entity.

[Article 15](#) addresses procedures for interpretation and disputes, noting simply that any differences will be settled by negotiation or by referral to the NAC.

Finally, [Article 16](#) addresses the issue of Supplementary Agreements, providing that the Protocol may be supplemented by bilateral agreement between a Supreme Headquarters and any of the Parties to the Protocol (see comments below).

D. SUPPLEMENTARY AGREEMENTS

Over time NATO SOFA and the Paris Protocol have been operationalised and amended both through NATO policy e.g. on host nation support, in NATO regulations, and in policies adopted by NAC and the Military Committee, and through Supplementary Agreements concluded under Article 16 of the Paris Protocol. In terms of policy some examples are the allied transportation and movement publications (border crossing, procedures, consignments and documents); the doctrine adopted in Allied Joint Publication 4.5 on Host Nation Support, and the terms of employment of NATO International Civilians, which are defined in NATO Civilian Personnel Regulations (issued by NAC).

The need for complementing arrangements was already identified during the negotiations of the Paris Protocol and at least two areas were named as subject for further agreements: Functional immunities to be granted to flag- and general officers and the operation of post offices by nations and an IMHQ. Today, SHAPE and HQ SACT, respectively, hold agreements with more than 10 NATO Nations. The first Supplementary Agreements were concluded just after the finalization of the Paris Protocol in support of the Supreme Headquarters, and the Agreement done in 1954 with U.S. regarding the status of the Supreme Headquarters to be placed in the US (then SACLANT, now HQ SACT) is still in force. The Supplementary Agreements principally accords the same status and entitlements to IMHQs, but more are worded differently as they have occurred over a period of nearly 50 years. Within the past two years, Legal Advisers in ACT and ACO have developed a master template agreement, representing an analysis of state practice, Supplementary Agreements in effect, and NATO regulations and policy, where such apply. The list below summarizes the features usually expected or found in a Supplementary Agreement. Generally, a Supplementary Agreement confirms the status granted under the Paris Protocol and NATO SOFA, and:

- explains the immunity enjoyed by an IMHQ, the inviolability of its premises, the functional immunities to be afforded to flag and general officers;
- addresses allocation and operation of facilities; security and force protection;
- reporting of assigned personnel; operation, registration and licensing of vehicles; carrying and storage of arms; access to banking facilities; measures to be considered with regard to public hygiene, environmental protection, health and safety; evacuation of IMHQ personnel;
- provides procedures for application of status and entitlements, e.g. identifies responsibilities of the hosting state in regard to representing the IMHQ should it become involved in legal proceedings, provides an opportunity for an IMHQ to contract through the authorities of the hosting Nation, identifies the relevant authority to handle claims;
- confirms the exemption from taxes enjoyed by an IMHQ, and the right to operate canteens and other facilities, and identifies fiscal entitlements of the IMHQ members;
- defines the rights for an IMHQ to hold, install, and operate communications equipment; protects the correspondence and communications of an IMHQ;
- recognizes the operation of morale and welfare programmes; access to health and dental services, and to military clubs, travel concessions, sports clubs as well as dependants' access to education;
- elaborates on definitions, extends entitlements and waivers for example on visa and residency requirements for civilians and dependants, and supplements and details the status to be afforded to the IMHQ and its personnel;
- identifies and defines contractors and defines their status.

E. AGREEMENTS IN THE PARTNERSHIP FOR PEACE FRAMEWORK

The original document which initiated the cooperation between NATO Member States and other states was called Partnership for Peace: Framework Document. This was issued by the Heads of State and Government participating in the Meeting of the North Atlantic Council in 1994.

The preamble of the text is as follows:

Further to the invitation extended by the NATO Heads of State and Government at their meeting on 10th/11th January, 1994, the member states of the North Atlantic Alliance and the other states subscribing to this document, resolved to deepen their political and military ties and to contribute further to the strengthening of security within the Euro-Atlantic area, hereby establish, within the framework of the North Atlantic Cooperation Council, this Partnership for Peace.

It is worth to note that the Framework Document is not a legally binding instrument and does not require ratification or other domestic legislative act, yet the content expresses explicit expectations, which sometimes ties partners closer than a legally binding treaty.

With regards to the status of forces issue, a PfP Status of Forces Agreement (PfP SOFA) was concluded in June 1995, regulating the status of Forces of NATO and PfP member nations, respectively. By virtue of the PfP SOFA, the provisions of the NATO SOFA apply to the relationships between :

- PfP States internally and vis-a-vis NATO States when conducting activities in the territory of a NATO member nation;
- NATO States and vis-à-vis PfP States when activities are concluded within the geographical area where PfP SOFA applies.
- PfP states when activities are conducted within the geographical area where PfP SOFA applies.

The PfP SOFA is supplemented by the "Additional Protocol" (June 1995), under which the parties will refrain from carrying out death sentences towards military and civilian personnel from a visiting force - and their dependants - of another party to the Protocol.

In 1997 a "Further Additional Protocol" to the PfP SOFA was introduced. The protocol makes the Paris Protocol applicable to PfP States, whereby PfP personnel sent to serve in Partnership Elements to NATO Headquarters will be granted the same status as their NATO colleagues, just as PfP States recognise the special status granted to NATO International Military Headquarters and to the Headquarters personnel by the Paris Protocol.

PART V
TREATY LAW, INTERNATIONAL AGREEMENTS
AND NATO PRACTICE

References and suggested reading:

- Allied Joint Publication 4.5 (A) (Allied Host Nation Support Doctrine And Procedures)
- Anthony Aust: Modern Treaty law and Practice / Cambridge / Second edition 2007, reprinted 2009
- Bi-SC Directive 15-3 on the Preparation and Control of International Agreements (11 January 2007 version)
- Canadian Forces - Memoranda of Understanding (MOU) Development 1998-03-31/ Memoranda of Understanding (MOU) Writing Guidelines Date of Issue 1997-06-24
- Denys P. Myers: The Names and Scope of Treaties / Source: The American Journal of International Law, Vol. 51, No. 3 (Jul., 1957)
- Glossary of terms relating to Treaty actions / Definition of key terms used in the UN Treaty Collection - UN Treaty Section
- Multilateral Treaties for which the United States is Depository / US Department of State - <http://www.state.gov/s/1/treaty/depositary/index.htm>
- The effect of armed conflict on treaties: an examination of practice and doctrine / International Law Commission, Fifty-seventh session, Geneva, 2 May-3 June 2005, and 4 July-5 August 2005 / Memorandum by the Secretariat
- The Treaty Maker's Handbook / Blix, Hans; Emerson, Jirina H./ Dag Hammarskjöld Foundation (Sweden) / Dobbs Ferry, N.Y., Oceana Publications, 1973
- Treaties and MOUs, Guidance on Practice and Procedures / Second Edition. April 2000 - Revised May 2004 / Treaty Section - Information Management Department - Foreign & Commonwealth Office, UK
- Treaties in Force - A List of Treaties and Other International Agreements of the United States / USA Department of State / <http://www.state.gov/s/1/treaty/treaties/2009/index.htm>
- Treaty Handbook / Prepared by the Treaty Section of the Office of Legal Affairs, United Nations
- United Nations Summary Of Practice Of The Secretary-General As Depository Of Multilateral Treaties / Prepared by the Treaty Section of the Office of Legal Affairs /
- United States Chairman Of The Joint Chiefs Of Staff Instruction - International Agreements / CJCSI 2300.01A / 12 February 1999
- United States Department of Defense Directive on International Agreements / No. 5530.3 - June 11, 1987 / Certified Current as of November 21, 2003
- Vienna Convention on the Law of Treaties / concluded in Vienna on 23 May 1969, Came into force on 27 January 1980
- Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, concluded in Vienna on 21 March 1986

Editorial note:

This chapter is not intended to substitute the extensive study of treaty law and the practice of international agreements. Rather, it contains a short introduction to the law of treaties, a short explanation of Memorandum of Understanding and its relation to treaty level agreements, with inclusion of NATO policies and practices.

It is suggested to read this chapter along with other parts of this Deskbook relevant to the law and practice of international agreements that can be found in Part III, Part IV, Part IX and Part X.

A. INTRODUCTION TO THE TREATY LAW**1. Definition of treaty**

Treaty is a generic term embracing all instruments binding under international law, regardless of their formal designation. Treaties are concluded between two or more international juridical persons signified by the intention of the parties to create rights and obligations enforceable under international law. The Vienna Convention on the Law of the Treaties between States of 1969¹²³ defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."¹²⁴ Accordingly, conventions, agreements, protocols, and exchange of letters or notes may all constitute treaties, if this is the intent of the parties.

A treaty is normally in written form. Although the Vienna Convention of 1969 does not apply to non-written agreements, its definition of a treaty states that the absence of written form does not affect the legal force of international agreements.

There are no consistent rules as to when an international instrument should be titled a "treaty" or when state practice employs the terms "treaty" as a title for an international instrument. However, usually the term treaty is employed for instruments of some gravity and solemnity.¹²⁵ Their signatures are usually sealed and they normally require ratification. Typical examples of international instruments designated as "treaties" are Peace Treaties, Border Treaties, Delimitation Treaties, Extradition Treaties and Treaties of Friendship, Commerce and Cooperation. The use of the term "treaty" for international instruments has considerably declined in the last decades in favour of other terms.

BACKGROUND INFORMATION

The Vienna Convention on the Law of Treaties is the fundamental treaty concerning the customary international law on treaties between States.¹²⁶ It was adopted on 22 May 1969, opened for signature on 23 May 1969, and later entered into force on 27 January 1980. The Convention has been ratified by 110 states as of the writing of this Deskbook.

¹²³ Further referred to as Vienna Convention of 1969.

¹²⁴ Article 2(1) (a) of the Vienna Convention of 1969.

¹²⁵ "The broad division of instruments into treaties and agreements in Article 102 of the United Nations Charter is valid in the sense that one category emanates from the highest executive authority in the state and the other from subordinate executive authority, the one laying down the general and substantial relations between states and the other handling the ordinary intergovernmental business. The line between the two categories can only be subjectively drawn, and the system of treaty relations tends to expand at the ends." Denys. P. "The names and scope of treaties" the American Journal of International Law, Vol 51. No 3, July 1957

¹²⁶ Article 3 of the Vienna Convention of 1969 covers the negative delimitation of the scope of the Convention.

Of the 28 NATO Member States 21 have ratified the treaty, the United States has signed, and six Member States have not signed it (France, Iceland, Latvia, Norway, Romania, and Turkey).

The Convention is widely recognized as the authoritative guide *vis-à-vis* the formation and effects of treaties. The Convention applies only to international agreements concluded between States. The Convention is built on the concepts of principles of free consent, good faith and the *pacta sunt servanda* rule as universally recognized principles of international treaty law.¹²⁷

The Convention does not deal with effects of war on treaties, apart from stating that the provisions of the Convention shall not prejudice any question that may arise in regard to a treaty from the outbreak of hostilities between the States.¹²⁸ For detailed analysis of the effects of war on treaties it is advised to consult the documents of the International Law Commission.¹²⁹

2. States and international organizations

Agreements concluded between States and international organizations and between international organizations¹³⁰ are regulated by 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations¹³¹ which has not entered into force to this date.¹³²

The 1986 Convention¹³³ is constructed on the assumption that international organizations possess the capacity to conclude treaties, which are necessary for the exercise of their functions and the fulfilment of their purposes and on the recognition that the capacity of an international organization to conclude treaties is governed by the rules of that organization.¹³⁴ The term treaty is defined for the purposes of the Convention as an international agreement governed by international law and concluded in written form between one or more States and one or more international organizations or between international organizations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation.¹³⁵¹³⁶

The Vienna Convention of 1986 governs the relationship to the Vienna Convention on the Law of Treaties of 1969. Accordingly, as between States Parties to the Vienna Convention on the Law of Treaties of 1969, the relations of those States under a treaty between two or

¹²⁷ Vienna Convention of 1969.

¹²⁸ Article 73 of the Vienna Convention of 1969.

¹²⁹ The effect of armed conflict on treaties: an examination of practice and doctrine / International Law Commission, Fifty-seventh session, Geneva, 2 May-3 June 2005, and 4 July-5 August 2005 / Memorandum by the Secretariat. <http://www.un.org/law/ilc/>

¹³⁰ An international organization for the purposes of the Convention means an intergovernmental organization

¹³¹ The Convention was signed in Vienna on 21 March 1986.

¹³² The Convention is subject to ratification by States and to acts of formal confirmation by international organizations. The Convention remains open for accession by any State and by any international organization which has the capacity to conclude treaties. According to Article 85 of the Convention, it shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession by a State. As of 03 July 2010, thirty States had deposited instruments of ratification, accession or succession and eleven international organizations deposited an instrument relating to an act of formal confirmation or an instrument of accession. Although forty-one parties altogether ratified the Convention, international organizations, which are party to the Convention, are not counted for entry into force purposes, pursuant to Article 85 of the Convention.

¹³³ Further referred to as Vienna Convention of 1986.

¹³⁴ Article 6 of the Vienna Convention of 1986.

¹³⁵ Article 2 of the Vienna Convention of 1986.

¹³⁶ Article 3 of the Vienna Convention of 1986 contains negative delimitation of the scope of the Convention.

more States and one or more international organizations shall be governed by that Convention.¹³⁷

Taking into account that the Vienna Convention of 1986 is not in force and that less than half of the members of NATO¹³⁸ have ratified it (or otherwise expressed their consent to be bound by the Convention), the forthcoming text predominately deals with the Vienna Convention of 1969, while providing references and corresponding provisions of the Vienna Convention of 1986. It is also worth mentioning that NATO is not a party to the convention.

B. TREATY MAKING POWER OF INTERNATIONAL ORGANIZATIONS

One of aspect of international organization's legal capacity in international law is the treaty-making power.¹³⁹ International organizations possess the capacity to conclude treaties which is necessary for the exercise of their functions and the fulfilment of their purposes.¹⁴⁰

As determined by the constituting documents or rules of such an organization, such a power is conferred either expressly, by reasonable implication as a competence required to enable the organization to discharge its functions effectively,¹⁴¹ or by subsequent practice.¹⁴²

The treaty making power is not absolute; the subject matter of the treaty represents a limit to the powers of international organizations to conclude treaties.

The identity of the organ(s) vested with the treaty-making power is a matter for internal rules of the organization, being expressly provided for in some cases.

THE UN EXAMPLE

The UN Charter specifies categories of treaties envisaged, for example, the relationship agreements between the UN and the specialised agencies under Article 57 and 63 of the Charter, the trusteeship agreements under Chapter XII or the conventions concerning privileges and immunities referred to in Article 105 (3).

Yet there are many agreements concluded on no specific grant of powers; the agreement on technical assistance and the Children's Fund, the agreements between the Secretary General and states contributing armed forces to peacekeeping operations, as well as those concluded with the states on the territory of which those operations are unfold are clear illustrations.

¹³⁷ Article 73 of the Vienna Convention of 1986.

¹³⁸ Out of 28 members of NATO only 13 have ratified the Convention. These are: Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Germany, Greece, Hungary, Italy, Netherlands, Slovakia, Spain and United Kingdom.

¹³⁹ See, for example, Nijhoff, *The Capacity of International Organizations to Conclude Treaties*, The Hague, 1966.

¹⁴⁰ See an explanation in Anthony Aust: *Modern Treaty law and Practice* / Cambridge / Second edition 2007, reprinted 2009 / p 398-399

¹⁴¹ Lauterpacht, *The Development of the Law of International Organizations by Decisions of International Tribunals*, p.388-478.

¹⁴² Yearbook of ILC 1974 II, Part One, at 148.

C. TREATY EXAMPLES IN THE NATO CONTEXT AND IN THE DEFENCE FIELD

As it was described in previous chapters, NATO Member States have concluded a series of treaty level multilateral agreements during the years of existence of the Alliance.¹⁴³ Beside the North Atlantic Treaty, one can identify the following important treaties:

- Agreement on the Status of the North Atlantic Treaty Organisation, National Representatives and International Staff / Ottawa, 20 September 1951;
- Agreement on the Status of Missions and Representatives of Third States to the North Atlantic Treaty Organisation / Brussels, 14 September 1994;
- Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces / London, 19 June 1951;
- Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty / Paris, 28 August 1952;
- Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces / Brussels, 19 June 1995;¹⁴⁴
- Agreement On The Communication Of Technical Information For Defence Purposes / Brussels 19 October, 1970;
- Agreement Between The Parties To The North Atlantic Treaty For Co-Operation Regarding Atomic Information / Paris, 18 June 1964;
- Agreement For The Mutual Safeguarding Of Secrecy Of Inventions Relating To Defence And For Which Applications For Patents Have Been Made / Paris 21 September 1960;
- Agreement Between the Parties to the North Atlantic Treaty for the Security Of Information / Brussels, 6 March, 1997.

NATO Headquarters is a party to the headquarters or seat agreements for NATO agencies (implementing the Ottawa Agreement). NATO Headquarters is a party to the Transit Agreements and Status of Mission Agreements.

The two Supreme Headquarters conclude agreements with one of the Member States on the status and location of the Supreme Headquarters and / or subordinate entities (Supplementary Agreements, authorised under the Paris Protocol, Article 16).

Most of the treaty level agreements that are concluded in the defence field are:

- the multilateral conventions in international humanitarian law (including the Geneva stream conventions and the Hague stream conventions);¹⁴⁵
- the arms control conventions, imposing restrictions upon the development, production, stockpiling, proliferation, and usage of weapons, especially weapons of mass destruction;¹⁴⁶

¹⁴³ The full list of the "all-NATO" treaties and accompanying accession documents can be found at in the ANNEX and at <http://www.state.gov/s/1/treaty/depositary/index.htm>

¹⁴⁴ Plus the Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace regarding the Status of their Forces. Done at Brussels June 19, 1995. Further Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace regarding the Status of their Forces. Done at Brussels December 19, 1997.

¹⁴⁵ See details in the Chapter on Law of Armed Conflict and Rules of Engagement

¹⁴⁶ A detailed description of arms control treaties is planned to be included in the next edition of this Deskbook.

- bilateral or multilateral treaties on mutual assistance / collective defence.

D. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

In order to become a party to a multilateral treaty, a State must demonstrate, through a concrete act, its willingness to undertake the legal rights and obligations contained in the treaty. In other words, it must express its consent to be bound by the treaty.¹⁴⁷ A State can express its consent to be bound in several ways, in accordance with the final clauses of the relevant treaty. The most common ways, as discussed below, are: definitive signature, ratification, acceptance or approval and accession. It is important to note that the act by which a State expresses its consent to be bound by a treaty is distinct from the treaty's entry into force. Consent to be bound is the act whereby a State demonstrates its willingness to undertake the legal rights and obligations under a treaty through definitive signature or the deposit of an instrument of ratification, acceptance, approval or accession. Entry into force of a treaty with regard to a State is the moment the treaty becomes legally binding for the State that is party to the treaty. Each treaty contains provisions dealing with both aspects.

1. Adoption of the text of a treaty

Adoption is the formal act by which the form and content of a proposed treaty text are established. As a general rule, the adoption of the text of a treaty takes place through the expression of the consent of the States participating in the treaty-making process.¹⁴⁸ Treaties that are negotiated within an international organization will usually be adopted by a resolution of a representative organ of the organization whose membership more or less corresponds to the potential participation in the treaty in question.

2. Consent to be bound by a treaty

Most multilateral treaties expressly provide for States to express their consent to be bound by several means, such as signature, exchange of instruments constituting a treaty, ratification, acceptance or approval or accession, or by any other means if so agreed.¹⁴⁹

3. Signature

One of the most commonly used steps in the process of becoming a party to a treaty is signing¹⁵⁰ the treaty. Multilateral treaties often provide that they will be open for signature only until a specified date, after which signature will no longer be possible. Once a treaty is closed for signature, a State may generally become a party to it by means of accession.

Multilateral treaties usually provide for signature subject to ratification, acceptance or approval - also called simple signature. In such cases, the signing State does not undertake positive legal obligations under the treaty upon signature. However, signature indicates the State's intention to take steps to express its consent to be bound by the treaty at a later date.¹⁵¹ Signature also creates an obligation, in the period between signature and ratification, acceptance or approval, to refrain in good faith from acts that would defeat the object and purpose of the treaty.¹⁵² Some treaties provide for definitive signature in which case States can express their consent to be legally bound solely upon signature. The definitive signature practice is commonly used in bilateral treaties. For the signature to be binding an instrument

¹⁴⁷ An international act corresponding to that of ratification by a State, is an "act of formal confirmation," whereby an international organization establishes on the international plane its consent to be bound by a treaty. Article 2 of the Vienna Convention of 1986.

¹⁴⁸ Article 9 of the Vienna Convention of 1969 and Article 9 of the Vienna Convention of 1986.

¹⁴⁹ Article 11 of the Vienna Convention of 1969 and Article 11 of the Vienna Convention of 1986.

¹⁵⁰ Article 12 of the Vienna Convention of 1969 and Article 11 of the Vienna Convention of 1986.

¹⁵¹ See Article 18 of the Vienna Convention of 1969.

¹⁵² See, e.g., Article 125(2) of the Rome Statute of the International Criminal Court, 1998.

of full powers¹⁵³ is needed. A person other than the Head of State, Head of Government or Minister for Foreign Affairs may sign a treaty only if that person possesses a valid instrument of full powers. This instrument empowers the specified representative to undertake given treaty actions and its format shall contain certain mandatory points.¹⁵⁴

STATE PRACTICE

In UK practice, the Queen does not sign treaties, but the Prime Minister sometimes does. Full Powers are normally signed by the Foreign and Commonwealth Secretary except for certain EU treaties which are drawn up between Heads of State and therefore require a Queen's Full Power. Foreign Commonwealth Office Ministers and certain UK Representatives hold general Full Powers giving them authority to sign any treaty (subject to the approval of the Foreign and Commonwealth Secretary in each case). Anyone else signing a treaty on behalf of the UK requires a special Full Power enabling them to sign the specific treaty.

Treaties endorsed by simple signature express the consent of the State to be bound subject to ratification, acceptance or approval.¹⁵⁵

- Ratification - Providing for signature subject to ratification allows States time to seek approval for the treaty at the domestic level and to enact any legislation necessary to implement the treaty domestically. Once a State has ratified a treaty at the international level, it must ratify it domestically in accordance with its own constitutional provisions before it expresses consent to be bound internationally.¹⁵⁶
- Acceptance or approval - Acceptance or approval of a treaty following signature has the same legal effect as ratification, and the same rules apply, unless the treaty provides otherwise.¹⁵⁷ If the treaty provides for acceptance or approval without prior signature, such acceptance or approval is treated as an accession, and the rules relating to accession would apply.
- Accession - A State may generally express its consent to be bound by a treaty by depositing an instrument of accession with the depositary.¹⁵⁸ Accession has the same legal effect as ratification. However, unlike ratification, which must be preceded by signature to create binding legal obligations under international law, accession requires only one step, namely, the deposit of an instrument of accession. Accession is possible only if it is provided for in the treaty, or if all the parties to the treaty agree that the acceding State should be allowed to accede.

¹⁵³ Article 7 of the Vienna Convention of 1969 and Article 7 of the Vienna Convention of 1986.

¹⁵⁴ For more precisions see United Nations Treaty Handbook, particularly Annex 3.

¹⁵⁵ The relationship between ratification and signature can be understood only in the light of history. In days when communication made it difficult for diplomat to keep in touch with its sovereign, ratification was employed to prevent the diplomat to exceed their instructions. By 1800 the idea of ratification came to be used for a different purpose, to give the head of state time for second thoughts. With the rise of democracy, the delay between signature and ratification gave a chance for public opinion to make itself felt. By the nineteenth century many states had adopted constitutions requiring the consent of legislature for ratification. However, the increasing number of treaties left no time for legislature to discuss the routine treaties. Thus the modern practice grew up of treating many treaties as binding upon signature alone

¹⁵⁶ Although in many State's practices ratification is perceived as internal act, resulting in acceptance of the treaty in domestic legal system, in the rigorous interpretation of the Article 2 of the Vienna Convention the term ratification signifies an international act by which a State establishes on the international plane its consent to be bound by a treaty.

¹⁵⁷ See Article 14(2) of the Vienna Convention of 1969 and Article 14 of the Vienna Convention of 1986.

¹⁵⁸ See Article 15 of the Vienna Convention of 1969 and Article 15 of the Vienna Convention of 1986.

THE PRACTICE

Treaties are nowadays often concluded by an exchange of correspondence- exchange of notes between two States. Each note is signed by a representative of State and the two signatures are usually enough to establish the consent of the States to be bound.

The modern practice of leaving certain treaties open for long periods for signature has blurred the distinction between accession, on one hand, and signature and ratification on the other.

Acceptance or approval is sometimes used nowadays in place of ratification. The innovation is more a matter of terminology than substance, acceptance and approval performing the same function as ratification and accession; in particular they give a State time to consider a treaty at length before deciding whether to be bound.

In today practice texts of multilateral treaties are usually drawn up by an organ of international organization and then the treaty is declared to be open for accession, ratification, acceptance or approval by Member States. The terminological confusion becomes complete, since these terms are used interchangeably to describe a process which is absolutely identical.

Practical considerations linked to the consent to be bound include certain form and content of the instrument of ratification, acceptance, approval or accession.¹⁵⁹

ACCESSION IN NATO'S PRACTICE

Accession of new Member States to NATO is formally performed by the ratification of all Member States of the Protocol which contains the invitation to accede to the North Atlantic Treaty. After all ratifications are in place, the country in question shall deposit its instrument of accession.

Taking the example of the recent accession of Albania and Croatia, a template of the Protocol is the following:

"The Parties to the North Atlantic Treaty, signed at Washington on April 4, 1949,

Being satisfied that the security of the North Atlantic area will be enhanced by the accession of the [country] to that Treaty,

Agree as follows:

Article I

Upon the entry into force of this Protocol, the Secretary General of the North Atlantic Treaty Organisation shall, on behalf of all the Parties, communicate to the Government of [country] an invitation to accede to the North Atlantic Treaty. In accordance with article 10 of the Treaty, [country] shall become a Party on the date when it deposits its instrument of accession with the Government of the United States of America.

Article II

The present Protocol shall enter into force when each of the Parties to the North Atlantic Treaty has notified the Government of the United States of America of its acceptance thereof. The Government of the United States of America shall inform all the Parties to the North Atlantic Treaty of the date of receipt of each such notification and of the date of the entry into force of the present Protocol.

Article III

¹⁵⁹ The model instrument of ratification, acceptance or approval can be found in Annex 4 and the model instrument of accession in Annex 5 of the United Nations Treaty Handbook.

The present Protocol, of which the English and French texts are equally authentic, shall be deposited in the Archives of the Government of the United States of America. Duly certified copies thereof shall be transmitted by that Government to the Governments of all the Parties to the North Atlantic Treaty.

In witness whereof, the undersigned plenipotentiaries have signed the present Protocol.

Signed at Brussels on the [...] day of [...].”

4. Reservations¹⁶⁰

In certain cases, States make statements - reservations¹⁶¹ upon signature, ratification, acceptance, approval of or accession to a treaty. A reservation in international law is a caveat to a State's acceptance of a treaty. However phrased or named, any such statement purporting to exclude or modify the legal effect of a treaty provision with regard to the declarant is a reservation.¹⁶² The freedom of States to make a reservation is limited by Article 19 of the Vienna Convention of 1969.¹⁶³ Moreover, in some cases, treaties specifically prohibit reservations.¹⁶⁴

The effect of a reservation depends on whether it is accepted or rejected by other States concerned. A reservation to a bilateral treaty presents no problems, because it is, in effect, a new proposal reopening the negotiations between the two States, and unless an agreement has been reached about the terms of the treaty, no treaty will be concluded.

EXPLANATION

The traditional rule is that the State could not make a reservation to a treaty unless the reservation was accepted by all States which had signed or adhered to a treaty. However, the International Court of Justice said in the advisory opinion of the *Genocide* case¹⁶⁵ that although the traditional theory had an undisputed value, it was not applicable to certain types of treaties, more specifically to the Genocide Convention, which sought to protect individuals instead of conferring reciprocal rights on contracting States. The Court held that the State having made a reservation can be regarded as a party to that Convention if the reservation is compatible with the object and purpose of the Convention. As consequence a State making a reservation is likely to be regarded as a party to the treaty by some States and not by other Parties.¹⁶⁶

5. Declarations

Sometimes States make declarations as to their understanding of some matter or as to the interpretation of a particular provision. Unlike reservations, declarations have in general

¹⁶⁰ All the specific aspects of reservations relating to the form, time, notification and withdrawal of reservation can be found in the United Nations Treaty Handbook.

¹⁶¹ Article 19 - 23 of the Vienna Convention of 1969 and Article 19 - 23 of the Vienna Convention of 1986.

¹⁶² See Article 2(1)(d) of the Vienna Convention of 1969 and Article 2(1)(d) of the Vienna Convention of 1986.

¹⁶³ The same limitations are included in Vienna Convention of 1986.

¹⁶⁴ For example Article 120 of the Rome Statute of the International Criminal Court, 1998.

¹⁶⁵ ICJ Rep 1951,15.

¹⁶⁶ Articles 19 - 21 of the Vienna Convention of 1969 follow the principle laid down in the *Genocide* case, supporting at the same time the traditional rule by recognizing that every reservation is incompatible with certain types of treaties unless accepted unanimously.

merely interpretative function; to clarify the State's position and do not purport to exclude or modify the legal effect of a treaty. Treaties may provide for States to make optional and/or mandatory declarations. These declarations are legally binding on the declaring states. Optional declarations are frequently employed in human rights treaties.¹⁶⁷ In most cases, these declarations relate to the competence of human rights commissions or committees.¹⁶⁸

In the NATO practice, one can find several declarations to some of the treaty level NATO agreements, especially regarding status of forces.

For example, regarding the territorial scope of the NATO SOFA, the United Kingdom declarations were as follows:

The British Ambassador notified the Acting Secretary of State by a note dated January 30, 1962, which was received on that same date that "the said Agreement, in accordance with the provisions of Article XX thereof, shall extend to the Isle of Man."

The British Ambassador notified the Secretary of State by a note dated June 18, 2002, which was received on that same date that "the said Agreement, in accordance with the provisions of Article XX thereof, shall extend to Bermuda."

Belgium, Luxemburg and Netherlands made joint declarations to the NATO SOFA, Paris Protocol and the Ottawa Agreement, as regards the applicability of exemptions of the respective agreements to their nationals while they are on the territory of one of these three countries.

6. Entry into force

Typically, the provisions of a treaty determine the date of entry into force of a treaty.¹⁶⁹ Where the treaty does not specify a date, there is a presumption that the treaty is intended to come into force as soon as all the negotiating States have agreed.

In general, treaties may enter into force:

- upon a certain number of States depositing instruments of ratification, approval, acceptance or accession with the depositary;¹⁷⁰
- upon a certain percentage, proportion or category of States depositing instruments of ratification, approval, acceptance or accession with the depositary;¹⁷¹
- specific time after a certain number of States have deposited instruments of ratification, acceptance, approval or accession with the depositary;¹⁷²

¹⁶⁷ Where a treaty requires States becoming party to it to make a mandatory declaration, the Secretary-General, as depositary, seeks to ensure that they make such declarations. Some disarmament and human rights treaties provide for mandatory declarations.

¹⁶⁸ Since an interpretative declaration does not have a legal effect similar to that of a reservation, it need not be signed by a formal authority as long as it clearly emanates from the State concerned. Optional and mandatory declarations impose legal obligations on the declaring State and therefore must be signed by the Head of State, Head of Government or Minister for Foreign Affairs or by a person having full powers for that purpose issued by one of the above authorities. Objections to declarations are possible, focusing generally on whether the statement is merely an interpretative declaration or is in fact a true reservation sufficient to modify the legal effects of the treaty. For more information about declarations and their effects see the United Nations Treaty Handbook.

¹⁶⁹ See, e.g., Article 41 of the International Covenant on Civil and Political Rights, 1966.

¹⁶⁹ Article 24 of the Vienna Convention of 1969 Article 24 of the Vienna Convention of 1986.

¹⁷⁰ See, e.g., Article 8 of the Protocol relating to the Status of Refugees, 1967

¹⁷¹ See, e.g., Article 14 of the Comprehensive Nuclear-Test-Ban Treaty, 1996

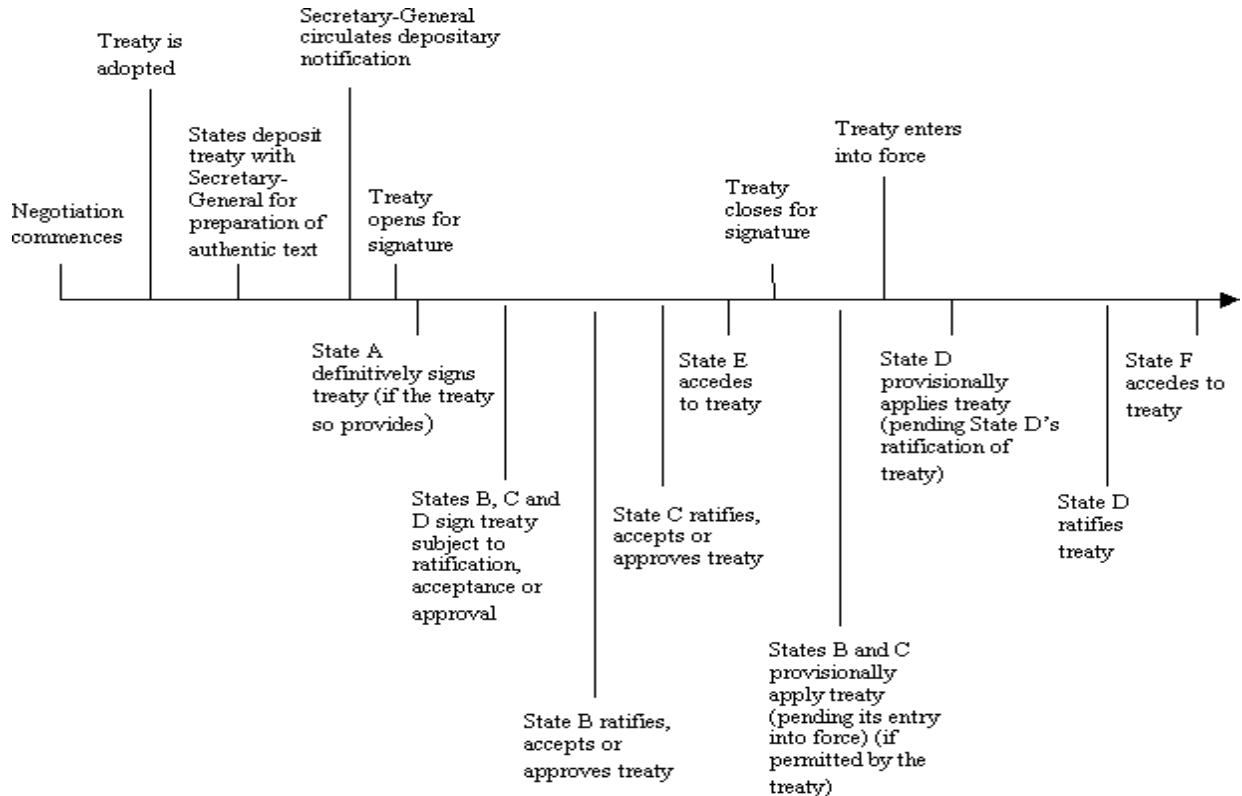
¹⁷² See, e.g., Article 126(1) of the Rome Statute of the International Criminal Court, 1998

- on a specific date.¹⁷³

Bilateral treaties may provide for their entry into force on a particular date, upon the day of their last signature, upon exchange of the instruments of ratification or upon the exchange of notifications. Some treaties provide for additional conditions to be satisfied, e.g., by specifying that a certain category of States must be among the consenters. A treaty enters into force for those States which gave the required consent. A treaty may also provide that, upon certain conditions having been met, it shall come into force provisionally.¹⁷⁴

7. Key events in a multilateral treaty

The time line below shows a possible sequence of events as a treaty enters into force and States become parties to it.¹⁷⁵



E. AMENDMENTS

The text of a treaty may be amended¹⁷⁶ in accordance with the amendment provisions in the treaty itself or in accordance with Chapter IV of the Vienna Convention of 1969.¹⁷⁷ The term amendment refers to the formal alteration of treaty provisions affecting all the parties to the particular agreement.¹⁷⁸ Such alterations must be effected with the same formalities that attended the original formation of the treaty. Many multilateral treaties lay down specific requirements to be satisfied for amendments to be adopted. In the absence of such provisions, amendments require the consent of all the parties.

¹⁷³ See, e.g., Article 45(1) of the International Coffee Agreement 2001, 2000

¹⁷⁴ Article 25 of the Vienna Convention of 1969 and Article 25 of the Vienna Convention of 1986.

¹⁷⁵Source United Nations Treaty Handbook.

¹⁷⁶ Article 39 - 41 of the Vienna Convention of 1969 and Article 39 - 41 of the Vienna Convention of 1986.

¹⁷⁷ Chapter IV of the Vienna Convention of 1986.

¹⁷⁸ Article 40 of the Vienna Convention of 1969 and Article 40 of the Vienna Convention of 1986.

An amendment can enter into force in a number of ways; upon adoption of the amendment; after elapse of a specified time period; by consensus if, within a certain period of time following its circulation, none of the parties to the treaty objects; or by deposit of a specified number of instruments of ratification, acceptance or approval. Depending on the treaty provisions, an amendment to a treaty may, upon its entry into force, bind either only those States that formally accepted the amendment or, in rare cases, all States parties to the treaty. States that become parties after the entry into force of an amendment become a party to the treaty as amended, unless otherwise indicated.¹⁷⁹ The provisions of the treaty determine which States are bound by the amendment.¹⁸⁰

F. TERMINATION OF TREATIES

To avoid the insecurity in legal relations, Article 26 of the Vienna Convention of 1969 provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith.¹⁸¹ Thus a State cannot release itself from its treaty obligations whenever it feels like. The termination of a treaty, its denunciation or withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the provisions of the Vienna Convention. The same result applies to suspension of the operation of a treaty.¹⁸²

1. Withdrawal or denunciation

In general terms, a party may withdraw from or denounce a treaty:

- in accordance with any provisions of the treaty enabling withdrawal or denunciation,¹⁸³
- with the consent of all parties after consultation with all contracting States,
- in the case of a treaty that is silent on withdrawal or denunciation, by giving at least 12 months' notice, and provided that it is established that the parties intended to admit the possibility of denunciation or withdrawal, or a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. Termination

Treaties may include a provision regarding their termination. Article 42 (2) of the Vienna Convention of 1969 states that a treaty may only be terminated as a result of the application of the provisions of the treaty itself or of the Convention.¹⁸⁴

There is a possibility of termination or suspension of a treaty as a consequence of its breach. In the case of bilateral treaties the injured State's power to terminate or suspend the treaty is one of the main sanctions for the breach of the treaty.¹⁸⁵

¹⁷⁹ See Article 40(5)(a) of the Vienna Convention of 1969 and Article 40(5)(a) of the Vienna Convention of 1986.

¹⁸⁰ See, e.g., Article 13(5) of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997.

¹⁸¹ Also in Article 26 of the Vienna Convention of 1969.

¹⁸² Article 42(2) of the Vienna Convention of 1969 and Article 42(2) of the Vienna Convention of 1986.

¹⁸³ For example as regards the Paris Protocol (Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty. Done at Paris August 28, 1952.) France withdrew its membership. The Embassy of the French Republic, by a note dated March 30, 1966, and received on that same date, notified the Department of State of the denunciation by France of the Protocol, in accordance with Article 16, paragraph 1 of the Protocol and Article XIX of the 1951 NATO Status of Forces Agreement. Denunciation of the Protocol by France was effective March 31, 1967.

¹⁸⁴ E.g., Articles 54, 56, 59-62 and 64 of the Vienna Convention of 1969 and Article 54, 56, 59-62 and 64 of the Vienna Convention 1986

¹⁸⁵ Article 60(1) of the Vienna Convention of 1969 and Article 60(1) of the Vienna Convention of 1986.

The problem is more complicated in case of multilateral treaties, where the denunciation of a treaty would not only affect the exiting and the breaching State's position, but the position of other participating States. This situation is governed by Article 60 (2) of the Vienna Convention of 1969.

It is generally agreed that a right to terminate does not arise unless the breach is a material one.¹⁸⁶ Breach does not automatically terminate the treaty, it merely gives the injured party or parties an option to terminate or suspend the treaty, and, according to Article 45, an injured party loses the right to exercise this option. The power of the injured party to terminate or suspend a treaty may also be modified or excluded by the treaty itself.

A termination or withdrawal of a treaty may occur in the case of supervening impossibility of performance, for example in case of permanent disappearance or destruction of an object indispensable for the execution of the treaty.¹⁸⁷ The impossibility to terminate does not automatically terminate the treaty, but merely gives an option to a party to terminate it.

Additional motive for termination of a treaty is the fundamental change of circumstances occurring after the conclusion of the treaty. The rule only applies in the most exceptional circumstances to avoid its abuse for evading inconvenient treaty obligations.¹⁸⁸

Emergence of new peremptory norm of general international law may make void and terminate an existing treaty which is in conflict with such a norm.¹⁸⁹

G. REGISTRATION

An important phase in a life of an international treaty is its registration with the Secretariat of the United Nations. According to Article 102 of the Charter of the United Nations, every treaty and international agreement entered into by a Member of United Nations shall as soon as possible be registered with the Secretariat and published by it. Prior to registration, no party may invoke a treaty or agreement before any organ of the United Nations. Registration, not publication, is the prerequisite for a treaty or international agreement to be capable of being invoked before the International Court of Justice or any other organ of the United Nations. Registration promotes transparency and the availability of texts of treaties to the public. An additional advantage of the Article 102 is that the treaties are published in the United Nations treaty Series which is a useful work of reference.

Recognising the need for the Secretariat to have uniform guidelines for implementing Article 102, the General Assembly adopted certain Regulations to give effect to Article 102, governing questions and modalities of registration.¹⁹⁰

HISTORICAL BACKGROUND

The objective of Article 102, which can be traced back to Article 18 of the Covenant of the League of Nations, is to ensure that all treaties and international agreements remain in the public domain and thus assist in eliminating secret diplomacy. The Charter of the United Nations was drafted in the aftermath of the Second World War. At that time, secret diplomacy was believed to be a major cause of international instability.

¹⁸⁶ Article 60 (3) of the Vienna Convention of 1969 and Vienna Convention of 1986 contains the definition of material breach.

¹⁸⁷ Article 61 of the Vienna Convention of 1969 and Article 61 of the Vienna Convention of 1986.

¹⁸⁸ Article 62 of the Vienna Convention of 1969 and Article 62 of the Vienna Convention of 1986.

¹⁸⁹ Article 71(2) of the Vienna Convention of 1969 and Article 71(2) of the Vienna Convention of 1986.

¹⁹⁰ See Repertory of practice, Extracts relating to Article 102 of Charter of United Nations, available at <http://www.un.org/law/repertory/>.

H. DEPOSITING AN INTERNATIONAL TREATY

After a treaty has been concluded, the written instruments, which provide formal evidence of consent to be bound, and also reservations and declarations, are placed in the custody of a depositary.¹⁹¹ The depositary of a treaty is responsible for ensuring the proper execution of all treaty actions relating to that treaty. The depositary's duties are international in character, and the depositary is under an obligation to act impartially in the performance of those duties.¹⁹²

When a treaty is adopted within the framework of the United Nations or at a conference convened by the United Nations, the treaty normally includes a provision designating the Secretary-General as the depositary for that treaty. The Secretary-General of the United Nations, at present, is the depositary for over 500 multilateral treaties. The Secretary-General derives this authority from the Charter of the United Nations and United Nations resolutions.¹⁹³

When a treaty is not adopted within the framework of the United Nations or at a conference convened by the United Nations, the negotiating parties to a multilateral treaty may designate the depositary for that treaty either in the treaty itself or in some other manner.¹⁹⁴ It is customary for the treaty to be deposited with the State that hosted the negotiating conference. For treaties with a small number of parties, the depositary will usually be the government of the State on whose territory the treaty was signed.

Most of the treaties in the area of international humanitarian law are deposited at the Government of Switzerland.

NATO PRACTICE

The vast majority of multilateral treaties concluded by Nations regarding NATO are deposited at the Department of State of the United States. (One exception is the Agreement on the Status of Missions and Representatives of Third States to the North Atlantic Treaty Organisation (14 Sep. 1994), which is deposited with the Kingdom of Belgium.)

The Department of State maintains a regularly updated list of the States parties to the treaties and their possible reservations and declarations.¹⁹⁵ The United States is depositary for over 200 multilateral treaties - including, for example, the Charter of the United Nations, the Statute of the International Atomic Energy Agency.

I. APPLICATION OF TREATIES

The general rule in regard of application of treaties is that a treaty is binding upon each party in respect of its entire territory, unless a different intention appears from the treaty or is otherwise established.¹⁹⁶

When analysing a question that is subject to a multilateral treaty, a practitioner lawyer shall be cautious as to which States are parties to a treaty.¹⁹⁷

¹⁹¹ Article 16 of the Vienna Convention of 1969 and Article 16 of the Vienna Convention of 1986.

¹⁹² Article 77 of the Vienna Convention of 1969 and Article 77 of the Vienna Convention of 1986.

¹⁹³ Article 98 of the Charter of the United Nations; provisions of the treaties themselves; General Assembly resolution 24(1) of 12 February 1946; and League of Nations resolution of 18 April 1946.

¹⁹⁴ Article 76 of the Vienna Convention of 1969 and Article 77 of the Vienna Convention of 1986.

¹⁹⁵ The websites are: 1. <http://www.state.gov/s/1/treaty/> 2. <http://www.state.gov/s/1/treaty/depositary/index.htm>

¹⁹⁶ Article 29 of the Vienna Convention of 1969 and Article 29 of the Vienna Convention of 1986.

¹⁹⁷ For example, not all NATO members are parties to the Additional Protocol and Further Additional Protocol to the PfP SOFA.

A State may have signed but not ratified a treaty. A State may have made reservations, declarations, or may have not given consensus to an amendment that entered into force with regard to other parties, so with regard to this particular State the previous version is still applicable. Therefore a multilateral treaty may have different versions applicable at the same time.

This could be misleading when the legal adviser uses the text that is found in a national data store, which is usually the text that is considered to be binding on that nation, and there is no reference to other, also applicable versions. Therefore it is always suggested to consult the list of parties to the main text, annexes and amendments.

It is suggested to be cautious regarding the source of information about whether a certain State is a party to a given agreement. Unofficial or semi-official sources are to be avoided. It is always suggested to verify the official source of the depositary nation or of the international organisation¹⁹⁸.

APPLICATION OF NATO TREATIES

Just to highlight the different aspects of application of a treaty, the Washington Treaty serves as a suitable example. Without going into the details of explanation, there are several provisions as regards their application:

Washington Treaty

Article 5

*The Parties agree that an armed attack against one or more of them **in Europe or North America** shall be considered an attack against them all; [...] to restore and maintain the security of the North Atlantic area.*

Article 6

For the purpose of Article 5, an armed attack on one or more of the Parties is deemed to include an armed attack on the territory of any of the Parties in Europe or North America, on the Algerian departments of France, on the occupation forces of any Party in Europe, on the islands under the jurisdiction of any Party in the North Atlantic area north of the Tropic of Cancer or on the vessels or aircraft in this area of any of the Parties.

In order to identify the State Parties of the NATO treaties it is advised to consult the webpage of the US State Department.¹⁹⁹

J. INVALIDITY OF TREATIES

The validity of a treaty or of consent to be bound by a treaty can be impeached only through the application of provisions found in the Vienna Convention.²⁰⁰ Causes of invalidity of a treaty are various:

- breach of municipal law regarding competence to conclude treaties;
- lack of authority to act in the name the State;
- coercion;
- error, fraud, or corruption.

The consequence of invalidity may vary according to the precise nature of the cause of invalidity. In case of the lack of authority, coercion, or treaty conflicts with peremptory

¹⁹⁸ For example Canada signed but has not ratified the Paris Protocol.

¹⁹⁹ <http://www.state.gov/s/l/treaty/depositary/index.htm#NORTH> Click on Status list of each agreement.

²⁰⁰ Article 42 (1) of the Vienna Convention of 1969 and Article 42(1) of the Vienna Convention of 1986.

norms of general international law, the treaty is rendered void - or the expression of consent to be bound by the treaty is without any legal effect.

In circumstances of violation of internal law regarding competence to conclude treaties, specific restrictions on authority to express the consent of a State, error, fraud and corruption, the State can merely invoke this factor. Thus the treaty remains valid until a State claims that it is invalid. The right to make such a claim, however, can be lost in certain circumstances.²⁰¹

K. MEMORANDA OF UNDERSTANDING

Below treaty level agreements, there are generally non-binding international agreements.²⁰² These agreements may have different names and forms, typically following the logic of the treaty. However, there is one type that is frequently used, especially in the practice of NATO and its Member States, the Memoranda of Understanding (MOU). Their relation to the treaties and their application needs clarification.

MOUs are written arrangements setting forth the conditions under which the parties intend to co-operate in given areas, setting out operational arrangements under a framework international agreement. An MOU records international "commitments" without treaty language and in a form that usually expresses its non-legally binding nature. (See explanation below under section 12.) It often sets out operational arrangements under a framework international agreement. It is also used for the regulation of technical or detailed matters.

The form of MOU is frequently used to record informal arrangements between States on matters which are inappropriate for inclusion in treaties or where the form is more convenient than a treaty (e.g. for confidentiality). They may be drawn up as a single document using non-treaty terms, signed on behalf of two or more governments, or consist of an exchange of notes or letters recording an understanding reached between two governments, or a government and an international organization.

MOUs usually do not require ratification. However depending on the content and the agreement between the Parties on the nature of the document, MOUs can be subject of a certain level of domestic ratification.

The United Nations usually concludes MOUs with Member States in order to organize its peacekeeping operations or to arrange UN Conferences. The United Nations also concludes MOUs on cooperation with other international organizations.

NATO, in general, concludes MOUs for in numerous occasions. MOUs are a very flexible and adaptable instrument to record the will of entities with legal personality to achieve practical results that do not amount to treaty obligations.

L. DIFFERENTIATION BETWEEN TREATIES AND MOUs

An MOU, when applicable, is considered preferable because it is less formal than a treaty. Often, international cooperation requires a less formal approach because the topic to be regulated falls below the treaty-threshold. MOUs, therefore, being an international administrative agreement, is appropriate when jointly accepted to facilitate technical and administrative cooperation below the level of treaties. For example, where there are detailed provisions which change frequently; or the matters dealt with are essentially of a technical or administrative character; or in matters of defence or technology where there is a need for such documents to be classified; or where a treaty requires subsidiary documents to fill out the details, the formalities of treaty-making are less applicable.

²⁰¹ Article 45 of the Vienna Convention of 1969 and Article 45 of the Vienna Convention of 1986.

²⁰² There are different approaches by States as to the binding nature of agreements below the level of treaties. However, in this chapter we follow the approach that the form of the MOU is generally chosen to demonstrate the non-binding nature in the outset, unless its binding nature is expressly formulated.

The status of such arrangements has been debated in international law. However, practice shows that MOUs rarely give rise to disputes. As such, they adequately fulfil their mission.

For the outset, an MOU can be distinguished by the terms in which they are written. However, the intention of the parties and whether or not they want the agreement to be binding in international law is what distinguishes an MOU from a treaty.

Regarding formalities, it is becoming general practice to show clearly by the form of the document and its terminology the intention to either create legally binding obligations or not - i.e. either to conclude a treaty or an MOU. However, in case of dispute, formalities and use of terms shall not be decisive on the binding nature.

Terminology in the drafting of MOUs and other arrangements shall indicate that they are not treaties. Thus care should be taken to avoid the use of "treaty language." The provisions should be cast as expressions of intent rather than as obligations in order to avoid it being a treaty. The following collection is based on practice of Canada and UK²⁰³, but also can be found in practices of other countries, as well.²⁰⁴

Do Not Use	Use Instead	Do Not Use	Use Instead
agree	accept, approve, concur, decide	continue in force	remain in effect / continue to have effect
agree(s) to	will	done	signed
agreements/undertakings	arrangements/understandings	enter into force	come into effect / come into operation
article	paragraph	mutually agreed	jointly decided
authoritative or authentic	equally valid	obligations	commitments / responsibilities
be entitled to	enjoy	party/parties	participant(s)
clause	paragraph	preamble	introduction
commitments	arrangements	rights / have the right	benefits / be permitted to
conditions , terms	provisions	shall	will

²⁰³ Canadian and UK documents available on the internet. (1) Treaties and MOUs, Guidance On Practice And Procedures / Second Edition. April 2000 - Revised May 2004 / Treaty Section - Information Management Department - Foreign & Commonwealth Office, UK (2) Canadian Forces - Memoranda of Understanding (MoU) Development 1998-03-31 (3) Memoranda of Understanding (MoU) Writing Guidelines Date of Issue 1997-06-24

²⁰⁴ A similar list of suggested terms will be inserted in the amendment of the BI-SC Directive 15-3 On The Preparation And Control Of International Agreements

constitute an obligation	continue to apply	undertakes	intends / carries out
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A NATIONAL EXAMPLE

The approach and advice of the State Department of the United States on suggested wording of non-binding agreements can be found in the Guidance on Non-Binding Documents²⁰⁵ :

“With respect to the title of a non-binding document, negotiators should avoid using the terms “treaty” or “agreement.” While the use of a title such as “Memorandum of Understanding” is common for non-binding documents, we caution that simply calling a document a “Memorandum of Understanding” does not automatically denote for the United States that the document is non-binding under international law. The United States has entered into MOU’s that we consider to be binding international agreements. [...]

Finally, depending on the circumstances, it may be useful for a non-binding document to include a disclaimer in the text of the document expressly providing that it is not legally binding under international law.

United States practice on non-binding documents may differ from that of other countries. For example, the mere fact that a document is called a “Memorandum of Understanding” does not mean that the document automatically is considered non-binding for the United States. Also, for the United States, the use of the verb “will” in the text does not necessarily mean that the commitment at issue is not legally binding under international law. Because the use of the term “will” may lead to confusion as to the intention of the participants, the Office of Treaty Affairs generally recommends that this term be avoided in non-binding documents.”

M. SUMMARY OF THE BI-SC DIRECTIVE 15-3 ON THE PREPARATION AND CONTROL OF INTERNATIONAL AGREEMENTS

To familiarize the reader with the policy and practice conducted by the Strategic Commands and their subordinate headquarters, a brief summary of the Bi-SC Directive 15-3 on the Preparation and Control of International Agreements is necessary (11 January 2007 version).²⁰⁶

The Bi-SC Directive 15-3 establishes procedures and responsibilities for the drafting, preparation, negotiation, conclusion and communication of written international agreements to which HQ SACT, SHAPE or any other constituent element within Allied Command Operations (ACO) and/or Allied Command Transformation (ACT), is a party. It also provides commonly accepted definitions for agreements and arrangements entered into by the two Supreme Headquarters or their Subordinate Headquarters as well as it identifies the relevant entity having the authority to enter into a specific type of agreement.

Chapter 1 of the Bi-SC Directive deals with policies and procedures, authority to enter into international agreements, format, standardization of clauses, text preparation, paragraph numbering, signature blocks, annexes, languages, central repository for agreements.

Chapter 2 deals with responsibilities of the different actors and action officers in a NATO command, such as initiating officers, the SHAPE/HQ SACT Legal Advisers, the

²⁰⁵ <http://www.state.gov/s/1/treaty/guidance/>

²⁰⁶ At the time of the writing of the 2nd edition of this Deskbook, the BiSC Directive was under review, and planned to make several significant amendments. In this version of the Deskbook we used the version of the Bi-SC Directive at the time of the writing. Please check for any update.

ACO/ACT Financial Controllers, the Command Financial Controller and the Command Legal Adviser.

Annex A provides Definitions and Explanation of Terms. Currently there are 21 terms defined in this Annex.

Annex B provides a template format for an MOU between an Supreme Headquarters and another entity.

Annex C provides an informative matrix on the shared responsibilities of different NATO entities during the course of preparation of an agreement depending on the level and subject of the agreement.

N. STRUCTURE OF THE AGREEMENTS, MOUs AND SOURCES OF TEMPLATE MOUs

1. Structure of an agreement

Depending on the actual subject matter of an MOU, the agreements usually has the following structure and topics:

- Table of Contents
- Introduction / Definitions / Objectives and Scope
- Organization and Management / Contractual Arrangements / Work-Sharing
- Financial Arrangements / Taxes, Customs Duties and Similar Charges
- Liability / Status of Personnel
- Sales and Transfers to Third Parties / Quality Assurance / Project Equipment / Logistic Support
- Security / Access to Establishments / Disclosure and Use of Information / Controlled Unclassified Information
- Accession of Additional Participants
- Settlement of Disputes / Amendment / Duration, Withdrawal and Termination / Languages / Effective Date and Signature

In the current version of the Bi-SC Directive 15-3, Annex B provides the following structure for agreements (not exclusively for MOUs):

- Preamble
- Definitions
- Purpose
- Scope
- Applicable Documents
- Responsibilities
- Financial Provisions
- Legal Considerations
- Commencement And Duration
- Modification And Disputes
- Termination
- Disclosure Of Information

2. Other templates

In the NATO context one can find various following documents that contain templates for international agreements.

One is the AJP-4.5(A), Allied Joint Host Nation Support Doctrine & Procedures (May 2005). The several annexes to the AJP contain the following:²⁰⁷

- Example of Host Nation Support Request Letter
- Example of a Memorandum Of Understanding
- Example Note of Accession (NOA)/Statement of Intent (SOI)
- Example of a Concept of Requirements (COR)
- Example of a Host Nation Support Technical Arrangement
- Example of Statement of Requirements (SOR)
- Example of a Joint Implementation Arrangement (JIA)

Another type of agreements between NATO nations are those signed on specific technological cooperation including procurement, research and development.

These agreements, when used by NATO Allies to enter into collaborative armaments acquisition programmes, usually establish the principles for the execution of these programmes, and the commitments which the participants take upon themselves. They define in broad terms the objectives, scope and management of the programmes, the work to be performed by each participant and its financing, the structure and content of industrial collaboration, the intellectual property rights provisions and other necessary elements regarding the administration and performance of the programmes.

The NATO Group on Acquisition Practices (Ac/313) issued A Guidance Manual For Co-Operative Programme Arrangements, which contains a Guidance For The Negotiation And Drafting Of Memoranda Of Understanding (MOUs) for Armaments Co-Operative Programmes. This has two major sections:

- Guidance for the Drafting of MOUs and Programme MOUs - Basic Considerations and Checklist
- Guidelines and Sample Provisions for Memoranda of (Samples) Understanding²⁰⁸

O. DIFFERENT LEVELS OF AUTHORITY OF NATO ENTITIES TO ENTER INTO INTERNATIONAL AGREEMENTS

There is a continuing requirement for SHAPE and/or HQ SACT and their subordinate entities to enter into formal agreements and administrative arrangements with various bodies at varying levels. In accordance with the Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty (Paris Protocol), only the two Supreme Headquarters are given juridical personality; and thus the authority to enter into legally binding agreements.²⁰⁹

The North Atlantic Council (NAC) specifically recognizes the authority of SHAPE and HQ SACT to enter into international agreements. This authority may be delegated to subordinate entities, which may enter into international agreements, be it formal or informal,

²⁰⁷ A more detailed discussion of some of these templates can be found in the Chapter on Logistics.

²⁰⁸For more information see *NATO Guidance for the drafting of MOUs and Programme MOUs- basic considerations and checklist*, available at <http://www.nato.int/docu/stanag/aacp001/internet%20aacp001g.pdf>.

²⁰⁹ Article 10 of the Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty (Paris Protocol), 1952.

and other legally binding agreements only where authority has been delegated to them by the Supreme Headquarters to which they report, and only on behalf of that Supreme Headquarters.

Certain international agreements fall within the purview and authority of the NAC or its subordinate bodies at NATO Headquarters. This applies to Status of Forces Agreement (SOFA), Transit Agreement (TA) and Status of Mission Agreement (SOMA) and agreements relative to the status of NATO Agencies. Political sensitivity may additionally result in NATO Headquarters retaining authority to negotiate and conclude certain international agreements. In some circumstances NATO Headquarters may retain authority to conclude the agreement but will allow a Supreme Headquarters to participate fully in the arrangements and negotiations of the agreement.

Examples of differentiated responsibilities:

- to prepare, negotiate and conclude certain international agreements, specifically any agreement which takes the form of a SOFA or a Transit Agreement, will be exercised only by NATO HQ and shall not be accomplished by either HQ SACT or SHAPE nor by any subordinate headquarters or activity, especially where the agreements in question will be used as the framework documents for other supplementary agreements.
- Standing Host Nation Support (HNS) Arrangements that serve as the primary and overarching source of agreement for provision of HNS to missions and exercises shall, in almost all cases, be negotiated and concluded with SHAPE as the lead Supreme Headquarters. SHAPE should coordinate, as warranted by the subject of the specific agreement, with HQ SACT and NATO HQ.
- Conclusion of MOUs with nations as regards a Centre of Excellence is granted to HQ SACT.
- any other Support or Supplementary Agreements, whether in the form of an MOU, MOA, Technical Arrangement, other agreement, or an exchange of letters, shall be negotiated and concluded by the Supreme Headquarters with the greater interest in the matter.

P. RESPONSIBILITIES OF THE LEGAL ADVISER

The SHAPE/HQ SACT Legal Adviser's main responsibility in the area of international agreements include:

- Advising on the negotiation and conclusion of international agreements and on issues related to the juridical personality of the Supreme Headquarters and delegation of authority,
- Providing guidance to all Legal Advisers on the drafting of international agreements,
- Maintaining a coordinated repository for all international agreements signed by HQ SACT and/or SHAPE, or signed on their behalf by any subordinate Headquarters,
- Maintaining a comprehensive catalogue of all international agreements within ACO and ACT,
- Assisting in preparation of the appropriate SHAPE/HQ SACT staffing document forwarding agreed international agreement to SHAPE/HQ SACT for signature, or for authority to sign on behalf of the Supreme Headquarter,

The resident Legal Adviser and the appropriate legal office in the command structure are responsible for:

- Advising the initiating officer as whether or not the inclusion of Legal Adviser in the negotiation party would be necessary. As appropriate, provide necessary negotiation support, direction, coordination and advice during the negotiation,
- Providing legal advice on the initial draft during the preparation phase and legal advice on the final draft during the concluding phase,
- Ensuring that the original version of the agreement, once signed, is lodged in the Central Repository maintained in the Office of the Legal Adviser for SHAPE pr HQ SACT, along with all relevant background documents,
- Keeping copies of documents with all relevant negotiating documents.

PART VI

LEGAL SUPPORT IN NATO

References and suggested reading:

- AJP-01Ed. (C), Allied Joint Doctrine
- AJP-2.5 Ed. (A) Captured Persons, Materiel And Documents
- AJP-3 Ed. (A) , Allied Doctrine For Joint Operations
- AJP-3.4 Non-Article 5 Crisis Response Operations
- AJP-3.4.1, Peace Support Operations
- AJP-3.9 Allied Joint Doctrine For Joint Targeting
- AJP-3.9.2 Land Targeting
- APP-12 (STANAG 2226), NATO Military Police Doctrine and Procedures
- Bi-SC 75-2 Education, Training, Exercise And Evaluation Directive (ETEED) 18 February 2010
- Bi-SC Directive 15-23 Policy on Legal Support (23 July 09)
- Colonel Kenneth W. Watkin: The Operational Lawyer: An Essential Resource For The Modern Commander
- Council of European Union / Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL) EN C 303/12 Official Journal of the European Union 15.12.2009
- Legal Support to Military Operations - Joint Publication 1-04 / 01 March 2007 / United States Joint Chief of Staff
- NATO Rules of Engagement, MC 362/1
- STANAG 2449, Training in the Law of Armed Conflict, dated 29 March 2004
- The Manual of International Humanitarian Law / Black letter text from: Dieter Fleck (Ed.), The Handbook of International Humanitarian Law, Second Edition (Oxford: Oxford University Press, 2008) © Dieter Fleck, 2009

LEGAL ADVISERS WITHIN NATO

Editorial note: This chapter is to a significant extent based on the Bi-SC Directive 15-23 Policy on Legal Support (23 July 09), as well as on the Bi-SC 75-2 EDUCATION, TRAINING, EXERCISE AND EVALUATION DIRECTIVE (ETEED) 18 February 2010 and other directives. This chapter also contains in several places references to ACT Directive 75-2/J, LEGAL Joint Functional Area Training Guides (JFTAGs), which is already not in force, but as regards its contents it provides a good reference. The Chapter deals in detail with STANAG 2449 on the Training in the Law of Armed Conflict that also constitutes part of the minimum training objectives for NATO Legal Advisers.

A. BACKGROUND

The mission of Legal Advisers and supporting legal personnel is to provide professional legal services at all echelons of command throughout the range of military operations. The purpose of this section is to describe how the NATO legal community provides legal support to NATO activities, and especially to operations and how commanders should integrate legal support in operational planning and training. Generally the legal support provides information about legal implications, consequences, and, when appropriate, possible courses of action to address requirements and events that affect the performance of NATO's mission.

Likewise all personnel and commanders are obligated to comply with international law including, in appropriate circumstances, the law of armed conflict (LOAC) and international human rights law. Other treaty obligations and customary international law may also apply to operations. This requirement to consider legal implications is implicit in the ACO Guide for Operational Planning.

Each of the main conventions on LOAC contains a rule on obeying the law; in addition some contain special provision on the role of Legal Advisers. Article 82 of the first Protocol Additional to the Geneva Conventions of 1949, the effect of which is accepted by many non-Parties as reflective of customary international law, specifically states that:

“The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.”

In addition to the general requirements for involvement of Legal Advisers in the operational planning process, more specific requirements are found throughout existing NATO directives and guidance. Compliance with international law and some domestic national laws, in the planning, training, and execution of operations, can be found in the Military Committee documents governing the Rules of Engagement (ROE), Information Operations, Civil-Military Cooperation (CIMIC), negotiation of agreements for Host Nation Support, non-Article 5 Crisis response Operations, and other functional areas. Therefore commanders must ensure that they involve the Legal Advisers and legal staffs in the planning, training, and execution of all aspects of their operations as early as possible.

Legal support to operations encompasses all legal services provided by Legal Advisers and other legal personnel in support of headquarters and staffs, units, commanders, and individual service members throughout an area of operations and across the spectrum of operations.

Legal support to operations falls into at least three functional areas: command and control, sustainment, and personnel service support.

- Command and control functions include advice to Commanders, staffs, and service members on the legal aspects of command authority, the legal basis for assigned missions and operations, limited aspects of personnel administration, and the legal basis for and constraints upon specific plans and on the use of force.
- Sustainment functions include the negotiation of Host Nation Support Agreements such as Memoranda of Understanding (MOU) and Technical Arrangements (TA's), negotiation and application of Status of Forces Agreements (SOFA's), advising on contracting and fiscal legal issues, and environmental law.
- Personnel service support includes legal support that may be given to individual service members.

Legal Advisers must be trained and prepared to operate independently across the spectrum of legal disciplines and the spectrum of conflict, standing by the side of the Commander. To succeed in today's operational environment, legal advisers must be master general practitioners, effective in varied roles as lawyer, ethical advisers, and counsellors. They must be trained to be able to understand and remain constantly aware of the operational situation and thus be in a position to proactively support the mission and enhance the legitimacy of NATO operations.

Similarly, supporting legal staff must be proficient in administrative as well as legal support functions. If military, they must also be proficient in military skills. Support staff must be in a position to spot potential legal issues and raise them for resolution.

Finally, as stated above, all personnel involved in military operations are individually responsible for ensuring compliance with LOAC by themselves and by their subordinates. This responsibility includes the responsibility to include training in and dissemination of LOAC in military and civil instruction.

Commanders are responsible for training and supporting Legal Advisers and their subordinates to ensure robust legal support to operations. Legal Advisers must similarly ensure they take an active role in the command training program. Training plans must be developed, including the development of conditions and standards, training objectives, and selection of tasks. The training plan must include training that integrates and trains Legal Advisers and legal staff with the units they support in a variety of environments, settings, and exercises.

B. SUMMARY ON THE BI-SC DIRECTIVE 15-23 POLICY ON LEGAL SUPPORT (23 July 09)

The content of the Bi-SC Directive is incorporated or cited at several places in this section; here a brief summary is provided:

The Bi-SC Directive 15-23 Policy on Legal Support (23 July 09) provides guidance to Commanders concerning the role which Legal Advisers and their offices ought to play in the accomplishment of NATO operations. It is applicable to all International Military HQs.

The Directive is necessary to ensure that during operations, Commanders comply with the law and are properly informed about it via legal support. Legal support entails that, in a timely matter, the Legal Advisers provide for expert legal advice, technical guidance, advocacy etc. to ensure compliance with NATO guidance and obligations. The areas in which legal support is provided are Operational Law, Fiscal and Contracting Law, Administrative Law, Claims and Advice with regard to payment of damages, NATO Education and Training / experiments and Negotiations. Covering all these areas is essential for lawful mission accomplishment.

The Commanders, Senior Legal Adviser and the Office of the Legal Adviser, and the Legal Personnel all have their own responsibilities to ensure smooth cooperation: The Commanders need to make sure that the Office of the Legal Adviser receives timely access to all necessary information.

The Senior Legal Adviser and the Office of the Legal Adviser have their responsibilities as Subject-Matter expert, Advocate and Counsellor; and the Legal Personnel provide a broad range of legal and administrative support concerning operational, international, administrative, environmental, contract and employment law.

Bearing in mind the “responsibility to share” and the “need-to-know”, there has to be coordination between the NATO Legal Offices. As the legal authority flows from the Strategic Commands, the ultimate controlling authority for legal advice provided within the military chain of the Alliance is the Senior Legal Adviser of the appropriate Strategic Command.

Legal Advisers and all legal support staff are entitled to communications and computer support, inasmuch as to be able to provide accurate and timely legal advice.

C. NATO’s LEGAL ADVISER STRUCTURE

1. Legal Adviser in the International Staff (IS)

The North Atlantic Council (NAC) and its Committees provide primary legal and policy guidance. Legal advice to the Secretary General and International Staff (IS) is provided by the Office of the NATO Legal Adviser which deals with the legal and politico-legal aspects of NATO’s activities. The IS LEGAD is also responsible for providing detailed guidance to NATO LEGADs through the legal-technical chain. The IS Legal Adviser reports directly to the Secretary General.

2. Legal Adviser in the International Military Staff (IMS)

The IMS Legal Adviser provides advice on all legal matters to the Chairman of NATO’s Military Committee, who is the senior NATO military official. Advice is also provided to the Military Committee and the IMS staff in general. The IMS LEGAD is a conduit between the IS Legal Adviser and the various Legal Advisers in the NATO command structure.

3. Legal Advisers at the Strategic Commands

The Legal Advisers for the two Strategic Commanders develop more detailed directives and instructions as well as plans including objectives and policies in accordance with received guidance and strategies. This encompasses legal aspects of training, exercises, and operations. The Strategic Command Legal Advisers represent the Commander in ensuring that legal support and advice provided within the military chain of command is consistent with the authority and responsibilities of the Strategic Commands. All actions and advice that may affect the legal status of NATO International Military Headquarters in host nations or negotiations shall be coordinated and approved by the Legal Advisers of Strategic Commands.

4. Legal Advisers at the Component and Subordinate Commands

Legal Advisers attached to component commands or other subordinate headquarters and commands will serve as primary Legal Advisers to their respective commanders and staffs. There may be supervisory attorney responsibilities over other Legal Advisers.

D. COORDINATION BETWEEN NATO LEGAL OFFICES

Within ACO and ACT, legal offices perform a wide variety of tasks at the strategic, operational, and tactical level. While legal support in NATO is decentralized, clarity of the Alliance’s legal position depends on unity of effort at all levels of command. Because all legal authority for NATO International Military Headquarters and Organizations flows from

Strategic Commands, the ultimate controlling force for legal advice provided within the military chain of the Alliance is the Senior Legal Adviser of the appropriate Strategic Command.

Therefore, as professional staff officers, all NATO Legal Advisers and legal support staff personnel are expected to have effective working relationships and good means of communication with all legal offices. Information shall be managed with an emphasis on the “responsibility to share” balanced by the security principle of “need-to-know,” and managed to reduce legal ambiguity, facilitate access, and optimise information sharing and knowledge re-use. Although specific tasks may differ, by positive engagement with other NATO Legal Offices and Legal Advisers who address similar issues, common goals and congruent legal results will be achieved throughout ACO and ACT.

E. MISSION OF THE LEGAL ADVISER

In accomplishing its role, the Legal Adviser must address questions of substantive law and operational feasibility. The Legal Adviser’s role is to support the Commander by identifying and recommending courses of action that strive to meet the Commander’s intent while minimalizing legal risk, promoting the rule of law, protecting human rights and adhering to the highest standards of legitimacy for NATO actions.

1. NATO Legal Advisers

Provide professional legal support at all echelons of command throughout the range of military operations. This support includes support in the disciplines of operational law, international law, contract and fiscal law, civilian and limited military personnel law, environmental law, as well as in the area of claims, administrative law, legal support to NATO education and training and negotiations. Legal Advisers perform several legal roles (subject-matter expert, advocate, counsellor), in support of three fundamental objectives: mission, service, and legitimacy.

- (1) Mission: in this context, means protecting and promoting command authority and objectives, assisting the Commander and staff in preserving resources, and ensuring fair systems, all in support of the underlying mission of NATO and the specific command or headquarters to which they are attached. Legal Advisers participate in key decision-making processes, becoming involved early to identify and resolve legal issues, and in some cases non-legal issues, before these become command problems.
- (2) Service: in this context, means meeting the legal needs of Commanders, staff, and other personnel. Legal Advisers provide their clients sound legal advice based upon a thorough understanding of the situation, an analysis of lawful legal alternatives, and their individual professional judgment. They enhance command and control, sustainment, and support functions by providing legal advice and services in all legal disciplines during peacetime and in all military operations.
- (3) Legitimacy: in this context, means assisting in engendering public respect and support, promoting justice and ethical behaviour. Legal Advisers must be competent, confident, caring and courageous. They must be fully integrated into the command, and thus able to help enhance legitimacy by integrating NATO and the international community’s values into the command or headquarters programs, operations, and decision-making processes. Finally, Legal Advisers must help their Commanders and NATO conduct operations in ways that will respect international law and preserve international and national public support.

2. Roles of Legal Advisers

Legal advisers tend to fulfil several functional roles. These roles can be expressed in different ways, but often are described as *Subject Matter Expert*, as *Advocate*, as *Ethical Adviser*, and as *Counsellor*. Commanders and staffs should use the legal adviser in each of these roles to take best advantage of the Legal Adviser's skills and training. Similarly, Legal Advisers must cultivate their capabilities in all areas. When a Legal Adviser acts in any of these roles, they identify issues, formulate courses of action, and evaluate the relative strengths, weaknesses, and legal consequences. Legal Advisers must acquire an intuitive and reasoned grasp of the command's interests and objectives.

- (1) Subject Matter Expert (SME) – where a proposed course of action is presented to the Legal Adviser, who then provides an opinion as to the course's legality or how the objective may be legally accomplished. In this role, the Legal Adviser does not interpret the law on the basis of personal views or policy preferences but rather on the basis of a careful reading of the law and objective reasoning. Doing so effectively requires impartiality, diligence, independence, moral courage, a thorough knowledge of the facts, sound judgment, and a judicious temperament.
- (2) Advocate – where the Legal Adviser acts as a spokesperson for the Commander to outside organizations or to higher headquarters using persuasive skills and legal training to advocate the chosen course of action. The Legal Adviser here is called upon to provide the command's understanding about what a particular rule means or whether it applies, to present evidence in support of the command position, or to persuade. This role may be called upon to help develop command policy or in liaison with host nation or non-governmental organizations. Ethical performance of this function requires zealousness, but also candour and fairness.
- (3) Ethical adviser – where the Legal Adviser provides guidance on ethical and legal issues that are raised or may be foreseen. This includes appraising conduct in light of laws and regulations, but also includes consideration of and advising upon other ethical precepts, such as officer ethics, values, and societal expectations.
- (4) Counsellor – Legal Advisers are also often called upon to serve as a counsellor to the Commander, in which they advise whether proposed actions, while legal and ethical, are prudent. In this role, the Legal Adviser does not simply provide legal advice, but also serves as a confidante to the Commander, providing an independent perspective and analysis to issues presented by other members of the staff. Here analytical skill, judgment, combined with legal knowledge is relied upon. The Legal Adviser provides advice early in the decision-making process to enable the command to accomplish missions. They seek to be proactive and to confront problems before the problems confront the command.

3. Operating Environment

The Legal Adviser will fulfil the mission and roles discussed above in various ways throughout the operating environment:²¹⁰

- (1) Planning and Pre-mobilization phase. In this phase, the Legal Adviser must thoroughly understand the contingency plans or concepts of the operation and the applicable international law, NATO policies, and national laws.
- (2) Mobilization and Pre-deployment phase. During this phase, establishing liaison and briefing deploying personnel are the principal tasks.
- (3) Deployment and Execution phase. During this phase, the Legal Adviser's principal tasks are advising the command and managing legal processes.

²¹⁰ See details later.

- (4) Re-deployment phase. During this phase the Legal Adviser will work to resolve legal issues remaining from the deployment or related to the re-deployment.
- (5) Legal Advisers assigned to headquarters/agencies/NATO bodies

While much of the foregoing discussion has been put in terms of the Legal Adviser assigned to the Component Command or deploying staff, each of the roles and functions apply as well to Legal Advisers assigned to administrative offices. Regardless of where assigned, all Legal Advisers should be fully integrated into the Commander's decision-making network and should be able to address legal and policy issues that arise in a variety of contexts. In short, Legal Advisers must be trained to:

- (1) Understand and apply principles of national, host nation, international, operational, and fiscal law to issues which may arise in a static international or an operational military headquarters legal office;
- (2) Identify the specific legal issues and considerations that are linked to operations; and
- (3) Summarize and apply the legal lessons learned.

F. FUNCTIONS AND TASKS

A sample list of functions and tasks fulfilled by Legal Advisers and legal staff follows. This list is not exhaustive. It will vary according to the specific mission of the headquarters or staff to which the Legal Adviser is assigned. Similarly, in some situations, staff members who are not Legal Advisers may fulfil some of these functions and tasks; in such cases liaison with Legal Advisers for advice and oversight is critical.

1. Policy

In all matters, the Legal Adviser should report to the Commander or Deputy Commander. The general mission of all staff Legal Advisers is to perform primary duties in connection with legal matters and function as the principal Legal Adviser and staff assistant to the Commander/Commanding Officer and to the Deputy Commander/Chief of Staff/Chief Staff Officer.

Within their commands they will ensure the effective training and utilization of legal assets and will ensure that assigned Legal Advisers are provided the security clearances to fulfil their assigned functions.

2. Adviser Functions and Tasks of Legal Advisers

Each Legal Adviser, regardless of the level of command to which he/she is assigned, should take the responsibility to establish priorities for assigned legal assets and to manage these assets to successfully accomplish the mission of the Commander. It is expected that those in supervisory positions will ensure the proper and efficient use of legal personnel and monitor through various means the proficiency and capabilities of these assets, ensure compliance with legal directives and the appropriate processing of legal matters for various commands and initiate action to meet established requirements. Specific requirements necessary for the fulfilment of this mission are as follows:

- (1) International Law:
 - a. In conjunction with staff principal OPRs²¹¹, negotiate international agreements (SOFA's, Host Nation Support Agreements, EOL's, Transit Agreements, Exercise MOU/TA/IA's) or assist, as necessary, Legal Advisers of higher headquarters with such negotiations;

²¹¹ Office of Prime Responsibility.

- b. In conjunction with staff operations directorate (J3 or equivalent) review OPLAN's for legal issues, including compliance with international law, United Nations Security Council resolutions, treaties and other international agreements, and with LOAC. Assist with drafting and dissemination of, as well as training in, ROEs. Draft legal and use of force annexes to OPLAN's; provide advice and training on LOAC;
 - c. In coordination with staff logistics and financial staff, review and advise on matters of Host Nation Support including negotiation and drafting of applicable MOUs, TA's, and related matters. Provide support to Contracting Officer in drafting and applying NATO contracts, in accordance with appropriate/relevant law;
 - d. In coordination with Political Advisers (POLAD), ensure necessary coordination with international organizations;
 - e. In coordination with staff exercise and training directorate, provide all necessary legal advice during exercise planning process and provide or coordinate the provision of legal support during exercise and training evolutions.
- (2) Liaison with Civil Authorities: In conjunction with other staff, assist as necessary in facilitating coordination with host nation, sending state, and intergovernmental or nongovernmental agencies as necessary for fulfilment of the Command's mission. Provide advice as needed to staff personnel and subordinate commands on the extent of assistance which may be given to civil authorities.
- (3) Military and Civilian Personnel Issues, including Disciplinary matters:
- a. Provide legal advice to Commander and staff on legal aspects related to personnel management. Provide advice on NATO rules and policies regarding issues involving allegations of maltreatment, harassment, or other wrongful or criminal conduct.
 - b. Where necessary, ensure proper coordination with applicable law-enforcement, security, and other investigative agencies or offices, and with national (military) justice authorities, on the investigation of allegations of misconduct.
 - c. Ensure that national military justice authorities receive proper, full and complete advice and assistance to enable them to determine appropriate disposition of offenses within the context of the national military justice system.
- (4) Investigations: Advise the Commander on the initiation of investigations where appropriate; monitor assigned investigations and provide advice when requested. Coordinate as needed with host nation or sending state authorities in the conduct of investigations.
- (5) Miscellaneous: Provide advice to Commander, staff, and subordinate commands, and prepare responses, where appropriate, in the following areas:
- a. Budget and Financial Law: Provide advice and otherwise coordinate as necessary with Financial Controller and other Budget and Finance Staff
 - b. Contract Law issues with contractor providing goods and services. Provide advice and otherwise coordinate as necessary with relevant contracting officers
 - c. Environmental Law
 - d. Claims

- e. Personal Data Protection, Information Disclosure, and related issues, including possible compromise of classified information and security problems
- f. NATO guidelines on Standards of Conduct and Ethics
- g. Assistance and advice to command in responding to inquiries from higher headquarters or national authorities
- h. Oversight of advice and training to Force Protection/Security Force personnel (military, civilian and contract) regarding operating procedures
- i. Advice and coordination with Public Information Office
- j. Drafting and review of instructions and directives, including review of those instructions drafted by other staff codes or subordinate commands

3. Functions and Tasks of Strategic Command Legal Advisers

In addition to fulfilling the specific tasks of the staff Legal Advisers set out below, Legal Advisers attached to a strategic command headquarters have the responsibility of providing guidance and oversight to the NATO Legal Advisers in subordinate organizations. Accordingly, it is expected that the strategic command Legal Adviser will oversee provision of legal services by Legal Advisers assigned to subordinate commands and, through the chain of command, will:

- (1) Coordinate within the staff to ensure the appropriate utilization of Legal Advisers and legal assets.
- (2) Encourage attendance at continuing legal education/training which will enhance legal performance relevant to the mission of the subordinate organization to which a Legal Adviser is assigned.
- (3) Oversee availability and quality of Legal Adviser and other legal services within subordinate units.
- (4) Monitor legal services extended to individual members of units.
- (5) Provide or assist in the provision of legal services to commands without assigned Legal Advisers.
- (6) Consult frequently with command and other Legal Advisers and make recommendations for courses of action which will improve legal services within NATO.

LEGAL ADVISER'S ROLE IN OPERATIONAL PLANNING AND EXECUTION

As previously discussed, NATO Legal Advisers provide professional legal support at all echelons of command throughout the range of military operations. This includes support in the disciplines of operational law, international law, contract and fiscal law, civilian and limited military personnel law, and environmental law. Legal Advisers must provide their clients sound legal advice based upon a thorough understanding of the situation, an analysis of lawful alternatives, and their individual professional judgment.

In order to accomplish this, Legal Advisers should participate in key decision-making processes, becoming involved in early stage to identify and resolve legal and non-legal issues before these become command problems. Finally, Legal Advisers must help their Commanders and NATO to conduct operations in conformity with international law and preserve international and national public support, integrating NATO and the international community's values into the command or headquarters programs, operations, and decision-making processes.

OTHER SOURCES

According to the **Manual of International Humanitarian Law**²¹², legal advisers in a law of armed conflict situation shall have the following responsibilities

VI. TASKS OF THE LEGAL ADVISER

147 States must ensure that legal advisers are available, when necessary:

- to advise military commanders in all matters pertinent to the military law and the international law;
- to examine military orders and instructions on the basis of legal criteria;
- to participate in military exercises as legal officers whose duties include giving advice on matters pertinent to international law; and
- to give legal instruction to soldiers of all ranks, particularly including the further education the rules of international humanitarian law.

148 The legal adviser should have direct access to the commander to whom he is assigned. The commander may give directives to the legal adviser only if they are pertinent to general aspects of duty.

149 The legal adviser receives directives and instructions pertinent to legal matters only from his supervising legal adviser, via the legal specialist chain of command.

150 The legal adviser may additionally exercise the functions of a Disciplinary Attorney for the Armed Forces. In the case of a severe disciplinary offence the legal adviser may then conduct the investigation and bring the charge before the military disciplinary court. Such a disciplinary offence may include a grave breach of international law which in addition to its criminal quality also has a disciplinary significance.

As previously discussed, Legal Advisers tend to fulfil several functional roles, which can be entitled as Subject Matter Expert, as Advocate, as Ethical Adviser, and as Counsellor. These roles are just as important in the operational context as in any other context. Commanders and staffs should use the Legal Adviser in each of these roles to take the best advantage of the Legal Adviser's skills and training. Similarly, Legal Advisers must cultivate

²¹² Black letter text from: Dieter Fleck (Ed.), *The Handbook of International Humanitarian Law*, Second Edition (Oxford: Oxford University Press, 2008) © Dieter Fleck, 2009

their capabilities in all areas. When a Legal Adviser acts in any of these roles, they identify issues, formulate courses of action, and evaluate the relative strengths, weaknesses, and legal consequences. Legal Advisers must acquire an intuitive and reasoned grasp of the command's interests and objectives.

In assisting the Commander and Command Group during the operational planning process, the Legal Adviser must ensure that he/she thoroughly understands the contingency, any existing contingency plans or concepts of operation, the applicable international law, NATO policy, and national laws that may affect the situation. The Legal Adviser must be a part of any Operational Planning Group or other planning and coordination cells.

Input on ROEs should be provided and staffed. Effectiveness in this stage includes informing the Commander and staff of the legal obligations on the force, ensuring that plans comply with LOAC, protecting the legal status of the force, and contributing to the provision of responsive and economical host nation support. The Legal Adviser is also responsible for supporting the Commander in helping ensure that personnel have been trained or receive training on LOAC and other international law affecting operations.

During any mobilization and pre-deployment phase the Legal Adviser should establish liaison with any Legal Advisers attached to senior command staffs and with coalition or other friendly force staffs, and legal officials with the host nation and non-governmental organizations, such as the ICRC. Issues of Host-Nation Support, SOFAs, and other issues should be identified and worked on as early as possible. Briefings should be prepared and delivered to deploying personnel and should cover the legal basis for the operation, the legal status of deploying personnel, relevant country law, guidance on the treatment of civilians in the area of operations, and applicability of LOAC or other applicable laws.

During deployment and execution, the Legal Adviser's principal tasks involve advising the command and managing legal processes, requiring continuous liaison with host nation legal officials, senior and subordinate command legal staffs, coalition partner legal staffs, the ICRC and other non-governmental organizations and agencies related to the operation, and effective integration into the headquarters staff. The Legal Adviser should be prepared to provide advice on ROE's, treatment of civilians, of detainees/Prisoner of War (POW) and other LOAC issues, compliance of targeting decisions with LOAC, civil-military cooperation, and other international legal matters. Managing legal processes may include investigation of alleged LOAC violations and coordination with host nation and sending nation legal and investigative staffs.

OTHER SOURCES

The advice on the law of armed conflict that the military lawyer can provide to a commander includes²¹³:

- Rules of Engagement
- Targeting
- Review of Operational Plans for Compliance with the Law of Armed Conflict
- Legality of Weapons and Their Use
- Investigation of War Crimes
- Setting up POW Status Determination Tribunals
- Handling of POWs/detainees

²¹³ Colonel Kenneth W. Watkin: The Operational Lawyer: An Essential Resource For The Modern Commander p 4/16 - 5/16

- Treatment of the Wounded and Sick
- Treatment of Civilians and Refugees
- Instruction in the Law of Armed Conflict
- Negotiation of Status of Forces Agreements and Memoranda of Understanding with Host Nations
- Law of the Sea

Finally, during re-deployment phase, the Legal Adviser will work to resolve legal issues resulting from the deployment or relating to the re-deployment. These tasks may include resolution of claims, participating in and cooperating with investigations on alleged LOAC violations and any follow-on hearings or trials, resolving host nations support issues.

TRAINING OF LEGAL ADVISERS IN GENERAL

A. REQUIREMENTS

Legal advisers provide legal support in all areas. Under this title “NATO Legal Community” refers to military or civilian legal advisers or legal assistants filling Peace Establishment (PE) or Crisis Establishment (CE) positions, or serving as voluntary national contributions or augmentees in support of NATO operations.

The following requirements apply to all members of the NATO Legal Community:

- Graduate of law school or national equivalent for leg advisers; graduate of legal assistant program, legal assistant certificate or national equivalent for legal assistants;
- One of the following: NATO Staff Officer Orientation Course, NATO Partner/MD Staff Officer Course, NATO Senior NCO Orientation Course, all at NATO School Oberammergau (NSO);
- NATO Legal Advisers Course at NSO;
- NATO Advanced Operational Law Course at NSO, if supporting operations;
- Bi-annual attendance of the NATO Legal Advisers Conference;
- Annual training in legal matters necessary to provide legal advice/support to a multinational staff conducting multinational operations. For example: rules of engagement, international law, claims, fiscal and contracting law, legal assistance;
- Annual training in non-legal matters to increase one’s general knowledge. The NATO Education & Training Facilities, COEs and national/partner training centres offer many courses for general military education. For example: operational planning.

For those filling posts requiring specialized legal expertise, the Job Description for that post will list other prerequisites. In addition, theatre-specific training requirements may be issued by the respective Joint Force Command to prepare personnel, HQs and forces for deployment to current operations.

The following requirements apply to all NATO personnel:

- Training in the Law of Armed Conflict per NATO STANAG 2449;
- Annual training/update in legal matters pertinent to one’s job by a member of the NATO Legal Community.

Nations are responsible to provide the above training to their personnel. When they cannot because the training exceeds their capabilities or expertise, arrangements may be made to develop and deliver specific training.

B. COLLECTIVE TRAINING AND EXERCISES

As soon as planning for collective training or exercises at the strategic, operational or tactical level starts, a LEGAD must be involved to ensure legal issues that arise in preparation for, and administration of, the exercise are resolved.

LEGADs participate in military exercises in order to train NATO personnel on legal issues. This includes LEGAD involvement in scenario and MEL/MIL development. A training plan will be developed by the responsible commander with LEGAD support.

3. ACT and ACO will work together to identify legal augmentees for exercises and training that cannot be completely staffed from within the NATO legal community.

C. COURSES AND OTHER TRAINING WITHIN NATO

1. Courses at the NATO School

The NATO Legal Advisers course is one week long, provides military and civilian NATO and Partnership for Peace (PfP) legal advisers with an overview of and introduction to legal aspects of NATO military operations including the plans, policies, and procedures of the Alliance, and includes instruction on LOAC and ROE, as well as human rights protection and detention operations, and practical exercises on these subjects. Normally there are two courses per year.

The NATO Operational Law course provides instruction of a more detailed nature and is appropriate for military and civilian legal advisers who will be deploying in support of NATO operations, either as part of a NATO headquarters or a NATO-led force. This course will be held at least once per year.

The NATO School regularly organizes *ad hoc* courses and workshops on LOAC and Human Rights, Anti-Piracy, Sharia`a Law and Military Operations. The School has an agreement with the International Institute of Humanitarian Law in San Remo, Italy on the cooperation between the two institutes.

The NATO School also provides instruction on LOAC and ROE in the Staff Officer and Staff Non-commissioned Officer courses taught there.

Finally, the NATO School will often send out Mobile Training Teams to various countries and provide instruction on requested topics, including LOAC.

2. Other recommended NATO School courses

- **NATO Operational Planning Course:** Provides an understanding of the NATO Operational Planning System and the ability to apply the principles of operational art across the full spectrum of military missions.
- **Host Nations Support Course:** Introduces NATO's HNS planning procedures and on the concept and organization for the provision of HNS. Although not designed specifically for legal advisers, the content of this course is such that all legal advisers attached to NATO headquarters should attend.
- **NATO Conventional Targeting Course:** Ensures that staff officers understand the force applications targeting cycle, including target analysis, selection, nomination, and battle damage assessment, and are familiar with roles and responsibilities of target cell personnel assigned to various coalition Joint/Combined organizations involved in Force Application.
- **Civil-Military Cooperation (CIMIC) Courses:** Both the Basic NATO CIMIC Course and the Advanced NATO CIMIC Course are valuable to a Legal Adviser intending to deploy to a theatre of operations
- **NATO Arms Control Courses:** Certain Arms Control Courses might be of interest to Legal Advisers as they provide an overview on relevant arms control commitments.

3. Other training events

Both SHAPE and ACT provide LOAC and ROE training to various training audiences, generally in the form of briefings and exercise play. Subordinate SHAPE commands, like JFC Brunssum and JFC Naples, often provide this training to Commanders and senior staff before their units deploy into a theatre of operations. As scenario writers, role players and OT at exercises and experiments, SHAPE and ACT Legal Advisers provide

performance-based training in LOAC and ROE to Commanders, staffs and Legal Advisers in the training audiences in addition to more academic instruction.

Periodic conferences and symposia recommended for attendance by NATO legal advisers and legal staff:

- NATO Legal Conference, once year with changing locations, usually in spring or the beginning of summer;
- NATO Administrative Law Workshop, usually held during autumn at ACT Staff Element Europe, SHAPE, Mons.

D. COURSES AND OTHER TRAINING PROVIDED BY OTHER THAN NATO INSTITUTIONS

A variety of courses involving the Law of Armed Conflict and other aspects of law affecting military operations, varying in length from several days to two weeks, are provided by national military staff colleges and training academies. Courses, seminars and other events provided by other educational institutions recommended for attendance by NATO legal advisers and legal staff are the following:

- The International Committee of the Red Cross similarly provides training opportunities through conferences, often sponsored in partnership with other institutions, on varying aspects of LOAC, International Law affecting Refugees, and related topics.²¹⁴
- The International Institute of Humanitarian Law, located in San Remo, Italy, provides a variety of courses on LOAC, International Law affecting Refugees, and related topics.²¹⁵
- Increasingly, the various Centres of Excellence (COE) that have been aligned with NATO are providing instruction in topics of interest to legal advisers. One example, illustrative of the fine work now being done at the COEs: the Defence Against Terrorism COE in Turkey provides an excellent course on legal issues connected with Defence Against Terrorism.
- The German "Bundeswehr Education Centre for Legal Advisers and Disciplinary Attorneys" offers a variety of courses open to colleagues from NATO and PfP States. The courses are held in German and focus the Law of Armed Conflict and international security issues.²¹⁶
- The PfP Training Centre in Ankara, Turkey, among other courses holds the two weeks long Law of Armed Conflict Course, usually two times a year, that provides military and civilian personnel an appropriate balance of academic and practical knowledge in the principal areas of international law relating to the LOAC and to enable participants to acquire ability and knowledge on the broad field of the LOAC.²¹⁷
- UK International Defence Training Headquarters Land Warfare Centre (Warminster, UK) provides the Brigade Legal Officer's Operational Law Course two times a year, which is open to foreign students. The course is a mixture of practical and academic instruction which assumes both a familiarity with and understanding of the Law of Armed Conflict, Rules of Engagement and to some degree targeting. Lectures will range from the tactical to strategic level, to place

²¹⁴ www.icrc.org

²¹⁵ www.iuhl.org

²¹⁶ For more information, please contact the Centre at: Zentrale Ausbildungseinrichtung für die Rechtspflege (ZAR) Zentrum Innere Führung Bereich 4 Von-Witzleben-Str. 17, 56076 Koblenz, Germany / e-mail: ZInFueZAREingang@bundeswehr.org

²¹⁷ www.bioem.tsk.tr

the Legal Adviser's role in context. Amongst the practical aspects considered will be targeting and the actual application of force in high pressure situations. Areas of study include counter insurgency, international agreements, international law on human rights, international criminal law, legal aspects of prisoner of war handling and targeting, post conflict resolution.

- George C. Marshall European Center for Security Studies, located in Garmisch-Partenkirchen, Germany, provides annual conferences and symposia.²¹⁸
- US Army's Judge Advocate General Legal Center and School, Charlottesville, Virginia. The U.S. Army JAG School is the educational headquarters of the US Army JAG Corps. It offers a variety of courses, which are open to international students. Military and civilian lawyers are welcome to participate in a two-week course on Operational Law offered twice a year, a one-week "Rule of Law" course, a six-week "Basic Course" designed for lawyers entering the military and the ten-month long "Graduate Course", where students have the opportunity to obtain a Master of Law in Military Law certified by the American Bar Association. Additionally, a course for military judges and for contract-attorneys is offered and is open to international guests.²¹⁹
- The U.S. Naval War College, Newport, Rhode Island, USA, holds a conference each summer, usually in late June, dealing with some aspect of international law affecting military operations.²²⁰
- Defense Institute of International Legal Studies (DIILS) serves as the United States Department of Defense lead agency for providing professional legal seminars and programs, as well as education and training, to international military members and civilian government officials in furtherance of US national security and foreign policy objectives. The target audience includes the military personnel and related civilian government officials of nations throughout the world. The majority of the participants are not lawyers, although they do have some resident courses focused only on lawyers (i.e., the Military Law Development Program and the International Law of Military Operations courses).²²¹

E. PARTICIPATION IN TRAINING AND EXERCISES

1. Background

Legal issues arising across the full range of military operations: peace, crisis and conflict are increasing in complexity, and thus must be considered at all stages of planning and execution of military missions. Legal Advisers and legal support staff are deploying in operations in increasing numbers. Additionally, the need of Commanders, staffs, and individual military personnel to have an understanding of the legal issues likely to be raised during operations is significant. A fundamental requirement of LOAC is that the Legal Advisers are available at the appropriate level to advise military Commanders on the application of the law and that appropriate instructions are given to armed forces on the subject.

Effective legal advice requires effective legal training. While primarily a national responsibility, the issue must also be addressed in the context of NATO operations, and should also be a priority in all NATO training, including exercises. Exercises are not separate from, but rather are integral to, the overall training and education of the individual soldier, the unit, the staff, and every element. Accordingly, Legal Advisers and the Commanders for

²¹⁸ www.marshallcenter.org/

²¹⁹ <https://www.jagcnet.army.mil/>

²²⁰ <http://www.usnwc.edu/>

²²¹ <http://www.diils.org/>

whom they work must consider training and exercises as much a part of the job description as any other legal function.

As NATO operational tempo has increased, so has the need for all staff at operational commands to focus on preparing for real-world operations. In looking at the training and exercise environment, a fundamental principle is “train as you will fight.” This requires the legal community to develop and implement an approach to exercises that mirrors, to the greatest extent possible, the way Legal Advisers will actually be used in operations. Every opportunity to heighten operational effectiveness must be used. Accordingly, to the degree permitted by operational constraints, operational staffs that are part of the training audience should rely first and foremost on their assigned Legal Advisers and support personnel without augmentation. Where operational planning contemplates the augmentation of the legal staff, this augmentation should be done in the manner and, where possible, pulling from the same pool, as will occur during actual operations.

2. External Legal Support to Exercise Phases

Exercise training of NATO operational commands and staffs is generally divided into four phases:

- Phase I is referred to as the academics;
- Phase II as the operational planning process (OPP);
- Phase III the actual exercise or execution phase; and
- Phase IV is the after-action review (AAR).

The legal offices at Joint Warfare Centre (JWC) and Joint Force Training Centre (JFTC), as well as legal staffs of operational headquarters, are usually involved to a greater or lesser degree in all four phases. Additionally, some legal staff (normally the SC and/or JWC) is involved during the development of the scenario, the main story lines and the corresponding main event and main events/incidents lists (MEL/MIL) before and during the exercise.

It must be emphasized that the targeted training audience in most exercise and unit/staff training is not the Legal Adviser but rather the Commander and the staff, as well as subordinate units. Instead, the emphasis in providing legal training and incorporating legal issues into an exercise should be on observing internal staff processes, focusing on the interaction between the staff and the Legal Adviser, ensuring that the staff is able to identify possible legal issues and forward them to their legal office as necessary. Where it is observed that staff processes hinders legal issues from being brought to the attention of the Commander or other key staff, the observers/trainers can and should, through the Senior Mentor, bring this directly to the attention of the Commanders.

- **Phase I:** During Phase I, the primary host of the training (normally JWC or JFTC) will provide briefs tailored to the training audience on the legal basis for the military operation and applicable NATO policies/procedures. Increasing effort is being devoted to the development of training modules on legal issues related to the different NATO Response Force (NRF) missions such as non-combatant evacuation operations (NEO), initial-entry operations (IEO), detention operations, etc. There is also interest in developing training on broader politico-legal aspects of operations, such as the importance of staying within United Nations mandates and understanding the difference of working in different legal regimes, as these issues often have direct impact on the planning and execution of operations.
- **Phase II:** During phase II, Legal Advisers should be involved as observers/trainers (OT). At this stage the JFTC and JWC legal staffs, occasionally with augmented support, can primarily fulfil the OT role. Here the LEGAD OT should be one well-versed in the Operational Planning Process, well-acquainted

with lessons learned from current operations, and thus capable of ensuring that all parts of the OPLAN that are being developed receive legal review.

- **Phase III:** During phase III, past experience suggests that three Legal Advisers are normally required for component command (CC) or joint command (JC) level exercises. For Staff Element and other smaller unit training, one Legal Adviser is normally sufficient. Legal Advisers support Phase III of exercises in two ways.
 - Exercise Control (EXCON) should normally be staffed with two Legal Advisers, allowing one to attend the various meetings and briefings, the other to work on issues and otherwise be available for exercise staff. EXCON legal staff typically interacts with the command group, civilian response cells (IO/NGOs, governments and government agencies) and military response cells (lower control - LOWCON and higher control - HICON). To the greatest degree possible, they should read through all proposed injects and coordinate with legal staff in HICON (normally SHAPE or the JCs) for ROE play and other emergent issues. In smaller exercises, there is normally no need for 24-hour manning, but one of the Legal Advisers must always be available via telephone.
 - In addition to the LEGAD(s) working EXCON, one Legal Adviser should be available as observer/trainer (OT) for each level of the primary training audience that has legal staff or can be expected (given the nature of the training/exercise scenario) to encounter significant legal issues. If a Legal Adviser is not available to act as OT for each level of the primary training audience because of ongoing current operations or budget constraints of the exercise, several factors affect how and where to assign overlapping duties to the Legal Advisers participating in the exercise. First, logistics should be considered, especially in the case of live exercises (LIVEX). The OT must be able to move quickly and freely among the training audiences, which might not be possible if they are not co-located. Second, if the OT is assigned multiple training audiences, he/she should be able to observe each training audience during the most significant legal incidents/events, and should not be assigned to multiple training audiences experiencing significant legal activities simultaneously. In addition to the tasks mentioned for Phases I and II, the Legal Adviser OT's will liaise with the EXCON Legal Adviser to track injected incidents/events in the scenario, suggest "pop-up" injects based on the development of exercise play, report on the amount of work and need for adjustments .
- **Phase IV:** During Phase IV, the need for outside legal support is greatly reduced. The OT's and other LEGADS should have been preparing and consolidating draft lessons learned and AAR's as the training/exercise progressed, so these drafts can be fed to the JWC or Joint Analysis & Lessons Learned Centre (JALLC) staff.

3. Sourcing Legal Support to Exercises

Historically, legal augmentees for exercises have been drawn, usually on an ad-hoc basis, from two main sources:

- from the existing community of NATO LEGADs; and
- from national sources, i.e., military lawyers who are seconded to the exercise while serving in the active-duty or reserve cadre of an individual nation.

As NATO's operational commitments have increased, it has become more difficult to free up NATO LEGADs for exercise support, especially at the strategic level.

The planning process for exercises does contemplate a process whereby nations are asked to contribute personnel for service as staff augmentation, OT, subject-matter expert (SME) and other purposes. In many cases this can provide an adequate source of LEGAD support, especially where the personnel offered by the nations have experience in NATO operations or in exercise management. Unfortunately, however, the *ad hoc* nature of this method of sourcing is at the mercy of the very necessary internal manpower requirements of the nations.

Accordingly, as the transformation of the NATO LEGAD community continues, effort will be made to develop a cadre of trained Legal Advisers, within the national organizations and on the various NATO staffs, from whom augmentation can be sought when necessary.²²²

As a general matter, augmentation should not be a routine necessity for the primary training audiences. To the degree permitted by operational constraints, operational staffs that are part of the training audience should rely first and foremost on their assigned Legal Advisers and support personnel without augmentation. This will require a reorientation of work within the office or the referral of some matters to higher headquarters or other legal staffs, and may in some circumstances result in certain legal workload not directly related to the exercise and contemplated operation being done in as timely a fashion as might otherwise be the case. The ability of a legal staff to effectively address this prioritization of work is itself, though, an important matter to be identified through the training cycle.

Where operational planning contemplates the augmentation of the legal staff, for example in the development of the long-term CJTF staff, this augmentation should be done in the same manner and, wherever possible, by pulling from the same pool, as will occur during actual operations. Legal Advisers from within a national organization who are made available for exercises should similarly be among the first to be used to augment the staff with which they trained should real-world contingencies arise.

Finally, legal staffs should use exercises as an opportunity to develop “reach-back” or “reach-forward” capabilities that permit identification and resolution of legal issues without requiring the on-scene physical presence of a Legal Adviser at all times. This may require the Legal Advisers to be involved in earlier phases of an exercise to develop a professional rapport with the staff so that they can more effectively engage using technological reach-back capabilities.

The role of (OT’s) should normally be provided by augmentees. Here the title OT is perhaps used differently than in other NATO exercise doctrine. In the context of the LEGAD role, an OT serves several purposes: first to provide a combination of evaluative, mentorship, and training skills to the primary training audience, by commenting on staff use of the LEGAD, internal staff processes, and so forth. Next, by supporting EXCON by monitoring the effectiveness of scripted injects and by suggesting on-scene “pop-up” injects suggested by developments in the exercise play. Finally, to be able to feed back to the greater legal community the lessons learned and “best practices” observed from the exercise so that the body of corporate knowledge increases.

Because operational effectiveness is a skill set that must be developed as any other, the role of OT should, where possible, be accomplished by LEGADs currently assigned to other JHQ and CC staffs. This approach provides two benefits. The first is to the exercise itself. Using LEGADs assigned to other operational staffs ensures the OTs have the highest

²²² The ACT Staff Element Europe Legal Office has been operating an informal Training Calendar since September 2009, which covers all the main training events and exercises in a one year perspective that may require the presence or assistance of NATO legal advisers. The list performs several goals: (1) collection of events for planning, deconflicting and situational awareness, (2) highlighting requests for NATO legal support, (3) stimulating consultation between the legal offices. The Training Calendar is coordinated between the SCs, tactical commands and component commands. It is planned to include in the future COEs, CAOCs and other MOU organizations linked to NATO, as well as to be distributed to national legal channels for situational awareness and possible participation.

and most current situational awareness with current operations. Second, using a LEGAD from another operational staff as an OT allows the Legal Adviser him/herself to gain valuable training experience from observing how another staff operates, allowing this LEGAD to bring the experience back to the home staff.

4. Preparing the Legal Community for Exercise Support

As mentioned above, there is a rising need to develop a pool of trained national sources as augmentees for major NATO operations and exercises. Primary responsibility for identifying potential augmentees and ensuring their nations are aware of the training opportunities lies with Allied Command Transformation (ACT), which received overall responsibility for NATO training as part of the recent reorganization of the NATO Command Structure. As part of this same reorganization, Allied Command Operations (ACO) has been assigned responsibility for the NATO exercise program, including planning, resourcing, and execution.

In this context, ACT serves as a supporting command to assist ACO to carry out the NATO exercise program. In particular, the ACT Legal community will assist ACO in developing training packages and in identifying possible legal augmentees for large exercises that ACO cannot completely staff from within its own community of LEGADs.

Standard legal training packages for exercises consisting of briefs, OT checklists, MEL/MIL inject suggestions, etc., are developed and updated by ACT's Joint Warfare Centre (JWC), Joint Forces Training Centre (JFTC) and the NATO School (Oberammergau), all under the guidance of HQ SACT. The packages will be capable of being tailored for specific operational theatres as well as different levels of exercises. Additionally, nations will be encouraged to make more inexperienced or junior Legal Advisers available to observe exercise play as OT's "under instruction," with the understanding that these personnel will play roles in later exercises as staff augmentation or as OT's.

With regard to identification, assignment, and training of staff augmentees and OT's, the legal staff at the JWC will develop a legal manning plan by 1 July of each year for the following year's exercises. This plan will be presented to the SHAPE and HQ SACT Legal Offices who will ensure that needed personnel augmentation is accomplished, using active duty or reserve forces of the nations as appropriate. HQ SACT Legal will ensure that necessary individual training opportunities are made available, either through quotas to the NATO School LEGAD Course or by other means, and will emphasize to the parent nations of the identified augmentees the need to fund the personnel to the training identified.

Unless otherwise agreed, the primary funding source for these augmentees will be the nations, or, in the case of personnel already assigned to a NATO command or staff, the exercise fund provided to the command or activity conducting the exercise (Officer Conducting the Exercise - OCE).

F. TRAINING THE LAW OF ARMED CONFLICT: THE NATO PERSPECTIVE

1. Introduction

Because of the various international treaties the various NATO nations have signed regarding LOAC, and considerations of customary international law, training NATO service members on LOAC is first and foremost a national responsibility. The NATO nations have all signed the 1949 Geneva Conventions, and almost all have signed the Additional Protocols I, II, and III²²³.

²²³ NATO Member States are parties to the AP I and AP II except Turkey and the United States. NATO Member States are parties to the AP III except Belgium, Luxembourg, Portugal, Romania, Spain, Turkey. (As of 3 March 2010 according to the ICRC webpage.)

Two of the most important aspects of enforcing these agreements, training and court action, are left to the nations to handle as national responsibilities. The study of the Geneva Conventions and the Additional Protocols must be included in their respective signatories' courses of military instruction, and if possible, in civilian instruction as well. Violations of LOAC may be tried before national or international military or civilian courts. National courts were far more likely fora to handle these sorts of cases until the creation of ad hoc tribunals (e.g. International Criminal Tribunal for Rwanda, International Criminal Tribunal for the former Yugoslavia, the Special Tribunal for Lebanon etc.) and the International Criminal Court (adoption of the Rome Statute was in 1998 and its ratification in 2002).

That being said, developments in NATO Standardization Agreements (STANAGs), doctrine and mission have begun to bring a greater degree of uniformity to the training of LOAC than existed in the past. The purpose of this chapter is to highlight those developments and the potential impacts they have upon both national, and to the extent that it is conducted, NATO training in LOAC.

2. Applicable Standardization Agreements

Currently, the most important STANAG for training is **STANAG 2449, *Training in the Law of Armed Conflict***, dated 29 March 2004²²⁴. The stated aim of the STANAG is to establish a minimum acceptable standard of LOAC training, and nations are to use the training guidelines "for units and individuals deployed on NATO duties and under OPCOM or OPCON to NATO." STANAG 2249 reaffirms the NATO nations' independent legal obligations to both train their forces in LOAC and to ensure that Legal Advisers are available for operations. Importantly, even in NATO headquarters, the personnel support elements of the respective nations still have the responsibility to ensure that their service members are trained. By its terms, STANAG 2449 is applicable to a wide range of operations, including occupation and certain internal armed conflicts, as well as actual war.

STANAG 2449's instruction and training objectives and principles are very broad. That being said, the STANAG still provides significant guidance to training officers and Legal Advisers on how to construct a training program adequate to meet the STANAG's requirements.

As to the objectives,

- first, all personnel are to have a basic knowledge of LOAC appropriate for their duties and ranks'
- secondly, it requires meaningful input of LOAC issues into training and exercises, specifically in parts of these events that provide service members with conflict situations they must resolve;
- third, Commanders' decisions are to be consistent with LOAC, which of course requires the timely and accurate provision of legal advice by a Legal Adviser to the Commanders in the field;
- fourth, the STANAG requires similar legal input to Commanders and staff as they plan and prepare for their operational missions. In terms of actual training principles, STANAG 2449 requires regular LOAC training, both before and during deployments.

As to the frequency of training on LOAC issues, the STANAG requires that these issues be incorporated into training whenever possible. This broad formulation of the frequency gives flexibility to the commanders and Legal Advisers responsible for the trainings. However, it underestimates the crucial role of those preparatory activities placing them in a 'whenever mode'.

²²⁴ At the time of finalizing the second edition (2010) of this Deskbook, STANAG 2449 was under review by the LOAC Working Group of the NATO Training Group / Army Subgroup.

In terms of content, the STANAG sets forth a list of treaty references and other documents that span almost the entire history of LOAC, from the Hague Conventions of 1907 to the Ottawa Landmine Convention of 1997. Depending on the operation for which service members are being trained, and their military specialties, some of these references may not be functionally relevant to an adequate LOAC training program. Further, not all of the NATO nations have signed up to all of the treaties referenced. This will have important training and operational implications, regarding the capabilities and roles of various forces. Although not explicitly listed, it is a fair inference that customary international law, as understood by the respective nations, is appropriate content as well.

As to the specific subjects that are to be instructed and trained upon, the STANAG sets out in a series of annexes the different subjects appropriate to the respective ranks of the students or trainees.

- In Annex B, the subjects seen as appropriate for the training of all ranks are the history and definitions of terms used in LOAC, the basic principles of LOAC, the protection of certain persons and objects, the application of LOAC, and rules of engagement.
- Annex C sets out the subjects deemed particularly appropriate for non-commissioned Officers: the knowledge and exercise of LOAC rights and duties, Rules of Engagement, the protection of certain persons and property, the handling of Prisoners of War, discipline and the prevention of violations of LOAC, and cooperation with civilian organizations and non-governmental organizations.
- Annex D contains the subjects appropriate for additional instruction and training for Officers: the knowledge and exercise of LOAC rights and duties, command responsibility, the recognition that the legal duties of personnel may vary in detail depending on the domestic and international legal undertakings and understandings of their respective nations, peace support operations, war crimes and the enforcement of the law of armed conflict.

The following Member States ratified the STANAG: Belgium, Canada, Czech Republic, Denmark, France, Germany, Greece, Hungary, Italy, Luxembourg, Latvia, Netherlands, Norway, Poland, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom. Of those, seven have ratified with reservations.²²⁵

It is important for Legal Advisers who will be deploying on operations with units from different troop contributing nations to research whether they have expressed any reservations to the STANAG, because there could be both training and operational considerations as the result of these caveats. Certain examples of national reservations provide a flavour of the policy and legal considerations of which Legal Advisers should be aware.

3. NATO Rules of Engagement, MC 362/1²²⁶

With the United Kingdom's reservations to STANAG 2449 in mind, it is useful to review the NATO Rules of Engagement as set out in MC 362/1 and note areas where this document and this concept might impact upon the training of LOAC. MC 362/1 has five major parts.

- (1) Part I, Introduction, discusses the definition of Rules of Engagement (ROE) and the applicable international and national law. The NATO ROE note that they "never permit use of force which violates applicable international law." Units from NATO nations must follow their own national laws, and Commanders are not obliged to violate their respective national laws in operations. The NATO ROE also note that national "restrictions and instructions" may not be more permissive than the authorized operational ROE.

²²⁵ At the time of writing.

²²⁶ Details of MC 362/1 are discussed in the Chapter on Introduction To The Law Of Armed Conflict And Rules Of Engagement

- (2) Part II discusses self-defence. Importantly, the NATO ROE also note that the concept of self-defence is not limited by the rules of engagement.
- (3) Part III sets out the principles concerning the use of force.
- (4) Part IV discusses the role of political direction to military authorities.
- (5) Part V is perhaps the most important section, and it sets out the rules of engagement structure and procedures.

Specific ROE are listed as either permissions or prohibitions, in multiple series in Annex A. This listing is not exhaustive. Appendices to Annex A provide guidance on defining hostile intent and hostile act, and on information operations. Additional annexes deal with the various types of operations (air, land, maritime). This section also sets out general procedures for requesting, authorizing and implementing ROE. The structure of the document is hierarchical, and provides a good starting point from which to begin an evaluation of an actual mission-specific set of ROE.

4. NATO Doctrine

Training is, of course, supposed to follow a doctrine. Currently, NATO doctrine does not deal with training in LOAC or ROE extensively. However, there are certain references worth noting.²²⁷

AJP-01Ed. (C), *Allied Joint Doctrine*, notes the importance of ROE and legal considerations involved in the promulgation of orders and the control of forces. **AJP-2.5, *Handling of Captured Personnel, Equipment and Documents***, notes the need for specific LOAC training for those service members who will be tasked with working with prisoners of war. This reference contains what is perhaps a typographical error, noting that LOAC training is “suggested” for military personnel, rather than required under the Geneva Conventions.

AJP-2.5 Ed. (A) *Captured Persons, Materiel and Documents* is to provide guidance on the procedures for the handling and administration of captured persons (CPERS) and their effects, for the interrogation of CPERS, as well as the procedures for the handling and reporting of captured materiel (CMAT) and documents (CDOCs) within the NATO alliance. It is also intended to improve cooperation between NATO forces during operations and provide a sound procedural base for instruction in the service schools and establishments of NATO and its member states.

AJP-3 Ed. (A), *Allied Doctrine for Joint Operations*, notes the importance of working with ROE in exercises, and emphasizes the need to ensure that targeting procedures and targeting in general are lawful.

AJP-3.4.1, *Peace Support Operations*, notes the complexity of use of force considerations in this sort of operation, and the need to frequently review and update the ROE, and the requirement for the concepts of legitimacy and legality to be considered in the planning process.

APP-12 (STANAG 2226), *NATO Military Police Doctrine and Procedures*, addresses the need to consider the legal issues involved in dealing with terrorism, war crimes investigations, and prisoners of war. It is worthwhile to review the various reservations of the nations to these documents, for they will often contain important information about legal concerns that impact upon operations. For example, in its reservations to APP-12, which apparently is intended to evolve into STANAG 2226,

²²⁷ Besides NATO references it is worth to mention that the Council of European Union also deals with the humanitarian law issues on a regular basis. See Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL) EN C 303/12 Official Journal of the European Union 15.12.2009

France notes that its Gendarmerie cannot be tasked to guard prisoners of war, because that would violate French domestic law.

Other NATO publication with use of force and LOAC implications:

- AJP-3.4 *NON-ARTICLE 5 CRISIS RESPONSE OPERATIONS*
- AJP-3.9 *ALLIED JOINT DOCTRINE FOR JOINT TARGETING*
- AJP-3.9.2 *LAND TARGETING*

5. Conclusion

Training service members in LOAC remains a national responsibility and obligation. LOAC training can only be standardized in NATO to a certain degree, because the nations will, of course, have their own respective interpretations and reservations to treaty and customary international law. Further, political and resource drivers will limit the degree to which standardization can be achieved as well.

However, in light of NATO's current operational missions, and the effort to bring the NATO Response Force to full operational capability, it is clear that efforts should be made to standardize NATO LOAC and ROE training to the greatest extent possible. Commanders, staffs, and Legal Advisers need to know how the different NATO nations train their service members, and the impact of national legal caveats upon operations and capabilities.

Further, the impact of different technologies upon the targeting and clearance of fires staff processes of different national contingents in terms of LOAC issues need to be appreciated and understood. Finally, in a world of increasing joint and multinational operations, it will become ever more important for junior service members to know how their counterparts from different nations have been trained, both in terms of methods and content.

THE ROLE OF LEGAL ADVISERS IN CIVIL-MILITARY COOPERATION (CIMIC) ORGANIZATIONS

1. Introduction

Legal Advisers have two missions in Civil-Military (CIMIC) organizations. The principal function of Legal Advisers in CIMIC organizations is to provide Commanders with the full range of legal advice and services normally associated with a Legal Adviser's office. Additionally, however, Legal Advisers are increasingly being called upon to perform rule of law missions, which requires that they carry out operations to rebuild, reform, assist, and in some cases administer the judicial sector of the host nation. This section addresses this emerging role and what corresponding competencies and skills must be developed.

2. Rule of Law Operations

It is now recognized that successful development and reconstruction efforts must be approached holistically and not simply as isolated functions and tasks. The phrase "Rule of Law Operations" is being used to refer to the entire range of police, judicial, legislative, and security reforms, supported by lead nations, NGO's, as well as CIMIC units that contribute to the improvement or development of respect for and adherence to the Rule of Law. It is imperative to restore order to the civilian population in the vacuum that almost inevitably results when the routine administration of the society has been disrupted by conflict.

The purpose of rule of law operations is to foster security and stability for the civilian population by restoring and enhancing the effective and fair administration and enforcement of justice. There must be synchronization and synergy between efforts to restore, reform, and assist the court and legal system and efforts to restore, reform and assist the public safety system. A judicial system is powerless without an effective public safety system, while a public safety system is not legitimate without a fair and efficient judicial system. Therefore, rule of law missions will normally be executed by Legal Advisers working in conjunction with public safety specialists.

- (1) Rule of Law operations will rarely, if ever, be exclusively a military activity. Rule of Law operations must be a collaborative effort involving NATO military assets, other agencies of the international community governments, international organizations, Coalition military and civilian organizations, NGOs, host nation legal professionals, law enforcement personnel and other officials.
- (2) Many activities conducted in Rule of Law operations involve the practice of law. If these operations are conducted by or closely coordinated with NATO or predominately NATO forces, those activities involving the practice of law should have the involvement of Legal Advisers or other attorneys under LEGAD's supervision. These activities include, but are not limited to:
 - Evaluating and assisting in developing transitional decrees, codes, ordinances and other measures intended to bring immediate order to areas in which the Host Nation (HN) legal system is impaired or non-functioning.
 - Evaluating the reform of HN laws to ensure compliance with international legal standards, and, when necessary, providing appropriate assistance to the drafting and review process.
 - Evaluating the legal training given to HN judges, prosecutors, defence counsels, and Legal Advisers, and, when necessary, providing appropriate training.
 - Evaluating the legal training given to police and corrections officials to ensure compliance with international human rights standards.

- Advising NATO military Commanders and others on the application of international law, NATO member nation domestic law, and host nation law to the process of restoring and enhancing rule of law in the HN.
- Evaluating legal and administrative procedures to ensure compliance with international law, the law of the power administering the territory, and the law of the supported country.
- Determining which host nation offices and functions have the legal authority to evaluate, reform, and implement the law.
- Advising NATO military Commanders and NATO, other international, and HN authorities on the status of the HN legal system and its compliance with international standards, and providing recommended reforms.
- In rare and exceptional circumstances, serving as judges, magistrates, prosecutors, defence counsels and Legal Advisers for transitional courts.

Other rule of law tasks not involving construing or interpreting law or legal authority, or providing a legal evaluation, may be done by Legal Advisers or by other appropriate personnel.

3. Legal Advice and Services

Legal Advisers in CIMIC organizations must be prepared to perform all the legal advice and services required by the Commands and Commanders they support. In garrison and deployed, they must be able to advise the Commander and staff on military justice, administrative law, international law, civil law, claims, and legal assistance, as well as operational law. Even if not a normal part of their assigned duties, they must be prepared to coordinate, manage, or be responsible for ensuring all assigned personnel receive required pre-mobilization legal services, to include preparing wills, powers of attorney, and advanced medical directives. They must be prepared to present legal training oriented to the CIMIC mission, to their units. When deployed, they will frequently be the only legal assistance available to their personnel. When deployed, they will normally work closely together with the LEGAD of the higher command or task force the CIMIC organization is supporting, and should coordinate with that LEGAD for technical consistency of legal advice and services.

4. LEGAD Core Competencies and Operational Law

The CIMIC LEGAD must be prepared to give accurate legal advice to the Commanders and staffs of CIMIC units and CIMIC-based CJTFs. This will require good grounding in international law, human rights law, the Law of Armed Conflict, administrative or civil law, claims, NATO contracting and financial policies law, and an awareness of military justice as it may apply to the assigned personnel through their national authorities. The CIMIC LEGAD should also be competent in providing effective legal assistance to soldiers prior to and during mobilization and while deployed.

5. Specialized Knowledge and Skills for Rule of Law Operations

The CIMIC LEGAD must have a background in comparative law and be prepared to evaluate all aspects of a foreign legal and judicial system, determine where there are deficiencies, and make the system work so that the people perceive that the system is fair, efficient, effective, and, very importantly, true to their own cultural traditions. This requires:

Knowledge of international law, to include concepts of sovereignty, state action, relations between states and with international organizations, treaty interpretation, and NATO member nation domestic law and regulations pertaining to international agreements.

Knowledge of human rights law, to include extensive knowledge of internationally recognized human rights standards. The CIMIC LEGAD needs to be able to interpret

these standards into the host nation legal system and evaluate that system in terms of those standards, recognizing that interpretations and practices in the host nation system may not be the same as in NATO law, but may nonetheless be appropriate within the context of the host nation system.

Knowledge of comparative law, to include a good grasp of the principles of the common law, civil law and Islamic law traditions, as well as various forms of traditional law and informal justice which may be encountered. Should include knowledge of statutory and code law, the adjudication process, the legal professions, training of judges, prosecutors, and defence counsels, and informal dispute resolution practices. This knowledge must be supplemented by knowledge of the particular legal traditions and systems of the country where the operation is being conducted.

Diplomatic skills, to include being able to persuade and guide host nation civilian legal personnel who come from a vastly different culture and legal tradition, and to foster cooperation between civilian representatives of other NATO member nation governmental agencies, international organizations, other participating countries, and non-governmental organizations. While this function is the responsibility of the Political Adviser, the Legal Adviser must be in a position to support the Political Adviser (POLAD) as necessary. In some cases, the senior LEGAD may be the principal NATO military liaison with ministers and other high-ranking personnel in the host nation ministry of justice and court system, and should be of a grade appropriate to that function.

Organizational skills, to include being able to coordinate the efforts of the NATO military, NATO civilian organizations, host nation institutions, and international, national and non-governmental groups to effectively implement the practical aspects of legal and judicial reconstruction, reform and administration. Skills in conducting training and planning and managing projects are very important.

PART VII
PERSONNEL

References and suggested reading:

- ACE Directive 40-7, Standards of Conduct, Relationships with Contractors, and Disclosure of Information (19 February 1992)
- ACE Directive 50-10, Administrative Procedures for Complaints and Appeals by International Civilian Staff (13 September 1994) (also SHAPE Supplement to ACO Dir 50-10) (26 January 2004)
- ACO Directive 45-1, Military Personnel Management and Administration (04 July 2002)
- ACO Directive 50-4, The Recruitment of NATO Civilian Personnel in Allied Command Operations (ACO)(29 January, 2009) (See also a SHAPE Supplement (06 November, 2003) to ACO Directive 50-4)
- ACO Directive 50-11, Deployment of NATO Civilians
- ACO Directive 60-52, Official Representation and Hospitality (17 February 2006)
- ACO Directive 60-54, Acceptance of Gratuities (13 April 1988)
- ACT Code of Conduct (22 October 2008)
- ACT Directive 40-1, ACT Standards of Personal Conduct (08 April 2009)
- ACT Directive 40-3, Allied Command Transformation Standards of Ethical Conduct in Relationships with Contractors and Other Entities (08 April 2009)
- ACT Directive 50-1, Recruitment of NATO Civilian Personnel in Allied Command Transformation (23 January, 2009)
- ACT Directive 50-8, ACT Policy on Alcohol and Substance Abuse by NATO Civilian Staff (30 July 2007)
- ACT Directive 50-11, Procedures for NATO Civilian Mediation, Complaints and Petition (04 October 2007)
- ACT Directive 50-13, Deployment of ACT NATO Civilians (12 February 2010)
- Agreement between the parties to the North Atlantic Treaty regarding the status of their forces. Done at London June 19, 1951. (NATO SOFA)
- Bi-SC Directive 60-70 Bi-Strategic Command Procurement Directive (22 December 2004)
- C-M(2005)0041 Participation of NATO Civilians in NATO Council Approved Operations and Missions
- EC Treaty, as amended by the Treaty of Amsterdam
- European Council Directive 2006/112/CE of 28 November 2006 (effective 1 January 2007).
- Lazareff, Status of Military Forces under Current International Law, Sijthoff 1971
- MC 216/4, Manpower Policy and Procedures (AAP-16D)
- NATO Appeals Board Decisions
- NATO Civilian Personnel Regulations
- Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty. Done at Paris August 28, 1952. (Paris Protocol)
- SHAPE Directive 50-3, International Civilian Personnel Disciplinary Procedures (12 April 1999)
- SHAPE Directive 50-9, Discrimination and Harassment in the Workplace (15 October 2008)
- SHAPE HSG Directive 60-58, Acceptance of Gratuities and Standards of Conduct (02 October 2002)

A. OVERVIEW OF CIVILIAN PERSONNEL

1. References

The relevant source documents for personnel management in NATO are a combination of formal regulations, local implementing guidance, and quasi-judicial rulings.

- (1) NATO Civilian Personnel Regulations: The main source document for dealing with most civilians in the NATO system is the NATO Civilian Personnel Regulations (NCPR), also known as the “Red Book” because of its distinctively coloured covers. The NCPR apply to NATO international civilians, who constitute the bulk of the long-term NATO civilian work force. The NCPR also apply to consultants and temporary hires, but not to contractors or host-nation personnel hired under local wage rates. The NCPR is a compendium of rules, entitlements, and obligations – both for management and for individual employees. – but over the past 30 years it has been amended and supplemented so many times that the Red Book is now a maze that can easily baffle the casual reader. Key information often appears in the annexes and appendices.
- (2) NATO Appeals Board: Another source of legal guidance for civilian personnel issues are the 758 written judgments (as of January 2010) of the NATO Appeals Board. Typically, these rulings deal with claims of monetary or job entitlement brought by individual NATO civilians against their organizations. Decisions that clarify an ambiguity in the NCPR, or otherwise modify an entitlement, usually end up being memorialized as formal amendments to the NCPR. The time lag can be substantial, however, and it is important to keep an open channel with one’s servicing Civilian Personnel Office to maintain situational awareness and to have sight of the Appeals Board rulings as they are issued.
- (3) Strategic Commands Directives: A third source of guidance for civilian matters are Directives issued by the two Strategic Commands. Such directives offer two benefits: (1) they usually re-organize the applicable NCPR rules into a more coherent and readable format; and (2) they offer implementing rules in areas where the NCPR permits development of local guidance. In case of conflict, however, the NCPR prevail. Ideally, the two Strategic Commands should issue similar, if not identical, directives. In practice, the ACO and ACT directives sometimes have variances in local guidance.
- (4) ACO directives can be accessed from the NATO classified system: <http://cww.shape.nato.int/central%20records/hsg/pubs/pubs.asp> (best to use a key word search, not a directive number). ACT directives are found at <http://registry.act.nato.int/portal/Directives> .
- (5) Allied Administrative Publication-16D (AAP-16D): Another key document to consider for guidance is MC 216/4, Manpower Policy and Procedures (AAP-16D) which is the basis on which manpower requirements within NATO Military Bodies are assessed.

2. Personnel Categories

A useful first step in dealing with NATO employee issues is to identify an individual’s personnel classification – e.g., uniformed military, NATO international civilian, consultant, contractor, temporary personnel, seconded personnel (international civilian personnel recruited with the concurrence of their national authorities and who are subject to national administration or who are on loan to NATO to serve in support functions), or local hire (also known as local wage rate). These categories determine a person’s privileges and

immunities, disciplinary and complaint system, employment and deployment flexibility, and recruitment/termination procedures.

- (1) NATO International Civilians (NIC), consultants, and temporary personnel: They are all covered by the NCPR. NICs are employees of their NATO Organization and the NATO equivalent of career civil servants in a national system. Consultants are civilians with special/recognized expertise (not otherwise available within the NATO personnel system) who are hired, in principle, for a maximum of 180 days (generally 90 days plus up to an additional 90 days). Consultants do not hold an established PE post. Temporary personnel fill NATO posts on an interim basis until more permanent arrangements can be made.
- (2) Local Wage Rates (LWR): They are a separate category of employee mentioned in the NATO SOFA (Art. IX.4), which notes that “local civilian labour requirements of a [sending] force ... shall be satisfied in the same way as the comparable requirements of the receiving State...” In other words, a force stationed in another NATO nation may hire local nationals, but the labour laws of the receiving State - e.g., dealing with work permits, unions, taxes, conditions of employment, safety rules - apply. Such “local wage rate” employees are not entitled to the privileges and other special dispensations that the NATO SOFA accords to visiting forces and NICs.
- (3) Civilian Component of the Force: This is a special category defined by the SOFA (Art. I, 1, b) as civilian personnel accompanying a military force who are (1) employed by an armed force of a NATO sending State, and (2) not ordinarily resident in the receiving State.²²⁸ This second condition distinguishes members of the Civilian Component from Local Wage Rate (LWR) employees. In general terms, Civilian Component persons enjoy SOFA privileges, whereas LWR’s operate under the employment laws of their host nation. This, of course, is a very general statement and the arrangements applicable to each organization should be confirmed.
- (4) Contractors: Contractors are individuals whose rights and obligations are defined by the terms of their employer’s contractual agreement with the NATO entity. Contractors are an increasingly common phenomenon within NATO and Alliance nations. They range from self-employed individuals with a business license, to employees of a large multinational contracting company. Although they are civilians, contractors are not subject to the NCPR and are not employees of NATO. In practical terms, this means that contractors cannot file a grievance using NCPR procedures or bring a case before the NATO Appeals Board. Contractor disputes are usually resolved through the terms of the contract between them and NATO organization, but could vary as a result of negotiation, mediation by a third party, arbitration, or litigation.

The NATO SOFA, formulated more than 50 years ago before contractors emerged as a significant aspect of modern military activity, does not mention contractors at all. Thus, the status of contractors - and their entitlements to various privileges and immunities -- becomes negotiable as NATO develops Supplementary Agreements for nations hosting Alliance forces.²²⁹

²²⁸ For an IMHQ, you must also consider the definition of “civilian component” found at Article III .1.b of the Paris Protocol which reads, in part, as follows: “Civilian Personnel who are not stateless persons, ..., nor nationals of, nor ordinarily resident in, the receiving State, and who are (i) attached to the Allied HQ and in the employ of an armed service of a Party to NATO or ii) in such categories of civilian personnel in the employ of the Allied HQ as the NAC shall decide.”

²²⁹ Negotiations regarding the status of contractors can be lengthy and, at times, contentious. Recall that the NATO SOFA at Article 1, 1 b line 2 clearly requires the person to be “in the employ of an armed service”/“employe par l une des parties” and this would, absent a willingness on the part of the host nation to expand this definition, exclude contractors. See also Lazareff, *Status of Military Forces under*

SPECIFIC QUESTIONS ON CONTRACTORS²³⁰

Civil & Criminal Jurisdiction

Since contractors are not covered by the provisions of the NATO SOFA, they are therefore within the jurisdiction of the Host Nation's civil and criminal courts unless bilateral agreements are made between NATO and the Host Nation to address jurisdiction differently. Further, depending upon the laws of the nations that hired the contractors, national domestic or military courts may also have jurisdiction over them for certain criminal acts committed in a theatre of operations. Finally, international tribunals may have jurisdiction over certain matters involving contractors if the hiring nations or the Host Nation choose not to bring the cases before their own courts.²³¹ Legal issues of primarily a civil jurisdictional character which may arise include whether locally hired contractor personnel or NATO forces are required to make contributions into a social welfare network, whether particular licenses are required of contractor personnel, how non-contractual tort claims against contractors are handled, and whether there are host nation environmental laws and regulations that impact contractor activities.

Administrative Jurisdiction

Ordinarily, contracting officers not only have staff responsibility, but also the authority within a command to discuss contract management activities with the contractors. Commanders and staffs unaccustomed to working with contractors, and perhaps also unaccustomed to depending upon contractors to provide services essential for operations, are sometimes frustrated to learn that contractors cannot just be ordered to do or not to do things. Essentially, the Statement of Work and contract management provisions in the contract is what states the performance requirements and how they are to be enforced, respectively. Legal advisers will often need to work closely with contracting officers to ensure that instances of performance deficiencies or contractor personnel misconduct are identified quickly and properly to the contractor in keeping with the terms of the contract. Commanders will of course have an interest in ensuring that certain orders they give, like force protection measures, will be followed by all personnel, military or contractor, in a theatre of operations. It may be necessary for the legal adviser to examine the contract, or to assist the command in negotiating an amendment to the contract, to ensure that such orders of general application may quickly be communicated and enforced.

Support of Contractor Personnel

Depending upon the environment in which the contract support is being rendered, NATO and national force commanders may find themselves required to provide fairly significant support to contractor personnel. Force protection issues, for example, may require commanders to provide contractors with military escorts in order for them to fulfil the conditions of their contracts. Importantly, logistics contractors may require logistics support from the military forces in terms of equipment, medical services, billeting or messing services. Legal advisers may find themselves advising commanders and contracting officers as to what NATO or the nations have bound themselves to provide under the terms of the contracts, and whether and how reimbursement is to be made for provided services. Some services, however, would appear to be required by international law, regardless of whether the matter is addressed in the contract, as in the case of providing appropriate identification to contractors.

Current International Law, Sijthoff 1971 at pages 88 to 92, quoting the US representative during NATO SOFA/PP negotiations.

²³⁰ For the status of contractors in military operations see also Part X on Logistics.

²³¹ Rome Statute, ICC.

B. STANDARDS OF CONDUCT FOR CIVILIAN PERSONNEL

References:

- NATO Civilian Personnel Regulations (NCPR), Articles 12-14
- Bi-SC Directive 60-70 Bi-Strategic Command Procurement Directive (22 December 2004)
- ACE Directive 40-7, Standards of Conduct, Relationships with Contractors, and Disclosure of Information (19 February 1992)
- SHAPE Directive 50-9, Discrimination and Harassment in the Workplace (15 October 2008)
- ACO Directive 60-52, Official Representation and Hospitality (17 February 2006)
- ACO Directive 60-54, Acceptance of Gratuities (13 April 1988)
- HSG (Headquarters Support Group) SHAPE Directive 60-58, Acceptance of Gratuities and Standards of Conduct (02 October 2002)
- ACT Directive 40-1, ACT Standards of Personal Conduct (08 April 2009)
- ACT Directive 40-3, Allied Command Transformation Standards of Ethical Conduct in Relationships with Contractors and Other Entities (08 April 2009)
- ACT Directive 50-8, ACT Policy on Alcohol and Substance Abuse by NATO Civilian Staff (30 July 2007)
- ACT Code of Conduct (22 October 2008)

1. Overview

Overall, NATO's approach to standards of conduct issues is not complicated. The directives proceed from two basic tenets:

- (1) no use of official position for personal gain; and
- (2) maintenance of a work environment free of discrimination, harassment, and abuse of authority.

Areas of particular focus include the relationship between NATO staff and contractors, and the working relationships among NATO staff members, especially seniors and subordinates.

With regard to contractors, the directives are relatively precise, but limited to interactions while serving in a NATO post. Post-NATO employment limitations, such as ineligibility to work for a commercial firm involved in a NATO contract over which an individual had decision authority while serving in a NATO post, are not covered. These so-called "revolving door" issues are left to national rules. Similarly, NATO has no jurisdiction over standards of conduct violations discovered after a person has left NATO service, other than to refer the matter to national authorities.

With regard to *staff interaction*, the directives define categories of unacceptable conduct in the workplace, and also set out detailed procedures for resolving complaints. One of the difficulties is that the definitions of unacceptable behaviour unavoidably involve an element of subjective judgment in determining whether conduct was "improper." Where is the boundary line between a firm management style, for example, and abuse of a subordinate? In a multinational environment, cultural differences can also introduce an added element of ambiguity. One nation's traditions of acceptably flirtatious behaviour could be viewed as sexual harassment by nationals from another background. In this context,

the Alliance's guiding concept of "consensus" decision-making becomes a kind of *laissez-faire* tolerance of a wide range of behaviour, with counselling and informal mediation the typical outcome. In egregious cases, disciplinary action is authorized. Offenders other than NATO Civilians or Local Wage Rate (LWR) employees have their cases handed over to the respective national authorities for appropriate disciplinary action in accordance with national regulations. NATO Civilians are subject to disciplinary action under Chapter XIII of the NCPR, with penalties ranging from a verbal warning to dismissal from post. LWR discipline is typically controlled by a separate agreement on the conditions of employment, based on host-nation labour laws.

2. General Guidelines

The applicable directives and NATO Appeals Board decisions can be distilled into a handful of basic principles for NATO personnel (military and civilian). All personnel:

- (1) Shall treat other staff members with respect and courtesy.
- (2) Shall maintain a positive work environment free of moral harassment, sexual harassment, intimidation, discrimination, abuse of authority and retaliation.
- (3) Shall not use their official position for personal gain.
- (4) Shall avoid any appearance of conflict between personal interests and official duties.
- (5) Shall avoid the premature or unauthorized release of information that could provide a nation or commercial firm an unfair advantage in seeking NATO business.
- (6) Shall not solicit or accept gifts, gratuities or favours from outside sources (companies, individuals, governments) seeking to do business with NATO. Common sense exceptions include:
 - Items available to the general public.
 - Advertising materials of trivial value such as a calendar or notebook with a company logo.
 - Local transportation when alternative arrangements are not practicable
 - Luncheons at a contractor's facility when alternative arrangements are not practicable.
 - Gratuities of small intrinsic value (no more than 50 Euro) in conjunction with a public ceremony of mutual interest.
- (7) Shall disclose in writing to their Director of Management those situations in which they approve or manage contracts with firms that employ family members or relatives.
- (8) Shall avoid any action or activity that may adversely reflect on either their position or the Organization.

3. Political Activities

Generally, military and civilian personnel may not become candidates for public office or hold public office, of a political nature, without the prior consent of the Head of the NATO Body (HONB). This, of course, should not be interpreted as denying an individual's right to vote in elections for which they are eligible to vote. Military personnel must also respect their national rules and regulations.

4. Communicating with the Media

Unless it is part of their normal duties such as a Public Affairs Officer (PAO), military and civilian personnel may not discuss the aims and activities of the Organization through the press, radio, or television without prior approval from HONB.

5. Outside Employment

NIC may not engage in outside employment that HONB determines to be “incompatible” with their NATO duties. Military personnel must respect their national rules and regulations governing outside employment, as well as host-nation limitations.

6. Proprietary Rights

Intellectual property rights such as title, copyright, and patent rights, in any work carried out by members of the staff in the performance of their duties shall be vested in the Organization unless the NATO-approved charter of that NATO body provides otherwise. Additionally, NIC are bound to professional secrecy.

C. MILITARY PERSONNEL

References

- ACO Directive 45-1, Military Personnel Management and Administration (04 July 2002)

1. Disciplinary Authority

NATO Commanders have limited authority over military personnel attached to their commands. In essence, military personnel in NATO are “on loan” from their respective sending nations, filling posts in either the Peacetime or Crisis Establishment of various NATO entities. Although international staff members are largely under the administrative control of their NATO Command and are to execute their international duties under the direction and guidance of their international supervisors, national authorities retain disciplinary authority over their military personnel. A Commander can inform the appropriate national authority of cases where an individual’s standards of discipline are considered unacceptable and, in instances where continued assignment as an international staff member is impractical, bar an individual from access to the Command and request a national replacement.

2. Administrative Authority

A Commander (or Head of NATO body) has inherent responsibility for the safety and welfare of those entrusted to his organization, and thus has wide-ranging authority to investigate the activities of the organization, including compliance with applicable laws and rules. A Commander can withdraw a staff member’s privileges, such as duty-free purchases, in case of abuse. Misconduct that raises doubts about an individual’s reliability or trustworthiness could result in loss of the national security clearance required for an assigned post. A Commander also has the administrative authority to ensure that the professional qualifications and language proficiency required for a post are adequately met by a post-holder, although in practice few staff members are rejected or relieved on this basis.

D. NATO INTERNATIONAL CIVILIANS

References:

- NCPR, Articles 1-3 (Recruitment); Articles 7-11 (Separation)
- ACO Directive 50-4, The Recruitment of NATO Civilian Personnel in Allied Command Operations (ACO)(29 January, 2009) (See also a SHAPE Supplement (06 November, 2003) to ACO Directive 50-4)
- ACT Directive 50-1, Recruitment of NATO Civilian Personnel in Allied Command Transformation (23 January, 2009)

1. Recruitment and Separations

(1) Recruitment

NATO International Civilians (NICs) are recruited from nationals of Alliance nations, and generally they must be between ages 21 to 60, physically fit for their intended function, eligible for a security clearance, finished with their compulsory military service, and have adequate knowledge of at least one of the two official NATO languages (English and French). Additional qualifications for a post appear in the official job description. These typically involve educational requirements, minimum years of experience in related posts, technical skills, and the required level of language proficiency. Recruitment notices usually appear in NATO websites and sometimes in external media and recruitment services in order to optimize the targeting of candidates with the desired competences, skill sets, and experience. Candidates are selected on the basis of merit through a multi-step selection board process that begins with submission of a formal NATO job application, followed by initial screening of applications for qualifications, an optional written test, and a final interview of the most promising candidates. The selection board recommendation, usually for a primary and one or more alternate selectees who, in the collective judgment of the Board are the most "suitable and qualified" candidates, is then passed to the decision authority, who is the Head of NATO body, unless selection authority has been delegated to a senior subordinate such as the Chief of Staff.

(2) Separation

A staff member may be separated from the Organization for any of the following reasons: expiration of contract, resignation, termination by the Head of NATO body (HONB), dismissal due to discipline, attainment of the age limit of 65 or death. Some of these reasons have the potential for legal challenge. The Appeals Board fields numerous cases arising from non-renewal or termination of employment contracts. Termination by HONB can be triggered by unsatisfactory performance, incapacitation for service, redundancy due to suppression of a post, or withdrawal of security clearance. Again, each of these grounds for termination can be contested, and LEGADs are typically involved in the processing of such cases. Historically, the upper age limit for service as a NATO civilian has been age 65, but NATO has now established an option for NICs to serve up to age 67 under certain circumstances, if mutually agreed by the staff member and HONB. The details of this new program (commonly referred to as the "Late Retirement Option") were promulgated in October 2008 as Annex XV to the NCPR.

2. Basic requirements for NATO international civilians

(1) "A" GRADE STAFF - Managerial/professional level

Category A is divided into seven grades designated A.7 to A.1. It covers posts ranging from Deputy Assistant Secretary General to Junior Administrative Assistant. In addition to a university degree, A-grade posts require professional experience of several years in the subject matter of the particular post (at least 2 or 3 years, not including periods of training, for entry-level posts and up to 10 years for senior posts), together with a good knowledge of one of the two official NATO languages (English and French) and sometimes a working knowledge of the second (depending on the post to be filled).

- (2) "B" GRADE STAFF e.g.: administrative posts (clerks, senior clerks), IT staff (assistants) secretarial staff

Category B is divided into six grades designated B.6 to B.1. It covers posts held by technical, clerical and administrative staff. For these posts, secondary education and often additional practical qualifications are necessary. Professional experience of several years in the same kind of functions is required. Candidates must have a good knowledge of one of the two official languages and sometimes a basic knowledge of the second (depending on the post to be filled).

- (3) "C" GRADE STAFF e.g. Technicians in Technical Services (Carpenters/Plumbers/Electricians, etc.), Handymen, Drivers, Fire Fighters, Security Guards

Category C is divided into six grades designated C.6 to C.1. It covers posts held by ancillary, operative, mechanical, manual or custodian personnel. These posts require a certificate/diploma relating to the skills required for the position, together with several years of professional experience. Candidates must have a good knowledge of one of the two official languages and sometimes a basic or working knowledge of the second (depending on the post to be filled). Practical tests (for technicians) or physical trials (for security guards and fire fighters), together with written tests, are usually required.

(4) LINGUISTIC STAFF

Category L is divided into five grades designated L.5 to L.1. It covers the posts held by linguistic personnel (heads of sections, revisers, interpreters, translators and trainee interpreters and translators). NATO Linguistic Staff are members of two independent services, the Translation Service and the Interpretation Service, both of which are part of Headquarters Support Services. The staff members of the linguistic services work only in the two official languages.

- a. TRANSLATORS must satisfy the following conditions:
 - i. possession of a degree, preferably in translation or in modern languages, or an equivalent professional qualification;
 - ii. English or French mother tongue (NATO translators translate only into their mother tongue);
 - iii. relevant professional experience.
- b. INTERPRETERS, the basic requirements (which apply to both freelance and permanent staff interpreters) are as follows:
 - i. possession of a degree, preferably in interpretation or in modern languages, or an equivalent professional qualification;
 - ii. English or French mother tongue;
 - iii. relevant experience in conference interpreting;
 - iv. English AND French as "active" languages.

3. Deployment of Civilians

References:

- ACO Directive 50-11, Deployment of NATO Civilians (a living document)
- ACT Directive 50-13, Deployment of ACT NATO Civilians (12 February 2010)
- C-M(2005)0041 Participation of NATO Civilians in NATO Council Approved Operations and Missions

There is a current and enduring need for the participation of NATO civilians in NAC-approved operations and missions. NICs who deploy on such operations must be physically

and mentally fit, immunized, trained, and equipped. They cannot be ordered to deploy to a theatre of operations for longer than 30 days, unless their Job Descriptions (JD) carry a requirement to do so. A NIC may volunteer, however, to serve in theatre; such volunteers have a tour length similar to their military counterparts.²³² NICs working in support of a NATO operation have the legal status of a non-combatant, but they are eligible for privileges enjoyed by members of the civilian component accompanying the force as set out in the Status of Forces or other agreement negotiated between NATO and the host nation. Deploying NICs are to receive a theatre ID card that affirms their legal status. A NATO-wide ID card for such purposes is still in development.

4. Discipline

References:

- NATO Civilian Personnel Regulations (NCPR), Articles 59-60 & Annex X
- SHAPE Directive 50-3, International Civilian Personnel Disciplinary Procedures (12 April 1999)

(1) Overview of the Disciplinary Process

Formal discipline of a NIC is an infrequent occurrence. Grounds for discipline include negligent or intentional failure to comply with obligations set out in the NCPR. Available sanctions range from oral reprimand to dismissal with loss of pension. NICs charged with serious misconduct or involved in criminal proceedings can be suspended immediately from their functions if the Head of NATO body (HONB) determines that the charge is *prima facie* well-founded and that the staff member's continuance in office during investigation might prejudice the Organization. Such administrative suspension is not considered to be discipline.

The upper tier of sanctions - temporary suspension with loss of pay; and dismissal, either with or without loss of pension rights - requires a Disciplinary Board before the HONB makes a determination. The procedures for such a Board are set out in Annex X of the NCPR. A NATO Disciplinary Board does not have the power to issue subpoenas, but may invite witnesses to testify. A disciplinary decision by the HONB is an action that can be appealed to the NATO Appeals Board. A common denominator of most cases resulting in loss of pay or dismissal is substantial monetary fraud.

A variation to the above procedures occurs when a staff member loses - for whatever reason - the security clearance issued by his/her sending nation. Since a security clearance is a pre-condition for employment as a NIC, the consequence of losing the clearance is immediate dismissal of the staff member concerned.

(2) Role of the LEGAD

Usually, the LEGAD works closely with the CPO in processing civilian disciplinary cases. The NCPR provide a staff member facing discipline with the typical array of procedural due process rights - information about the charges, the right to respond; and in cases involving a Disciplinary Board, submission of evidence and witnesses, and the right to appear in person with or without a spokesperson. Since serious disciplinary cases often end before the Appeals Board, which takes particular care in assuring itself that management has followed all the required steps and acted justly, a primary function of the LEGAD is to help shepherd the disciplinary proceedings at every step, always with an eye to a potential appeal.

5. Complaints

References:

²³² A key difference in the case of NICs is that there can be no single assignment for a period exceeding 183 days in any period of 18 months (547 days).

- NATO Civilian Personnel Regulations (NCPR), Articles 61-62
- NATO Civilian Personnel Regulations (NCPR), Annex IX
- ACE Directive 50-10, Administrative Procedures for Complaints and Appeals by International Civilian Staff (13 September 1994) (also SHAPE Supplement to ACO Dir 50-10)(26 January 2004)
- ACT Directive 50-11, Procedures for NATO Civilian Mediation, Complaints and Petition (04 October 2007)

(1) Overview of Complaint Process

NICs have a well-established process for bringing grievances to the attention of management. Within NATO organizations, a key figure in this process is the Head of NATO Body (HONB). An HONB is the senior official, whether military or civilian, at an organization sufficiently large to qualify as a NATO body. The HONB is allowed to delegate much of his involvement in NATO civilian matters to a subordinate, such as a chief of staff, but there are some functions that cannot be delegated (see below).

(2) Procedures for Complaints:

- a. Pre-Complaint: Article 61.1 of the NCPR creates an obligation on the part of NICs to refer any complaint affecting their work or their conditions of work to the head of their division or office, through their immediate supervisor.
- b. Although not explicitly stated, Article 61.1 of the NCPR can be reasonably read as requiring that complaints relating to work or work conditions should be handled at the lowest level possible.²³³

(3) General Procedure for Complaints

- a. Article 61.3 of the NCPR establishes the right of members of the international staff to submit a written complaint within a **reasonable time** to the HONB concerned seeking to alter or annul an administrative decision taken with respect to **that** staff member.
- b. Neither the NCPR nor ACE Directive 50-10 defines the words “within a reasonable time.” Their meaning must therefore be sought in decisions of the NATO Appeals Board. The Board has clarified the respective time limits in several cases.
 - In two cases, the NATO Appeals Board rejected claims that an employee’s complaint was untimely.²³⁴
 - On the other hand, several NATO Appeals Board cases have discussed what constitutes an unreasonable period of time for purposes of Article 61.3:²³⁵

²³³ See NATO Appeals Board Decision No. 164 (1 March 1984) (noting the intention behind Article 61.1 and 61.3 was to “specify that the head of the NATO body shall be approached only after recourse to the initial procedures [and] . . . that the head of the body should not be required to deal with complaints to which a solution could be found at head of division or office level.”).

²³⁴ Decision #90 (Perrier v. NATO HAWK, 29 March 1978), the Board held that “the period of about three months which elapsed before she petitioned the General Manager...must be regarded as reasonable....”

Decision #79 (Hintz v. NAMSA, 27 May 1977), the NAB rejected NAMSA’s contention that a complaint lodged approximately two months after the decision in question was untimely, and declared the complaint admissible.

²³⁵ Decision #279 (Swan v. NAEW, 10 February 1993), the Board held that a delay of eight months was not reasonable for purposes of Article 61.3.

Decision #97 (Baylac v. NATO HAWK, 28 March 1979), delay of 12 months was not reasonable for purposes of Article 61.3.

Decision #268-269-270 (Quarto v. AFSOUTH, 23 March 1992), delay of 14 months was not “within a reasonable time” for purposes of Article 61.3.

- The Board dismissed portions of appeals in Decisions #705 and #706, dated 24 May 2007. These decisions were rendered in the specific context of staff complaints related to working hours. NATO civilians pay during the period 2003-2005 had not been adjusted in accordance with a regulatory reduction in working hours which took effect in 2000. The Board ruled that, *"It was open to them at that time to contest each of the adjustments...even if they did not then know the exact magnitude of that increase, but they did not make use of this possibility. Their request lodged on 28 February 2006 was thus too late as regards years 2003, 2004 and 2005..."* Accordingly, the Board dismissed their complaints.
- In addition to the above, several cases address longer periods which were also found to be unreasonable for purposes of Article 61.3.²³⁶
- Another case should also be noted as it stands for the proposition that new facts will not "re-start the clock:"²³⁷
 - i. A staff member making a written complaint in accordance with the provisions of Article 61.3 of the NCPR is generally required to submit the complaint to the HONB to which he belongs through the official responsible for personnel management (i.e., cognizant CPO).
 - ii. Annex IX of the NCPR contains the regulations governing complaints.
 - iii. Any staff member who files a formal complaint is entitled to request that the complaint be submitted to a Complaints Committee prior to a decision by the HONB. The implementing procedures for Complaints Committees are found in Appendix 3, Annex IX of the NCPR.
 - iv. Referral of a complaint to a Complaints Committee is not mandatory when the complaint is directed against a decision already taken by the HONB and the staff member concerned has been notified of that decision. However, in such cases the HONB has forty-five (45) days from the date of receiving the complaint to reply to the staff member. The requirement to allow the staff member to see the HONB per Article 3.2, Annex IX of the NCPR must be observed.
 - v. The HONB may always, whether or not requested by the staff member concerned, refer a complaint to a Complaints Committee or establish (generally through a convening order) some other means of conducting an investigation into the facts and allegations contained in the complaint. This could include, for example, appointing a member of the staff to conduct a Preliminary Inquiry or Investigation and preparing a report to assist the HONB in making a decision.

²³⁶ Decision #41 (Duruturk v. NAMSA, 8 May 1972): 7 years

Decision #393 (Linder v. NAEW, 26 March 2000): 8 years

Decision #287a (Somville v. NAMSA, 13 January 1994): 11 years

²³⁷ Decision #208 (Huwart v. NAMSA, 7 February 1986), delay of 20 months between the decision and the filing of a complaint was not a "reasonable time." Worth noting is the following comment by the Board: *"[XY] did not apply for [compensation] until 28th March 1985, i.e. 20 months after the expiry of his contract; whereas this period cannot be regarded as reasonable even though the appellant may not have learned until early 1985 of the practice followed in another NATO body where compensation in lieu of notice is awarded in cases comparable to his own; whereas this circumstance can have no bearing on the length of the reasonable period of time within which[XY] should have applied."* This case stands for the principle that even the occurrence of new facts will not be allowed to "re-start the clock" in determining whether time elapsed is reasonable or not.

6. Complaints Committee Membership

- (1) Each NATO body shall have a Complaints Committee composed of the following three members :
 - a. A Chair (commonly referred to as a Chairperson or Chairman) of the Complaints Committee appointed by the HONB for a period of two years. The Chair can be a civilian or military member of the staff.
 - b. A member of the civilian staff in a grade at least equal to that of the complainant is typically appointed to serve on the Complaints Committee. In contrast to the Chair position, this is typically not a “standing” assignment but rather a function of an individual appointing order to consider a particular case.
 - c. A member chosen from among the same personnel by the Staff Committee of the Staff Association to which the claimant belongs; should there be no Staff Committee, the choice shall be made by the Staff Association concerned.
 - i. Although not required, it is common to have a Legal Adviser appointed as a non-voting member to assist the Complaints Committee, as required by the Committee.

7. Role of the Complaints Committee

- (1) The Complaints Committee is to give its opinion and make recommendations to the HONB to enable him to take an administrative decision regarding the staff member’s complaint.
- (2) The Complaints Committee is not a judicial body but does have broad investigatory authority to hear witnesses whose testimony appears necessary/useful and to review documents it deems necessary to investigate the facts relating to the complaint and to make findings and recommendations warranted by those facts.
- (3) Witness interviews should be recorded or taken in the presence of someone taking thorough notes, since the interview must be reduced to a narrative statement by the Complaints Committee, then reviewed and signed by the witness (document/annotate any refusals to sign).
- (4) Before submitting its recommendations, the Complaints Committee must offer the complainant the opportunity to be heard. If it is impractical for the complainant (or any other witness) to appear, the Complaints Committee should request a written statement.
- (5) The HONB is not bound by the opinions and recommendations of the Complaints Committee and remains free to act as he deems appropriate. See NATO Appeals Board Decision No. 10 (24 October 1968); NATO Appeals Board Decision No. 164 (1 March 1984).

8. Timelines

- (1) As indicated above, the complaint must be filed within a reasonable time.
- (2) Within 15 days from receipt of the complaint, a Complaints Committee should be established if either requested by the complainant or, in the absence of such a request, if desired by the HONB.²³⁸

²³⁸ NOTE: In the case where a Complaints Committee is not formed, the decision by HONB is to be taken no later than 45 days after receipt of the complaint. Even in this scenario, the claimant has the right to be heard by the HONB before the HONB can take a decision.

- (3) Within 30 days from the date on which it received the complaint, the Chair is to submit the Report of the Complaints Committee to the HONB. In complex cases, the Chair can request an extension of time from the HONB
- (4) The staff member concerned must be notified in writing of the decision taken within 15 days of receipt of the opinion of the Complaints Committee. Thus, the HONB needs to be briefed promptly on the contents of the Report of the Complaints Committee.²³⁹
- (5) Under the terms of Article 4.31 of Annex IX to the NCPR, the staff member only has sixty (60) days from the date of notification of the decision by HONB to file an Appeal with the Secretariat of the Appeals Board.
- (6) Final comment with respect to timelines: both the complainant and the Organisation should endeavour to comply with the time limits set in the NCPR. Failure to comply, however, is not necessarily fatal error for either the Organisation or the complainant. The NATO Appeals Board has ruled that failure to comply with the established time limits does not automatically result in the annulment of an administrative decision unless the delay “*significantly affects the matters at issue.*” Moreover, such delay is only compensable if it results in “*direct and identifiable prejudice*” to the complainant. ²⁴⁰

9. Petition to the Head of NATO Body

- (1) When the initial decision has been taken by the HONB, the staff member may file an Appeal with the NATO Appeals Board or, before filing an Appeal, petition the HONB to reconsider his/her decision. ²⁴¹
- (2) The Petition does not require any action on the part of HONB other than to reconsider/review the earlier decision and advise the petitioner/complainant of his/her decision. ²⁴²
- (3) A Petition to the Head of NATO Body preserves/interrupts -- for the benefit of the appellant (i.e., “stops the clock”) -- the period allowed for an appeal to the Board provided the Petition to HONB is submitted within the time limit of 60 days laid down in Article 4.32 of Annex IX of the NCPR. In such a case, the time limit for an appeal to the Board begins to run again from the date of notification of the express decision, or the emergence of the tacit decision, rejecting the petition. See NATO Appeals Board Decision No. 322 (28 February 1996).
- (4) A Petition submitted outside the sixty-day period for filing an Appeal has no effect on the running of time for submission of appeals and the Appeal will be dismissed as untimely. This, of course, should not factor in the HONB’s decision with respect to appropriate handling of the Petition for Reconsideration. See NATO Appeals Board Decision No. 369 (22 April 1998).

²³⁹ NOTE: Before a decision can be taken by the HONB, the claimant must be allowed to exercise a right to be heard by the HONB. If the claimant elects to exercise this right, the HONB must not take a decision until after the discussion has occurred between HONB and the claimant. This requirement exists even in those cases where no Complaints Committee was formed. See Articles 3.2.3 and 6(a) of Annex IX to the NCPR.

²⁴⁰ See NATO Appeals Board Decision No. 99 (26 January 1979). Similarly, the Board has permitted Appeals to be filed by claimants beyond the 60 day period in “*exceptional cases and for duly justified reasons.*” See NATO Appeals Board Decision No. 97 (25 January 1979).

²⁴¹ NOTE: The “Petition to the Head of NATO Body” is not part of the procedures found in the NCPR but rather is an option recognized in the decisions of the NATO Appeals Board (See NATO Appeals Board Decisions Nos. 63, 79, 100, 101, 106, 107, 108, 322, 324, 325, 369; see also paragraph 6c below).

²⁴² NOTE: The Petition to the Head of NATO Body is not considered a “complaint” within the meaning of Article 61 of the Civilian Personnel Regulations. Thus, the HONB may submit the Petition to a Complaints Committee but is not compelled to do so. See NATO Appeals Board Decision No. 322 (28 February 1996).

10. Appeals

References:

- NATO Civilian Personnel Regulations (NCPR), Article 4 of Annex IX
- ACE Directive 50-10, Administrative Procedures for Complaints and Appeals by International Civilian Staff (13 September 1994)

(1) General

A staff member has the right to appeal the decision of the Head of NATO Body by filing an Appeal with the NATO Appeals Board within 60 days from the date of receiving the HONB's decision (as discussed in paragraph 5f above, in exceptional cases an Appeal can be filed after the 60 day time limit).

The failure by the HONB to reply within 30 days to a complaint shall be considered as equivalent to the rejection of the complaint or request. Nevertheless, if on receipt of a complaint, a Complaints Committee is set up, the Appeals Board shall not be convened before the HONB has taken a decision.

Annex IX of the NCPR, starting at Article 4, contains the regulations governing the NATO Appeals Board, the composition of the Board and the guidelines for submissions to the Board. The rules of procedure of the NATO Appeals Board are found in Appendix 1, Annex IX of the NCPR.

The Appeals Board consists of three persons -- a President and two other members of different nationalities -- appointed by the North Atlantic Council (NAC).

(2) Specifics on the Process:

A staff member files a written Appeal with the Secretariat of the Appeals Board at the following address:

Secretary, NATO Appeals Board
NATO Headquarters
B-1110 Brussels, Belgium

The Appeal must be in writing, in duplicate and state all grounds for the Appeal and include, as enclosures, all documentary evidence intended to substantiate the Appeal.

Before an Appeal will be considered by the Board, the staff member must deposit, within 60 days of filing an Appeal, an amount equal to 1% of their annual basic salary. This amount is deposited with Financial Controller of the NATO International Staff. When the NATO Appeals Board receives an Appeal from a staff member, it will immediately forward the Appeal to the HONB concerned. The HONB then must, within sixty (60) days from the date the appeal was submitted, provide written comments on the contents of the Appeal. ²⁴³

The appellant, after receiving the comments from the HONB, may, if he/she chooses, submit a written reply to those comments within 30 days of receipt of the notice from the Board advising them of this right. The HONB is not afforded the opportunity to "rebut the rebuttal" from the appellant.

There is a temptation for the HONB to submit an abbreviated or incomplete written reply to an appellant's allegations. This approach can cause problems. In Appeals Board Decision No. 687 (27 October 2005), the Board stated that "Proceedings before the Appeals

²⁴³ NOTE: the comments (the word "comments" should be read to mean "response brief") by the HONB are due to the appellant within 60 days from the date the Appeal was submitted. You will send the original response brief to the Secretariat but you must ensure the appellant receives his/her copy within the prescribed time period. In reality, HONB will have slightly less than 60 days to respond simply because of postal delay. It is, however, permissible for the HONB to request more time, though there is no guarantee that the request will be granted. Such a request should be submitted to the Secretariat of the Appeals Board.

Board are essentially of a written nature.” In this context, a NATO organization is free to elaborate on arguments contained in its written submission during the hearing, but may not invoke a new defence.

(3) Competence of the Board

Per Article 4 of Annex IX of the NCPR, the Appeals Board is vested with authority to decide the following cases:

- a. Any individual dispute arising out of a decision taken by the HONB either on his/her own authority or in application of a decision of the Council and which a staff member, or former staff member or his/her legal successors consider constitutes grounds for grievance. The fact that an Appeal has been filed does not give rise to an “automatic stay” of the decision to be appealed against, although the HONB “shall exercise all due circumspection” to avoid taking any further action which would make it impractical to grant the relief sought by the appellant in the event of the appeal being upheld.²⁴⁴
- b. All questions regarding the interpretation and application of the Civilian Personnel Regulations, contracts or other terms of appointment.

The Board has often noted that it will not go behind the reasons that may have prompted an Organization not to renew an initial contract or a contract of definite duration. However, before applying this deferential standard of review, the Board must be satisfied that the refusal to renew emanated from a competent authority in accordance with proper procedure, and that it is not based on errors of fact, errors of law, obvious errors of judgment or a misuse of powers.²⁴⁵

Similar to the above deference, the Board has held, when hearing an appeal against the decision by the competent administrative authority to accept an application to fill a vacant post, that it was not its place to substitute its own judgement for that of the party making the decision as to the respective merits of the various candidates who have applied for that post. Again, however, the Board will only apply this deferential standard of review when it is satisfied that the decision contested was taken in accordance with a regular procedure, not founded on materially inaccurate facts or tainted by error of law or misuse of powers, and lastly that the assessment by the competent authority was not tainted by an obvious error.²⁴⁶ The two most frequent ways that NATO organizations find themselves in difficulty with the Appeals Board are (1) failing to follow their own organizational procedures; and (2) dealing with a civilian staff member in a manner that suggests discriminatory, unequal, or otherwise unfair treatment.

It is important to understand that the Appeals Board decides its cases mainly on procedural matters. Rarely does it interpret the law, but rather focuses on applying it. As noted above, the Board recognizes an organization’s freedom of choice in the area of staff appointments, but still reaffirms its willingness to scrutinize the procedure leading to the appointment. The Board is more inclined to accept precise arguments about management failure to follow its own rules, either the canon of rules set out in the NCPR, or the specific

²⁴⁴ . See Article 4.3.5 of Annex IX of the NCPR. Since the time between the filing of an appeal to the rendering of a decision is often one year, in cases involving disputed recruitment for a post or a decision not to renew an employment contract, the Appeals Board has historically not required management to freeze its hiring processes while a case is pending. In practical terms, this means that an appellant usually receives monetary compensation for a lost post instead of specific placement into the post.

²⁴⁵ See NATO Appeals Board Decisions Nos. 63, 68, 72, 75, 79, 81, 85, 87, 88, 94, 97, 99, and recently 741 (12 December 2009). In Decision No. 741, without specifying whether it found an error of fact, law, or judgment, the Board ruled there was insufficient management justification for denying renewal of a definite duration contract.

²⁴⁶ See NATO Appeals Board Decision No. 339 (9 January 1997).

implementing rules developed by each activity.²⁴⁷ Legal Advisers should be watchful to ensure that their organizations do not develop local “paper tigers” in the form of implementing directives that are ignored in practice.

In this context, most of the appeals won by staff members are based on procedural irregularities. The Board is not inclined to accept arguments on broad legalistic grounds. For example, cases based on “discrimination” or “harassment” are won only 5% of the time by staff²⁴⁸; and the Board has never ruled in favour of staff for alleged violation of acquired rights, even though this argument has been used in more than 35 appeals.

Reciprocally, cases involving disciplinary sanctions receive the closest scrutiny, and a single unexplainable irregularity in procedure can be fatal for management. For this reason, legal advisers must work closely with both their personnel offices and senior management in the development of disciplinary cases involving NATO civilians.

(4) Remedies and Relief

By far the most common remedy awarded by the Appeals Board is monetary compensation, often based on a calculation of wages – e.g., three months’ wages -- but also allowing monetary compensation for psychological, moral, or professional damage. Other relief granted by the Appeals Board may include:

- a. Annulment of a decision by the HONB that is contrary to the contract terms or NCPR.
- b. Issuing an order to an Organization to repair the damage resulting from any irregularity committed by the HONB. Per Article 4.2.3 of Annex IX of the NCPR, where SECGEN or the SC concerned affirms that the execution of an annulment decision would give rise to substantial difficulties, the Appeals Board will convert, upon request, the earlier award of “specific performance” to a monetary award (an example of this would be an order for reinstatement in the case of termination). Subordinate commands or organizations have to submit such a request up the chain, since only SECGEN and the two Strategic Commanders are vested with the authority to invoke this special option.
- c. In cases where it is admitted that there were good grounds for the appeal, even if the appellant is not successful, the Board typically orders the NATO body to reimburse reasonable expenses (including attorney fees) incurred by the appellant and any witnesses who have been heard.

11. Appeals Board Hearing

After all of the submissions by the appellant and HONB are received, to include the appellant’s security deposit, the Secretariat of the NATO Appeals Board will schedule a hearing of the Appeal at NATO HQ. The HONB and the staff member may on their own initiative or if requested by the Board, attend the hearing and make an oral presentation in support of their written submissions. Typically, the LEGAD and/or CPO represent the HONB at the hearing. The Board may require the production of any document that it deems useful for the consideration of the appeal before it. All documents communicated to the Board will also be communicated to the HONB and the appellant.

²⁴⁷ See Appeals Board Decision No. 754 (10 July 2009) and No. 733 (13 March 2008), in which the Board ruled that a local hiring policy more generous to staff than the established NCPR requirement was enforceable in favour of staff.

²⁴⁸ See Appeals Board Decision No. 739 (12 December 2008), affirming that in evaluating a harassment claim, the Board will not presume misuse of powers, and that appellant allegations must be substantiated by credible evidence, in light of all the circumstances, that official authority has acted, exclusively or substantially, for purposes other than those that it could legally pursue in the exercise of its jurisdiction. But see Appeals Board Decision No. 756 (18 December 2009), noting that differences in judgment in managing an organization do not constitute harassment, but that defamatory statements about a staff member in a Complaints Committee report can be the basis for compensation arising from psychological damage.

The Board will hear any witnesses that it deems to have useful information of evidentiary value.

The Board makes its rulings by majority vote, and Board members vote in secret.

The decisions of the Appeals Board are not subject to appeal, except that the Board may be requested to correct clerical or accidental mistakes.

12. Privileges

References:

- 1951 NATO SOFA (Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, 19 June 1951) (199 UNTS 67)(available at NATO’s website on the internet)
- 1951 Ottawa Agreement (Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, 20 September 1951) (200 UNTS 3) (also available on the NATO website)
- 1952 Paris Protocol (Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty, 28 August 1952) (200 UNTS 340)(also available on the NATO website)
- The Handbook of the Law of Visiting Forces, Ed. Dieter Fleck, Oxford University Press, 2001
- Status of Military Forces under Current International Law, Serge Lazareff, A.W. Sijthoff (Leyden, 1971).

(1) Overview

A topic that frequently engages the attention of NATO LEGADs is the scope of individual privileges available to military and civilian staff members attached to NATO bodies. From the perspective of many outsiders, NATO seems to be one vast duty-free store. In this context, the term “privileges” is viewed mainly as exemption from various host-nation taxes, duties, fees, and controls that would otherwise apply to foreign forces stationed in a receiving State. The cornerstone documents are listed above.

The NATO SOFA sets out privileges for both a visiting force and the individual members of such a force. The Paris Protocol covers institutional privileges that belong to an International Military Headquarters (IMHQ); and the Ottawa Agreement does the same for NATO civil bodies and the cluster of NATO headquarters elements in Brussels. This Handbook has a separate chapter on “institutional” privileges granted by the Paris Protocol and Ottawa Agreement. The current section only surveys “individual” privileges. It is important to note that the SOFA treatment of individual privileges is relatively precise about privilege categories, but vague about practical details. Thus, in most instances, there is need for a Supplementary Agreement (SA) with each receiving State to spell out implementing arrangements for various SOFA rights, obligations, and privileges. The 1959 SA with Germany, for example, was more than 50 pages long.

(2) Monetary Privileges

The individual military and civilian personnel of visiting forces, and their dependents, are generally subject to the tax jurisdiction of the nation in which they are located, except to the extent that they receive exemptions. Article X of the SOFA does exempt members of the visiting force or civilian component from taxes paid on (1) NATO-related salaries; (2) tangible personal property temporarily brought into the receiving state; and (3) the basis of residence in the receiving state. Article XI, dealing with customs, permits the duty-free importation of a private motor vehicle, household goods, and personal effects – plus a similar duty-free exportation of these items on departure from the receiving State. The caveat is that such items may not be disposed of in the receiving State either by sale or gift without complying with receiving State requirements, including payment of applicable

transaction taxes. In addition, the quantity of such temporarily imported items must be consistent with personal use.

One of the privileges cherished by NATO staff is the ability to purchase consumer goods such as alcohol, perfume, tobacco and petrol free of taxes and import duties. This privilege has its anchor point in the SOFA statement that *“a force may import free of duty the equipment for the force and reasonable quantities of provisions, supplies and other goods for the exclusive use of the force and, in cases where such use is permitted by the receiving State, its civilian component and dependents.”* (SOFA, Art. XI, 4). Limitations on what is a *“reasonable quantity”* for eligible individuals are usually established by a Supplementary Agreement and administered by mechanisms such as a ration card. Less clear, however, are the positions of the host nations when operation and importation is contracted to a private company for the purpose of running a duty-free store.

(3) Impact of European Union (EU)

Institutional and individual tax exemptions enjoyed by NATO since 1951 have come under increasing scrutiny in recent years, especially within Europe. The mandate of the EU, pursuant to its supranational authority under the Treaty of Rome, is to remove barriers to the free movement of goods and services within the Union’s boundaries – including market distortions caused by varying systems of exemptions and rates of taxation on transactions. The system of privileges granted by the NATO SOFA, although intended to provide fiscal and other incentives to visiting forces, is viewed as being out of step with the ongoing EU drive to standardize the structure for indirect taxes, such as VAT. In 1977, the EU’s Sixth VAT Directive²⁴⁹ provided a specific exemption from VAT for purchases of goods and services made by a visiting NATO military force, but the supranational competence of the EU in this area means that individual EU nations no longer have the same unfettered freedom as before to extend tax privileges to individuals through a Supplementary Agreement with NATO.²⁵⁰

Article 17 of the Treaty of Rome confirms NATO’s primacy on matters related to security and defence. The EU, however, has asserted legal competence in areas outside of security and defence that are relevant to personnel management, such as workplace environment and privacy rights. This can lead to confusion about whether NATO or EU rules apply to certain personnel issues, depending on whether the issue is viewed as integral to security and defence – broadly interpreted – or is treated as a more generic issue of working conditions. The NATO SOFA addresses such conflicts at Article II, where it requires that forces of a sending State *“respect”* the laws of a receiving State. Since EU legislation has the equivalent force of national laws in areas where it has assumed legal competence, NATO personnel and entities have only the same obligation of *“respect”* for EU law. The key point is that *“respect,”* although debated, is generally viewed as falling somewhere between strict compliance and wanton disregard. In practical terms, NATO entities should and do attempt to comply with national laws, to include EU law, unless such laws conflict with a NATO edict in that same area.

²⁴⁶ The EU Sixth VAT Directive has been replaced by European Council Directive 2006/112/CE of 28 November 2006 (effective 1 January 2007). Former Article 15.10 of the Sixth VAT Directive – the legal basis for NATO’s VAT exemptions – is incorporated in European Council Directive 2006/112/CE at Article 151. 1.

²⁴⁷ It should be recognized that Article 307 of the EC Treaty, as amended by the Treaty of Amsterdam, specifically addresses the compatibility of *“EU”* law and international agreements concluded before 1 January 1958 or -- in the case of new members to the EU -- the date of accession into the EU. Article 307 grants primacy to international agreements concluded before those key dates. That said, in a few rare decisions, the Court of Justice of the European Communities (CJCE) has examined the general scope of Article 307 and imposed an obligation on EU Member States to denounce *“incompatible”* treaties concluded prior to the EEC. These decisions are extremely limited in their range and cannot reasonably be interpreted as obligating NATO Member States that are also part of the EU to denounce the NATO SOFA or the Paris Protocol or the obligations created therein.

13. Investigations

(1) No Centralized NATO Model

Unlike most national systems, NATO does not have the equivalent of an Inspector General (IG) to conduct investigations, enforce standards, and ensure compliance with directives. As a result, the leaders of NATO entities often rely on their LEGADs to organize and conduct administrative investigations. Experience suggests that most cases arise from the usual temptations of sex, power, and money. Typical triggers for such an investigation would be a significant loss of property, allegation of misconduct, or breach of security. There is no omnibus NATO directive that spells out either the requirements for investigations or the procedures to be followed, though both SHAPE and NATO HQ IMS have incorporated a Board of Inquiry as part of their procedures for preparing Reports of Survey (property loss investigations).

(2) Common-sense Approach

Most LEGADs will already have some national experience in conducting administrative investigations. One common feature of such informal inquiries is an appointing letter, usually signed by the Chief of Staff, which designates an investigator, states the scope of the investigation, sets a due date for completion, and provides administrative support. The investigator should gather available documentary evidence and interview witnesses in order to determine the cause(s) of the incident under investigation, damage to NATO interests, and the culpability of involved persons. Report format can vary depending on the complexity of the inquiry, but should include findings of fact (supported by documentary references), opinions regarding accountability, recommendations for disposition of the case and, if applicable, lessons learned to prevent the reoccurrence of similar incidents.

(3) Colleagues

Large NATO commands have a Financial Auditor on the staff. If the incident under investigation involves financial discrepancies, the Auditor often serves as the lead investigator, with support from Legal. Similarly, if the incident involves a security breach or misuse of computers, the staff Security Officer will likely be involved as part of the investigative team. Also, when investigating allegations of misconduct, it is useful to coordinate the investigation with both the local NATO Manpower Branch and the National Liaison Representative (NLR) of the individual being investigated to determine whether any special personnel or national factors apply to the case. If an incident does not directly affect the NATO entity, but does call into question an individual's suitability for continued NATO service, the NLR will be involved in advising the Command Group. An example of this might be a staff member accused of a serious crime in the local community.

PART VIII
OVERVIEW OF
NATO PROCUREMENT, LOGISTICS OR SERVICE ORGANIZATIONS

References and suggested reading:

- Agreement on the Status of the North Atlantic Treaty Organisation, National Representatives and International Staff, signed in Ottawa on 20th September 1951, Ottawa Agreement
- Bi-SC directive 15-3 "Preparation and control of international agreements"
- C-M(2009)0079 The Regulations for NATO Procurement, Logistics or Service Organizations" (NPLSO) dated 15 June 2009
- C-M(62)18 "Regulations for NATO Production and Logistic Organizations"
- NATO Civilian Personnel Regulations (NCPR)

A. INTRODUCTION

NATO Procurement, Logistics or Service Organizations

Within NATO there are a number of separate organizations that implement the political goals of NATO under the final responsibility of the NAC. These so called NATO Procurement, Logistics or Service Organizations (NPLSOs) are part of NATO and share its judicial personality, but represent either the interests of a limited number of NATO nations in order to develop and sustain capabilities, or provide services to the NATO nations and the NATO organization. Particular to these organizations are their chartered structure, their relation with each other and other NATO organizations and their specific status in the nations where they operate, especially the host nation. These particular elements are described in this part of the handbook.

C-M(2009)0079

The previous regulations called “Regulations for NATO Production and Logistic Organizations” contained in document C-M(62)18, were replaced, in June 2009, by a reviewed set of regulations contained in document C-M(2009)0079 “Regulations for NATO Procurement, Logistics or Services Organizations”. These Regulations, commonly referred to as the “NPLSO” Regulations cover different types of NATO organizations that implement NATO’s goals, and their Agencies: NATO common funded, customer funded, those that come under NATO Committees, existing and potential future Agencies with a defined scope of activities in the field of procurement and/or logistics and/or other services. Charters for those NATO organizations follow the template contained in C-M(2009)0079.

Innovation

C-M(2009)0079 has introduced an important development regarding the establishment of NATO subsidiary bodies within the meaning of the Ottawa Agreement.²⁵¹ While under the previous Regulations as contained in document C-M(62)18, only NATO nations were allowed to become members of a NATO Production and Logistic Organization, the new NPLSO Regulations allow for non-NATO countries to apply for association with a NPLSO. Thus, throughout the new NPLSO Regulations, the concept of “member nations” has been replaced by the concept of “participating nations”, including both NATO member nations and non-NATO countries associated with the NPLSO. The conditions under which a non-NATO nation may participate in an NPLSO, including its rights and responsibilities vis-à-vis NATO, are determined by the NPLSO Regulations, the Charter of the respective NPLSO and a NAC-approved agreement concluded between the nations that already participate in this NPLSO and the non-NATO nation that candidates for association. To the extent possible, the rights and responsibilities of the associated non-NATO nation in the NPLSO should be similar to those of the NATO nations. However, such a non-NATO country will not share in the international personality of NATO nor in the juridical personality possessed by NATO.²⁵²

Relations of NPLSO’s

Being chartered as a NATO organization comes with certain restrictions. These restrictions, such as limited contract authority, are not stated in founding documentation for charters and the rules on NATO agreements are dealt with in a separate chapter.

²⁵¹ Agreement on the Status of the North Atlantic Treaty Organisation, National Representatives and International Staff, signed in Ottawa on 20th September 1951

²⁵² C-M(2009)0079, article 8

The seat Agreements

The peculiarities of the relation between NATO organizations and HN form the final part of this contribution.

B. NATO CHARTER DOCUMENTATION - C-M(2009)0079

1. NATO's legal position based upon the Ottawa Agreement

The Ottawa Agreement is a basic document for the NAC and its subsidiary bodies. In this treaty the signatories grant NATO its juridical personality. The capacity to conclude contracts and to acquire and dispose of goods and the possibility to institute legal proceedings are specifically mentioned. Moreover, the treaty establishes the immunities and privileges of NATO and its staff. A specific article instructs the Council to develop arbitration provisions for contract disputes or other disputes of a private character. This legal position is different from that of a military headquarters, which normally derives its legal status from the Paris Protocol which supplements the NATO SOFA.

2. Charter

In order to execute specific tasks for the benefit of NATO nations or to provide support/services to all of NATO, the NAC can decide to establish a NATO Procurement, Logistics or Service Organization. NPLSOs share the legal personality of NATO. NATO bears responsibility for the activities of these organizations, including the contracts and agreements concluded in accordance with the charter. The nations that participate in the NPLSO, however, need to assume responsibility for it vis-à-vis NATO and bear any resulting costs, with the exception of activities that result from a direct tasking by the NAC.

3. The Regulations

The Regulations for NATO Procurement, Logistics or Service Organizations" (NPLSO) C-M(2009)0079 dated 15 June 2009 give a framework for a charter of a NATO organization. The charters of the NPLSOs should be in conformity with the regulations. The policy on the dissolution of an NPLSO is described in another policy document²⁵³

Simultaneously with its decision to establish a NPLSO and within the framework of NATO to grant such organizations administrative, organizational and financial independence, the NAC is required to approve the charter of any such NATO organization. To avoid proliferation and duplication, any request seeking establishment of an NPLSO has to be accompanied with a separate justification for a new NPLSO rather than using an existing NPLSO. The Secretary General of NATO advises the NAC on the appropriateness of the request, taking account the advice of the NATO committee(s) concerned, when appropriate.

Modifications of a NPLSO Charter follow the same procedure, i.e. a justified request addressed to the NAC, the latter being advised by the Secretary General of NATO as described above.

In order to establish in detail their understandings as to the NPLSO, the participating nations may enter into separate arrangements like an MOU that may however not derogate from the provisions of the NPLSO Regulations and the Charter of the NPLSO.

4. Contracting

As NATO bears responsibility for its NPLSOs' contracting activities, the Regulations set limits on the authority of the NPLSO to enter into contracts. The contracting authority

²⁵³ C-M (66) 9

delegated to a NATO organization is limited to contracts and agreements involving only NATO countries and to administrative agreements with other NATO bodies.

In cases involving a non-NATO nation or an international organization, or when an international agreement requires Parliamentary approval, upfront approval of the NAC is required in principle. This approval may already result from earlier relevant applicable decisions of the NAC. Otherwise, it has to be specifically requested by the Board of Directors, in most cases through the Secretary General. This is no longer a theoretical possibility as NATO and agencies team up with partner nations, as with the Partnership for Peace, the Mediterranean Dialogue and other partner nations and with international organizations such as the UN and the EU.

The contracting authority is generally delegated to the Board of Directors, who in turn may mandate the General Manager of the executive body of the NPLSO. This mandate to the General Manager (GM) is allowed for contracts regarding routine management and business activities. Furthermore, the GM can be mandated for an individual case, however not for the conclusion of international agreements. Delegation of the act of signature to a GM is not precluded by these restrictions.

5. Arbitration clause

The Council implemented the Ottawa Agreement provision on contractual disputes by approving Article 22 of the NPLSO Regulations, which requires a defined arbitration clause to be included in contracts.²⁵⁴ This arbitration clause was last amended in 2009 to fit the NPLSO Regulations.²⁵⁵

The arbitration clause gives a procedure for joint appointment of one arbitrator, and, if that fails, the instalment of an Arbitration panel of three arbitrators, one arbitrator being appointed by each party and the third one by the two appointed arbitrators. Responding to criticism on a possible partial influence of the NATO Secretary General who originally had the authority to choose the third arbitrator if necessary, and reflecting a basic rule of the European Convention on arbitration that declares clauses that confer a preferential status to one of the parties on the appointment of arbitrators invalid, the arbitration clause was amended in 1986 to state that, if necessary, the third arbitrator shall be appointed by the Secretary General of the Permanent Court of Arbitration at the Hague.

The arbitration procedure itself follows the arbitration procedures of the International Chamber of Commerce in force at contract signature. The arbitrators take their decision with a majority vote to which there is no right of appeal or other form of recourse.

6. Organizational

One of the main organizational elements of a NPLSO is the Board of Directors in which the participating nations are represented, having one vote each. The principle of unanimity is applicable to the Board of Directors' decisions with financial implications, as well as decisions of general policy for the NPLSO, and on the selection of staff at A-5 staff and above. On other subjects a charter can state that majority decisions can be applied; however, a participating state can present a majority decision that is detrimental to its interest to the NAC for resolution.²⁵⁶

The Board of Directors, as a NPLSO's highest level of management, has responsibility for issues such as those concerning general policy and those of a budgetary and financial nature. It is the Board of Directors that exercises management control over the NPLSO and ensures the latter's adherence to the Corporate Governance principles and the reporting

²⁵⁴ The reader should be aware that arbitration procedures are costly and that arbitration should be sought only as a last resort, after friendly negotiation failed.

²⁵⁵ Appendix 1 to the Annex of C-M(2009)0079 dated 15 June 2009,

²⁵⁶ C-M(2009)0079 Article 32 (b)

requirements set forth in C-M(2005)0087. It is also the Board of Directors that has the final say in reporting to the NATO Council. If the possibility is provided for in the NPLSO's Charter, a NATO state which is not participating in the NPLSO may be represented on the Board of Directors under the conditions foreseen in the Charter. The Board of Directors may also invite other stakeholders to attend to its meetings, without the right to vote.

7. Advisory Committees

The Board of Directors of NATO Procurement, Logistics or Service Organisations have advisory committees at their disposal. These committees go under different names such as the Audit Committee, the Legal Contracts & Finance Committee, the Contractual Committee and the Operational and Technical Subcommittee. These committees which comprise government representatives and, where appropriate, other stakeholders, shall advise and assist the BOD in carrying out its duties. They shall also submit to the Board of Directors their recommendations which the Board on its part needs to take into consideration when reaching a decision. Article 31 of C-M(2009)0079 mentions that, unless otherwise provided in the Charter of the NPLSO, at least one committee must be put in place: a Finance Committee or equivalent body. For this committee two main tasks are given in the document. The first task is to review the NPLSO's annual budget and to make recommendations on it to the Board of Directors. The second task is to comment on the annual financial report of the General Manager and on the report of the NATO Board of Auditors of its audit of the NPLSO's accounts.

8. Agency

The executive body of a NPLSO is the General Manager (GM) with his staff, in most cases defined as the Agency.

9. General Manager

The GM has a general responsibility towards the Board of Directors for the operations of the NPLSO. As head of the agency, the GM is expected to implement Board of Directors' decisions, to plan for the organization and operation, and to submit his plans to the Board of Directors. He is responsible for the drafting of the budgets, to which he has to comply in the execution of the agency's tasks, and for the financial and the annual reports to NATO. Another major responsibility of the GM concerns the selection of the personnel to fill the positions in the peacetime establishment of the NPLSO. Above all other considerations, his selection of personnel has to aim at securing the highest standards of diligence, competence and integrity of the NPLSO staff and, to the extent compatible with this objective, to provide, insofar as A category staff is concerned, equitable geographic representation from the NPLSO participating nations. The GM is also the Head of the NATO Body within the meaning of the NATO Civilian Personnel Regulations.

10. Relationship NPLSO-NATO

The fact that the personality of the NPLSO is intermingled with that of NATO and that a NPLSO may share in the exemptions of taxes and duties to which NATO is entitled as well as in NATO immunities and privileges, is balanced in the Regulations by obligations of the NPLSO towards NATO. These obligations are to be reflected in a charter.

As a general rule the NPLSOs are placed under the authority of the NAC, which can raise any matter on the NPLSO's organization and operation. To implement this possibility of intervention a liaison officer is appointed by the Secretary General with broad responsibilities of advice, and with a task of giving his comments on matters to the Board of Directors. In his role of watchdog on NPLSO developments that could jeopardize the general interest of

NATO or are contradictory to the charter, the Secretary General can even bring such matters to the notice of the NAC.

Every year, the Board of Directors needs to report to the NAC on the activities of the past year and give a forecast for the year to come. Furthermore, the NPLSO needs to live up to the standardized rules and regulations declared compulsory by the NATO Council. One of the most important set of rules and regulations are the NATO Civilian Personnel Regulations (NCPR) which deal with employment conditions of NATO personnel, consultants and temporary workforce. The rules and regulations not designated as compulsory also need to be taken into account by the NPLSO.

On financial regulations it is left to the NPLSO to adopt a set of regulations in conformity with Article 40 of the NPLSO Regulations, the NATO Financial Regulations as well as any other standardized rules and regulations promulgated by the NAC. The budget and corresponding financial statements should cover at least the funds appropriated by the normal contributions of the participating nations, the income generated by the NPLSO's authorized activities, and funds otherwise made available to the NPLSO by its participating nations. A provision should also be incorporated in the NPLSO's financial regulations that forbids engagement of funds beyond those authorized, or beyond the budget as provided by the participating nations. The NPLSO Regulations foresee that the General Manager shall submit annual statements of financial position and financial performance as well as other components of financial statements in accordance with the International Public Sector Accounting Standards (IPSAS) as adopted by NATO²⁵⁷ and with Articles 26 and 27 of NATO Financial Regulations.

The accounts of a NPLSO are subject to audit by the International Board of Auditors of NATO (IBAN), results of which are shared with the Secretary General. The IBAN submits its reports together with the comments of the NPLSO's Board of Directors and the related IBAN position to the NAC. When the NAC agreed the NAPMO charter, a delicate balance between the organizational, administrative and financial independence of the NPLSO and the IBAN audit responsibilities as laid down in the NATO Financial Regulations was already noticed. After discussion in the NAC, the chartered independence and the IBAN responsibilities were, however, not found to be contradictory to each other. IBAN's responsibilities were even expanded to cover a regular review of the NPLSO's adherence to the Guidelines on Corporate Governance. The NPLSO Regulations also foresee the possibility for national audit authorities to obtain, in specific cases and at their own cost, information and documents related to the nation's participation in the NPLSO, on condition that either the NPLSO Charter or the Board of Directors of Steering Committee authorizes such access.

Each NPLSO must adopt the necessary regulations to implement the NATO Security Policy²⁵⁸ and such other security rules as the NAC has decided should be applied to the NPLSO. Regarding management of information, the NPLSOs are bound by the NATO Public Disclosure Policy²⁵⁹, NATO Information Management Policy (NIMP)²⁶⁰ and the Management of Non-Classified Information²⁶¹, and other appropriate rules as decided by the NAC.

The NPLSO can influence the NATO personnel policy through its representation at the Advisory Panel in which amendments to the NCPRs are coordinated and policy documents on NATO Civilian personnel are discussed.

11. Dissolution

As a general rule, an NPLSO shall be terminated as soon as its mission has been completed. However, its mandate may be extended if there is a consensus among the participating nations. Dissolution of a NPLSO is a prerogative of the NAC, leaving the

²⁵⁷ PO(2002)109

²⁵⁸ C-M(2002)49 and C-M(2002)50 and supporting directives, supplements and amendments thereto

²⁵⁹ C-M(2008)0116

²⁶⁰ C-M(2007)0118

²⁶¹ C-M(2002)60, currently under review

participating states involved with the proceeds derived from the assets minus the liabilities incurred.

Upon completion of the mission for which a NPLSO was created, the participating nations can request the liquidation of the organization. The Board of Directors, with a BOD appointed liquidator, will be charged with completion of the business, fulfilling the obligations and recovery of the debts due the NPLSO activities. Finally, it has to convert the assets into money in order to distribute the proceeds to the participants. The liquidator can represent the NPLSO in its capacity as such in contracts. The liquidation ends with the liquidator being discharged for its final account, followed by the reports of the Board of Directors to the Secretary General and the NPLSO's participating governments indicating the liquidation has been completed. Finally, the Secretary General is left with the responsibility for tasks remaining after the conclusion of the liquidation.

C. RELATIONS WITHIN NATO

The Regulations allow for authorizing agencies to conclude agreements with other bodies. These agreements can be concluded with other agencies, but also with NATO Military HQs that have a legal personality of their own as attributed by the Paris Protocol.

NPLSO to NPLSO agreements are arrangements made between bodies sharing the same NATO legal entity status. However, the financial, organizational and administrative rights granted to the respective agencies, with often different participating nations, still give a need for firm arrangements on issues like sharing of costs and risks.

As stated above, agreements also need to be put in place with legal entities that derive their legal personality from a different treaty between the NATO nations, the Paris Protocol.

Therefore, similar agreements need to be agreed on with the Military HQs. In this case, international agreements are established between different legal entities within the same political organization. As the Military HQs derive their status from a different treaty, which grants the HQs its juridical personality and the right to conclude contracts, and as the agencies are financially, organizationally and administratively independent as granted by their Charter, arrangements between these differing entities also need to be put in place. This is even more the case when a difference in membership of nations exists between the HQs and the agency involved.

The policy of SACEUR and SACT on what to incorporate in a MOA/MOU to be concluded with other NATO entities can be found in the BI-SC Directive 15-3.²⁶²

This directive can also be used as a guideline for MOUs and MOAs to be entered into by agencies. In dealings between NATO entities, it is of importance:

- to define the legal entities involved, and to refer to the legal personalities;
- to involve the legal advisers and the financial controllers of the parties to the agreement or understanding, or to involve those of the executing organization(s) if it concerns an executing organization with a separate budget;
- that NPLSOs should in particular refer to their founding document, the charter, and the decision of their Board of Directors that allows them to enter into an agreement or understanding.

²⁶² BI-SC directive 15-3 "Preparation and control of international agreements" SACEUR/SACT 11 January 2007

D. SEAT AGREEMENTS

The Ottawa Agreement supposes that the status of personnel will be determined with the governments concerned. In particular, the status of the personnel should be arranged for with the host nation (the nation(s) where the NPLSO is located). The starting point for such status is that the staff of an NPLSO is subject to the same staff rules as members of the international staff. The issue of immunities and privileges of international staff versus that of national staff in comparable functions needs to be addressed.

The Ottawa Agreement and the charter of a NPLSO give a legal framework for the relations of the NPLSO with its participating nations. In many cases, implementing agreements are concluded with the nation(s) that host(s) the NPLSO: the so called "Seat Agreement". These seat agreements further detail the immunities and privileges required for the functioning of the NPLSO in the host nation(s).

1. Immunities and privileges

The Ottawa Agreement more specifically gives a need for detailing between the NPLSO and the HN on the issue for which staff will enjoy the immunities and privileges granted to diplomatic personnel of comparable rank. The immunities from legal process in respect of statements made in an official capacity, those for currency exchange, the rights regarding repatriation for staff and family, exemptions to import/export duties on taking up duties and removal out of the host nation, and the exemptions on taxation on the salaries and emoluments paid by NATO need to be arranged in more detail in many cases.

2. Social security

There is a need to come to an agreement with the host nation on the issue of social security. The NATO Civilian Personnel Regulations (NCPR) state that staff can be subject to the social security system of a host nation or can depend on the NCPR provisions.

3. Labour

The EU has restricted the possibilities for employment of non-EU persons. Due to the EU directive on this subject, non EU dependants to staff of NATO agencies or HQs are required to request a work permit that normally will only be granted if strict conditions are fulfilled. The NATO nations that are EU members need to implement this EU directive in their legislation. In the Seat agreement, however, the Non-EU dependents can be exempted as a privilege from this limitative regime. If an article to that extent is introduced in the Seat agreement, employment of dependents is possible. This privilege can entail that the host nation requests to waive upfront immunity of premises of staff that enjoy such entitlement, as a consequence of such employment.

In the case of establishment of a NATO entity in a host nation, additional privileges might be offered. Examples of such privileges are exemption for the organization or its staff from dues and taxes on immovable property, exemptions for staff on income generated in the host nation, and exemption from local taxes (especially for staff that lack full diplomatic status). The exemptions from road tax and special taxes on passenger motor vehicles may also be covered in this category. A specific provision is the right to exempt staff purchases from Value Added Tax (VAT) or duties if made at a specific duty free facility. These "ex gratia" exemptions need to be detailed in a seat agreement. Another ex gratia exemption that can be granted is the right to operate a duty free facility (a shop at the NPLSO premise in most cases), under certain conditions (limitation on the volume of duty free products per month).

PART IX

NATO RESOURCES AND FINANCIAL MATTERS

References and suggested reading:

- AACP-1, part 1 Guidance for the Drafting of MOUs and Programme MOUs – Basic Considerations and Checklists January 1989
- AC 119-N(2004)0058 NATO Claims Policy For Designated Crisis Response Operations 5 May 2004
- ACE Directive 60-52 Official Representation and Hospitality 4 May 2002
- ACLANT Financial Rules – ACT Financial Manual 2004-2005
- Agreement on the Status of the North Atlantic Treaty Organisation, National Representatives and International Staff, signed in Ottawa on 20th September 1951, Ottawa Agreement
- AJP 4.5 (A) Allied Joint Host Nation Support Doctrine and Procedures May 2005
- Bi-SC Directive 15-3 on the Preparation and Control of International Agreements (11 January 2007 version)
- Bi-SC Directive 60-70 Bi-Strategic Command Procurement Directive (22 December 2004)
- C-M(06)49 Travel on duty allowance – CPR Changes 20 May 2006
- C-M(93)38 Renewal of the Infrastructure Programme 18 June 1993
- Financial Regulations of the North Atlantic Treaty Organization 2000
- MBC-M(95)040 Military Budget System 13 February 1995
- NATO SOFA 19 June 1951
- OCB(95)116 Budget Preparation Guidance – Definition of Chapter and Item Contents 8 May 1995
- PO(2000)16 Funding Policy for Contingency Operations 2 February 2000
- Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Paris, 28 August 1952) – Paris Protocol
- STANAG 2034 NATO Standard Procedures for Mutual Logistical Assistance 11 October 2000
- STANAG 6007 Financial Principles and Procedures for Provision of Support within NATO 19 September 1996
- STANAG 6012 Financial Principles and Procedures Relating to use of Training Areas and Training Facilities 20 March 1996

A. NATO FINANCIAL FRAMEWORK

The financial framework of NATO is structured to ensure the ultimate control of expenditures rests with the member countries that, by consensus, support the costs of defined activities. Each of these activities is supervised by an implementing Committee (the Budget Committee (BC) and the Investment Committee (IC)) with overall resource policy issues being handled in the Resource Policy and Planning Board (RPPB).

This structure has been recently agreed by the NAC following a proposal of the NATO Secretary General recorded under SG(2010)0471, dated 14 July 2010.

The former resource committee structure consisted in two implementing Committees (the Civil Budget Committee (CBC) and the Military Budget Committee (MBC), plus the Infrastructure Committee (IC)) with overall resource policy issues being handled in the Senior Resource Board (SRB).

The MBC was responsible to the NAC, through the Chairman of the Senior Resource Board, for the common funded Military Budget. In many cases, such as an NSIP-funded project for a new headquarters in the Military Command Structure, the MBC became responsible for funding the associated operations and maintenance costs (of the new headquarters).

The Infrastructure Committee was responsible to the NAC for the "implementation" of NSIP projects, including screening of project proposals from a technical and financial point of view, granting authorization to Host Nations to commit funds for approved projects, managing the NSIP from a financial point of view within the approved expenditure ceiling

The SRB was responsible to the NAC for common funded military resource management. Its main function was to determine the affordability and eligibility of projects and requirements proposed for common funding, and to recommend programming to the NAC. The SRB also recommended the annual contribution ceiling for the NSIP and Military Budget.

Reference to SG(2010)0471, the North Atlantic Council agreed on a reform consisting in the creation of a new resource committee structure capable to oversee and manage all NATO resources to include the Civil Budget, the Military Budget, the NSIP and manpower (common-funded financial implications for civil and military personnel). Its objective should be to ensure that the Council is provided with coherent and timely resource advice.

The new structure consists now of a Resource Policy and Planning Board (RPPB), which replaces the current Senior Resource Board, an Investment Committee (IC), which replace the former Infrastructure Committee and a Budget Committee (BC). The RPPB will be the sole resource committee reporting to Council with responsibility for policy, including eligibility and affordability, being focused on overall planning and performance assessment, ensuring regular contact with and reporting to Council in order to obtain strategic guidance on resource issues as well as Council consideration of medium-term financial/resource plans and annual budgets.

The former Civil Budget Committee and Military Budget Committee have been merged into a single Budget Committee. Despite the merging of the Committees, the Military Budget and the Civil Budget will continue to be considered strictly separately in order to ensure that there is no fungibility between the budgets. The Investment Committee will continue as a separate committee reporting to the RPPB. Over the course of one year the Budget Committee and Investment Committee will hold joint meetings as appropriate, especially to consider complex projects. After this year, it will be considered to possibly further merging the Budget Committee and the Investment Committee.

The NATO Office of Resources (NOR) provides staff advice on resource issues to the Secretary General and other Staff Divisions, coordinating with the International Military Staff in their role of supporting the Military Committee, as necessary. It supports the resource committees described above, particularly in assessing funding requests from the military

commands and the agencies for which the resources committees are responsible. It gathers financial data concerning all NATO entities and provides the analyses requested by the resources committees. It continuously monitors the risks of imbalance between requirements and resources, and alerts the resources committee concerned accordingly

The financial administration of all civilian and military headquarters, and other organizations established pursuant to the North Atlantic Treaty, is controlled by the Financial Regulations of the North Atlantic Treaty Organization and their Implementing Procedures. The NATO Financial Regulations (NFR), approved by the North Atlantic Council (NAC), govern the financial administration of all NATO bodies. Articles 18.2. and 18.3. of the NFR prescribe approval by the respective finance committees of rules and procedures (FRP) in implementation of the Regulations, ensuring effective, economical budgetary and financial administration. These regulations consist of three parts:

Part I provides an overview of regulations for the entire organization. The NATO Financial Regulations (NFR) are approved by the Council (C-M(81)30) and they establish the basic financial policy applicable to all NATO bodies.

Part II contains financial rules and procedures (FRP) for International Military Headquarters and Agencies. The FRP have been approved by the Military Budget Committee (MBC) for the purpose of ensuring effective, economical budgetary and financial administration throughout NATO military headquarters and agencies financed from the international military budget resource allocations approved by the NAC and such other NATO bodies for which the MBC may assume the role of finance committee;

Part III addresses the NATO Financial Regulations for the International Staff. The Financial Rules and Procedures (FRP) for the NATO International Staff (IS) in implementation of the NFR are established by the Secretary General and have been approved by the Civil Budget Committee (CBC).

To implement Part II, both Allied Command Operations (ACO) and Allied Command Transformation (ACT) have published additional financial guidance.

Allied Command Operations continues to use the 26 directives in the ACO 060 series to provide guidance for ACO fiscal activities. A complete list of the titles of these directives is contained at Appendix 1. For ACT, the previous *ACLANT Financial Rules*, modified in 2004 and 2005 remain in use, renamed as the *ACT Financial Manual*. A listing of section titles for this directive is provided at Appendix 2.

The financial responsibilities in HQ SACT are assigned to the Assistant Chief of Staff (ACOS), Resources and Logistics and in SHAPE to the Director of Finance and Acquisition Directorate (former ACOS, J-8, Budget and Finance (BUDFIN)). In both commands the Financial Controller (FC) is appointed by the North Atlantic Council (NAC) to serve as the senior executive responsible for all financial management operations. The FC also serves (dual-hatted) as the principal financial adviser to the Strategic Commands in all matters of budget and finance, and is personally responsible for the correct application of all international and multinational appropriated funds approved for use. The ACO/ACT Financial Controller reports to SACEUR/SACT in accordance with the NATO Financial Regulations Article 21. In the case of final recourse, the FC reports directly to the Nations, as represented on the Budget Committee, in accordance with the NATO Financial Regulations Article 22. The FC also provides representation to the Budget Committee on all matters with financial implications and supervises the activities of subordinate command Financial Controllers; develops financial, budgetary, accounting, treasury, audit and procurement policies and procedures; exercises administration of the financial and budgetary control and accounting systems for all ACO/ACT commands; executes financial control over mission related activities during operations and exercises; and provides financial and contracting support to deployed operations.

In addition to the *NATO Financial Regulations* and the *ACO/ACT financial directives*, considerable financial guidance is contained in documents issued throughout and each year by the Budget Committee (BC), the Resource Policy and Planning Board (RPPB) and the

North Atlantic Council (NAC). Specific supplemental guidance and direction on financial issues is also provided by the Financial Controllers of both Strategic Commands. Further standardized and administrative procedures are outlined in NATO Standardization Agreements (STANAGS). In short, for a legal adviser to enter the field of NATO fiscal matters, close liaison with a NATO budget expert is essential.

B. SOURCE OF INTERNATIONAL FUNDS

NATO receives its international funds in accordance with budget authorizations financed by contributions from member Nations according to a previously agreed standard cost share agreed by nations. Until 1 April 2009, the military budget was funded under a 25/26 Nations cost share, depending on France's participation to the Military Budget and to the NSIP. The French Ambassador's letter of 26 March 2009, announcing France's full participation in the NATO Structures, predicated France's fiscal contribution to all 25/26 nations activities, as well as for the NSIP regarding all new activities (i.e. there was no retroactivity on previous or ongoing Capability Packages that were not approved by France). With the accession of Albania and Croatia to NATO the standard cost share of the civil budget, military budget and NSIP is at "28 Nations"

The cost share arrangements valid from 1/1/2010 to 31/12/2011 is provided at Appendix 3 and is based on SRB-N(2009)0058.

C. TYPES OF NATO FUNDING

Funding within the NATO framework has two well-established mechanisms: multinational funding and common funding. Also a new third mechanism comprised of ad hoc arrangements known as "Trust Funding" has been used during recent operations.

1. National Funding

Each NATO nation allots funds for different purposes in its annual budget. A significant portion of these funds are reserved for defence and foreign affairs. The vast majority of these defence and foreign affairs funds are used to meet national requirements and commitments that may be unrelated to NATO. However, some of these funds are used by the nation to pay salaries (especially the salaries of the armed forces) and to purchase capabilities (such as weapon systems) that are committed for NATO use. In the NATO resource community, these funds are known as "National Funding" and they are provided to NATO under the principle of "costs lie where they fall."

Typical examples of national funding are:

- Salaries of the people working in national delegations at NATO Headquarters (the Ambassador, the Military Representative, the receptionist, the member of the Investment Committee, etc);
- The cost of weapon systems and military forces provided to NATO through the Force Planning system; and
- The costs attributed to the lead nations of Alliance Operations and Missions.

2. Multinational Funding

There are different types of multinational funding. The primary types are known as multinational funding, (proper) joint funding, and common funding. Other types of multinational funding include coalitions of the willing, contributions in kind, and trust funds.

3. Multinational Funding: (Proper)

Multinational Funding (Proper) refers to a funding arrangement outside the NATO structures involving two or more nations. Such structures are based on bilateral and multilateral arrangements between the concerned nations. Multinational funding (proper) is often used for international co-operative development projects or for co-operative procurements (such as the F16 aircraft by different European nations).

A “Coalition of the Willing” normally has Ad Hoc funding arrangements to support specific activities. Often, these arrangements are structured in a programme document or in a project plan that describes specific roles and responsibilities.

A “Contribution in Kind” refers to participation by a nation in non-monetary ways. Typically, this involves the provision of facilities, capabilities, personnel, and special “know-how”, as opposed to making financial contributions.

“Trust Funds” have been used to manage voluntary contributions for a given scope. This sort of arrangement opens the way for the participation of non-NATO nations. An example is the “Travel and Subsistence” Trust Fund within the framework of the NATO Training Mission - Iraq.

4. Joint Funding

Joint Funding is a special type of multinational funding within the terms of an agreed NATO Charter. The participating nations identify requirements, priorities, and funding levels, and develop a formal cost sharing mechanism. NATO has visibility into these arrangements and often provides political and financial oversight. For example, in the NAEW programme, there is a Memorandum of Understanding that identifies the individual national cost shares and work shares.

In many cases, a NATO Production and Logistics Organisation (NPLO) is established as part of a Joint Funding arrangement. Currently, there are several NPLOs, principally in the areas of aircraft and helicopter production, air defence and logistics:²⁶³

- (1) NATO European Fighter Aircraft and Tornado Development, Production and Logistics Management Agency (NETMA);
- (2) NATO Maintenance and Supply Agency (NAMSA);
- (3) NATO Helicopter Design and Development Production and Logistics Management Agency (NAHEMA);
- (4) NATO Airborne Early Warning and Control Production Management Agency (NAPMA);
- (5) Central Europe Pipeline Management Agency (CEPMA);
- (6) NATO Medium Extended Air Defence System Design and Development, Production and Logistics Management Agency (NAMEADSMA);
- (7) NATO HAWK Management Office (NHMO); and
- (8) NATO Battlefield Information, Collection and Exploitation Systems (BICES) Agency (NBA)
- (9) NATO Airlift Management Agency (NAMA).

²⁶³ Other NATO Agencies: NACMA, NC3A, NCSA, NSA, RTA, and NDC are mainly commonly funded.

5. Common Funding

NATO has many requirements that cannot be met through the above mentioned funding mechanisms by the member nations. These requirements include NATO Headquarters and the facilities for the Military Command Structure, NATO command and control systems, and NATO operations and exercises. To provide funds for these requirements, formal arrangements have been put in place whereby nations, collectively, provide funds to NATO. These arrangements are called common funding.

In addition to the Joint Funded NPOs listed above there are five NATO Common Funded agencies that manage decentralised and diverse multinational co-operative activities, such as research, development, production and logistic support. Nations provide funds for the running of these agencies through direct contributions to NATO, in accordance with an agreed cost-sharing formula broadly calculated in relation to their ability to pay. The five Common Funded agencies are:

- (1) NATO Air Command and Control Management Agency (NACMA);
- (2) NATO Consultation, Command and Control Agency (NC3A);
- (3) NATO Communications and Information Systems (CIS) Services Agency (NCSA);
- (4) NATO Standardization Agency (NSA); and
- (5) NATO Research and Technology Agency (RTA).

There are three different types of Common Funding: the civil budget, the military budget, and the NSIP. Features of common funding include:

- Pre-agreed annual ceilings on the expenditures;
- Pre-defined cost shares;
- Each type is managed by a different committee consisting of representatives from the contributing nations; and
- Each type has rules and procedures governing how the funds may be used.

Characteristics of Common Funding are to reinforce NATO cohesion (the “glue” of the Alliance), to complement national funding, to act as a force multiplier to be directly linked to Alliance requirements and priorities and providing the core Alliance capabilities under an established environment for the implementation of capabilities (agreed eligibility criteria, agreed cost shares and agreed financial and procedural mechanisms). It should be noted that while some might consider the size of these budgets and programs as large, no nation contributes more than 0.5% of 1% of their national defence budget to common funded projects.

Eligibility, affordability and the minimum military requirement

To attract Common Funding, there must be a military requirement, and the required capability must be “affordable” and “eligible” for common funding. Affordability refers to the priority of the requirement in comparison with other requirements. Eligibility refers to what may be procured within the rules of Common Funding. Affordability and eligibility are sometimes seen as tools that are used by the financial committees to keep expenditures within the limits of the annual ceilings.

Any common funded requirement must not exceed the Minimum Military Requirement (MMR). The MMR has to meet the NATO Level of Ambition (LoA) previously specified in political guidance documents. The NATO Military Authorities (NMAs) determine the MMR and the resource implications. The Resource Policy and Planning Board (RPPB) determines whether the MMR is eligible for common funding and is affordable. However, two key points: eligibility does not ensure future common funding and it does not

denote an entitlement to common funding. The bottom line is that eligibility is largely determined on case-by-case basis.

The “Over and Above” Principle

In the earlier Infrastructure programme, capabilities falling into certain categories were considered eligible for common funding whereas capabilities, such as weapon systems, that did not fit into the list of categories were not eligible.

With the introduction of the NSIP, new rules for eligibility were established in C-M(93)38(Final). According to paragraph 8 of C-M(93)38(Final), NATO Security Investment Programme “common funding eligibility will focus on the provision of infrastructure requirements which are *over and above* those which could reasonably be expected to be made available from national resources.” Generally, this means that those items which cannot be provided by the nations may be procured using common funds (if they are required and affordable). The former Senior Resource Board elaborated on how this principle was to be interpreted in SRB-N(96)33(Revised). In practice, it is not always evident what a nation could reasonably be expected to provide; thus, eligibility under the “over and above” principle is often determined by the RPPB on a case-by-case basis.

Case by Case Decision Making

In addition to the “over and above” principle for eligibility, paragraph 15 of C-M(93)38(Final) states: “[t]hese guidelines will not preclude the possibility of common funding, on a case-by-case basis, of limited critical additional infrastructure – required by NATO to cater for exceptional regional risk factors or *geostrategic conditions* within the alliance – as identified by the Major NATO Commanders [now Strategic Commanders], endorsed by the Military Committee, and approved by the Council/DPC...” Generally, any use of this provision is considered to be “non precedent setting.”

There are *special eligibility* rules in some cases.

- (1) The most typical case for special eligibility is Alliance Operations and Missions (AOM) (former NATO Crisis Response Operations (CROs)). Normally, the North Atlantic Council establishes special funding rules for each operation. General funding policy for contingency operations (non-article 5 NATO-led operations) is defined in [PO\(2005\)0098](#). The basic principle is that “costs lie where they fall.” Common funding is provided for costs that are not attributable to a single nation. These include: theatre headquarters elements, shortfalls in strategic communications, and critical strategic theatre infrastructure.
- (2) Another case where special rules for eligibility were established is the Air Command and Control area. Recognizing that air defence can be conducted only at the continental level, Canada and the United States established the North American Air Defence (NORAD) on a bilateral basis (i.e. outside of NATO). In Europe, through MC 54/1, SACEUR, the Commander of Allied Command Operations was made responsible for air defence. Consequently, there are air command and control requirements in Europe that are not the responsibility of any nation, but that are not clearly over and above what a nation would be expected to provide for its own sovereignty. Consequently special eligibility rules, found in OCSRB(2004)0031-REV4 were established.

For a complete summary of all the exceptions to normal Common Funding eligibility principles it is recommended to read a compendium issued by the former SRB under SRB-N(2008)0038-REV3.

6. The NATO Security Investment Programme (NSIP)

[FY 2010 653.5 MEUR]

The NSIP has existed as a NATO programme since 1951. It was originally known as the Infrastructure programme. The name was changed in 1993 as part of the renewal of the programme, discussed in C-M(93)38(Final). The word “infrastructure” is still used to describe the works funded from the NSIP, and denotes those fixed installations which are necessary for the effective deployment and operations of modern armed forces (airfields, port facilities, communications and information systems, military headquarters, fuel storage and distribution systems, etc). C-M(65)84 provides historic background on the definition of the word “infrastructure.”

The NSIP provides the funds for the development, construction, and implementation of facilities that are required by the Strategic Commanders to complete their missions, but that are not provided by the member nations. When the NSIP programme was renewed in 1993, the needs that NSIP meets were defined. Paragraph 13 of C-M(93)38(Final) stated that in consonance with NATO’s future requirements, including peacekeeping activities and “outreach,” the renewed NATO common-funded infrastructure programme will be based upon NATO’s overall need, presented in no particular order of importance, for:

- (1) Intra-European Theatre and Transatlantic Mobility of NATO Immediate Reaction, Rapid Reaction, and Reinforcing Forces;
- (2) Flexible Command and Control of Land, Air, and Maritime Forces;
- (3) Surveillance, Reconnaissance, and Intelligence;
- (4) Logistics Support and Re-Supply;
- (5) Control of Lines of Communication;
- (6) Training Support and Exercise Facilities;
- (7) Nuclear Capabilities; and
- (8) Consultation.

Since it is not possible to implement NSIP projects within the window of an annual budget, the NSIP operates as a multi-annual programme rather than as a budget. Nevertheless, expenditures are reported on a semi-annual basis in order to satisfy budgeting requirements.

The NSIP is controlled by the Investment Committee. Expenditures are implemented by Host Nations, military commands, and NATO agencies.

7. The Civil Budget

[FY 2010: 200 MEUR]

NATO Headquarters was established under the Ottawa Agreement for International Headquarters. Other units in NATO were established under the agreement for International Military Headquarters (known as the Paris Protocol). There are legal differences (such as for taxes) between an International Headquarters and an International Military Headquarters. Recognizing the unique financial situation affecting NATO Headquarters, and the political (as opposed to military) role of the Headquarters, a special type of common funding known as the Civil Budget was established to support this International Headquarters.

The Civil Budget operates as an annual budget and is controlled by the Budget Committee. Expenditures are implemented by the International Staff at NATO Headquarters. The main expenditures are the salaries of the members of the International Staff and the running costs of NATO Headquarters.

8. The Military Budget

[FY 2010: 1,300 MEUR]

The NATO Military Budget is a collection of some individual budgets covering the running expenses of the Allied Military Headquarters, certain NATO Agencies and Research centres, communication requirements, the operation and maintenance costs of NATO Infrastructure, and the O&M (Operational and Maintenance) costs of the NAEW&C Force.

Funding for the Military Budget is granted by the nations represented in the NATO Budget Committee (BC). The BC meets at NATO Headquarters and is composed of national delegates from the permanent delegations to NATO. The Chairman of the BC is an independent appointee from one of the nations.

The Military Budgets are based on a three chapter budget structure, as follows:

(1) Chapter 710000 - PERSONNEL

The credits required for all civilian and military personnel expenses (direct or reimbursed basic salaries and emoluments), as well as other non salary related expenses, in support of NATO internationally funded headquarters and activities. Credits required for contracted consultants and temporary personnel. The credits required for salaries and emoluments for approved NATO permanent civilian positions, proposed new positions and reclassification or declassification of positions, and temporary personnel costs. Includes credits for other salary related and non related allowances including overtime, NATO Civilian Personnel Regulation required medical examinations, recruitment, installation, and removal expenses for approved and proposed NATO positions.

(2) Chapter 720000 - CONTRACTUAL SUPPLIES AND SERVICES

The total credits required for administration support to Headquarters, general administrative overheads, and the maintenance costs of buildings/grounds, communications and information systems, transportation, travel expenses, representation/hospitality and miscellaneous expenses of NATO internationally funded headquarters and activities

(3) Chapter 730000 - CAPITAL AND INVESTMENTS

The credits required for major construction and rehabilitation projects costing greater than level A (9,500 EUR) of the Established Financial Limits (EFL), the procurement and replacement of equipment and property costing more than 50% Level A, and the initial procurement of spare parts in support of new major capital items of equipment.

Scope of the Military Budget

As far as most people are concerned budgeting is simply a means of calculating how best to use the money received. The NATO Military Budget can be put into various categories as follows:

The HEADQUARTERS BUDGET covers the costs incurred when operating a NATO Headquarters and includes the personnel salaries, facility operation such as utilities, operational expenses such as specialised communication, and capital investments. These are the requirements necessary to maintain the mission capabilities of military Headquarters within the Integrated Command Structure of the Alliance.

AGENCY BUDGETS are essentially the same except that the budget supports the operation of an agency (such as NCSA, NACMA, or other activity). These organisations support the military mission, but are not part of the Integrated Command Structure.

PROGRAMME BUDGETS are functionally oriented budgets. They support a specific activity conducted by a Headquarters or agency but outside of the framework of the

headquarters-operating budget. Segregating programmes from Headquarters operations, should in principle, increase the stability of funding requirements for Headquarters operating costs. Examples of such Budgets are the Air Defence (Ground) Programme, the NATO Centralized CIS Budget (NCCB), and the Headquarters Deployable assets.

ALLIANCE OPERATIONS AND MISSIONS BUDGETS - This is a type of budget that NATO has only used since 1993. Similar to a programme budget, in that it supports the funding of the costs of a specific mission which are over and above normal costs of headquarters operations. Due to the revised NATO policy on common funding for operations, the amount of AOM budget rose in 2010 up to almost 470 MEUR.

PENSION BUDGETS - As more people are made redundant by changes this requirement has increased substantially. This is a legal requirement and as such is not subject to prioritisation.

As noted above, the Military Budget covers the day-to-day peacetime running costs of NATO Military Headquarters and agencies. These costs cover such items as salaries, wages and allowances for NATO civilian staffs (apart from certain exceptional reimbursement budgets, service pay and per diem is borne by the nations providing the military personnel). Also covered are costs of utilities, cleaning, repair and maintenance (and, where appropriate, replacement) of premises, furniture and equipment, purchase, operation and maintenance of transport and the cost of travel on NATO duty.

The essential point about the Military budget is its primarily peacetime nature. Requirements related to wartime purposes are generally financed by the Infrastructure programme, which is funded as said above by the Investment Committee through the Capability Package. On many occasions however the correct imputation is unclear and in such cases the BC may refer the issue to the joint BC/Infra Working group to determine which funding source is liable for the requirement.

Each subordinate command of ACO has a Financial Controller who is a national of the country in which the HQ is situated and is normally a serving civil servant of the host nation. Financial Controllers are nominated by the national administrations concerned, selected by a selection board at the headquarters, endorsed by SACEUR, and appointed by the Budget Committee. Each year the Financial Controllers prepare a budget estimate for the NATO HQ's for which they are responsible.

NATO uses a commitment budget with a three-year budget period which enables credits that have been legally committed in the first year to be expended during the following two years. Nonetheless, there are many projects and programmes that span more than one year. Construction projects, ADP implementation plans, and Aircraft life-extension programmes are a few examples. To address this need, NATO uses a concept called "contract authority". In such cases, the nations authorise the Headquarters to enter into obligations which span more than one year, but will only provide budget credits and cash for payments which are likely to become payable during the current budget year.

9. Non-Appropriated Funds (NAF)

At some organizations, military and civilian NATO staffs generate NAF revenues through retail or service facilities operated by the Command. These funds are to provide Morale and Welfare Activities, the means to enhance the quality of life of eligible individuals including spouses and dependents of staff members. Non-Appropriated Funds are funds that are not provided by nations or via a funding Committee. They are, however, generated under the legal personality of the organization, and are international funds falling under authority of the NATO nations via the chain of command.

10. Ad Hoc Arrangements

Trust Funding

In addition to joint and common funding, NATO nations cooperate inside NATO on an ad-hoc basis for a range of other, more limited, activities that do not fit the NATO funding eligibility framework (for operational, political, programmatic or organisational reasons).

Cooperation in such cases usually takes the form of trust fund arrangements, contributions in kind, ad-hoc cost sharing arrangements, donations, etc. Recent examples include the support to Iraqi security forces training at NATO institutions; the transportation of equipment donated to Iraq; the transportation of supplies and the financing of reconstruction projects in the framework of the Pakistan earthquake relief operation; cooperation in the framework of the NATO-Russia Council (e.g. the Cooperative Airspace Initiative); and the start-up costs of future joint/common funded activities (e.g. the AGS Programme Management Office).

D. NATO POLICY FOR CONTINGENCY OPERATIONS

1. Traditional funding eligibility under PO(2000)16

When NATO started conducting non-article 5 operations in 1993, funding eligibility was determined on a case-by-case basis for such operations. This caused much uncertainty during the planning stage of OPS and development of GCOPS. To enable planning and decision-making to occur in a more structured content, the NAC approved PO 2000(16), *Funding Policy for Contingency Operations*, 2 February 2000. Later on, a revised funding policy for non Art-5 NATO led operations, PO(2005)0098 replaced the previous one incorporating the conclusions and recommendations related to the Theatre Capability Statement of Requirements (TCSOR) approach contained in MCM-0155-2005.

This new revised funding policy established the following basic principles, some already addressed in the PO(2000)16:

- (1) The primary funding will be that nations absorb any and all costs associated with their participation in NATO-led operations (cost lie where they fall); this principle applies equally to non-NATO Troop contributing nations; it does not preclude bilateral or multilateral support arrangements.
- (2) Only costs agreed as eligible for common funding and not attributable to a specific nation will be assumed by NATO.
- (3) NATO common funding will be limited to minimum military requirements – no “nation building.”
- (4) NATO Common funding will pay for the deployment, installation and running of the TCSOR capabilities provided by lead nations under the operational or logistic control of the theatre commander.
- (5) NATO costs agreed as eligible for common funding will be borne by the Military Budget and the NATO Security Investment Programme and shared by all member nations, using the corresponding cost sharing formula.
- (6) Normal implementation procedures apply, using the capability package process where time permits, meeting minimum operational standards only.
- (7) NATO rules and procedures on ownership, disposal of equipment and residual value apply.
- (8) Forces participate at national expense in accordance with the NATO Funding policy. This means that NATO military budget funding should be used for three primary categories of costs:
 - a. The O&M costs of designated Theatre HQ elements including their logistic support; administrative and operational functioning; office accommodation and facility maintenance; role 1 or 2 medical facility; PSYOPS requirements; local connectivity and connectivity to subordinate

formations and leased lines (Costs related to the individuals salaries, accommodation, per diem, food remains the responsibility of the sending nation.);

- b. Deployment and redeployment of NATO HQ staffs and eligible NATO HQ personnel to NATO Theatre HQ; and
- c. Incremental costs, in direct support of the NATO led operation, at existing NATO HQ.

For AOMs, the NATO Security Investment Program (NSIP) will be used to cover three major categories of costs:

- (1) Shortfall Strategic communications that cannot be provided through the reassignment of NATO owned assets or through loans from nations;
- (2) CIS and intelligence data base equipment for the designated theatre HQ elements and for connectivity to subordinate formations;
- (3) Substantive capital expenditure for the designated theatre HQ elements, including accommodation for CE personnel, static force protection measures, demining of the HQ footprint, and soft & hardware information & communications systems for theatre level NBC warning and reporting, theatre level consequence management needed to maintain the minimum military requirement and force tracking.

The document also describes in detail the TCSOR capabilities that are eligible for common funding and the cost categories to be covered by NSIP and the Military Budget.

2. Expanded common funding eligibility under PO(2005)0098

Following examination of Lessons Learned from NATO's operations from 1993 to 2004, the SCs recommended expansion of common funding to cover certain theatre-wide support functionalities. The aim was to remove disincentives to force generation and substance implementation of multinational logistics solutions. In 2005, the NAC approved expanded eligibility per PO(2005)0098 as summarized below:

Expansion of Common Funding Eligibility for CROs

Summary of PO(2005)0098 Provisions				
Facility of Capability	Facility Investment (NSIP)	C2 Equipment (NSIP)	C2 Connectivity to Unit (MB)	O&M (MB)
CJTF/DJTF/CC HQs	Y	Y	Y	Y
CJTF/DJTF/CC HQs PSYOPS Requirements	Y	Y	Y	Y
CBRN Elements	Y	Y	Y	Y
APOD	Y	Y	Y	Y
SPOD	Y	Y	Y	Y
FWD Assembly Areas	Y	Y	Y	Y
Role 3 Medical Facilities	Y	Y	Y	Y

Role 2 Medical facilities at APODs or other operational level assets	Y	Y	Y	Y
Weapons Collection & Destruction Sites	Y	Y	Y	Y
MSRs & Critical theatre infrastructure	Y	N/A	N/A	Y
Engineering Support	Y	Y	Y	Y
ISR	Y	Y	Y	Y
AGS	Y	Y	Y	Y
Fuel Storage and Supply	Y	Y	Y	Y
DOB	Y	Y	N	N
FSB	N	N	N	N
SOR Forces and Force Functions	N	N	N	N
Everything else	N	N	N	N

In general, the aim is to reimburse lead nations for the incremental costs of deploying and employing these scarce and expensive capabilities. To qualify for reimbursement, the capability must be operated under the control of the NATO Commander, and must be open to use by all NATO forces in theatre (including those of non-NATO nations participating under NATO Command). Furthermore there is a general pre-requisite that the capability will be made available for at least one year, and that any commercial outsourcing must be approved by the MC and RPPB.

Nations must provide forecasts of their reimbursable costs to the NATO Commander for inclusion in mission budgets. Specific arrangements are to be formalized in the context of an MOU between the lead nation and SC, to be approved by NATO Resource Committees as appropriate.

E. OTHER RELEVANT NATO DOCUMENTS REGARDING FINANCIAL MATTERS

Other than the financial documents mentioned at paragraph 1, there are other documents with financial implications that do not have specific financial implications, such as the NATO SOFA, the Paris Protocol, and the Ottawa Agreement. However, they do contain pre-agreed procedures for resolving the financial aspects of claims and other fiscal issues, so that they can be included in the NATO financial framework as well.

1. NATO SOFA

- (1) Article VIII sets out the claims regime for all claims likely to arise out of the acts or omissions for which a Force can be held legally responsible.
- (2) Article IX,
 - paragraph 1 [Local purchases]
 - paragraph 2 [Force buying provisions on the economy]
 - paragraph 7 [Force's payment for goods and services]
 - paragraph 8 [Tax/duties exemption]

- (3) Article X, [Taxation /exemption on individuals]
- (4) Article XI paragraph 4 [Duty free importation]
 paragraph 5 [Duty free importation of household goods]
 paragraph 6 [Duty free importation of privately owned vehicles]
 paragraph 7 [Non-official importation]
 paragraph 8 a. & b. [Export and sale]
 paragraph 11 [Tax free petroleum, oil, and lubricants (POL)]
- (5) Article XII [Customs and fiscal controls]
- (6) Article XIV [Foreign exchange controls]

2. Paris Protocol

- (1) Article 1 (b) automatically grants international status to a Supreme Headquarters of its equivalent
- (2) Article 1 (c) grants international status to Military Headquarters immediately subordinate to the Supreme Headquarters
- (3) Article 6 [Claims]
- (4) Article 7 [Tax exemption of individuals]

3. Ottawa Agreement

- (1) Article VIII [Financial Controls]
- (2) Article IX [Tax exemptions]
- (3) Article X [Remission or return of duty or tax by members states]
- (4) Article XIII para 1, h [Duty free importation of household goods]
 para 1, [Duty free importation of private automobile]
 para 2 [Tax exemption of personal salary and emoluments]
- (5) Article XIX [Tax exemption for officials of the organization]

NATO organizations / agencies: Charter / MOU + NPLO regulation

NATO organizations, such as the agencies created within the framework of the North Atlantic Treaty Organization (NATO) for the implementation of tasks arising out of that Treaty, and established by the North Atlantic Council pursuant to Article 9 of the NAC and in conformity with the Ottawa Agreement, have their own Charters. The Charter describes the Organisation, including its mission, objectives and constituent elements. The legal, financial and administrative framework for the organizations is also described as well as Terms of Reference for the functional elements. The authority and management prerogatives of the North Atlantic Council (NAC) and the Secretary General shall be fully respected in the implementation of the provisions of such Charters. Normally the content of a Charter, for the foundation of a NATO Organization, encompasses an introduction, the legal status, the mission, the objectives, the element of the Organization, the Terms of References.

F. HOST NATIONS SUPPORT ARRANGEMENTS

Prior to 2007, NATO had never taken a structured approach to the host nation support of NATO garrisons. In general, the current variety of arrangements has simply

evolved over 50 years as NATO has grown, reduced, and transformed. Current arrangements consequently represent the results of political decisions being taken first about the location of a HQ, with the SC thereafter being tasked to try to negotiate with the HN for the most favourable terms. The SC staffs had very little leverage in these negotiations, as the HN's willingness to provide support to the NATO HQ was not a factor in deciding on the HQ location.

Arrangements vary from the HN-centric end of the spectrum (such as HQ CCAir Ramstein with a NATO building on a national base) to situations where NATO provides and funds virtually everything (such as at SHAPE or JFC-N). At present, approximately 1,000 PE posts (ACO-wide) and substantial common funded financial resources are dedicated to non-core services in these areas, none of which are directly related to command and control of NATO HQs and forces. While the Committee has approved each of the arrangements at the time they were established, they result in widely varied funding burdens on the individual HQ budgets.

At Appendix 4 the primary categories of garrison support are broken down to provide granularity about the different services Host Nations provide for the multinationally funded Combined Air Operation Centres (CAOCs) in ACO AOR. The HN Support Arrangements for the CAOCs are of a particular interest, because they have constituted the basis for implementing the new NATO policy with regards to Host Nation Support Arrangements at the different locations of ACO's peacetime headquarters.

The "CAOC deal" has been used to draft the recent approved DARS1 SA at Nieuw Milligen, The Netherlands. With MBC-DS(2009)0034 the former Military Budget Committee by approving the Support Arrangements between SHAPE and the Host Nation stated that this document will serve as a template for future documents of the same nature.

NATO SHAPE has on several occasions noted that the presence of a NATO HQ attracts economic benefits to host nations. It is, therefore, reasonable to expect a meaningful host nation contribution to the burdens associated with maintaining and securing NATO garrisons on their soil. On several occasions SHAPE has also suggested that a standard catalogue of HN services should be established as a formalised expectation of host nations prior to inviting offers to host NATO HQs and prior to political decisions on locations. While facility support must be provided to an acceptable NATO standard, it does not necessarily have to be provided or funded by NATO. The ideal result should be a NATO facility operated in partnership with the Host Nation. SHAPE suggests that one way forward could be to stipulate that an offer to host a NATO HQ should imply a host nation obligation to provide the following garrison functions free of charge:

- security services (guarding) and force protection
- fire fighting services;
- cooks and mess management staff (or contractual catering)
- motor pool support, including drivers;
- facility maintenance, including roads, grounds, fences, building structures, and utility distribution systems.

Service Level Agreements and Real Life Support

In accordance with MCM-202-03 (Reference D), the NATO Communication and Information Systems (CIS) Services Agency (NCSA) was created to become "the centrally controlled organisation responsible for Communications and Information Systems (CIS) service provision." In addition, C-M (2005) 0036, Charter for the NATO C3 Organization (Reference E), states that NCSA, being part of the NATO Consultation, Command and Control Organisation (NC3O), will provide "NATO CIS services to customers, as determined by the NC3B, to meet customers' requirements. NCSA will provide these services to the agreed level of quality and standards." Furthermore, and in accordance with the NC3 Board Directive for the Director NCSA (Reference F), NCSA will negotiate and control Service Level Agreements (SLAs) with customers.

The Service Level Agreement (SLA) documents the terms and conditions under which NCSA delivers specified CIS Services to its Customer. It provides a service definition and framework for the delivery of agreed levels of service to meet the needs of the Corporate Customer. The Annexes to the SLA describe the Services and systems in general terms and encompass Service Levels and reporting criteria.

NCSA delivers two types of Services: Local/End-User Services and Corporate Services. End-Users receive services from NCSA Sectors in accordance with their Local SLAs. These services are delivered as a result of a “chain of services” or “service tree” comprised of Local Services and Corporate Services – or “core” services – provided by NCSA. These Core Services constitute the means by which the NCSA Sectors provide wide area connectivity and access to centrally managed systems to their local customers and users.

The design principle applied since NCSA's creation has been to avoid duplication of functions wherever possible, enabling NCSA to focus on the provision of CIS services to its customers. This design concept means that NCSA does not have civilian personnel offices, motor pools, engineer sections, or any of the other functions that are routinely provided by the ACO and ACT HQs at which NCSA serve. In line with this well-established design principle, NCSA did not address RLS functions in its PE. Nor has NCSA ever budgeted for RLS, particularly in those areas where NCSA is collocated with ACO HQs.

Generally, the RLS is to be provided by the respective ACO HQ support elements, where possible, at no cost unless agreed to be provided on a reimbursable basis. In particular, NCSA elements that are not collocated with ACO HQs, but which are located in the same country, will receive RLS provided they are willing to travel to the ACO HQs providing the support, and as long as such support can be provided without a need for ACO personnel to visit the remote site. RLS which must be delivered on-site to not-collocated NCSA elements should, as a rule, be provided by the territorial Host Nation, subject to legal negotiations between the HN and NCSA, while outsourcing should be considered a last resort.

Specific Exercise and Operations Memorandums of Understanding

These types of agreements will be more specific about the requirements of the NATO Headquarters forces, and the funding obligations of the parties. These MOUs should also display the willingness of the parties to support the specific exercise or operation. Again, specific obligations should not be included in the MOU. Wherever possible, it is preferred to utilize generic HNs MOUs, with requirements for specific exercises provided for via linked, subordinate agreements (i.e. TAs) and to place the specific quantified orders for supplies, services and their pricing details in either an implementation agreement (IA) or the Joint Implementation Plan (JIP) for the exercise.

G. FINANCIAL APPROVAL REQUIREMENTS

In NATO, no authority may obligate the organization to pay funding unless the money required to make the payment has been approved for obligation for that purpose by the relevant authorities. This means a NATO HQ can sign an agreement to pay for a cost only when:

- (1) the eligibility has been agreed upon by the Resource Policy and Planning Board;
- (2) the funding has been approved in a NATO budget; and
- (3) the Financial Controller responsible for that budget has approved the commitment of funding.

The Financial Controller (FC) or his designee must first approve any obligation that legally binds the organization to make a payment. To ensure the liquidity of NATO organizations, all obligations must be formally registered in the accounts of the organization as a liability. This occurs so that Commanders, Managers, and the Financial Controller can look at financial reports and understand that the funding is no longer available for spending on other projects. This requirement is consistent with the Financial Controller's responsibility

for budget preparation and the management of its execution. To ensure the independence of judgment of the SC Financial Controller, he or she has direct and independent recourse to the Budget Committee whenever a question may arise concerning the performance of these duties. (*Financial Regulations of NATO*, Article 22.) Subordinate HQ FCs enjoy the right of direct recourse to both their Commanders and the SC FC. Only the SC FCs enjoy recourse to the BC.

The Budget Committee (BC) must approve all open-ended financial obligations prior to the commitment being entered into. The financial implications of these commitments must be included in the appropriate budget supporting that organization or activity. This includes agreements to share costs or future activities with host nations or external organizations. It also includes potential costs that may be included in future budgets that are not yet approved such as a cost of a support action that will be payable three years in the future. This implies that MOUs with binding obligations to NATO budgets must be approved by the BC prior to HQ signature.

When the nations approve the mission or exercise budget for a particular year, expenditure approval within the limits of the approved budget are implicitly delegated to the Financial Controller of the organization concerned. This means that a Financial Controller can usually only approve potential expenditures funded in a budget for the current year that has received approval. With the approval of the BC, a Financial Controller can receive “contract authority” that allows him or her to promise payments in future years.

H. MOU APPROVAL PROCEDURES

A representative for the BUDFIN office should always be included in the development process for a MOU to ensure NATO financial policies and procedures are reflected in the proposed document. It is extremely embarrassing when NATO staffs present a text during negotiation that cannot later be approved by the same NATO body due to the lack of preliminary internal coordination. Once a draft of the MOU is prepared, it will be staffed at the Strategic Command level for formal signature authority. If the Strategic Command Financial Controller is satisfied that financial elements in the MOU are consistent with policy, are affordable and represent a binding obligation for the military budget, the document will be forwarded to the BC for approval prior to being presented to the Strategic Command for signature, or signature delegation. Only after these steps can the final signature authority sign on behalf of NATO. While the BC is only asked to approve the financial provisions of the MOU, it is not unusual for nations to raise issues regarding other provisions of the agreement.

NATO Commands may influence but not control the decisions of the BC membership. The role of the military staffs at all levels is to develop documents that accomplish the mission and then be prepared to successfully defend these documents when they are considered by the BC. Success is usually linked to the staff having ensured that the document is fully consistent with NAC and RPPB guidance, and avoiding inclusion of non-essential issues that might exacerbate debate. Chances of timely and trouble-free approval are also increased when the documents are based on templates or language previously approved by the funding committee in other documents.

I. AVAILABLE TEMPLATES

When representing NATO in negotiations, the following directives and publications provide the approved templates for use. These templates contain financial language that has been approved by the Strategic Commands and the Nations. By using these templates and the language they contain, the form of the resulting document will avoid being a distraction during the approval process. Changes, with good justification, can be made and should be considered where it is necessary to update the template. However, the rationale for these changes must be compelling and ensure that all Nations and all NATO Headquarters are treated equally.

- (1) Allied Command Operations Directive 15-3, *Preparation and Control of International Agreements*, 2 January 2000
- (2) Allied Joint Publication 4.5(A), *Allied Joint Host Nation Support Doctrine and Procedures*, May 2005
- (3) Allied Acquisition Procurement Practices (AACP-1. part 1) *Guidance for the Drafting of MOUs and Programme MOUs- Basic Considerations and Checklists*, January, 1989
- (4) Bi-SC Directive 60-70, *Bi-Strategic Command Procurement Directive*, (22 December 2004)
- (5) STANAG 2034 *NATO Standard Procedures For Mutual Logistical Assistance*
- (6) STANAG 6007 *Financial Principles and Procedures for Provision of Support within NATO*
- (7) STANAG 6012 *Financial Principles and Procedures Relating to use of Training Areas and Training Facilities*

J. USING EXISTING MULTINATIONAL ARRANGEMENTS AS TEMPLATES

These are numerous arrangements that exist between NATO Commands and nations. When new requirements arise, depending upon their terms, they may be amended for the new purpose. However, one should recognize that because of negotiation history they should not be used as the starting point on all issues.

As already mentioned, Host Nation Support Arrangements have to follow the new template of the DARS NM Support Arrangement. The SA signed between SHAPE and The Netherlands has been approved by the former MBC and considered the template to be used in such negotiations (MBC-DS(2009)0034). This should serve as the basis for all future Support Arrangements of the same nature (i.e. HN support to NATO HQ at garrison).

K. NATO NEGOTIATION POLICY

Most negotiations and agreements address issues with legal and financial implications. Budget and Finance (BUDFIN) officers and legal advisers (LEGAD) depend on and require each other for functional expertise. In negotiations involving NATO Forces or facilities, operational issues are raised, but questions about status, claims, privileges and immunity are significant and inevitably and financial issues remain the most contentious.

The legal role in these negotiations usually is to establish the framework and conditions for NATO's presence via SOFAs and other understandings such as transit agreements. Many logistics matters depend upon a Memorandum of Agreement or Understanding that requires legal staffing, review, and negotiation. All NATO contracts that may arise as the result of overarching agreements have a legal dimension and provisions. Additionally, as the organization's resident experts on agreements and negotiations, Legal Advisers are expected to advise and guide on strategy and techniques.

Normally, the BUDFIN community will provide support to the LEGAD or legal team participating in a negotiation to ensure the required expertise is immediately available. By working together BUDFIN and LEGADS ensure Commands negotiate agreements and make financial commitments that can be honoured. As a matter of candour and professional competence, LEGADs participating in negotiations must ensure that BUDFIN representatives are present and engaged in negotiations on NATO's behalf. Similarly, the BUDFIN community is committed to ensure that Legal Advisers are engaged when appropriate, and are trained to understand when legal issues are germane to a situation.

When using the above listed directives and publications in a negotiation, there is one overarching principle that must be observed: it is better to have no agreement than a bad agreement. If NATO cannot obtain a written agreement that is acceptable—meaning that it

generally conforms with past practice and ensures that NATO is acting fairly to all Nations - ACT or ACO will seriously consider cancelling the exercise or event that caused the necessity of having an agreement. Past adherence to this principle has caused political authorities to re-visit the negotiating instructions that have thwarted the acceptance of standard provisions—such as tax exemptions—that are key to NATO activities or exercises. Additionally, seven other financial and good-practice principles should be applied during agreement negotiations:

- (1) Operational issues normally are to be excluded from financial arrangements; these matters are enhanced in NAC/MC decisions and documents and are the responsibility of the chain of command to resolve;
- (2) Conflicts arising out of the terms of the agreement are to be resolved exclusively by NATO authorities. The North Atlantic Council is the place of ultimate recourse for a Nation, NATO Agencies, or Strategic Commands;
- (3) All signatories must approve all changes and participate in decision making regarding the interpretations of the MOU or agreement;
- (4) There is no default to NATO funding;
- (5) Host Nations may not derive revenue from NATO activities (no taxation);
- (6) Every order must specifically agree the quantity, price, and who is responsible for payment;
- (7) In the absence of an MOU, normal NATO rules apply (no agreement is better than a bad agreement).

L. NEGOTIATING PRACTICE

Best results are achieved when NATO teams organize themselves before all negotiations. Foremost, all participants need to meet each other before the meeting and determine the agreed upon negotiation goals and strategy. While this is normal for national representatives, many times NATO representatives come from several NATO Headquarters for an MOU meeting and have never met before. The pre-meeting before a negotiation should clearly determine three issues before the NATO team begins its representation of the Alliance:

- (1) *Who* is in charge on the NATO side—the definitive leader of the NATO delegation. Normally this is the Command Group from a NATO HQ (usually a Joint Force Command or a Strategic Command). Usually Legal and Finance are included as members of the negotiation team;
- (2) What is *necessary* to be achieved during the operation or event the MOU is being negotiated for and what absolutely must be contained in this MOU; and
- (3) The limits to what can be offered, promised, agreed to, or compromised.

Best practice is for the NATO negotiation team to remain stable and unchanged during the course of the negotiation. When the same people are at the table for all discussions, the protocol and delay of the introduction of new team members is avoided and the need to re-open or extensively review topics that have already been addressed will not occur. The NATO team also needs to be as neutral as possible during multilateral negotiations. As such, it is appropriate and advisable for the NATO delegation to accept chairmanship and secretariat duties during the new development and negotiation process. Wherever possible, the individual chairing the meeting should not actively participate in negotiations; instead he/she should focus on running the meeting and ensuring the parties enjoy the opportunity to contribute to the process. This may imply the need for two or more NATO participants at the table.

Appendix 1 to Part II (Financial Issues) - ACO Directives (Financial)

060-01	Control of Funds
060-02	Fund Raising / Solicitation Requests
060-03	SHAPE Budget Holders Responsibility & Procedures
060-11	Review and Prioritisation of the ACE Medium Term Financial Plan (MFTP) for International Military Budget Activities
060-30	Regulations for Execution of the Fiscal Functions
060-40	Regulations for Execution of the Disbursing Function
060-41	Collection of Sums due to International Headquarters
060-45	Financial Administration of Advance Accounts
060-50	Travel on International Duty + Supplement
060-51	NATO Civilian Staff Provident Fund
060-52	Hospitality Funds + Change 1, dated 06 MAR 2001.doc + Change 2, dated 05 April 2002
060-53	Tax Exemption and Customs Clearance
060-54	Acceptance of Gratuities
060-55	Bachelor Officers' Quarters and Hotel-Like Guest Accommodation
060-56	ACE Management Board Impact Statements
060-70	Procurement of Military Budget Funded Property & Services + Change 1, dated 17 JUL 2003.doc
060-71	Use of Purchasing/Credit Cards
060-80	Property Accounting and Control
060-90	Standards for Office, Mess & Barracks Furniture, Equipment & Furnishings
060-100	Auditing and Internal Control

Appendix 2 to Part II (Financial Issues) - ACT Directive 60-1

- Section 1: Status and Funding Criteria
- Section 2: Financial Administration
- Section 3: Allied Commander Atlantic (ACLANT) Financial Organizations
- Section 4: Civilian Personnel
- Section 5: Maintenance of Premises and Equipment
- Section 6: General Expenses
- Section 7: Automated Data Processing (ADP) For Financial Functions
- Section 8: Communications
- Section 9: Transportation
- Section 10: Staff Travel
- Section 11: Exercises
- Section 12: Representation and Hospitality Funds (R&H) Funds
- Section 13: Non-Appropriated Funds (NAF) and Morale and Welfare Activities (MWA)
- Section 14: Construction
- Section 15: Equipment
- Section 16: The Supreme Allied Commander Atlantic Undersea Research Centre
- Section 17: Medium Term Financial Plan
- Section 18: Budget
- Section 19: Bi-SC Directive 60-70 Command Procurement
- Section 20: Cash, Requirements, Receipts, Disbursements, Investments, and Advances
- Section 21: Accounting
- Section 22: Internal Control and Audit
- Section 23: Records Disposal
- Section 24: Contractor Travel

Appendix 3 to Part II (Financial Issues) - New Cost Share Percentages
(SRB-N(2009)0058 dated 30 October 2009)

NATO COMMON FUNDED BUDGETS & PROGRAMMES			
COST SHARE ARRANGEMENTS VALID FROM 1/1/2010 TO 31/12/2011			
NATION	Civil Budget at 28	Military Budget at 28	NSIP at 28
Albania	0.0763	0.0763	0.0763
Belgium	2.1413	2.2904	2.2904
Bulgaria	0.3055	0.3055	0.3055
Canada	5.9532	5.5000	5.5000
Croatia	0.2686	0.2686	0.2686
Czech Republic	0.9010	0.9010	0.9010
Denmark	1.2619	1.5020	1.5020
Estonia	0.1014	0.1014	0.1014
France	11.9201	11.6200	11.6200
Germany	14.8411	15.5360	15.5360
Greece	0.8000	0.8000	1.1029
Hungary	0.6850	0.6850	0.6850
Iceland	0.0658	0.0658	0.0450
Italy	8.5000	8.6467	9.0189
Latvia	0.1367	0.1367	0.1367
Lithuania	0.2048	0.2048	0.2048
Luxembourg	0.1534	0.1534	0.1534
Netherlands	3.3271	3.3516	3.3516
Norway	1.4282	1.5180	1.5180
Poland	2.3284	2.3284	2.3284
Portugal	0.9000	0.7500	0.7500
Romania	0.9651	0.9651	0.9651
Slovakia	0.4068	0.4068	0.4068
Slovenia	0.2376	0.2376	0.2376
Spain	4.6195	4.5595	4.5595
Turkey	3.1374	3.1374	3.1374
United Kingdom	12.5944	11.5478	11.5478
United States	21.7394	22.4042	21.7499
	100.0000	100.0000	100.0000

Appendix 4 to Part II (Financial Issues) – Host Nation Support Services “the CAOC deal”

CATEGORIES OF SUPPORT	* FINDERUP	Kalkar	Reitan	Messstetten	Poggio R.	Eskisehir	Latissa	Torrejon	H. Wycombe	Monsanto	Ramstein
Provision of a facility		F	F	F	F	F	F	F	F	F	F
External Security		F	F	F	F	F	F	F	F	F	F
Firefighting			F	F	F	F	F	F	F	F	F
Local sports and recreation facilities		F	F	F	F	F	F	F	F	F	F
Roads & grounds maint. & clearance		F	F	F	F	F	F	F	F	F	F
Health & Safety modifications to comply with HN laws			F	F	F	F	F	F	F	F	
Metereological support		F	F	F	F	F	F	F	F	F	F
Emergency medical support		F		F	F	F	F	F		F	
Admin costs for work on buildings			R	R	R	R	R	R	R	R	R
Admin costs for contract support			R	R	R	R	R	R	R	R	
Admin costs for fiscal & accounting support			R		R	R	R	R	R	R	F
Costs of alterations & engineering works			R	R	R	R	R	R	R	R	R
Actual costs of engineering material and contract labour			R	R	R	R	R	R	R	R	R
Office furniture		R	R	R	R	R	R	R	R	R	R
Office supplies		R	R	R	R	R	R	R	R	R	R
Postal & Freight		R	R	R	R	R		R			
Reprographics / Photo		R			R	R	R	R		R	
Printing		R			R	R	R	R		R	
Utilities		R	R	R	R	R	R	R	R	R	R
Cleaning		R	R	R					R		
ADP Maintenance		R		R	R	R	R	R	R	R	
Local transportation		R	R-overtime	R	R	R	R	R	R	R	R
Leased circuits & Phone charges		R	R	R	R	R	R	R		R	R
Morale & recreation services			I	I	I	I	I	I	I	I	I
Messing & canteen facilities		I	I	I	I	I	I	I	I	I	I
Membership in officers' & NCO clubs		I	I	I	I	I	I	I	I	I	I
Accommodation in quarters		I	I	I	I	I	I	I	I	I	I

PART X
LOGISTICS

References and suggested reading:

- AJP-4(A), Allied Joint Logistic Doctrine (December 2003)
- ALP-4.1 Supp. 1, Advanced Logistics Support Sites (April 2001)
- ALP 4.2 Ed. (A), Land Forces Logistic Doctrine
- Allied Movement Publication, AJP-4.4(A) ALLIED JOINT MOVEMENT AND TRANSPORTATION DOCTRINE
- AJP 4.5 Ed. (A), Allied Joint Host Nation Support Doctrine and Procedures
- Bi-SC Directive 15-3 on the Preparation and Control of International Agreements (11 January 2007)
- Bi-SC Directive 60-70 Bi-Strategic Command Procurement Directive (22 December 2004)
- Contractors on the Battlefield: Emerging Issues for Contractor Support in Combat & Contingency Operations, James McCullough & Abram Pafford, West Group Briefing Papers, 2nd Series (2002)
- Extending Military Jurisdiction to American Contractors Overseas, Michael Davidson & Robert Korroch, The Procurement Lawyer (2000)
- Handbook of the Law of Visiting Forces, Chapter IV/8 (Claims), Chapter IV/9 (Logistic Support), Chapter IV/10 (Tax Exemptions), and Chapter IV/11 (Customs Exemptions), Dieter Fleck (Ed.) (2001)
- Logistic Support for NATO Operations – a Backgrounder (2006) (http://www.nato.int/cps/en/natolive/topics_61741.htm)
- MC 319/2, NATO Principles and Policies for Logistics (May 2004)
- MC 334/1, NATO Principles and Policies for Host Nation Support (HNS) (Sep 2000)
- MC 336/2, NATO Principles and Policies for Movement and Transportation (2002)
- NATO Logistics Handbook (2007)
- NATO Logistics Handbook (3rd Ed., 1997)
- NATO policy on contractor support to operations
- NATO website on Logistics: http://www.nato.int/cps/en/natolive/topics_61741.htm
- Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield, Michael Davidson, Public Contract Law Journal (2000)
- Strategic Commander's advice on NATO policy on contractor support to operations, IMSWM-0379-2006 (SD 1)
- United States Operational Law Handbook, Chapter 9 (Claims), Chapter 12 (Fiscal), and Chapter 13 (Deployment Contracting and Battlefield Acquisition)

A. INTRODUCTION

Logistics planning is an integral part (one of seven disciplines) of Defence planning. Defence planning in turn consists of two planning systems – the Defence Planning Process (DPP) for NATO nations and the Partnership for Peace (PfP) Planning and Review Process (PARP) for PfP nations.

While defence planning aims to ensure that NATO-led operations are supported by appropriate force structures and capabilities, operational planning seeks to prepare NATO for execution of those missions. Overall, logistic planning provides a significant input to both defence and operational planning which are described in detail in AJP-4(A).

Logistics is defined as “the science of planning and carrying out the movement and maintenance of forces.”²⁶⁴ The six logistics functional areas are:²⁶⁵

- (1) design and development, acquisition, storage, transport, distribution,
- (2) maintenance, evacuation and disposition of materiel;
- (3) transportation of personnel;
- (4) acquisition or construction, maintenance, operation and disposition of facilities;
- (5) acquisition or furnishing of services; and
- (6) medical and health service support²⁶⁶

These functional areas are addressed through various support options that include:

- (1) **National Logistics**, in which support flows directly from the home nation to the supported unit in the Area of Responsibility (AOR);
- (2) **National Support Elements**, which are ordinarily located in the AOR and facilitate the flow of support;
- (3) **Host Nation Support**, which will ordinarily involve the negotiation of Host Nation Support Agreements;
- (4) **Local Contracting**, when there is no feasible Host Nation Support mechanism to be used;
- (5) **Mutual Support Arrangements**, between the participating countries;
- (6) **Lead Nation**, where a Nation assumes “responsibility for coordinating and/or providing specified support and other functions,” generally within a geographical area;
- (7) **Role Specialist Nation**, where a Nation provides “common user or standardized support such as fuels, rations and certain medical services” in a specialized role throughout the theatre;
- (8) **Multinational Integrated Logistic Units or Medical Units**, where two or more nations agree to provide support to a multinational force under the operational control of a NATO commander; and
- (9) **Third Party Logistical Support Services**, which “is the pre-planned provision of selected logistic support services by a contractor.”²⁶⁷

Traditionally within NATO, logistic support has been seen as national business.²⁶⁸ However, C-M(2001)44, NATO Policy for Co-operation in Logistics and the NATO Principles and Policies set out in MC 319/1, establish the principle of collective responsibility of Nations and NATO authorities

²⁶⁴ NATO Logistics Handbook, para. 103 (3rd Ed., 1997).

²⁶⁵ AJP-4 (A), Annex A (May 2005).

²⁶⁶ AJP-4 (A), Annex A (May 2005).

²⁶⁷ AJP-4(A), para. 117 (December 2003); ALP-4.2, para. 216 (February 2003).

²⁶⁸ The Handbook of The Law of Visiting Forces, Ed. Dieter Fleck, Chap. IV/9, page 194 (2001).

for logistic support of NATO's multinational operations."²⁶⁹ This means that although the Nations "bear the ultimate responsibility for ensuring the provision of logistics support for its forces allocated to NATO, NATO commanders also assume responsibility for the logistic support of assets under their authority."²⁷⁰ The Nations and NATO had already begun moving toward more flexible, multinational means of satisfying logistics requirements that would address these responsibilities in an efficient and effective fashion before the NATO intervention in Bosnia-Herzegovina.²⁷¹ It was the cost of the continuing mission in Bosnia, however, which appears to have given the impetus to efforts to establish a genuine multinational logistics system,²⁷² as seen in the most recent doctrinal publications.²⁷³

With regard to Host Nation Support (HNS) this is an important factor in any operational or exercise scenario. Within the current NATO environment, the need to achieve both efficiency and cost effectiveness is a key element in providing this support. Increasingly, by applying the concept of multinational joint logistics as outlined in AJP-4 (A), the overall costs for an exercise or operation can be reduced and greater support efficiencies achieved. Coordinated planning and the provision of HNS are key elements of this approach and it is therefore important that Host Nation Support Arrangements (HNSAs) are developed, as necessary.

Within NATO, the logistic (J-4) staff has the lead for HNS planning and the development of HNSA. In developing HNSA, it is essential that the logistic staff work closely with the legal, financial (J-8), Civil-Military Cooperation (CIMIC) (J-9) and other relevant staffs internally, within HN and Sending Nation (SN) and the relevant NATO Commander's HQ.

Accordingly, NATO LEGADs can find themselves involved in logistics issues both across the spectrum of operations and support options. They may find themselves involved in planning as part of the staff, in the negotiation of support arrangements with NATO Nations and host nations, in dealing with disputes in the execution of these arrangements, in the negotiations with contractors supporting operations, and in the execution of these contracts, and issues of payment and termination. The purpose of this chapter is to highlight some of the pertinent authorities governing these various areas, some of the more important actions LEGADs might find themselves involved in, and some of the areas of practice that have been problematic in operations.

B. AGREEMENT HIERARCHY SUPPORTING HOST NATION SUPPORT (HNS)

1. The Planning Process in General

The logistics staff has the lead for Host Nation Support (HNS) planning, and for development of the Host Nation Support Agreements (HNSA), which are ordinarily contained in an overarching Memorandum of Understanding (MOU).²⁷⁴ Once the agreements are concluded, the designated NATO commanders should establish Joint Host Nation Support Steering Committees, including representation from the Host Nation, "to oversee the development of the Technical Arrangement[s] (TAs) and the Joint Implementation Agreements (JIAs)."²⁷⁵ Depending upon the complexity and duration of the mission or exercise, however, either a Technical Arrangement (TA), a Statement of Requirement (SPR), a Joint Implementation Agreement (JIA), or even a NATO STANAG may be sufficient for logistics purposes.²⁷⁶

NATO doctrine specifically notes that "legal advice is essential during all phases of HNSA development."²⁷⁷ Any HNSAs will be developed within the context of the legal relationships

²⁶⁹ AJP-4(A), para. 105b (December 2003).

²⁷⁰ AJP-4(A), para. 105b (December 2003).

²⁷¹ Fleck Chap. IV/9, pages 193-96 (2001).

²⁷² Fleck, Chap. IV/9, page 194 (2001).

²⁷³ See Logistic Support for NATO Operations – a Backgrounder

²⁷⁴ AJP- 4.5 (A), para. 114 (May 2005).

²⁷⁵ AJP-4.5(A), para. 113 (May 2005).

²⁷⁶ AJP-4.5(A), para. 114 (May 2005).

²⁷⁷ AJP-4.5(A), para. 125 (May 2005).

between NATO and the host nations as set out in either the NATO or PfP SOFAs²⁷⁸, or whatever mission specific SOFAs need to be created for the operation or exercise at hand.²⁷⁹ Supplementary documents, such as the Paris Protocol and the Further Additional (Headquarters) Protocol to the PfP SOFA, and supplementary agreements between NATO Headquarters and the Host Nations may have a significant role to play in the negotiation of HNSAs as well.²⁸⁰ Finally, the LEGAD needs to be familiar with whatever transit agreements or other bilateral arrangements between NATO or NATO Nations and the HN that may exist.²⁸¹

2. The Planning Process Stages

Ideally, the Host Nation Support Planning Process should have five stages²⁸².

In Stage 1, after the strategic command level (or operational level after delegation) NATO Commander has identified in very broad terms the support that would be required from the HN, an HNS Request is sent “to the prospective HN(s) as the first notification of the requirement. The other expected product of the first stage is an MOU.²⁸³

If an MOU does not exist, the LEGAD should research whether previous MOUs or similar arrangements would be suitable for negotiation.²⁸⁴ Once the MOU is signed by the NATO Commander and the HN, the NATO Nations will be afforded an opportunity to accede by note to the MOU, or to state reservations in a Statement of Intent (SOI). If the HN accepts the reservations, it would indicate this on the SOI.²⁸⁵ At a minimum, the MOU should cover:

- (1) Definitions;
- (2) Purpose of the MOU;
- (3) Scope and General Arrangements;
- (4) Applicable Documents;
- (5) Responsibilities of the Participants;
- (6) Financial Principles;
- (7) Legal Aspects;
- (8) Force Protection;
- (9) Security Responsibilities;
- (10) Disputes and Interpretations of the MOU;
- (11) Modification;
- (12) Commencement, duration, and termination; and
- (13) Be accompanied by any Notes of Accession or SOIs.²⁸⁶

In Stage 2, a more defined Concept of Requirements (COR) is prepared by the operational (Joint Force Command HQ) level commander, and is submitted to the HN to serve as the basis for further negotiations.²⁸⁷ The COR addresses “broad functional support requirements,” but does not yet furnish details regarding the timing and quantity of that support.”²⁸⁸ In Stage 3, (TAs) are

²⁷⁸ Partnership for Peace Status of Forces Agreement, June 1995

²⁷⁹ AJP-4.5(A), para. 126 (May 2005).

²⁸⁰ AJP-4.5(A), para. 126 (May 2005).

²⁸¹ AJP-4.5(A), paras. 127, 128 (May 2005).

²⁸² AJP- 4.5 (A), para.303 (May 2005).

²⁸³ AJP-4.5(A), paras. 303a, 304 (May 2005).

²⁸⁴ AJP-4.5(A), para. 305 (May 2005).

²⁸⁵ AJP-4.5(A), para. 305b (May 2005).

²⁸⁶ AJP-4.5(A), para. 305c(2), (3) (May 2005). For a sample MOU, see AJP-4.5(A), Annex D.

²⁸⁷ AJP-4.5(A), paras. 303b, 304 (May 2005).

²⁸⁸ AJP-4.5(A), para. 306a (May 2005).

finalized within the JHNSSC “to address common requirements and procedures for the provision of HNS.”²⁸⁹ At this stage, “the JHNSSC plans – in a generic form – what support can be provided by the HN against the COR(s).”²⁹⁰ Although the TA should of course not duplicate information found in other documents²⁹¹, it should as a minimum include:

- (1) Purpose and Scope of the TA;
- (2) Definitions;
- (3) Applicable Documents;
- (4) Situation, HNS mission, and execution;
- (5) Command and Control;
- (6) Responsibilities;
- (7) Financial Procedures;
- (8) Legal Aspects;
- (9) Supplies and Services;
- (10) Commencement, Amendment, and Termination; and
- (11) Associated Annexes.²⁹²

The execution of Stages 4 and 5 moves to the tactical (Component Command) level.²⁹³ In Stage 4, Statements of Requirements (SORs) on the basis of site surveys coordinated by the JHNSSC are submitted to the HN. The HN then confirms whether it can provide the requested support and identifies any shortfalls. Doctrinally, these are seen as “executable documents, which obligate the signatories.”²⁹⁴ In Stage 5, Joint Implementation Arrangements (JIAs) are negotiated, and “represent the final stage when more detail is required to effectively implement the HNS plan after confirmation by the HN.”²⁹⁵ The “JIAs are contracts that obligate the signatories financially and to provide resources.”²⁹⁶ While JIAs are intended to be stand-alone documents, they may also take the form of annexes to the TA.²⁹⁷

C. LEGAL ISSUES IN THE PLANNING PROCESS

When logistic planners begin to plan the support to operations and exercises, their overall aim is to:

- (1) Define the logistic support concept;
- (2) Determine the organization and structure required for logistic support;
- (3) Identify the requirements, shortfalls, and necessary arrangements to deploy, support and sustain NATO operations;
- (4) Determine the availability of and requirements for Host Nation Support or local contracting; and

²⁸⁹ AJP-4.5(A), paras. 303c, 304 (May 2005).

²⁹⁰ AJP-4.5(A), para. 303c (May 2005).

²⁹¹ JAP-4.5(A), para. 307c(2) (May 2005).

²⁹² AJP-4.5(A), para. 307c(1) (May 2005). For a sample MOU, see AJP-4.5(A), Annex G.

²⁹³ AJP-4.5(A), para. 304 (May 2005).

²⁹⁴ AJP-4.5(A), para. 303d (May 2005).

²⁹⁵ AJP-4.5(A), para. 303e (May 2005).

²⁹⁶ AJP-4.5(A), para. 309c (May 2005).

²⁹⁷ AJP-4.5(A), para. 309c (May 2005).

- (5) Identify the requirements and necessary arrangements for the redeployment of forces, to include the preparation for and recovery of formations, individuals and materiel from the area of operations to their home bases.²⁹⁸

NATO LEGADs provide assistance to the logistic planners in many areas of this process.²⁹⁹ There are many legal considerations, both national and international. For these reasons, legal advice is essential during all phases of logistics planning process.³⁰⁰ For example, one of the most important areas of logistic planning involves medical support for casualties through emergency medical and surgical services, and medical evacuation. Special medical planning conferences may identify the need to negotiate mutual support MOUs between the Nations, or even the need for Host Nation Support Agreements to complement the resources that NATO will bring to the operation.³⁰¹ Planning for HNS in general will often identify other areas where LEGADs may assist in negotiation and in identifying country-specific issues that require significant lead time to address properly in agreements.³⁰² Further, understanding the planning for infrastructure requirements will allow LEGADs to identify issues involving local property, environmental, commercial and labour law practices that will need to be addressed in negotiations with host nations.³⁰³ Similarly, contracting and funding issues can arise in the use of Third Party Logistic Support Services.³⁰⁴ Finally, part of the initial planning also includes planning for the conclusion of the operation and redeployment of NATO forces back to their home stations. NATO LEGADs can provide invaluable assistance to planners in this area, helping with setting out measures for handling damage claims, improvements to and the disposal of property, and environmental issues.³⁰⁵

D. LEGAL ISSUES IN THE EXECUTION PHASE

1. Customs, Border Controls and Taxes

Under the NATO SOFA, NATO forces shall have facilitated border-crossing or be permitted to acquire visas for entry into the host nation, and should not be made to pay any taxes pursuant to their entry on either their persons or their equipment and supplies. The freedom of NATO forces from host nation border controls is, however, not absolute. For example, where the movement of goods and services (or trash) across the host nation's borders into another country would violate obligations of the host nation under international law, it may forbid such movement. Legal advisers must maintain the working relationships they developed with logistics planners in the planning phase of the operation to become aware as soon as possible of potential legal issues in the execution of

²⁹⁸ AJP-4(A), para. 211 (December 2003).

²⁹⁹ It is important to note that the headquarters logistics staff may be supported by a Multinational Joint Logistic Centre during actual execution of the logistics function. The MJLC may itself be broken down into various coordination cells, including Logistics Support, Movement and Transport, Infrastructure, Medical, a Regional Allied Contracting Office, and Host Nation Support. ALP-4.2, para. 307 (February 2003).

³⁰⁰ AJP - 4.5 (A), para.125 (May 2005).

³⁰¹ AJP-4(A), para. 218 (December 2003), see also AJP-4.10. Other conferences of which the LEGAD should be aware include those sequenced by doctrine, such as the Initial, Main and Final Logistics Planning Conferences, and other specialty conferences such as Movement and Transportation. ALP-4.2, para. 411 (February 2003).

³⁰² AJP-4(A), para. 219 (December 2003). Host Nation Support Agreements are the preferred method of obtaining support in non-Article 5 missions as well traditional Article 5 missions, but because of their very nature, such agreements do not likely exist between the Host Nations and NATO. In such cases, individual contractor support may be the only practical way to ensure adequate resourcing. NATO Logistics Handbook, para. 1215 (3rd Ed., 1997).

³⁰³ AJP-4(A), para. 220 (December 2003). "The use of the NATO Maintenance and Supply Agency (NAMSA), for contracting assistance should be considered for NATO operations." NATO Logistics Handbook, para. 1324 (3rd Ed., 1997). ALP-4.2, Chap. 10, sets out more detailed guidance on infrastructure engineering and real estate management.

³⁰⁴ AJP-4(A), para. 221 (December 2003). NAMSA maintains an online TPLSS database which "contains the details of potential contractors, world-wide, capable of providing logistic support to NATO operations." ALP-4.2, para. 216k (February 2003).

³⁰⁵ AJP-4(A), para. 223 (December 2003).

the logistics support plan. Further, knowledge of not just the host nation law but the host nation's international obligations is imperative.

2. Claims

The NATO SOFA (and PfP SOFA) sets out a basic claims procedure by which the receiving State agrees to receive, investigate, adjudicate and pay claimants for damages suffered by persons or caused to property through the activities of sending state forces. In terms of non-contractual, third-party claims, the receiving State pays 25% of the approved claim as a confidence building and a burden-sharing measure, and forwards to the sending State a bill for the reimbursement of the remaining 75%. Local law is applicable to this process in terms of determining legal responsibility and the scope of compensable damages. NATO SOFA and PfP SOFA only apply within a defined geographical area. Moreover, in an operational context other legal principles apply, but in order to provide a vehicle for addressing claims in operations a NATO Claims Policy was adopted in 2004.³⁰⁶

Given the scope of the logistics stream for a modern military force, it is inevitable that damages resulting from vehicular accidents, collisions with livestock, and establishment of logistics sites will occur. Legal advisers can assist commanders and staffs in keeping the logistics operations flowing smoothly in many ways. For example, they can assist in setting up claims procedures. As regards contractual issues, legal advisers ensure that leases for real estate contain dispute resolution and claims processing clauses, and inspection and valuation mechanisms to survey and assess the condition and value of the property at the time the lease is entered into and when it terminates. Further, legal advisers can create simple claims information packets, in one or more languages, to be given to drivers of military vehicles for use when they have an accident or cause other damages. These packets can then be given to the local inhabitant who has suffered injury or property damage for them to begin the claims process if they wish. Finally, they can establish working relationships with host nation law enforcement and transportation authorities and explain the claims process. Particularly in out of area operations, many local inhabitants are likely to use these offices rather than some designated claims office to start the filing of their claims.

E. CONTRACTOR ISSUES

Necessity for contractors: Contractor support is a force multiplier that can be particularly valuable when:

- the military manpower strength in a national contingent or in a Joint Operations Area (JOA) is limited by a political decision;
- the required capability is not available from military sources;
- the required capability has not been made available for an operation;
- the military capability is not available in sufficient numbers to sustain an operation;
- the military capability is required for other missions; and/or - the use of local contractors supports an agreed Civil-Military Cooperation (CIMIC) plan;
- the use of contractors (civilians or local labour) for certain functions, and at certain times may be more cost-effective; and
- there is an operational need for continuity and experience that cannot be provided by using military manpower on a rotational basis.

306 GENERAL CLAIMS POLICY 5 May 2004 - AC/119-N(2004)0058 (POLITICAL COMMITTEE AD HOC WORKING GROUP OF LEGAL EXPERTS)

Some countries will require that NATO forces “use the services of the HN military authorities in arranging local contracting.”³⁰⁷ In some countries, the only local contractor the HN military deals with may in fact be a quasi-military organization itself. This can lead to difficulties in securing competitive pricing, and can lead to contractual issues becoming command issues rather than being resolved through agreed-upon dispute resolution mechanisms. If the NATO forces are allowed to contract directly, a system needs to be established that will allow the NATO commander to obtain the resourcing required without creating undue competition between NATO forces and the civilian population for scarce resources.³⁰⁸

The NATO Policy on Contractor Support to Operations³⁰⁹ among others sets out the forms of contractor support, principles, general policies (when to contract, what form of contractor support to use, functions that can be performed by contractors.

3. Status of Contractors in military operations³¹⁰

The status of contractors in military operations especially that of the Private Military and Security Companies (PMSCs) and their personnel has a long history of discussion in the international legal community, and is a subject of several initiatives for regulation. With regard to armed contractors, guidance can be found in Strategic Commander’s advice on NATO policy on contractor support to operations, IMSWM-0379-2006 (SD 1)

The NATO Logistics Handbook from 2007 states the following:

“Status and Use of Contractors

The force consists of combatants and non-combatants. Contractor personnel, whether civilians accompanying the force or local hires, are non-combatants. Local hires, regardless of nationality, are subject to the laws of the nation where they are operating and may not enjoy the legal status accorded to civilians accompanying the force.

NATO and nations engaged in NATO operations which involve the employment of contractors should clearly define the status of contractor personnel and equipment in all agreements, understandings, arrangements and other legal documents with host nations. These documents, such as a Status of Forces Agreement (SOFA) or Transit Agreement, should establish legal jurisdiction, the rights to tax and customs exemptions, visa requirements, movement limitations and any other matters which host nations are willing to agree.”³¹¹

Contractors’ status is addressed in the standing HNS Agreements and usually addressed in status of forces agreements.

According to the NATO Policy on Contractor Support to Operations, the status of deployed contractors will depend on the nature of the mission undertaken by NATO and the services being provided thereby. will be governed by host nation law or applicable Status of Forces Agreements (SOFA). Unless stated otherwise in applicable international agreements (e.g., SOFA or Transit Agreement) contractors will be subject to the law of the nation in which they are operating.³¹²

The latest international initiative, the Montreux Document³¹³ details the obligations of Contracting States, territorial States and the companies. Although the Montreux Document is not a

³⁰⁷ AJP-4.5(A), para. 123 (May 2005).

³⁰⁸ AJP-4.5(A), para. 123 (May 2005).

³⁰⁹ C-M(2007)0004, approved 26 January 2007.

³¹⁰ For the status of contractors in peacetime environment see Part VII on Personnel

³¹¹ NATO Logistics Handbook (2007) p 104.

³¹² C-M(2007)0004. Para 48, 48.1

³¹³ Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict - UN GA - SC A/63/467-S/2008/636 , Annex to Letter dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General

legally binding document, it is rather a high level political commitment by the signing States for a common approach, its content will very likely evolve in the future into a legal document and in the NATO context into common NATO policy.

According to the Montreux Document, the PMSCs have the following obligations in conflict situations:

“E. PMSCS AND THEIR PERSONNEL

22. PMSCs are obliged to comply with international humanitarian law or human rights law imposed upon them by applicable national law, as well as other applicable national law such as criminal law, tax law, immigration law, labour law, and specific regulations on private military or security services.

23. The personnel of PMSCs are obliged to respect the relevant national law, in particular the national criminal law, of the State in which they operate, and, as far as applicable, the law of the States of their nationality.

24. The status of the personnel of PMSCs is determined by international humanitarian law, on a case by case basis, in particular according to the nature and circumstances of the functions in which they are involved.

25. If they are civilians under international humanitarian law, the personnel of PMSCs may not be the object of attack, unless and for such time as they directly participate in hostilities.”

4. Financial Issues

Financial issues of which legal advisers should be aware include the need to avoid unauthorized commitments of funds by NATO personnel, who, although they may be in positions of command or staff authority, may not have the authority to direct work by contractors. The stewardship of funds, while not strictly a legal issue, does have legal implications. For example, during long-term out of area operations, it is not uncommon for NATO forces to rotate through base camps on a fairly regular basis. Depending on the situation, the same base support contractors may remain in place through several troop rotations. Levels of services that were appropriate for initial stages of the deployment may in fact become unnecessary for supporting later troop rotations. Commanders and staffs falling in on established base camps may not be inclined to question the level of support services rendered by the contractors, when in fact a contract review may be in order. Further, just as NATO forces will generate claims activity simply through the normal conduct of logistics operations, contractors too will have accidents and instances of damage result from doing their work. Legal advisers can be useful in determining how claims against the contractors are paid, because the contractors will be associated with the NATO forces in the minds of the local inhabitants, and a contractor’s failure to properly address meritorious claims may become a command issue.

5. Negotiation Issues

Bi-SC Directive 60-70 Bi-Strategic Command Procurement Directive (22 December 2004) contains detailed rules on the role of legal advisers.

Legal advisers can also be of help to contracting officers in the negotiation of contracts during the execution phase. For example, depending on the local culture, it may be customary to give officials in the position of the contracting officer gifts not just during the negotiation, but upon successful completion of a contractual relationship as well. Particularly with contracts that are negotiated locally, as compared to the pre-planned contract mechanisms that many nations will have in place when they deploy, legal advisers can also assist the contracting officers in making sure that the NATO forces and the local contractors have a common understanding of the meaning of terms in the contract. A working knowledge of local commercial law (along with local customs) in this regard can be very helpful.

PART XI

LEGAL FRAMEWORK AND LEGAL BASIS OF MILITARY OPERATIONS

References and suggested reading:

- AAP-6(2009) -NATO GLOSSARY OF TERMS AND DEFINITIONS (ENGLISH AND FRENCH)
- AJP-01 Ed. (C) ALLIED JOINT DOCTRINE
- AJP-3(A) Allied Doctrine for Joint Operations
- AJP-3.4 NON-ARTICLE 5 CRISIS RESPONSE OPERATIONS
- AJP-3.4.1 PEACE SUPPORT OPERATIONS
- AJP-3.4.2 NON-COMBATANT EVACUATION OPERATIONS
- Anthony Clark Arend, Robert J. Beck: International Law and the Use of Force: Beyond the U.N. Charter Paradigm / Routledge; 1 edition (June 25, 1993)
- Bonn Agreement On Provisional Arrangements In Afghanistan Pending The Re-Establishment Of Permanent Government Institutions, 5 December 2001
- Bruno Simma (Editor) : The Charter of the United Nations: A Commentary / OUP Oxford; 2 edition (12 Sep 2002)
- Charter of the United Nations, 1945
- Christine Gray International Law and the Use of Force / OUP Oxford; 3 edition (17 July 2008)
- Comprehensive Operations Planning Directive (COPD Trail Version February 2010)
- Dinstein: War, Aggression, Self-defence, / Cambridge University Press 2001
- Michael N. Schmitt: International Law and the Use of Force: The Jus ad Bellum Connections, 89-97, September 2003.
- USA Law Of War Deskbook International And Operational Law Department International And Operational Law Department The Judge Advocate General's Legal Center and School, U.S. Army Charlottesville, VA, USA / January 2010
- USA OPERATIONAL LAW HANDBOOK 2009 issued by International and Operational Law Department, The Judge Advocate General's Legal Center & School, U.S. Army, Charlottesville, Virginia
- USE OF FORCE REPORT - Initial Report on the Meaning of Armed Conflict in International Law Prepared by the International Law Association Committee on the Use of Force / INTERNATIONAL LAW ASSOCIATION RIO DE JANEIRO CONFERENCE (2008)
- United Nations Peacekeeping Operations / Principles and Guidelines 2008 - United Nations Department of Peacekeeping Operations Department of Field Support <http://www.un.org/en/peacekeeping/>

Editorial note: This chapter does not intend to substitute the hundreds if not thousands of books, studies, articles, conference reports and other forms of discussion on the law of use of force, the different interpretations of legitimate and / or lawful ways of use of force.

Instead, this chapter intends to give a general overview of legal framework from the aspect of legal planning of operations. To include highlighting the major issues which legal advisers in their national assignments or in NATO billets may need to look at when planning and implementing operations or elaborating detailed rules for national forces or NATO operational headquarters.

A. WHAT LAW TO BE APPLIED?

Military operations of today's world have many folds and layers and the operational environment is very complex. When dealing with a situation or a problem, the first question for a legal adviser to ask usually is what law shall be applied to that situation or problem.

International military operations have many folds and may different aspects, therefore usually several branches of law shall be taken into consideration:

- (1) international law
- (2) national / domestic law of the sending states
- (3) law of host/receiving nation
- (4) law of third States - (when transiting or stationing there)
- (5) special regulations of the mission

1. International law

One shall find sources of the following issues in treaty law and / or customary international law:

- (1) law of use of force / legal basis / mandate;
- (2) law of armed conflict (LOAC) or in its other usual name: international humanitarian law (IHL) or *ius in bello*;
- (3) international criminal law;
- (4) human rights law;

2. Domestic law

National / domestic law of the sending states of the troops / personnel cover the following:

- (1) constitutional rules of participation in peace support operations;
- (2) laws on status of military personnel with special rules for foreign service / deployment;
- (3) application of domestic criminal law;
- (4) national ROE (rules of engagement), (if any);
- (5) national limitations / reservations / caveats on mandate and tasks:
 - a. constitutional;
 - b. international law obligations, etc.;
 - c. legal or policy-driven limitations.

3. Host nation law

Law of host nation shall be taken into account especially in the following issues:

- (1) status of forces issues, visa, diplomatic clearance in order to facilitate entry, exit, movement, embarkation, debarkation
- (2) laws, customs, habits, traditions

4. Law of third States

Law of third States has similar significance as the law of host nation, since a third State may become a host nation for a temporary period:

- (1) status of forces issues, visa, diplomatic clearance in order to facilitate entry, exit, movement, embarkation, debarkation, transiting, overfly

5. Special regulations of the mission

- (1) NAC decisions / NAC policies
- (2) Rules of engagement - ROE
- (3) Standing Operational Procedures - SOP
- (4) Force Commander's orders / Guides / Directives

B. LEGAL BASIS OF MILITARY OPERATIONS

1. Prohibition of use of force

Before we look at the legal basis in detail it is necessary to put the concept of the use of force into context.

The United Nations Charter was written in the mid 1940s during WW II. There was a realization that the end of the war would necessitate a new world order and ultimately the creation of a new world body. The aim of the UN Charter was the maintenance of international peace and security as stipulated in the Preamble to the Charter and repeated throughout.

The main organ with primary responsibility to maintain international peace and security is the Security Council (Article 24). The Security Council has extensive powers to recommend pacific settlement of disputes within the provision of Chapter VI but also mandatory powers of action under Chapter VII which can be provisional, economic or military.

However there has to be a determination that there has been a threat to the peace or a breach of the peace or an act of aggression. There can be other goals such as human rights, economic and cultural development, but conflict prevention is preeminent.

The United Nations Charter provides a general prohibition on the use of force:

UN Charter Article 2 (4):

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

This is the cornerstone of the UN Charter. Article 2(4) of the Charter gives substance to the statement of the intent to maintain international peace and security. Article 2 (4) is usually held to be the general prohibition on the use of force and aggression. It has been reaffirmed in many resolutions and exists as customary international law as well (see Nicaragua Case at ICJ).

All states recognize and accept the fundamental importance of the primary ban on the resort to force. In every example of the use of force in recent years, the state using force has acknowledged that international law raises a presumption that force is unlawful.

The UN Charter provides **two exceptions** to the prohibition.

One is Article 51 on self-defence, and the other is United Nations Security Council authorization under Chapter VII of the Charter.³¹⁴

2. Self defence

Article 51 is as follows:

*Nothing in the present Charter shall impair the **inherent right of individual or collective self-defence** if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.*

*Measures taken by Members in the exercise of this right of self-defence shall be **immediately reported to the Security Council** and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.*

By this, the notion of individual and collective self-defence that had already existed in customary international law and in state practice was reasserted.

Self defence is the most basic and fundamental legal basis for an operation involving the use of force. It is the inherent right of a state and it is integral to a state's sovereignty.

A well-known difference between the above-mentioned provisions of the Charter is that the prohibition in Article 2 (4) is wider than the exception in Article 51, which only allows counter measure including use of force when an armed attack occurs.³¹⁵

There are different kinds of self defence - individual and collective. Both are an inherent right which means that this right exists outside of the Charter. In other words the customary international law right of self defence remains extant.

HISTORY

The customary international law right of self defence was definitively expressed in the Caroline Case which involved diplomatic correspondence between the US Secretary of State and the British officials over the destruction of the **Caroline vessel**.

There was a dispute in 1837 in which some British military forces seized and destroyed the Caroline; it was birthed in an US port on the grounds that it was going to be used by rebels acting against British rule in Canada. It was sent over the Niagara Falls. It had been supplying US nationals who had been conducting raids into Canadian territory.

During subsequent British attempts to secure the release from US custody of one of the individuals involved, the US Secretary of State indicated that the UK had to show "a necessity of self defence, instant, overwhelming, leaving no choice of means and no moment for deliberation." Both states agreed these elements were necessary for self defence to be legitimate.

³¹⁴ Usually the literature takes the Security Council authorization first, but taking into account the fact that self defence has always existed in customary international law, this chapter deals with self defence first.

³¹⁵ A possible interpretation and various list of situations of aggression including armed attacks can be found at United Nations General Assembly Resolution 3314 (XXIX). Definition of Aggression.

The actions taken in pursuance must not be unreasonable or excessive 'since the act justified by the necessity of self defence must be limited by that necessary and kept clearly within it.'

This article also raises the question as to whether an armed attack must occur and whether a state has to wait for an armed attack to occur. Anticipatory self defence occurs when a state believes an attack is imminent. Is this legal? The Caroline case does not rule out anticipatory self defence when an attack is imminent. State practice also supports this.

There is much debate in the literature on the interpretation of armed attack, pre-emptive and preventive self-defence, and on the narrow or wide interpretations of self-defence, whether it is constrained to territory or not, or is extendable to the protection of nationals abroad and / or to military personnel and infrastructure abroad.³¹⁶

3. UN Security Council authorization

Another authority upon which use of force may be based is the SC authorization.

The UN Charter grants the UN Security Council a powerful role in determining the existence of an illegal threat or use of force, and wide discretion in mandating or authorizing a response to such a threat or use of force (enforcement). The unique role is grounded primarily in Chapter VII of the UN Charter.

Chapter VII gives the UN Security Council authority to label as illegal threats and uses of force, and then to determine what measures should be employed to address the situation.

Article 39 is the starting point. Before any authorization the SC must determine whether there is a threat/breach of the peace, or act of aggression. On such a determination the SC can adopt recommendations or make decisions to deal with the situation. Article 39 allows the Council to make non-binding recommendations to maintain or restore international peace and security.

A few examples:

1991: the Security Council determined the situation in the former Yugoslavia a threat to the peace.

1992: the Security Council held that the situation in Somalia was a threat to the peace and underlined the magnitude of the human tragedy caused by the conflict in Somalia, exacerbated by the obstacles created to the distribution of humanitarian assistance.

1992: the Security Council held that the deteriorating civil war situation in Liberia was a threat to international peace and security.

1994: the Security Council held that the genocide in Rwanda was a threat to international peace and security.

More recently in 2001 the SC held that the September 11 bombings of the World Trade Centre and the Pentagon were threats to the peace.

Article 40 allows for provisional measures and usually includes a demand for a ceasefire or withdrawal of troops from foreign territory.

Article 41 lists several non-military enforcement measures designed to restore international peace and security. These include "complete or partial interruption of economic relations and of rail,

³¹⁶ This Chapter does not deal with the interpretation of the existence of armed conflict, the significance of which is rather relates to the application of law of armed conflict and other possible legal consequences. However, this question is strongly linked to the legality of use of force. For further details see a comprehensive summary at USE OF FORCE REPORT - Initial Report on the Meaning of Armed Conflict in International Law Prepared by the International Law Association Committee on the Use of Force / INTERNATIONAL LAW ASSOCIATION RIO DE JANEIRO CONFERENCE (2008).

sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.” Article 41 measures are stated as a “decision” (mandate), binding on all UN members. The most comprehensive range of economic sanctions imposed by the SC was that following the invasion of Kuwait by Iraq in 1990.

Where the SC thinks that the measures under Article 41 are insufficient, it may take such action by air, sea or land forces as necessary to maintain to restore international peace and security. Action may extend to demonstrations, blockades and other armed operations by members of the UN. Article 42 contemplated that the Security Council would be able to mandate military action by forces made available to it under special agreements with UN Member States. These Article 43 special agreements have never been made, consequently, Chapter VII resolutions are in the form of an authorization to member States rather than a mandate. Therefore the SC authorizes Member States to take action. These operations are UN authorized operations not UN operations.

The first example of enforcement action was the UN’s reaction to the invasion of South Korea. The second example is the case of Kuwait in 1990-1991.³¹⁷

Security Council Resolution 678 (Kuwait 1990) reads, in pertinent part:

The Security Council ...

Noting that, [...] Iraq refuses to comply with its obligation to implement resolution 660 (1990) and the above-mentioned subsequent relevant resolutions, in flagrant contempt of the Security Council, ...

Acting under Chapter VII of the Charter ... 2. Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements ...the (withdrawal) resolutions to use all necessary means to ... implement (the withdrawal) resolution ...

Note the use of the word ‘authorizes’ as opposed to a more directive term. There have been dozens of similar resolution in the last 20 years including those authorising NATO’s actions in Bosnia-Herzegovina.

C. OTHER FORMS OF LEGAL BASIS FOR THE USE OF FORCE

In state practice usually the following situations are commonly accepted or at least not highly controversial as legitimate forms of use of force beyond the traditional self defence.

1. Protection of nationals / Non-Combatant Evacuation Operations

This is not specifically mentioned in the UNC and is *in statu nascendi*.³¹⁸ It involves the right of states to intervene in other states to protect their own nationals. This can be said to be excluded from Art 51 which requires an armed attack and against Art 2 (4) as the territorial integrity and political independence of the target state are infringed.

Examples:

In 1964 Belgium and the US sent forces to the Congo to rescue hostages from the hands of the rebels with the permission of the Congolese Government.

In 1975 the US used force to rescue a US cargo boat and its crew captured by Cambodia.

The most famous incident was the rescue by Israel of hostages held by Palestinian and other terrorist at Entebbe following the hijack of an Air France airliner. The SC

³¹⁷ See details at the end of this chapter.

³¹⁸ B. Simma (ed.), *The Charter of the United Nations. A Commentary*, New York: Oxford University Press 2002, vol. I, p. 133.

debate was inconclusive. Some states supported Israel's view that it was acting lawfully in protecting its nationals abroad others said that Israel had used aggression against Uganda or excessive force.

In 1984 the US used this basis for the invasion of Grenada and for their intervention in Panama in 1989 although in both cases the level of threat against the US citizens was such to raise serious questions concerning the principle of proportionality.

In 1993 the US launched missiles at the HQ of the Iraqi military intelligence in Baghdad as a consequence of an alleged Iraqi plot to assassinate President Bush in Kuwait. It was argued that the force was used to protect US nationals in the future.

Recent examples of rescuing US nationals:³¹⁹

Lebanon: 14,000 American citizens, July 2006.

Liberia (Assured Response): 2200 civilians, April-June 1996.

Central African Republic (Quick Response): 448 civilians, April 1996.

Albania (Silver Wake): 900 civilians, March 1997.

Sierra Leone (Nobel Obelisk): 2610 civilians, May-June 1997.

The UK view is that force may be used in self defence against threats to one's nationals if there is good evidence that the target attacked would otherwise continue to be used by the other state in support of terrorist attacks against one's nationals and there is no other way to forestall imminent further attack on one's nationals and the force used is proportionate to the threat.

2. Consent / invitation of host nation

Clearly if a nation seeks assistance and gives consent then it is not a breach of Article 2(4). The concept of consent is integral to a state's sovereignty.³²⁰

EXAMPLE

In 2001 in FYROM³²¹, the Albanian population were becoming increasingly unhappy with their representation. Tensions between the minorities became worse leading to an armed conflict. President Trajkovski requested help from NATO in June 2001 and the international community managed to break a cease fire and peace agreement. Operation Essential Harvest was a collection of arms from the rebels.

3. Humanitarian Intervention

A less commonly accepted form of use of military force is the humanitarian intervention.

This is not specifically mentioned in the UN Charter, however the Charter does reaffirm human rights.

Humanitarian intervention means intervention to protect a country's population in whole or in part from denial of their most basic human rights and principally their right to life. Arend and Beck define humanitarian intervention as: '(...) the use of armed force by a State (or States) to protect citizens of the target State from large scale human rights violations there.'³²²

³¹⁹ USA OPERATIONAL LAW HANDBOOK 2009, p155.

³²⁰ Whether the government that issues the invitation is legitimate or not, and whether the invitation was sent on its free will, is another question.

³²¹ Turkey recognises the former Yugoslav Republic of Macedonia under its constitutional name.

³²² Arend and Beck (eds.), *International law and the use of force. Beyond the UN Charter Paradigm*, London: Routledge 1993, p. 113.

In the framework of the UN Charter it is difficult to reconcile this right with Article 2(4). Practice has generally been unfavourable to the concept because it could be used to justify intervention by stronger states into the territories of smaller and weaker states. However, in some situations the international community may not take a condemnatory stand where large numbers of lives have been saved in circumstances of gross oppression by a state of its citizens.

CASE STUDY

The Kosovo crisis in 1999 also challenged this principle. The justification for the NATO bombing campaign acting out of area and without UN authorisation in support of the repressed ethnic Albanian population was that of humanitarian necessity. The UK argued that in exceptional circumstances and to avoid a humanitarian catastrophe military action can be taken.

The Security Council by 12 votes to 3 rejected a draft resolution that would condemn NATO's use of force. After the conflict and an agreement had been reached between NATO and Yugoslavia UNSCR 1244 was adopted. This welcomed the withdrawal of Yugoslav forces from the territory and decided upon the deployment under UN auspices of international civil and military presences.

Member States and international organisations were authorised to establish the international security presence whilst laying down the responsibilities. There was no formal endorsement of the NATO action but no condemnation.

D. CHARACTERIZATION OF THE OPERATION

Characteristics of the operation are strongly influenced by the characteristics of the conflict that is going on in the area or that is followed up by another operation.

The applicable law is determined by the characteristics of the conflict and might be influenced by the UNSC Resolutions, if any. The type of conflict has consequences on how and on which legal basis states may join / intervene, what status their forces will have, and what type of military operations they may want to conduct.

In case of traditional hostilities we may distinguish between international armed conflict or non-international armed conflict.

In international armed conflict states may exercise their legitimate and lawful right to self defence and may conduct warfare within the lawful means as provided by the law of armed conflict. The status of their forces will be also ensured by the law of armed conflict.

In case of non-international armed conflict third states may lawfully intervene only on the invitation of a legitimate government, and their status is determined upon the agreement between them and the host nation. Status of the insurgents is determined by the domestic law and the Common Article 3 of the Geneva Conventions and the Additional Protocol II (1977) to the Geneva Conventions, whenever applicable.

Whenever states do not become belligerents in the given conflict, for example they conduct crisis management operations, then they may do so either based on UN mandate or upon invitation. Their status is determined usually in the status of forces agreement with the host nation(s) or sometimes in the pertinent UN Security Council resolution.

Traditional law of armed conflict rules are detailed in the following chapter. Here, it is worth to describe the different notions of peace operations.

E. PEACE OPERATIONS

Today's world is still full of conflicts, crises, catastrophes where the necessity of military involvement becomes apparent. There are also many terms which refer to the different type of

military involvements, including the several terms that refer to different type of operations conducted under UN mandate and / or based on the invitation of the host nation.

However, none of these terms is defined in any legally binding document. Based on the most commonly used terms for the typical military operations with typical features, the following is provided as a possible alternative to identify those legal characteristics that are relevant in respect of the planning of the legal basis and legal framework.

Non military efforts usually involve **preventive diplomacy, peace-making, peace-building.**

A military type, but non-armed mission is the **observer mission.**

Armed military peace operations can be divided into two categories:

- **peace-keeping operations;**
- **peace-enforcement operations.**

In the context of this chapter peace-keeping and peace-enforcement operations are called **Peace Support Operations.**³²³

The NATO definition is:

peace support operation / opération de soutien de la paix / PSO

*An operation that impartially makes use of diplomatic, civil and military means, normally in pursuit of United Nations Charter purposes and principles, to restore or maintain peace. Such operations may include conflict prevention, peacemaking, peace enforcement, peacekeeping, peacebuilding and/or humanitarian operations.*³²⁴

There are many other widely used terms: conflict prevention, conflict resolution, stabilization, emergency measures, crisis of a military nature, crisis management. From legal point of view these terms are not determinative on the legal characteristics of a planned operation, however they may give a sense on the extent of hostilities, or on the local circumstances and on the nature of possible intervention.

1. Peacekeeping Operations

Peace Keeping Operations are not expressly mentioned or authorized in the UN Charter. Peace keeping is distinguished from peace enforcement as peace keeping is consensual and non aggressive, the opposite to peace enforcement.

It has grown in practice and it is commonly said that such operations fall between Chapter VI (peaceful settlement) and Chapter VII (enforcement), so that the term "Chapter VI ½" has been used. However this approach shall be carefully handled, and can be misleading, since one of the core points in the peacekeeping is the consent of the host nation(s). If consent is given, which is the exercise of the sovereign powers of that state, then it is not entirely clear why one would like to identify an express provision in the UN Charter.

Therefore it is not legally necessary to have a UN mandate for peacekeeping mission. Why then, that in most of the cases there is a UN mandate? There are several reasons that lie in the interest of all parties. The host nation(s) would like to see a guarantee from the international community that on one hand it is "seized with the matter" – to use the usual terms of the UNSC resolutions. On the other hand it is also a guarantee that the mandated foreign forces have a limited and clearly described mission and task and will not stay forever. The sending nations also need to have clear mandate to work along with, which limits their political and legal responsibility. Also, from political perspective it is better to have a mandate to avoid the appearance of being aggressor.

³²³ There are several interpretations and use of the term of peace support operations. In this chapter the term is used in its common meaning.

³²⁴ AAP-6(2009) -NATO GLOSSARY OF TERMS AND DEFINITIONS 2-P-3

Having a mandate does not exclude the requirement of having the host nation consent. The two usually go together, formally the host nation requests the UN to mandate a force, and in absence of a host nation consent the UN shall discontinue the mandate.

Peacekeeping involves the deployment of armed forces under UN control to contain and resolve military conflicts. Although initially intended to deal with inter-state conflicts they have been used more for intra state conflicts and civil wars. They are not intended to take enforcement action but to sustain and secure peace by physically separating the conflicting parties.

This is not an enforcement action as undertaken by the SC nor is it a pure observation. Peacekeeping forces usually perform more than the simple function of observing and reporting on hostilities. It is consensual and non aggressive, whereas enforcement is the opposite. Instead of being a party to the conflict as it was in Korea or the Gulf, the UN in its peacekeeping role is more impartial.

The basic principles are no intervention, non aggression and no alignment. This signifies that the peace keeping force must have the consent of the state involved and must be impartial. However, the consent of parties might be somewhat theoretical. The lack of consent does not turn the peacekeeping mission into a peace-enforcement mission.

It must have the co-operation of the states and the peacekeeping troops only have the right of self defence.

THE UNITED NATIONS PRACTICE AND PRINCIPLES

Excerpts from the publication United Nations Peacekeeping Operations / Principles and Guidelines 2008³²⁵

Consent of the parties.

United Nations peacekeeping operations are deployed with the consent of the main parties to the conflict. This requires a commitment by the parties to a political process and their acceptance of a peacekeeping operation mandated to support that process.

The consent of the main parties provides a United Nations peacekeeping operation with the necessary freedom of action, both political and physical, to carry out its mandated tasks. In the absence of such consent, a United Nations peacekeeping operation risks becoming a party to the conflict; and being drawn towards enforcement action, and away from its intrinsic role of keeping the peace.

Impartiality.

United Nations peacekeeping operations must implement their mandate without favour or prejudice to any party. Impartiality is crucial to maintaining the consent and cooperation of the main parties, but should not be confused with neutrality or inactivity. United Nations peacekeepers should be impartial in their dealings with the parties to the conflict, but not neutral in the execution of their mandate.

Non-use of force except in self-defense and defense of the mandate.

The principle of non-use of force except in self-defense dates back to the first deployment of armed United Nations peacekeepers in 1956. The notion of self-defense has subsequently come to include resistance to attempts by forceful means to prevent the peacekeeping operation from discharging its duties under the mandate of the Security Council. United Nations peacekeeping operations are not an enforcement tool. However, it is widely understood that they may use force at the tactical level, with the authorization of the Security Council, if acting in self-defense and defense of the mandate.

³²⁵ United Nations Department of Peacekeeping Operations Department of Field Support
<http://www.un.org/en/peacekeeping/>

Recent developments show that peacekeeping missions have received more robust mandate from the UNSC, including the possibility to use force beyond self-defence, for example in cases of protection of civilians, protection of property.

While these operations were traditionally grounded in Chapter VI of the UN Charter, which deals with peaceful means of settling disputes, today, more peace operations are considered peace enforcement operations and carry with them a Chapter VII authorization from the Security Council.

The NATO definition and description is:

peacekeeping / maintien de la paix / PK

A peace support operation following an agreement or ceasefire that has established a permissive environment where the level of consent and compliance is high, and the threat of disruption is low. The use of force by a peace support force is normally limited to self-defence.³²⁶

Peacekeeping. *PK operations are generally undertaken in accordance with the principles of Chapter VI of the UN Charter in order to monitor and facilitate the implementation of a peace agreement. A loss of consent and a non-compliant party may limit the freedom of action of the PK force and even threaten the continuation of the mission. Thus, the requirement to remain impartial, limit the use of force to self-defence, and maintain and promote consent would guide the conduct of PK.³²⁷*

The status of forces is usually provided in an agreement between either the UN or the troop contributing nations and the host nation(s). In case of no agreement general customs and host nation law apply. In some cases the UNSC provides interim solution.

2. Peace-enforcement Operations

Peace-enforcement is something much more robust. The main characteristic is the coercive nature, which follows from the basic starting point: one of the parties in a conflict or other situation that constitutes a threat or danger to the peace and security, is not willing to obey the UN SC resolutions. Therefore enforcement measures are needed to restore peace and security in that region. However, there are several instances when missions under Chapter VII have been conducted with the consent of the target State. An operation under a Chapter VII UNSC resolution has greater legitimacy. Furthermore, the State's consent is not guaranteed forever, therefore an enforcement action may continue even if the State withdraws its consent.

Peace enforcement actions are authorized by the UNSC under Chapter VII of the Charter. Decisions made under Chapter VII are mandatory for all the States, including the target state and other states. This is especially important as regards the transition of UN mandated forces through the territories of third countries, as well as other support. The UN Charter expressly demands to facilitate the implementation of the UNSC resolutions:

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

In contrast to the peace-keeping operations, peace enforcement missions are characterized as follows:

- there is usually no need for consent of the Parties / States whose territory is concerned;
- international mandate is necessary,
- usually there is no sense for impartiality, since UN mandated forces are intervening in favour of one or more parties;

³²⁶ AAP-6(2009) -NATO GLOSSARY OF TERMS AND DEFINITIONS 2-P-3

³²⁷ AJP-3.4.1 PEACE SUPPORT OPERATIONS p 2-4 section 0216.

- depending on the mandate, but usually there is an extended right to use of force, not only in self-defence.

The authorization that accompanies these operations is usually narrowly worded to accomplish the specific objective of the peace operation.

The NATO definition and description is:

peace enforcement / imposition de la paix / PE

A peace support operation conducted to maintain a ceasefire or peace agreement where the level of consent and compliance is uncertain and the threat of disruption is high. The peace support force must be capable of applying credible coercive force and must apply the provisions of the ceasefire or peace agreement impartially.³²⁸

Peace Enforcement. *PE operations normally take place under the principles of Chapter VII of the UN Charter. They are coercive in nature and are conducted when the consent of all Parties to the conflict has not been achieved or might be uncertain. They are designed to maintain or re-establish peace or enforce the terms specified in the mandate. In the conduct of PE, the link between military and political objectives must be extremely close. It is important to emphasise that the aim of the PE operation will not be the defeat or destruction of an enemy, but rather to compel, coerce and persuade the parties to comply with a particular course of action. The provision of adequate military forces to establish a coercive combat capability is critical to any decision to deploy Alliance forces on a PSO.³²⁹*

The status of forces depends on the nature of the conflict. In case of war or warlike situations, law of armed conflict apply. In the application of LOAC it has no significance whether the operation was mandated by the UNSC or not. That also means that the status under LOAC of the opposing forces of the target State is not affected by the fact of being declared as an aggressor State by the UNSC.

In case of other peace enforcement situation a SOFA agreement would be essential. This is of course only feasible if the operation is consented by the host nation at least to a minimum extent.

F. THE NATO CONTEXT

In the NATO context nothing is different from the abovementioned legal framework. From a legal perspective the UNSC in its resolution authorizes the states and not the NATO. Naturally, from political and practical perspective the UNSC usually does not issue an authorization when it is not sure who will implement it.

Therefore, it is one question that the authorization by the UNSC looks the same irrespective of the potential undertaker, and another question, that in a certain situations, based consultations and agreements, NATO as an organization undertakes the lead of an operation, establishes operational headquarters, etc.

NATO, as the expression of joint effort of nations, embodying the collective self defence obligation as provided in the Washington Treaty, may decide on conducting self defence operations or any type of military operation based on legitimate purposes and on international law.

As regards the self defence, Article 5 of Washington Treaty has much more political and practical than legal relevance. Nations have the right to collective self defence anyway, they do not need the Treaty or the Organization to exercise this right. The reason to have the Treaty and the organisation is to have a political guarantee for the collectiveness, the unity of policies and efforts, as well as to have the technical means and organizational structure that facilitate the implementations and exercise of self defence.

³²⁸ AAP-6(2009) -NATO GLOSSARY OF TERMS AND DEFINITIONS 2-P-2 - 2-P-3

³²⁹ AJP-3.4.1 PEACE SUPPORT OPERATIONS p 2-4 section 0217.

1. “Non Article 5 operations”

Many NATO documents refer to a term of non-Article 5 operations, which means non self defence situations.³³⁰

The NATO Handbook 2006 has the following explanation:³³¹

Within NATO, there are now two broad categories of crisis management operations that member countries may consider, namely operations calling for collective defence, and other crisis response operations in which collective defence is not involved.

Collective defence operations are based on the invocation of Article 5 of the North Atlantic Treaty and are referred to as “Article 5 operations”. They carry the implication that the decision has been taken collectively by NATO members to consider an attack or act of aggression against one or more members as an attack against all. NATO has invoked Article 5 once in its history, in September 2001, following the terrorist attacks against the United States.

Other crisis response operations include all military operations that the Alliance may decide to conduct in a non-Article 5 situation. They may be designed to support the peace process in a conflict area and, in those circumstances, are referred to as peace support operations. However, they include a range of other possibilities including conflict prevention, peacekeeping and peace enforcement measures, peace-making, peace-building, preventive deployment and humanitarian operations. NATO’s involvement in the Balkans and Afghanistan are examples of crisis management operations in this category. Other illustrations include NATO’s supporting role for Polish troops participating in the International Stabilisation Force in Iraq and the acceptance of responsibility for assisting the Iraqi government with the training of its national security forces by launching the NATO Training Mission for Iraq referred to above.

AJP-3.4 NON-ARTICLE 5 CRISIS RESPONSE OPERATIONS gives the following definition:

Non-Article 5 Crisis Response Operations

(1) NATO activities falling outside the scope of Article 5 are referred to collectively as “NA5CROs.” One principal difference between Article 5 operations and NA5CROs is that there is no formal obligation for NATO nations to take part in a NA5CRO while in case of an Article 5 operation, NATO nations are formally committed to take the actions they deem necessary to restore and maintain the security of the North Atlantic area.³³²

Followed by the notice on legal aspects:

Legal Aspects. *NA5CROs will be initiated by an NAC Initiating Directive and executed in accordance with international law, including international humanitarian law, which applies in cases on international armed conflict. Commanders have a legal responsibility in accordance with national obligations and international legal statutes and agreements concerned with armed conflict and the law of war. Legal staffs advise the commander on these matters. However, in addition to fulfilling applicable legal requirements, commanders should always seek to minimise the effect of military operations on non-combatants.³³³*

2. The decision making process

The legal framework of a NATO operation therefore includes the following legal sources:

³³⁰ From a legal perspective it is interesting to see, that apart from the legal basis of self defence, what other difference this term of art makes that is necessary to take into account in the details of operational planning?

³³¹ NATO Handbook 2006, pp 44-45.

³³² AJP-3.4 , p 1-1, section 0102. b.

³³³ AJP-3.4 , p 2-9, section 0217.

- UN SC Resolution(s) and / or host nation request or consent, before or after the UNSCR, but before deployment;
- NAC documents;
- Commander's Intent / Principles / Directive;
- Task Assignments;
- SOP's, Mission FRAGO's (fragmentary order), etc.

When NATO decides to launch an operation, the procedure is the following:³³⁴

The NAC issues its decision on the operation: *NAC Initiating Directive* (NID).

After that the tactical level commands, led by the strategic level command (Allied Command Operations) prepare the draft of the *Concept of Operation* (CONOPS). The CONOPS is sent to the NAC via the Military Committee.

If the CONOPS is approved by NAC, the *Operations Plan* (OPLAN) is prepared and submitted via the same channel, and is approved by NAC, followed by the *Rules of Engagement* (ROE), also approved by NAC.

For the actual implementation and execution of the operational plans, the NAC issues the *Execution Directive* to execute an operation, followed by the *Activation Order* issued at the strategic level.

Thus, all the main decisions are made by the NAC and not by the military side. All NAC decisions are made by consensus and therefore with the involvement of all nations. This is important to note, since these are the most important documents necessary to operational planning and execution. NAC approval guarantees the highest political level and the common decision of all Member States.³³⁵

Any documents issued below the level of NAC shall be consistent with the NAC decisions.

3. The example of ISAF

The International Security Assistance Force in Afghanistan (ISAF) is UNSC authorized peace enforcement operation. The legal basis of the presence of ISAF forces has the necessary requirements, both the host nation consent and the UNSC authorization.

As regards the characterization of the situation, currently it is considered to be non-international armed conflict, where ISAF forces are representing third states that were invited by the legitimate government and supported by the UNSC.

The ISAF operation is conducted in parallel and in strong cooperation with the US-led counter-terrorist Operation Enduring Freedom.

The starting point of the legal basis is the *Bonn Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions*, that was signed on 5 December 2001 in Bonn, Germany between the Afghan tribal leaders and witnessed by the United Nations.

³³⁴ The detailed description of the procedure, as part of the operational planning procedure can be found in: ALLIED COMMAND OPERATIONS COMPREHENSIVE OPERATIONS PLANNING DIRECTIVE (COPD-Trial version) FEBRUARY 2010

³³⁵ All of this does not mean, contrary to a frequent misunderstanding – that the NATO may issue *mandate* for a military operation. Legally speaking the NATO does not issue mandate, but orders, which contain tasking for the forces of those Member States which decide to participate. The mandate – in the formal sense of the word, meaning legal basis – comes from either UNSC and / or based on the invitation of the host nation. Of course, in political sense, one can talk about *mandate* by NATO, but this is commonly misunderstood as the legal basis for the operation.

In the Bonn Agreement the UN was expressly requested to authorize the Member States to send forces:

3. Conscious that some time may be required for the new Afghan security and armed forces to be fully constituted and functioning, the participants in the UN Talks on Afghanistan request the United Nations Security Council to consider authorizing the early deployment to Afghanistan of a United Nations mandated force. This force will assist in the maintenance of security for Kabul and its surrounding areas. Such a force could, as appropriate, be progressively expanded to other urban centres and other areas. ³³⁶

ISAF is not a UN force, but is a coalition of the willing deployed under the authority of the UN Security Council mandate. NATO took on ISAF command on 11 August 2003, since then ISAF is supported and led by NATO, and financed by the troop-contributing countries.

ISAF's mandate was initially limited to providing security in and around Kabul. In October 2003, the UNSC extended ISAF's mandate to cover the whole of Afghanistan (UNSCR 1510), paving the way for an expansion of the mission.

The UN Security Council resolutions that provides the extension of mandate annually: 1386 - 20 Dec 2001, 1413 - 23 May 2002, 1444 - 27 Nov 2002, 1510 - 13 Oct 2003, 1563 - 17 Sep 2004, 1623 - 13 Sep 2005, 1659 - 15 Feb 2006, 1707 - 12 Sep 2006, 1776 - 19 Sep 2007, 1833 - 22 Sep 2008, 1890 - 08 Oct 2009³³⁷.

³³⁶ Bonn Agreement ANNEX I - INTERNATIONAL SECURITY FORCE

³³⁷ At the time of writing the mission is authorized until 13 Oct 2010 by UNSCR 1890.

PART XII
INTRODUCTION TO THE LAW OF ARMED CONFLICT
AND RULES OF ENGAGEMENT

References and suggested reading:

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- Marco Sassòli, Antoine Bouvier (ed.) How does law protect in war ? Cases, documents and teaching materials on contemporary practice in international humanitarian law, ICRC, Geneva, 2nd edition 2006
- MC 362/1, NATO Rules of Engagement
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- UK: The Manual of the Law of Armed Conflict (Oxford University Press, Hardback 2004, Paperback 2005) by UK Ministry of Defence
- USA Law Of War Deskbook International And Operational Law Department International And Operational Law Department The Judge Advocate General's Legal Center and School, U.S. Army Charlottesville, VA, USA / January 2010
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- www.icrc.org

A. INTRODUCTION TO THE LAW OF ARMED CONFLICT AND RULES OF ENGAGEMENT

A primary function of the legal adviser is the provision of advice and training on the Law of Armed Conflict and the Rules of Engagement. This section will provide an overview of these subjects. First, a brief overview of the sources and principles of the Law of Armed Conflict (LOAC) will be provided. Next, a summary of the NATO Rules of Engagement (ROE) process will be discussed. The final part of this section will provide a summary of NATO doctrine and other publications that discuss the training in LOAC and ROE principles in the NATO context.

LOAC and ROE are related subjects about which there have been volumes written, and much continues to be written on these subjects from the NATO perspective as well as the perspective of different national military forces. For this reason, the discussion below should be regarded only as the briefest of overviews and should not by any means be considered exhaustive. Any legal adviser who intends to work in the operational context should invest time in a detailed course of instruction as well as a more detailed reference text on the subject.

1. Sources and Principles of Law of Armed Conflict

Primarily, international law governs relations between states. In time of armed conflict, it regulates circumstances when states may use force (*jus ad bellum*) and the manner of armed force that can be used (*jus in bello*). LOAC is not concerned with the legality of a state using force. As soon as we are in presence of an armed conflict LOAC applies. Essentially, LOAC protects people from unnecessary suffering and safeguards the fundamental rights of the civilians and those who are not or are no longer taking part in an armed conflict.

When considering the sources and principles of LOAC, the reader should keep in mind that all of LOAC represents the international community's attempt to balance two basic criteria – the Military Factors that affect the successful planning and execution of military operations, and the Humanitarian Factors which allow all societies to meet the basic moral codes of the society. This balance has taken place, and continues to take place, in all cultures and times. Where the balance is struck in any particular conflict or operation may vary, just as the specific application of LOAC has varied across cultures and times, however, the basic principles remain.

(1) Sources

LOAC, like other parts of international law, arises from two basic sources: customary and treaty law.

Customary international law encompasses rules which, as a result of state practice accompanied by the legal belief (*opinion iuris*) over a period of time, have become accepted as legally binding³³⁸. Treaty international law arises through the conclusion of international agreements and treaties between two or more States. Generally, treaties are binding only on States party to them. Much of LOAC in today's environment comes to us through a mixture of these sources.

(2) Streams

There are two basic streams of LOAC, each with a specific focus and impact on planning and execution of operations. The GENEVA STREAM, which emanates from the various Geneva Conventions, provides the international community's perspective on protection of victims of war.

³³⁸ See the Statute of the International Court of Justice, Article 38 (1) b "... general practice accepted as law"

The HAGUE STREAM, originating from the Hague Conventions of the late 19th and early 20th century, focuses on the means and methods of warfare, such as bombardment, weapons, deception, and so forth.

The following lists provide the key documents for each of these streams of LOAC:

- a. GENEVA STREAM (Protection of Victims of War)
 - 1864 - Geneva Convention (Wounded)
 - 1906 - Geneva Convention (Shipwrecked)
 - 1929 - Geneva Conventions (Wounded and Prisoner of War)
 - 1949 - Geneva Conventions (Wounded (GC I), Shipwrecked (GC II), Prisoner of War (GC III) and Civilians GC IV))
 - 1977 - Additional Protocols to Geneva Convention
 - 2005 - Additional Protocol III to Geneva Convention
- b. HAGUE STREAM (Means of warfare)
 - 1868 - St. Petersburg Declaration - Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grams Weight
 - 1899 - Hague Declaration - Asphyxiating Gases
 - 1907 - Hague IV Convention with Regulations
 - 1925 - Gas Protocol
 - 1954 - Hague Cultural Property Convention
 - 1977 - Additional Protocols to the Geneva Conventions
 - 1980 - Conventional Weapons Convention and its Protocols
 - 1993 - Chemical Weapons Convention
 - 1997 - Anti-Personnel Mine Convention
 - 2008 - Convention on Cluster Munitions

(3) Principles

Arising from these agreements, and as will be more fully discussed below, are the following core principles of LOAC:

- Military Necessity
- Distinction
- Proportionality
- Humanity
- Non-discrimination

Generally speaking, these principles trace their origins in 1907 Hague Convention acknowledging that the rights of belligerents to adopt means of injuring the enemy are not unlimited. It is important to note that all these principles interact with each other.

a. Military Necessity

This principle could be considered, in many ways, as the foundation of all of LOAC. Under this principle, States can use force not otherwise prohibited by LOAC that is necessary or required for the submission of the enemy. The principle contains two additional elements: the force used can be and is being controlled and unnecessary force is unlawful. Necessity is a condition precedent to

legitimacy, not a final determiner; in other words, necessity is not in any way a waiver of any other LOAC principle, but must exist in order to get to any analysis under LOAC. As such, it is already factored into LOAC (E.g. art. 41 par. 3 and 52 API and the preamble of the St. Petersburg Declaration).

b. Distinction³³⁹

This principle is a central theme of LOAC. It requires a force to identify and differentiate between civilians and combatants and between valid military targets, which may be lawfully attacked, and civilian objects, which are not valid targets. While the principle of distinction is discussed and found in many different *fora*, the commonly accepted definition is stated in Article 51 of the First Additional Protocol to the Geneva Conventions (AP I):

[T]he parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.'

Article 52 (2) AP I goes on to state that:

“Attacks shall be limited strictly to military objectives ... (which are) ... those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

The second part of article 52 (2) “*offers a definite military advantage*” limits the first part which is that the object “*makes an effective contribution*”. Therefore both parts must apply before an object can be considered a military objective. The expression “in the circumstances ruling at the time” means that when the decision is taken to attack a military objective, the conditions required by article 52(2) should still exist at the time of the attack. As for the term “military advantage” it means the advantage that can be expected from an attack as a whole and not only from a specific part of the attack.

What objects by their nature, location, purpose or use could be a military objective? Nature refers to those objects used by forces which are military objects *per se*. It goes from barracks and transportation vehicles to command post and ammunitions depot. Location includes areas which are militarily important because they must be captured or denied to the enemy. An area of land like a hill, with a dominant view over the forces could be a military objective. Use means the present function of an object. For instance if a school is by nature a civilian object, it may become, should armed forces used it to lodge troops, a military objective. As for purpose, it means the future intended use of an object. If we know, for instance, that a bridge will be used by enemy forces approaching our position, it could be the object of an attack.

In practice, article 52(2) can be difficult to apply, especially with regard to certain civil infrastructure. For example, are bridges always a legitimate target? What about electrical systems? While each may have some military value, it is also clear that the civilian populace relies upon this infrastructure to a great degree, and may be inconvenienced or indeed put at risk if either is attacked.

Both bridges and electrical systems are problematic dual use cases. The analysis is situation dependant, and it should be kept in mind that the circumstances at the time of the conflict are those upon which the analysis is based. Traditionally and clearly, both bridges and electrical power systems have been found to be legitimate military objectives BUT empirical studies have tended to show the fact that there was minimal military advantage gained from attacks on electrical power systems in most (but not all) cases. It may be that, in striking the balance suggested by the language of the API, collateral damage concerns may predominate.

c. Proportionality

³³⁹ See advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, [1996] ICJ Rep. 26, 257. The court recognized this principle of distinction between combatants and civilians.

Besides distinction, the principle of proportionality is probably the most important principle of war in targeting the enemy. The underlying principle of proportionality seeks to strike a balance between two diverging interests, one dictated by considerations of military need and the other by requirements of humanity when the rights or prohibitions are not absolute.

Proportionality requires that the incidental loss of civilian life or damage to civilian objects, the humanitarian interest, must not be excessive compared to the concrete and direct military advantage anticipated, the military interest. The commonly stated principle of proportionality is summarized in Articles 51 (5) (b) and 57 (2) (b) of AP I: “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated is considered to be disproportionate.” Here again, the specific words used are important. The “Concrete and Direct military advantage anticipated” is weighed against Expected collateral damage. It may be that, as a matter of fact or due to matters beyond the knowledge of the decision maker at the time the decision is being made, other important factors would have resulted in a different decision.

For instance a munitions factory may be such an important objective that the death of civilians working there would not be disproportionate to the military gain achieved by destruction of the factory. A more significant factor may be the number of incidental casualties and the amount of property damage caused among civilians living nearby, if the factory is in a populated area. The explosion of a munitions factory may cause serious collateral damage but that is a risk of war that would not automatically offend the proportionality rule.

Collateral Damage is defined as loss of life or injury to civilians or damage to civilian objects which is UNINTENDED (even if foreseeable) resulting from military action. Collateral damage shall never be deliberate, but is instead incidental to military action, even if foreseeable. The key is that such unintended damage must not be excessive or disproportionate to the military advantage to be gained from the specific act or attack.

d. Humanity

On its face, the concept of Humanity seems most at odds with the conduct of warfare, and appears the most ephemeral and unenforceable in the context of LOAC. Yet this concept is again another way of looking at the fundamental principle of necessity. Humanity forbids the infliction of suffering, injury or destruction not actually necessary for legitimate military purposes. The principle of humanity was expressly enunciated in the Martens Clause, which first appeared in the Preamble to 1899 Hague Convention II on Laws and Customs of War on Land:

‘(...) populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usage established between civilized nations, from the laws of humanity and the requirements of the public conscience.’³⁴⁰ (E.g. Art. 63 GCI, Art. 62 GCII, Art. 142 GCIII, Art. 158 GCIV, Art. 1 API and Preamble of APII.

The principle of humanity is based on the notion that once a military purpose has been achieved the further infliction of suffering is unnecessary. If an enemy combatant has been put out of action by being wounded or captured there is no military purposes to be achieved by continuing to attack him. This principle put limits on actions that might otherwise be justified by the principle of necessity. For instance a commander may say that military necessity requires him to kill wounded enemy combatants that he holds, on the basis that once recovered they would continue to fight. Humanity intercedes on behalf of the wounded, recognizing that they are out of action and they do not pose an immediate threat and requires them to be saved and treated humanely.

Chivalry, as a part of humanity, can be difficult to apply in legal terms. This concept recognizes the common profession of military personnel and the common plight of those found in

³⁴⁰ See A. Roberts and R. Guelff, *Documents on the Laws of War*, New York: Oxford University Press 2000, p. 8-9.

conflict situations. As traditional forms of warfare give way to more unconventional conflicts, the principle of Chivalry appears less a foundational principle of LOAC.

e. Non-Discrimination

Another of the less concrete principles, this concept considers that there would be no adverse treatment on the basis of race, religion, sex etc. Here, too, this principle may be best understood in terms of military necessity; the distinctions listed, if they bear no rational relationship to the military capability of an adversary, then they cannot form a legitimate basis for targeting. The law would bind both sides regardless of the equities of the conflict. (e.g. 1899 and 1907 Hague Regulations Article 22-8 and Article 51 (4) and 48 AP I).

2. Enforcement of LOAC Principles

It should first be kept in mind that LOAC was developed and continues to bear legitimacy because it serves higher purposes. Those purposes have traditionally included the goal of reducing unnecessary suffering, protection of the victims of armed conflict - both combatants and non-combatants and, through these two purposes, the higher purpose of facilitating an earlier restoration of peace than might otherwise be the case.

Militaries have, over the years, found a number of reasons to obey LOAC. These include the principled reasons of Professionalism, Chivalry, and Conscience. Aside from these principled reasons, though, there are very pragmatic ones as well. Criminal Liability, both individual and of the command, is one reason but, quite honestly, not considered the predominate one. Reciprocity is often cited as a pragmatic reason and, though not without some criticism, is believed to be still significant. From a strict military perspective, there is the goal of Operational Effectiveness. Any use of force which does not translate into clear military advantage is a potential waste of ammunition and other resources. Finally, and especially in the current climate of global information, is the reason of maintaining public support - foreign as well as domestic. Alleged violations of LOAC severely threaten the perceived legitimacy of a nation's or coalition's efforts and with the erosion of public support comes a reduction of political and economic support.³⁴¹

Nevertheless, a party to an international armed conflict is bound to comply with the LOAC even if an adverse party breaches the law. Compliance with the law by one party is a strong inducement for the adverse party to comply with the law. As a practical matter, if one party treats Prisoners of War (PWs) properly or confines its attacks to military objectives, the adverse party is less likely to be tempted to breach the law.

3. Criminal Responsibility

LOAC requires that violations of principles carry the threat of criminal sanction. Every NATO nation has to a degree developed means of addressing LOAC violations under military justice law or the criminal codes. Individual responsibility for acts done by individual service members is primarily addressed by national sanctions.

Generally, subordinates are not held criminally responsible for acts carried out in obedience to orders. This cannot serve as a total defence in the case of LOAC violations, as there is an overriding duty of a service member to disobey manifestly unlawful orders. Obviously this concept

³⁴¹ Other sources: in Dieter Fleck's Handbook the following factors are grouped under enforcement measure: - public opinion, - reciprocal interests, - maintenance of discipline, reprisals, penal and disciplinary measures, compensation, protecting powers, international fact finding, ICRC's activities, diplomatic activities, dissemination of humanitarian law, personal liability. The Canadian The Law of Armed Conflict at the Operational and Tactical Levels (B-GJ-005-104/FP-021 / 2001-08-13) lists the following among PREVENTATIVE AND ENFORCEMENT MEASURES: dissemination, command responsibility, state responsibility, reprisals, complaint procedure under the Geneva Conventions, complaints, good offices, mediation and intervention, fact-finding commission under Protocol I.

is simple to state but much more difficult to enforce; hence the need for effective training and oversight.

4. Command Responsibility

Less clear has been the ability of the international community to enforce the concept of Command responsibility. Under this concept, leaders may be held criminally responsible for acts of their subordinates; both those acts ordered by the commander as well as those which the commander should have been aware of.

The juridical development and the codification of the concept of Command Responsibility started in the 20th century, however this concept had been already discussed before and put on the minds of those who participated in armed conflicts. In this vein, the Chinese warrior-philosopher Sun Tzu³⁴² and other Commanders in history have described the obligation of Commanders to assure a certain civilized behaviour during the battle.

HISTORICAL BACKGROUND

Paraphrasing Eugenia Levine³⁴³, “In 1439 when Charles VII of France issued the Ordinance of Orleans, which imposed blanket responsibility on Commanders for all unlawful acts of their subordinates, without requiring any standard of knowledge. The first international recognition of Commanders’ obligation to act lawfully occurred during the trial of Peter von Hagenbach by an ad hoc tribunal in the Holy Roman Empire who convicted Von Hagenbach of murder, rape, and other crimes which ‘he as a knight was deemed to have a duty to prevent’ ”.

The General Orders no. 100 passed during the United States Civil War set up the “Lieber Code” that imposed criminal responsibility on Commanders for ordering or encouraging soldiers to wound or kill already disabled enemies. Convention (IV) 1907 was the first attempt to codify this embryonic practice.

The court stated in the Von Leeb Nuremberg case that: ‘A high Commander cannot be kept completely informed of the details of military operations of subordinates and must assuredly not know of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed’. See Law-Reports of Trials of War Criminals, The United Nations War Crimes Commission, Vol. XII, London 1949, no. 72, the High Command Trial: United States-Von Leeb et al. United States Military Tribunal, Nuremberg.

The doctrine of Command Responsibility is codified in article 86(2) Additional Protocol I of 1977 to the Geneva Conventions of 1949, which provides that a superior is responsible for the offences of his subordinates if he knew, or ought to have known, of them and failed to take steps to prevent them. ³⁴⁴

³⁴² Sun Tzu, *The Art of War*, Boston/London: Shambhala 1988. E.g. chapter 1, p. 45, 6th principle: ‘Leadership is a matter of intelligence, trustworthiness, humaneness, courage, and sternness’ and chapter 3, p. 66, first principle: ‘The general rule for use of the military is that it is better to keep a nation intact than to destroy it (...)’.

³⁴³ Command Responsibility, Global Policy Forum, www.globalpolicy.org, 2005.

³⁴⁴ Additional Protocol I of 1977 Article 86.2 states that “the fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve this superiors from [...] responsibility [...] if they know, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or about to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach”.

The case law of Nuremberg and Tokyo trials, the AP I, the rulings passed by the International Criminal Tribunals for the former Yugoslavia and Rwanda³⁴⁵, and the doctrine codified by Article 28 of the Rome Statute of the International Criminal Court³⁴⁶ are the contemporary developments and contribution to the Command Responsibility concept.

The difference between the old concept of Command Responsibility and the after-WWII concept is mainly that, in addition to the inherent responsibility of Commanders, the accountability has been extended to their subordinates under their Command. This view of responsibility benefits the perception of NATO forces because the "armed forces can be successfully integrated into a system of good governance based on human rights and the rule of law"³⁴⁷.

(1) Principles of Command Responsibility:³⁴⁸

- a. A Commander has the duty to take steps in order to prevent violations of the law and, if necessary, to take disciplinary action. He or she may not deliberately or wilfully disregard his duties, neither discharge them;
- b. Proof of knowledge is necessary. Command Responsibility is based on how much Commanders must have known *ante* to become criminally bound for subordinates' crimes or troops acting in their Area of Responsibility (AOR). Doctrine has produced particular visions of such knowledge:
 - i. Commanders should have known or ought to have know about the crimes committed by their subordinates or troops manoeuvring in their AOR;
 - ii. Commanders must have known; or
 - iii. Commanders actually knew.³⁴⁹
- c. Commanders are responsible for having failed to find out about the crimes.

(2) A Commander can be held responsible for war crimes in an area under his control by persons not under his command.³⁵⁰

³⁴⁵ See C. Fournet, *International Crimes: Theories, Practice and Evolution*, London: Cameron May 2007, p. 116-123 and the websites <<http://www.un.org/icty/>> and <<http://www.69.94.11.53/>>.

³⁴⁶ Article 28 of the Statute of the International Criminal Court codifies the tenet of Command Responsibility (in the context of effective control over a subordinate):

- (a) A military Commander or person effectively acting as a military Commander shall be criminally responsible for crimes (...) committed by forces under his or her effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military Commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That the military Commander or person failed to take all necessary and reasonable measures within his or her power to prevent or suppress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be responsible for crimes (...) committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where
 - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; and
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

³⁴⁷ U. Haussler, *Ensuring and Enforcing Human Security. The Practice of International Peace Mission*, Nijmegen, The Netherlands: Wolf Legal Publishers 2007, p. 51.

³⁴⁸ See A.P.V. Rogers, *Law on the Battlefield*, Manchester: Juris Publishing 2004, p. 189-214.

³⁴⁹ *Ibid.*, p. 74. Furthermore the court stated that the Commander can be held responsible when he has 'passed the order to the chain of Command and the order must be one that is criminal upon his face, or one which he is shown to have known was criminal.'

Mens rea - the criminal intent - is the key element that distinguishes the two doctrinal approaches of Command Responsibility: what the Commander should have known and what the Commander failed to find out. Unfortunately, jurisprudence and customary law have not reached a standard concept of *mens rea*, which leaves the question unresolved.

This approach compels Civilian Representatives and Commanders to be proactive in every phase of the operation. This requires active communication with the Strategic Commander, the Military Committee, the NAC and subordinates contingents of troop contributing nations, and troops operating in the NATO area of responsibility such as the Receiving State government or security.

B. NATO RULES OF ENGAGEMENT

The MC 362/1, "NATO Rules of Engagement" was approved by the North Atlantic Council in 2003. The document contains a compendium of strategic and operational ROE and NATO policy for approving and implementing these rules for all NATO/NATO-led military operations.

Rules of Engagement (ROE) are defined in MC 362/1 as:

"ROE are directives to military forces (including individuals) that define the circumstances, conditions, degree, and manner in which force, or actions which might be construed as provocative, may be applied."

The development of ROE is due to the realization that the function of the profession of arms is the ordered application of force in the resolution of a social problem. As Clausewitz stated in his treatise, "War is not merely an act of policy but a true political instrument, a continuation of political intercourse carried on by other means...[t]he political object is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose."

ROE, therefore, are the instrument by which the political leadership exercises control of the means of armed force. The Law of Armed Conflict must be differentiated from Rules of Engagement issued by various countries, or by international organizations.

ROE were for many years kept classified, but over the past decade this is less and less often the case, as awareness of ROEs and their importance has spread to politicians, journalists, and laymen. It is now believed that bringing ROE into the open discourse is of benefit.

Because of the nature of ROE as a means of political and operational control over the use of force, ROE get robust application all along the Continuum of Violence from pure peaceful operations through the various operations now classified with different terms, in the USA as "Operations Other than War" up or the slightly ambiguous term used in NATO: non-article 5 operations, to the conduct of armed conflict itself. The more complex the operational and tactical environment, the more complex the ROE will likely be, and this has in the past carried risk - risk that the application of ROE will result in either an under-reaction or an over-reaction to a situation.

For these reasons, it is critical that the development and application of ROE be fully understood.

Normally, the ROE are formulated on the basis of three important categories of considerations:³⁵¹

- Legal
- Political and Policy Considerations

³⁵⁰ Rogers 2004, p. 195.

³⁵¹ The Use of Force in CF Operations (issued by Canadian Forces B-GJ-005-501/FP-000 , 2001-06-01) lists a fourth one: c. **Diplomatic Considerations**. During international operations and, in particular, during combined operations, the overall military objectives and the use of force will be influenced by the collective objectives of the alliance or coalition. These diplomatic considerations may ultimately limit legitimate uses of force, or they may permit a greater latitude in the use of force than would be permitted in a purely Canadian operation;

- Operational Requirements

1. ROE in NATO framework:

MC 362/1 sets out the general concepts for ROE as well as the ROE Procedures. There are a number of specific processes used to develop and gain approval of ROE measures. These include:

- ROEREQ – the ROE request, sent by a subordinate command to a senior (or to the NAC);
- ROEAUTH
- or ROEDENY – the response from higher authority denying or authorizing measures as may be the case;
- ROEIMPL – a communication implementing the ROE in a specific operational context;
- ROEAMPS – amplification of ROE where needed; and
- ROESUMS – summaries of ROE which have already been approved or modified.

MC 362/1 – the NATO ROE, provides guidance and direction on rules of engagement for NATO in both joint and combined operations. Promulgated in July 2003, it is the only standing Multinational ROE System. The current version, an unclassified document, is an update of NATO MC 362, which began in 1999 and was completed in July 2003. The document’s function, as stated earlier, is to provide NATO policy and procedural guidance. The document also provides a generic catalogue of individual rules. As an ROE Catalogue, it groups and integrates land, sea and air rules. The rules contained within, as well as the more general guidance, are designed for all aspects of operations, from Peace through Crisis and, potentially, up to Conflict.

2. Terms and Definitions

- (1) Hostile Act – MC 362/1 provides a definition of Hostile Act as: “any intentional act causing serious prejudice or posing a serious danger to NATO/NATO-led forces or designated forces or personnel. ...”
- (2) Also included in the discussion of Hostile Act is the necessity of taking any specific action in the context of the status of the crisis, the political situation at the time and, if known, the intent of the perpetrator (e.g. a defecting pilot), all of which must play a part in determining if indeed a hostile act has occurred.

MC 362/1 gives some examples of the types of things that might constitute hostile acts, a list which includes, but is not limited to:

- (1) mine laying restricting NATO forces
- (2) military a/c penetrating NATO airspace and not complying with intercept instructions
- (3) intentionally impeding NATO operations
- (4) breaching NATO secure/restricted areas
 - Hostile Intent – MC 362/1 defines it as “a likely and identifiable threat recognisable on the basis of both the following conditions: a. capability and preparedness ... to inflict damage and, b. evidence ... which indicates an intention to ... inflict damage.” Possible examples include manoeuvring into weapons launch positions, deployment of remote targeting methods, and use of shadowers / tattletales³⁵².

³⁵² small vessel sailing ahead of a fleet to identify other ships

- “Dormant ROE” - ROE which are approved but would take effect only upon the occurrence of a particular contingency is a concept included in MC 362/1.

In the section listing possible supplementary ROE measures is a series dealing with ‘attack,’ including guidance on whether the attack is on NATO or others. Other noteworthy categories in the ROE are:

14 - Intervention in Non-military Activities

17 - Boarding

32 - Riot Control Agents

33 - Use of Force in Designated Operations

42 - Attack

Some specific examples of ROE commonly used:

- 132 Use of DESIG force to prevent boarding, detention or seizure of DESIG vessels, aircraft, vehicles or property is authorised.
- 132 Use of minimum force to prevent boarding, detention or seizure of NATO vessels, aircraft, vehicles or property is authorised.
- 321 Use of chemical riot control agents for crowd control purposes, subject to the restrictions in Reference X is authorised.
- 331 Use of up to non-deadly force to prevent interference with NATO-led personnel during the conduct of the mission is authorised.
- 337 Use of minimum force to prevent commission of serious crimes that are occurring or are about to occur in all circumstances is authorised.
- 421 Attack against any forces or any targets demonstrating hostile intent (not constituting an imminent attack) against NATO forces is authorised.
- 42 Series - Attack:

Responses to hostile act and hostile intent

Against NATO forces or others (‘DESIG forces or personnel’)

Attack against ‘targets which have previously attacked’

Commanders can decide if an attack is the first in series and attack all

Attack on facilities making an ‘effective contribution’ to an attack

3. Self Defence

In the context of drafting, interpreting, and applying ROE, a significant subject of concern is the right of a military unit or individual members of a unit to use force in self-defence. What is clear is that NATO ROE do not limit the right to self-defence and in exercising it, individuals and units will act in accordance with national law.

The decision to use force including deadly force, and the level of force to be used, must be judged by the circumstances of the case. This judgment generally concerns the application of necessity and proportionality:

- necessity - that the use of force be the last resort, after other means (e.g. warnings) have failed or are judged unavailable/ineffective.
- proportionality, generally phrased in terms of the use of “minimum force” - limited in intensity, duration, so as to be proportionate to the perceived threat.

CAROLINE CASE

The application of the concept of self defence is based in large measure upon the famous CAROLINE CASE starting in 1837, where it is stated that there must be a necessity of self-defence which is “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”³⁵³

There is also, in the international military community, an ongoing self-defence controversy, namely whether there is an “Inherent” right to self-defence or an “Inalienable” Right to Self Defence. Whether or not the right to self-defence is not only inherent but also inalienable goes to the legitimacy of a military commander (or, for that matter, political leadership) being able to promulgate ROE or other directives which have the practical effect of restricting self-defence.

The Canadian Forces Use of Force Manual states that “...[T]here is no obligation to use force in self-defence and commanders may legitimately order that individuals or units under their command do not respond to an imminent threat.”

Indeed, Admiral Woodward, commander of the UK forces during the Falklands War, has stated in his accounts that “I had, in effect, taken away some of my commanders’ right of self-defence, further restricting the rules from home which allowed them to fire back. But I did not want this war to go off at half-cock, because that would likely cause disastrous confusion and loss of control.”

Accordingly, the issue should be affirmatively inquired into during the ROE planning process for any contingency or operation.

4. Defence of Property

Further complicating the use of force issue is the right of a unit or individual to use force, including deadly force, to protect property.

The US and some others consider that force may be used to defend certain designated property. Other nations hold the opposite view; that deadly force may never be used simply to defend property, no matter how sensitive that property may be. In the UK, Canada and some others, another position is taken, one that distinguishes between operations within the nation’s own territory and that undertaken elsewhere. In these nations, domestically, deadly force is not permitted. Outside of Canada and overseas, deadly force may be permitted in tightly controlled circumstances.

5. Legal Effect of ROE

What is the legal effect when military personnel breach the ROE prescribed?

When Military Personnel breach ROE within NATO, the effect is determined by national law. For some countries, ROE are guidance only, with little independent legal effect. For other countries ROE are orders, the violation of which is punishable just as any other violation of orders might be.

Can military personnel use ROE as a legal defence? If ROE are formulated and applied in accordance with international and national law, are those ROE available as a defence against an allegation of wrongdoing against the service member? Again, it depends. Within NATO, ROEs are authorized by the NAC (North Atlantic Council) i.e. NATO’s highest decision making body. This implies that the chain of command has been involved and has taken the responsibility to disseminate (pass them on), ensure understanding, request clarifications and, seek amendments as required. It

³⁵³ The Caroline Case was a dispute between Great-Britain versus United States concerning a violation of sovereignty; Great-Britain invoked the right to self-defence. See Y. Dinstein, *War, Agression, Self-defence*, Cambridge: Cambridge University Press 2001, p. 218.

also assumes the responsibility to ensure compliance and determine incompatibilities. In this context, ROE are certainly relevant to the issue of wrongfulness, but would probably not be considered determinative.

C. PLANNING RULES OF ENGAGEMENT

1. Background

This section provides a brief overview of the concepts as well as some advice and guidance to be considered by nations and training entities regarding planning for and drafting ROE. This section is not intended in any way to establish or state substantive policy but rather to provide concepts for consideration and further elaboration or development in the training of LOAC and ROE matters. Compliance with LOAC is primarily a national responsibility; as a matter of NATO policy, NATO forces, whether engaged in armed conflict or in peace support operations, will comply with the spirit and principles of LOAC in all operations.

This material is provided for the benefit of legal advisers and all others who are part of the ROE planning process. It is important that the legal adviser does not have sole cognizance of ROE, but rather be the primary adviser to the Operations Officer and Commander on legal aspects of ROE. This Annex is provided to highlight practical aspects that should be taken into account by the entire ROE planning team.

2. Basic Principles of LOAC

As set forth earlier, the five core features of LOAC shall be taken into account in ROE planning: *military necessity, distinction, proportionality, humanity, non-discrimination.*

3. Rules of Engagement (ROE)

ROE are the means by which the NAC provides political direction for the conduct of military operations, including authorizations for or limitations on the threat or use of force or actions that might be construed as provocative. The purpose of ROE is to ensure that the application of force is controlled by directing the degree of constraint or freedom permitted when conducting an assigned mission. The process of translating this political direction into tactical instructions and orders to soldiers, sailors, and air personnel requires commanders at all levels to exercise considerable judgment. ROE will be contained in an Annex to the operational planning document or order and may, depending upon the nature of the operation, be referred to as a Use of Force Annex. In addition, guidance on the use of force may also be contained or referred to in other sections of a planning document or order; where this occurs, particular care must be taken to ensure that different sections containing ROE or Use of Force guidance are harmonized and are not contradictory, ambiguous, or confusing. "ROE" will be used here to refer to all such guidance; however it may be characterized in the document/orders involved.

Drafting a ROE Annex is the responsibility of the operations staff (i.e. J3/J5). Legal staff will assist to ensure the Annex is consistent with International Law (including LOAC), the mission's political mandate, and the national policies and laws of NATO nations. Ultimately, ROE will be submitted for approval to the Military Committee (MC) as part of a Contingency Plan or to the NAC/DPC as part of an OPLAN. However, OPLAN and ROE are forwarded, considered and approved by NAC as separate documents. ROE will become classified when implemented in the OPLAN.

When preparing a ROE Annex, the following considerations should be taken into account:

- **Follow MC 362/1 Guidance.** The instruction contained in the ROE Annex must be consistent with MC 362/1, as this document provides standing NATO policy for approving and implementing ROE for NATO/NATO-led operations.

- **Avoid Strategy and Doctrine.** The ROE Annex should not be used as a mechanism to convey strategy or doctrine. The commander should express his campaign philosophy through the main body of the COP/SDP/OPLAN and supporting annexes.
- **Avoid Restating the Law of Armed Conflict (LOAC)** Commanders may emphasize an aspect of International Law that is particularly relevant to their Plan in the ROE, but ROE should not include an extensive discussion of LOAC.
- **Avoid Tactics.** Tactics and use-of-force guidance are complementary, not synonymous. The ROE Annex provides boundaries and guidance on the use of force that are neither tactical control measures nor substitutes for the exercise of military judgment.
- **Avoid Safety-Related Restrictions.** This Annex should not deal with safety-related restrictions. While certain weapons may require specific such safety-related, pre-operation steps, these should not be detailed in an ROE Annex but may appear in a tactical or field SOP.
- **Highlight any National Caveats.** When national laws or policies are at variance with the ROE approved by the NAC, MC 362/1 calls upon nations to provide notice of these variances. This information should be included in the ROE documentation so that Commanders and staffs are aware of the variance and can plan accordingly.

An ROE or Use of Force Annex should normally contain the following substantive information:

- **Mission Mandate.** A brief articulation of the political, diplomatic, and legal framework that underpins the mission.
- **International Law and LOAC.** A brief articulation of the applicability of International Law to the mission. Depending upon the nature of the mission, this may include a discussion of the applicability of certain provisions of International Human Rights Law and other obligations as well as the applicability of LOAC to the mission.
- **Applicability of National Laws.** An explanation of the relationship between the mission and the national laws of contributing nations. Where nations have expressed caveats on involvement or the use of force, such caveats should be summarized and the resultant impact on the mission identified. Forces of participating nations must adhere to their own national laws and are not obliged to execute any mission or task that would constitute a breach of their national laws. Nations may issue amplifying instructions in some form to their forces to ensure this compliance. Such instructions should be coordinated with the NATO Commander in advance.
- **Self-Defence.** An explanation of the relationship of self-defence to the mission's ROE. Individuals and units have an inherent right to defend themselves against attack or an imminent attack, and NATO ROE issued for a mission do not limit this right. Because national laws differ, there will not always be a consistency between multinational forces as to where the right to use force in self-defence ends and the use of force authorized by the mission ROE begins. This must be discussed and addressed during the planning phase. In cases of inconsistency, the mission's ROE shall not be interpreted as limiting the inherent right of self-defence.
- **Extended Self-Defence/Protection of Friendly Forces.** Amplify the meaning of extended self-defence as it applies to this mission. If authorized by their national authorities, NATO-led forces involved in operations may be permitted to use necessary and proportional force to defend other friendly forces in the vicinity from attack or imminent attack. The ROE may also be used to define the meaning of the word "forces" as it applies to civilians operating as integral members of a Troop Contributing Nation's (TCN) commitment.

- **Protection of Persons and Property with Designated Special Status.** Explain the mission's policy for protecting members and property of international, regional, or local organizations (e.g., NGOs and PVOs). Define any relevant terms, and discuss effect of relevant TCN national laws and policies.
- **Obligations of NATO/NATO-led Forces.** Whilst not restating the general precepts of LOAC, the ROE can be used to provide special instructions or guidance on how the LOAC principles must be applied in the context of the specific operation. In this regard, amplifying and mission-specific guidance can be provided on such subjects as to what constitutes military necessity, the duty to challenge or warn, duty to observe fire or target identification for indirect fire, avoidance of collateral damage, the duty to report certain incidents that could constitute violations of ROE or LOAC, and the duty to report ROE incompatibilities. This list is not exhaustive, merely illustrative. The key is that the information in the ROE be clear, succinct, and directly related to the mission at hand.
- **Key Definitions.** ROE should repeat and where appropriate amplify key definitions approved in MC 362/1 and AAP 6³⁵⁴ that apply to the mission. Additionally, because there are often situations where no single definition of a term exists or existing definitions are inadequate, the ROE can be used to flag these terms, provide a working definition that matches the circumstances surrounding the mission, and ensure that all forces are operating off the same definition.
- **Appendices.** There are a number of Appendices that normally appear in a Rules of Engagement or Use of Force Annex to an OPLAN. Again, the list below is intended to be illustrative, not exclusive:
 - Appendix 1 - Hostile Act / Hostile Intent. This section looks at mission-specific indicia that could be judged as constituting a hostile act or hostile intent, justifying a use of force in self-defence.
 - Appendix 2 - Mission Accomplishment ROE. Explains the purpose of the mission ROE and to whom and when they would apply, be promulgated, updated or changed.
 - Appendix 3 - Guidance on the Use of ROE in Land Operations. Specifics for land forces, including guidance on search and seizure, crowd and riot control, prevention of serious crimes, detention, etc.
 - Appendix 4 - Guidance on the Use of ROE in Air Operations. Weapons release criteria, air interdiction, intervention, and interception procedures, enforcement of military restricted airspace, etc.
 - Appendix 5 - Guidance on the Use of ROE in Maritime Operations. Guidance on maritime interception, diversion and seizure of cargo, boarding, use of warning shots, disabling, and non-disabling fire, etc.
 - Appendix 6 - ROE for Open Publication. Because ROE may contain sensitive information, the release of which could be harmful to the mission, this Appendix should indicate what information is releasable to the public.

4. ROE Procedures

ROE should contain a description of the specific policy guidance upon which it is based, and the procedures to be followed in disseminating ROE or in requesting additional ROE. Authorised Commanders are generally permitted to withhold or further restrict ROE to their subordinates; when and how this is to be done, or limited, should be described in the ROE Annex. The ROE authorized

³⁵⁴ AAP-6(2009) -NATO GLOSSARY OF TERMS AND DEFINITIONS (ENGLISH AND FRENCH) is a NATO Allied Publication. The agreement of nations to use this publication is recorded in STANAG 3680.

by the NAC/DPC delineates the limits or ceiling for the use of force. Within this envelope, Commanders will be given flexibility to exercise discretion and judgment on whether force should or should not be used. The inclusion in the ROE of Political Policy Indicators helps the Commander in the exercise of this judgment. Finally, because ROE can be changed only with the approval of the NAC/DPC, the ROE should contain guidance to the Commander on requesting changes to the ROE when that Commander believes the tactical situation warrants such a change. MC 362/1 sets forth the specific procedures for submitting ROE Requests (ROEREQ) and formatted messages are useful in this regard.

5. Plain Language ROE

Finally, because ROE must be understood and implemented by tactical personnel, every Commander should consider whether the ROE should be restated in a “plain language” version, capable of being kept on a kneeboard card, pocket reference card, or other easily-consulted format by troops in the field. In developing such reference aids, great care must be taken to make the ROE easily understood by even the most junior soldier, sailor, or airman, but also be worded carefully enough so that it does not change in any way the specific policies and guidance contained in the ROE as approved by the NAC. In other words, such a “Plain Language” ROE document would not be a substitute for the official ROE Implementation message, but rather a complement to that official submission.

6. National ROEs and NATO ROEs

After NAC has approved a set of ROE, NATO States are responsible for making them applicable to their own forces. In fact, nothing precludes an individual NATO member State from adopting its own set of rules as long as they respect the NATO rules. Of course a multiplication of sets of ROE may create divergence, for example in the use of force by various States. But still, States may disagree with a particular rule and put a caveat on it.

Nations generally caveat ROE on several grounds:

- (1) National law. A State may caveat a particular ROE in order to respect its national legislation. This often occurred in matter of self-defence.
- (2) International law. Similarly a State may caveat a ROE simply because of its interpretation of international law or due to special obligations under international law that would be conflicted by a ROE rule.
- (3) Interpretation. A State may disagree with the interpretation given to a UN mandate and therefore caveat a particular ROE.
- (4) Limitation/Restriction. Nations may invoke limitations on other grounds:
 - policy considerations; as a self-constraint on specific type of activities, or using specific type of weapons. For instance, a nation may refuse to use rubber bullets or tear gas
 - a geographical limitation; refusing to send troops in a particular area within the theatre of operation
 - or simply logistical or other capability-wise reasons; that limit a national troop to engage because of lack of resources or skills. They may refuse to use a certain weapons to accomplish a mission.

7. Training and dissemination

Training and dissemination of ROE shall be a part of the general training and the mission specific training of the troops. The dissemination of ROE is evidently limited due to classification reasons, but the knowledge on the standing ROEs such as MC 362/1, the planning, interpretation

and structural logic of the ROE is evidently a necessary subject of the general trainings. In case of general or of specific training, the training, explanation and instruction shall be preferably conducted in non-lawyer language.

Another concrete measure is the well-known ROE pocket cards. ROE cards are a summary or extract of mission-specific ROE. They shall be clear, concise, and preferably an unclassified distillation of the ROE. Still, even having a ROE card in pocket will not help the soldier where he lacks proper pre-training. ROE card is a reminder of the basic principles. For this purpose a ROE card should be:

- brief and clear, using simple language
- understandable for soldiers at every level
- mission-specific, including the main items of the situation

Dissemination of ROE includes proper follow-up of any changes, that should be implemented not only the hardcopies distributed, but also in training and in the ROE cards.³⁵⁵

³⁵⁵ One can find several ROE card samples in: OPERATIONAL LAW HANDBOOK 2009 (USA) issued by International and Operational Law Department, The Judge Advocate General's Legal Center & School, U.S. Army, Charlottesville, Virginia

PART XIII

ISSUES IN OPERATIONS:

SPECIAL OPERATIONS FROM A LEGAL PERSPECTIVE

References and suggested reading:

- AAP-6(2009) -NATO GLOSSARY OF TERMS AND DEFINITIONS (ENGLISH AND FRENCH)
- AJP-3.5 ALLIED JOINT DOCTRINE FOR SPECIAL OPERATIONS.
- General Comment No. 2 of the Committee Against Torture concerning the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/GC/2)
- General Comment No. 31 of the Human Rights Committee concerning the Covenant on Civil and Political Rights (UN document CCPR/C/21/Rev.1/Add.13),
- ISAF Commander's Counterinsurgency Guidance - <http://www.nsc.bices.org/page/downloads/>
- MEMORANDUM OF UNDERSTANDING between the participating nations and SHAPE on THE ESTABLISHMENT, ORGANISATION, ADMINISTRATION, SECURITY, FUNDING, AND MANNING OF THE NATO SPECIAL OPERATIONS COORDINATION CENTRE (NSCC)
- Special Operations Forces Study - 4 December 2008 - <http://www.nsc.bices.org/page/downloads/>

A. SPECIAL OPERATIONS - CHARACTERISTICS

Special Operations (SpecOps) are activities conducted by specially organized, trained, and equipped military forces to achieve military strategic or operational objectives by unconventional military means in hostile, denied, or politically sensitive areas.

These operations are conducted across the full spectrum of military operations, independently or in conjunction with conventional forces.

Political-military considerations often shape SpecOps, requiring discreet, covert, or low visibility techniques that may include operations by, with, and through indigenous forces.

SpecOps differ from conventional operations in degree of physical and political risk, operational techniques, modalities of employment, and independence from friendly support.

For optimal employment of Special Operation Forces (SOF), the following principles of SpecOps are essential:

- directed at High Value Objectives of high pay-off value;
- SOF personnel involved in the planning and execution must have access to accurate, detailed, and current Intelligence;
- lean command and control (C2) relationship to facilitate a close integration with the C2 of the joint force and timely decision making;
- broad, but clear mission directives to the SOF Commander providing the necessary authority to adjust the plan to cope with changing conditions during the conduct of the mission; and
- proper operations security (OPSEC) to identify and protect information that is critical to the success of the operation.

The basic SOF concept requires centralised planning and decentralised execution of operations.

B. SOF CONDUCT TACTICAL ACTIONS FOR STRATEGIC EFFECTS

SOF can maintain violence at a minimum level and destabilize an adversary by influencing or attacking his centres of gravity.

SOF can establish a forward presence, train friendly forces, initiate military liaison, and provide ground truth of a growing crisis. By directly enhancing mutual co-operation and complementing peacetime engagement strategies, SOF consequently/therefore provide NATO with increased military options.

SOF offer an alternative to the use of conventional forces that typically comes in a smaller "package," where small unit actions and calculated acceptance of force protection risks are more common. This less obtrusive posture decreases obvious direct involvement in counter insurgency operations by foreign forces, but also offers additional advantages. SOF are trained and conditioned to operate in a supporting role to indigenous forces in lieu of a direct combat role. At the same time, when a direct combat role is required, SOF are equipped with specialized skills, access to detailed intelligence, and other means to minimize collateral damage. The value of SOF, then, is derived from their inherent agility and broad utility stemming from their ability to operate in both an indirect and direct manner.

It is important to note that SOF's contribution is not limited to counter insurgency or other irregular challenges that call for the "comprehensive approach" to conflict resolution. SOF also brings full spectrum capabilities across the range of military operations. SOF are the potential force of choice to provide strategic anticipation during peacetime when early warning of impending strife can support conflict prevention efforts. At the opposite end of the spectrum, SOF's role in major combat

operations provides the commander with a well-honed Direct Action and Special Reconnaissance capability, along with an organic means to grow host nation forces through Military Assistance. With all of this in mind, it is important to dismiss the popular images that depict Special Operators as slightly refined, bare chest, hatchet throwing commandos or hooded counter terrorism forces abseiling down the side of a building. Compared to these legacy perspectives, today's SOF are renaissance men, and that brings us to the essence of SOF's critical contribution; its people.

The individuals who make it through selection are typically independently minded, innovative, resourceful, motivated, and tactically disciplined.

SOF are recognized around the world as strategic and operational assets. They are an instrumental component of any full spectrum military capability with a broad utility across the range of military operations now and into the future. Ultimately, it is important to remember that the strategic building blocks to such a capability are not equipment, weapons, or money but instead - *it is the people*.

C. SOF TASKS

Special reconnaissance and surveillance - SR³⁵⁶ - is the collection of specific, well-defined, and time-sensitive information of strategic or operational value. It complements other collection methods where constraints are imposed by weather, terrain-masking, hostile countermeasures or other systems availability. SR is a predominately-human intelligence (HUMINT) function that places specialized "eyes on target."

Direct Action - DA³⁵⁷ - are precise (surgical) operations normally limited in scope and duration aimed to specific, well defined targets of strategic and operational significance. DA may employ raid, ambush, or direct assault tactics; place munitions and other devices; conduct stand-off attacks by fire from maritime, ground or air platforms; or provide terminal guidance for precision-guided munitions to enable the destruction of specific targets. DA missions should be aimed at creating conditions that will allow decisive/political action to follow thereafter.

Military Assistance - MA - is a broad spectrum of measures in support of forces in peace, crisis, and conflict to enhance friendly or allied capabilities. MA can be conducted by, with, or through friendly forces that are trained, equipped, supported, or employed in varying degrees by SOF.

The NATO document that deals with special operations is AJP-3.5 ALLIED JOINT DOCTRINE FOR SPECIAL OPERATIONS.

D. THE NATO SPECIAL OPERATIONS HEADQUARTERS (NSHQ)

The NATO Special Operations Headquarters (NSHQ) was established by the MEMORANDUM OF UNDERSTANDING between the participating nations and SHAPE on THE ESTABLISHMENT, ORGANISATION, ADMINISTRATION, SECURITY, FUNDING, AND MANNING OF THE NATO SPECIAL OPERATIONS COORDINATION CENTRE (NSCC). The MOU was signed during October - November 2009.

The North Atlantic Council (NAC) on 24 September 2009, approved the reorganization of the NSCC as the NATO Special Operations Headquarters (NSHQ) at SHAPE. Participating nations will continue to man the NSHQ as an MOU organization; participating nations will continue to fund the

³⁵⁶ Note that AAP 6 defines SR (special reconnaissance and surveillance) as "[r]econnaissance and surveillance activities conducted by special operations forces, which complement theatre intelligence assets and systems by obtaining strategic and/or operational information. These are human intelligence operations, conducted independently or in support of conventional operations, which may use special techniques, equipment, methods or indigenous assets."

³⁵⁷ Note that AAP 6 defines DA as "[a]short-duration strike or other small scale offensive action by special operations forces or special operations-capable units to seize, destroy, capture, recover or inflict damage to achieve specific, well-defined and often time-sensitive results."

NSHQ as a multinational organization in accordance with the NSCC MOU. NSHQ remains a NATO Military Body with international status; NSHQ will continue to be directly subordinate to SACEUR for special operations matters and collocated with SHAPE as an MOU organization sponsored by the Framework Nation.

The NSHQ with its reorganisation is foreseen as significantly increasing NATO's ability to meet the requirement for a command and control capability for Special Operations Forces (SOF) for operations without increasing the NATO Command Structure Peacetime Establishments.

NSHQ is the centrepiece of the NATO SOF Transformation Initiative (NSTI). It provides focused Special Operations advice to the SACEUR and the NATO Chain of Command and provides on a collaborative, inter-dependent platform to enhance the Alliance SOF network. Through the NSHQ, NATO is transforming the current NATO SOF capability, i.e. leader education and development, doctrine, training and planning, information systems and infrastructure.

NATO decided to implement this plan after a specific analysis of the lessons learned across multiple theatres, with the aim of expanding the NATO SOF community while enhancing its interoperability and capabilities. These aspects are fundamental to generate combined and joint units capable of conducting all Special Operations missions in support of the NATO Allied Command for Operations.

The NSHQ Director, as member of SACEUR Special Staff, provides advice on Special Operations. According to this primary and essential function the NSHQ will enable and support NATO Special Operations Forces across the Alliance and provide the focal point for NATO Special Operations expertise to SACEUR and ACO.

The NSHQ, according to its NATO International Military Body status, can be tasked to support different elements of NATO and other National entities by deploying tailored planning and liaison teams.

The NSCC, established at SHAPE in Casteau, Belgium in June 2007 was re-designated March 1, 2010, as the NATO Special Operations Headquarters. The co-location with the Allied Command Operations (ACO) strongly affirms the NSHQ's function and support in providing Special Operations advice to SACEUR.

The NSHQ is assigned to SHAPE, under operational command (OPCOM) of the Supreme Allied Commander Europe (SACEUR). The NSHQ Commander reports directly to the SACEUR who employs the NSHQ in accordance with political and military decisions of the North Atlantic Council (NAC) and NATO's Military Committee (MC).

The NSHQ coordinates the execution of tasks directly with the appropriate command or nations. The NSHQ interacts with national SOF Commanders, their representatives, other NATO bodies and entities such as the European Union, Partnership for Peace members and NATO "contact countries."

The NSHQ is the single point of direction and coordination for all NATO Special Operations-related activities in order to optimise employment of Special Operations Forces to include providing and operational command capability when directed by SACEUR.

E. LEGAL CONSIDERATIONS

"If I always appear prepared, it is because before entering on an undertaking, I have meditated for long and have foreseen what may occur. It is not genius which reveals to me suddenly and secretly what I should do in circumstances unexpected by others, it is thought and mediation." Napoleon Bonaparte, 1812

Legal considerations play a key role in the decision making process and during the conduct of an operation.

Legal / Rules of Engagement Considerations Because special operations frequently involve a unique set of complex and sensitive issues, SOF commanders must seek legal review during all

levels of planning and execution of missions. This review should take account of domestic laws, international laws (to include the law of armed conflict), treaty provisions, political agreements, and the rule of engagement for any foreseeable contingency. The nature of coalition operations requires planners to consider legal constraints affecting partner nations. The availability of legal advice during all phases of a mission is crucial to ensure coherence of operational/tactical planning and law, and that rules of engagement are tailored accordingly.

The legal considerations will (SOF tasks and execution are no exception) have to be done in advance, evaluating possible consequences, to include legal limitations on the one hand but also outlining possibilities offered under the current legal setting. A clear understanding of the legal basis of an operation is required at all levels of the participating forces and in the participating Nations. It is also important to understand the differences between nations in terms of how applicable international law and sending state regulations may affect the conduct of SOF operations involving contributions from more than one nation (not to mention the political constraints that may be in place).

The legal basis of an operation may limit the scope of the operation. International law provides limitations and possibilities for operations as a whole, as well as for individuals. They include restrictions of the use of force in international relations, neutrality, use of weapons, targeting, war crimes, self-defence, non-combatants, immunity and environmental limitations. The conduct of military operations is controlled by international customary and conventional law and the domestic law of the participating nations. Within this framework, it is for NATO to set out the parameters within which military forces can operate. NATO operations will always be based on a mandate of International Law. Normally the mandate is derived from a UN Security Council Resolution and/or a NAC decision. International law regulates the use of force during military operations, while National law and policy may further regulate the use of force in certain operations or situations. Below are a few areas where military operations can meet with legal constraints.

Law of Armed Conflict (LOAC – aka International Humanitarian Law, IHL) is the body of international law that governs the conduct of hostilities during an armed conflict, including belligerent occupation. According to NATO (and UN) policy, the principles of LOAC shall always apply for military operations, irrespective of there being an armed conflict according to the definition in the Geneva Conventions and Additional Protocols (or equivalent customary international humanitarian law). Individual civilians along with the civilian population must never be purposefully targeted unless they have taken active part in the armed conflict. When military force is used, every effort should be taken to minimise the risk of civilian casualties. LOAC obligates military planners and commanding officers at all levels to take precautionary measures in order to prevent excessive collateral damage (incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof) and to cancel or suspend an attack if that attack may be expected to cause excessive collateral damage.

Human Rights NATO members and partners are, and NATO itself is, bound to respect the Universal Declaration of Human Rights. The wide range of human rights treaties concluded under the auspices of the United Nations may have similar effects³⁵⁸. For European nations, moreover, the European Human Rights Convention may be applicable extraterritorially for missions inside and outside of Europe. In principle, applicable Human Rights provisions shall be applied to the extent possible. Advice to HN entities (e.g. MA through/in fully integrated formations) may prove difficult as the Human Rights obligations may differ. Human Rights may, by order, be set fully or partially aside depending on the level and character of the crisis. However, fundamental human rights can never be set aside even in full scale war. The prohibition on torture is one example that applies under any circumstance.

³⁵⁸ Reference is specifically made, for that purpose, to General Comment No. 31 of the Human Rights Committee concerning the Covenant on Civil and Political Rights (UN document CCPR/C/21/Rev.1/Add.13), and to General Comment No. 2 of the Committee Against Torture concerning the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/GC/2).

Rules of Engagement³⁵⁹ define the degree and manner in which force may be applied and are designed to ensure that such application of force is carefully controlled. It is important to note that the conformity of any action with any set of ROE in force does not guarantee its lawfulness, and it remains the commander's responsibility to use only that force which is necessary and proportionate under the prevailing circumstances. ROE for SOF are the same as for conventional forces. The ROE profile may however provide different mechanisms of approval and different levels of authority. SOF doctrine³⁶⁰ needs to be revisited as to understand the difference between situations for national SOF and situations allowing for multinational authorities. The legal setting for Human Rescue Operations (HRO) may as an example need special attention, both from an operator's perspective as well as for the legal framework given.

Targeting is an agreed process closely linked to and bound by both IHL/LOAC as well as the implemented ROE. The aim of targeting is to create a desired effect upon the adversary, and SOF participates fully in all aspects of the targeting process at all levels in order to ensure the necessary coordination of SOF tasks. SOF ability to execute SR and DA (CAS support, not only kinetic but also non-kinetic operations) may offer special opportunities being favourable not only from an IHL/LOAC perspective but also from a more strategic and political aspect. SOF may support the targeting process through positive identification of specific targets, target marking and terminal guidance, provide battle damage assessment, provide recommendation to no-strike and restricted strike list. The Commander of a Combined Joint Special Operations Component Command (CJFSOCC) may consolidate and validate his own nomination of targets to ensure de-confliction. The SOF nomination and validation process will be supported by Special Operations Forces Fusion Centres (SOFFC) specifically dedicated to fuse intelligence for targeting purposes.

Law Enforcement In certain mission types, typically into a failed state, the multinational force may be the only organised entity capable of providing law enforcement functions to the local population. If planners consider this a possibility, a whole range of issues of legal character needs to be addressed, including, investigation capacity, specific aspects of the detention policy, safeguards of human rights etc. On the same note are issues pertaining to crowd and riot control. The HQ staff should include the legal advisers accordingly. Special attention will have to be made as to how Tactical Exploitation Operations may be done in support of the host nation law enforcement efforts and in what way nations may allow their forces to collect Biometrics data for sharing with other elements of the force.

Detention Multinational forces may need to detain persons for the purpose of mission accomplishment regardless of whether the situation would call for law enforcement measures. NATO-approved detention policies should provide guidelines to this end, focusing in particular on possible overlap of mission accomplishment and support to law enforcement (activities triggering detention may both constitute a threat to international peace and security – the safe and secure environment – and be of a criminal nature). Attention must also be given to the possibility of handing detainees over to other authorities and related procedures. Examples are handing over to the UN police force in Kosovo, to national authorities in Afghanistan, and to Kenyan authorities in the case of pirates and armed robbers at sea captured at the Horn of Africa. Awareness about national caveats regarding this issue is also important as some nations are prevented from carrying out detentions in certain settings. Awareness on national challenges

Logistical arrangements In most operations multinational forces will be dependent on arrangements with local authorities or with other TCN in order to sustain its presence over time in a theatre of operations. This requires legal arrangements between the parties involved covering the logistic and financial support to field operations. In addition, the TCN as well as NATO itself will require the purchasing of goods and service inside or outside the JOA. All staff should pay particular attention to the effect on the local economy when entering into local agreements. Experience has

³⁵⁹ Note that AAP-6 defines ROE as "[d]irectives issued by competent military authority which specify the circumstances and limitations under which forces will initiate and/or continue combat engagement with other forces encountered."

³⁶⁰ AJP 3.5 Allied joint Doctrine for Special operations and MC 437 Military Committee Special Operations Policy/

shown that foreign troops in local economies risk inflating prices significantly and drain qualified persons and much-needed goods from the local market. This should be avoided, as destabilising the local economy will normally undermine the achievement of the mission's end-state.

Status of Forces Agreement (SOFA) is one of the first legal considerations a JTF staff should address in establishing an expeditionary operation. Normally, NATO HQ will negotiate some sort of agreement with the host nations or nations within JOA in the conduct of non-article 5 operations. A SOFA deals with the legal status of the NATO forces and typically contains provisions concerning criminal jurisdiction, immunity, claims, and other matters. The JTF or the Component Command should ensure that higher HQ is handling the SOFA arrangements. If a SOFA cannot be agreed upon with the host government or there is not a functional government to negotiate with, separate legal arrangements or elements can still be arranged (e.g. a Note Verbale or Exchange of Letters). Early entry of elements will always require special legal focus. A multinational SOF command in such cases depends on the legal authority provided directly to nations through international law as may be the case for HRO. Entry of SOF may require national diplomatic efforts rather than a timely negotiation of the required level of multinational status arrangements. Risk assessments for early entry may include national limitations that need to be de-conflicted with the overall task given.

PART XIV

ISSUES IN OPERATIONS:

CLAIMS

References and suggested reading:

- Addressing Civilian Harm in Afghanistan: Policies & Practices of International Forces / www.civicworldwide.org
- Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, 19 June 1951. NATO SOFA
- Dayton SOFAs, art. 15.
- General David Richards, "A Firm Foundation," NATO Review (Spring 2007).
- GFAP, Annex 1-A, art. VI, para. 9(a).
- Hearts, minds and death, *The Economist*, p. 46 (12 May 2007).
- Karin Tackaberry (CPT), "Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander's Emergency Response Program," *The Army Lawyer* (February 2004).
- KFOR Statement on road traffic accidents on Saturday 28 and Sunday 29 August in FYROM, KFOR Press Statements, 30 August 1999 (accessed at <http://www.nato.int/kosovo/press/1999/k990830b.html>, 3 August 2007).
- Law and Military Operations in Kosovo: 1999-2001, Center for Law and Military Operations, p.162 (15 December 2001)(hereinafter "Kosovo").
- Marco Paccioj (1Lt), "Kosovo's new Claims Office at Film City," KFOR Chronicle (accessed at http://www.nato.int/kfor/chronicle/2001/nr_010629d.htm, 3 August 2007).
- Military Operations: The Department of Defense's use of Solatia and Condolence Payments in Iraq and Afghanistan, Abstract, GAO-07-699, U.S. Government Accountability Office, 23 May 2007.
- Military Technical Agreement between the International Security Force ('KFOR') and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, 9 June 1999.
- Military Technical Agreement, between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, Annex A, para. 10 (5 March 2003).
- NATO Claims Policy for Designated Crisis Response Situations," Annex 1, AC/119-N(2004)0058 (19 May 2004).
- Non-Binding Guidelines for Payments in Combat-Related Cases of Civilian Casualties or Damage to Civilian Property - ANNEX to SG(2010)0377 - (approved on 11 Jun 2010)
- Peter Lloyd, "Interview with Sarah Hoewinski," CIVIC (accessed at http://www.civicworldwide.org/index.php?option=com_content&task.html, 3 August 2007).
- REPORT: US Military Compensation to Civilians in Armed Conflict http://www.civicworldwide.org/storage/civicdev/documents/dod_condolence.pdf
- Sarah Holewinski, "Fixing The Collateral Damage," *International Herald Tribune*, reprinted on CIVIC at www.civicworldwide.org
- SFOR compensates Bosnian villagers for damage in operation to get Karadzic, AFP, 27 April 2002 (accessed at <http://www.balkanpeace.org/hed/archive/apr02/hed4918.shtml>, 4 June 2006).
- The Handbook of the Law of Visiting Forces, Dr. Dieter Fleck, editor, pp. 173-74 (Oxford 2001)(hereinafter "Handbook").
- UNMIK Regulation No. 2000/47 (18 August 2000) On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, (hereinafter "UNMIK Reg. No. 2000/47").
- UNMIK/KFOR Joint Declaration, CJ(00)0320 (17 August 2000).

A. BOSNIA-HERZEGOVINA AND CROATIA

Perhaps because of Bosnia-Herzegovina's and Croatia's unhappy experiences with the UN claims system during UNPROFOR³⁶¹, NATO's first significant out-of-area operation found itself working under a complicated and untried system involving host-nation participation in claims settlement and appeals.³⁶² Under the Claims Annexes to the Technical Arrangements that implemented the Dayton Status of Forces Agreements (SOFAs) and the General Framework Agreement for Peace (GFAP), Bosnia-Herzegovina and Croatia, the "receiving states," were to have the primary responsibility for collecting claims against IFOR and its Troop-Contributing Nations (TCNs).³⁶³ Interestingly, there was no waiver of claims between the governments of the receiving states and IFOR,³⁶⁴ but combat related damages were excluded.³⁶⁵ Claims Commissions were to resolve disagreements between these receiving state agencies and the IFOR forces regarding claims. These commissions would be made up of two IFOR representatives and two receiving state representatives, all of whom were to be legally qualified.³⁶⁶ If the parties still disagreed after the commission decision, then the claim could be referred to an Arbitration Tribunal composed of three members, whose decision was final and binding.³⁶⁷ If IFOR or a TCN did not comply with a payment order, then the claim would be sent to NATO Headquarters in Brussels for disposition.³⁶⁸

Appendices to the Claims Annexes were then negotiated to try to make the system more functional. These appendices required that Claims Commission decisions be unanimous, and claimants themselves were allowed to appeal to the Arbitration Tribunal rather than just the receiving state representatives.³⁶⁹ Finally, it was recognized that it was impractical to expect Bosnia-Herzegovina and Croatia to process claims against IFOR and the TCNs, so separate agreements between the receiving states and IFOR made the TCNs primarily responsible for collecting, investigating, and adjudicating claims.³⁷⁰ When the TCNs and the claimants could not agree on settlement, the newly established IFOR Claims Offices in Sarajevo and Zagreb would seek to mediate the cases. Only when mediation was unsuccessful would cases then go to the Claims Commission.³⁷¹

The IFOR Claims Offices became operational in March 1996, and assumed five main roles

- they processed claims against the IFOR headquarters itself.
- they served as points of contact between the TCNs and claimants.
- they conducted the Claims Commission and Arbitral Tribunal hearings that were held.
- they maintained a central database of claims statistics throughout the theatre.
- and very importantly, they provided claims guidance and suggestions to the TCN claims offices on the avoidance, the processing and the settlement of claims.³⁷²

³⁶¹ United Nations peacekeeping force in Croatia and in Bosnia and Herzegovina during the Yugoslav wars. It existed between the beginning of UN involvement in February 1992, and its restructuring into other forces in March 1995.

³⁶² THE HANDBOOK OF THE LAW OF VISITING FORCES, Dr. Dieter Fleck, editor, pp. 173-74 (Oxford 2001)(hereinafter "HANDBOOK").

³⁶³ Claims Annex, para. 6.

³⁶⁴ Dayton SOFAs, art. 15.

³⁶⁵ GFAP, Annex 1-A, art. VI, para. 9(a).

³⁶⁶ Claims Annex, para. 3.

³⁶⁷ *Id.*, para. 5.

³⁶⁸ *Id.*, para. 4.

³⁶⁹ Claims Commission Procedures, para. 5.

³⁷⁰ HANDBOOK, p. 176.

³⁷¹ *Id.*

³⁷² *Id.*, p. 177.

There were a number of challenges to conducting claims operations under this regime in Bosnia-Herzegovina and Croatia. Several NATO TCNs quickly identified that being required to pay claims under the Technical Arrangements was not possible under their respective domestic fiscal laws. This led to the adoption of various informal and practical measures, like ensuring that when a claimant brought a TCN before a Claims Commission or an Arbitration Tribunal, at least one of the members of the hearing body was appointed by the TCN. Since unanimity was required in these procedures, a TCN would always be presented with a decision with which it agreed. Damages to receiving state roads were another significant, high-level issue. IFOR forces, particularly U.S. forces, extensively used theatre roads to bring in troops, equipment and supplies. Road authorities of Bosnia-Herzegovina and Croatia each filed claims for millions of U.S. dollars for damages to their roads. Eventually, it was decided that these claims should be transferred to (by this time) SFOR, and denied as being the “unavoidable results of conducting the operation,” similar to combat damages.³⁷³ Other issues included determining the law to be applied to claims, especially when local law was required; determining standards for compensation; having to deal with the lack of ownership documentation for damaged property; the need for effective translators, and different interpretations of the language in the agreements regarding claims by various TCNs.³⁷⁴ Finally, many TCNs either had no claims program or saw no reason why they should be paying claims on this sort of operation.³⁷⁵

Under the current claims procedures, the role of the now EUFOR/NATO Headquarters Sarajevo claims office remains essentially the same as it was under IFOR. They still support the Claims Commission and Arbitration Tribunal processes and hearings, and in the event the responsible TCN cannot be found to settle a meritorious claim, the claims offices may settle the claim using EU or NATO funds.³⁷⁶ Helpfully, the procedures set out the responsibilities of TCN claims offices,³⁷⁷ and set out in detail the tasks of the headquarters claims offices. One task which is new since the first IFOR claims offices is the assertion of affirmative claims on behalf of the headquarters against those who damage its property.³⁷⁸ The procedures provide a detailed and clear description of the claims process,³⁷⁹ which serves not only as a model to TCNs on how to process their claims, but also provides transparency to the claimant.

The procedures note two kinds of claims that are specifically non-cognizable: those arising from “Combat and Combat Related Activities” and from acts of “Operational Necessity.” Combat and Combat Related Activities” include those things that involve protection of the force, such as firing weapons and manoeuvring in combat, the movement of military vehicles, and the occupancy of real estate.³⁸⁰ The concept of “Operational Necessity” excludes “claims for damages that may arise as a direct and foreseeable consequence of lawful detention of persons, riot control activities, and force protection activities . . . conducted in furtherance of the mandates.”³⁸¹ Importantly for purposes of this article, the procedures note that there may be situations in which TCNs are able and choose to make an *ex gratia* or *solatium* payment on claims barred for these reasons, but that in such cases the settlements are not subject to the claims appeals process.³⁸²

Two cases from Bosnia highlight how such provisions work in an operational setting. In the first case, a man indicted by the International Criminal Tribunal for former Yugoslavia (ICTY) filed a claim against a TCN for damages caused to his house during his arrest by the TCN’s troops in

³⁷³ *Id.*, p. 179.

³⁷⁴ *Id.*, pp. 179-81.

³⁷⁵ *Id.*, p. 521.

³⁷⁶ HQ EUFOR/NHQ Sa SOP 3401, § I, para. 2; § II, para. 1 (17 March 2005).

³⁷⁷ *Id.*, §II, para.2d.

³⁷⁸ *Id.*, § II, para.3c. “This process has been very successful and this HQ recovers approximately 90% of the damages inflicted on NATO HQ Sarajevo property.” “Claims Procedure in Bosnia and Herzegovina,” memorandum from LTC Barry Stephens, NHQ Sa Chief Legal Adviser (16 April 2007)(hereinafter “Stephens Memorandum.”)

³⁷⁹ HQ EUFOR/NHQ Sa SOP 3401, § II, para. 5; Annexes A-I.

³⁸⁰ *Id.*, § II, para. 7b.

³⁸¹ *Id.*, § II, para. 7c.

³⁸² *Id.*, § II, para. 8.

December 1997, an arrest which he resisted with rifle fire. Both the man and a soldier were wounded during the exchange. The SFOR Legal Adviser opined that the claim was barred. First, an investigation by the TCN contingent showed that the soldiers had acted properly within their rules of engagement (ROE). Second, the mission in which they implemented their ROE was lawful, pursuant to the ICTY indictment. Third, the man knew or should have known that he was indicted, and that he had no right to resist arrest. He therefore assumed the risk of damages to his property when he chose to fire upon the arresting soldiers.³⁸³ In the second case, villagers filed claims against SFOR for property damages caused by SFOR troops in March 2002 while searching their village for another individual indicted by the ICTY. Although their claims were rejected as arising from combat or combat related activities, the SFOR commander authorized *ex gratia* payments to correct “perceived wrongs” and to help the villagers repair their village.³⁸⁴

The NATO claims operations in Bosnia-Herzegovina and Croatia are beginning to draw to a close after almost 12 years. During this time, they have received approximately 13,200 claims. Many were denied or settled in other fashions, but for those claims settled with cash payments, the total for all the contingents is approximately €11,700,000 out of approximately € 75,000,000 claimed.³⁸⁵ They provide excellent case studies of just how complex and expensive it can be to conduct a large-scale, long-term military operation seeking to bring stability and the rule of law to a war-torn area, in part through the payment of meritorious claims resulting from its mere presence in peacekeeping operations.³⁸⁶

B. KOSOVO

Under the June 1999 Military Technical Agreement between KFOR and the Federal Republic of Yugoslavia that discontinued hostilities between the opposing forces and allowed the entry of KFOR into Kosovo, KFOR forces were not liable “for any damages to private or public property that they may cause in the course of duties related to the implementation of this Agreement.”³⁸⁷ This caused some political awkwardness, since the UN Mission in Kosovo (UNMIK) intended to pay claims, and the situation was no longer really a combat operation.³⁸⁸ Certain contingents, like the U.S., chose not to pay claims at this point.³⁸⁹ Eventually, the problem was resolved by a UNMIK/KFOR joint declaration that included the commitment for both international entities to “establish procedures in order to address any third party claims for property loss or damage and personal injury caused by them or any of their personnel.”³⁹⁰ The UNMIK regulation which implemented the joint declaration in August 2000 provided that both UNMIK and KFOR would set up their own claims commissions to settle third party claims. Claims resulting from “operational necessity” were barred, but importantly for claimants, the regulation was made effective retroactively to 10 June 1999.³⁹¹

³⁸³ “Interpretation of SFOR Authority under Annex 1-A, GFAP, in Connection With Claim of Kupreskic, Vlatka, SFOR Claim No. C-4724,” memorandum from COL Michael Neveu, SFOR Legal Adviser (28 January 1998).

³⁸⁴ “SFOR compensates Bosnian villagers for damage in operation to get Karadzic,” AFP, 27 April 2002 (accessed at <http://www.balkanpeace.org/hed/archive/apr02/hed4918.shtml>, 4 June 2006).

³⁸⁵ These approximations are based on several different sources, including Stephens Memorandum, and “Operational Claims,” briefing by CPT Maureen Kohn, Chief, European Claims, U.S. Army Claims Service Europe (March 2003).

³⁸⁶ HANDBOOK, p. 553.

³⁸⁷ Military Technical Agreement between the International Security Force (‘KFOR’) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, Appendix B, para. 3, 9 June 1999.

³⁸⁸ HANDBOOK, p. 345.

³⁸⁹ The U.S. did not pay claims for almost two years after the beginning of the operation. LAW AND MILITARY OPERATIONS IN KOSOVO: 1999-2001, Center for Law and Military Operations, p.162 (15 December 2001)(hereinafter “KOSOVO”).

³⁹⁰ UNMIK/KFOR Joint Declaration, CJ(00)0320 (17 August 2000).

³⁹¹ “On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo,” UNMIK Regulation No. 2000/47 (18 August 2000)(hereinafter “UNMIK Reg. No. 2000/47”).

Although some KFOR contingents had already begun paying claims, the first KFOR Claims Office in Kosovo did not begin operations until 2001.³⁹² At that time, it already had a backlog of about 100 claims.³⁹³ Although it was on a smaller scale, the KFOR claims operation was similar in many respects to the claims operations in IFOR/SFOR,³⁹⁴ and it dealt with similar challenges, such as the difficulty of establishing property ownership in a formerly communist country, and in establishing reliable valuations for goods and services in a war-torn economy.³⁹⁵ Preventative claims measures proved very successful, however, in easing the way for the conduct of exercises and the building of roads on land that the affected Kosovars now considered to be private property. Coordinating with local civilians and municipalities in advance, letting them know how their claims would be settled, and then paying in cash made a very positive impression on people who had become accustomed to having the government do as it liked with little or no compensation.³⁹⁶

Some KFOR units were based in countries that were already NATO members, like Greece, or which had signed the PfP SOFA, like Albania and the Former Yugoslavian Republic of Macedonia. The claims provisions of Article VIII, NATO SOFA, applied in these countries, which meant that the host nation, or "receiving state," was responsible for collecting, investigating, and adjudicating claims, and then billing the responsible TCN, or "sending state," for 75% of the costs of the claims.³⁹⁷ The NAC granted a waiver of this provision to Albania and the Former Yugoslavian Republic of Macedonia, so claims in these countries were processed in a fashion similar to that in SFOR at the time.³⁹⁸ For example, by August 1999, the NATO Claims office in the Former Yugoslavian Republic of Macedonia had already settled about 120 claims of the approximately 300 it had already received during the KFOR operation.³⁹⁹

Under the current KFOR claims procedure, the tasks of the HQ KFOR Claims Office are very similar to those of the NHQ Sarajevo claims offices. The HQ KFOR Claims Office serves as the primary "point of contact for all claims against KFOR generally."⁴⁰⁰ Claims against HQ KFOR are handled there, and claims against TCNs are forwarded to them to be handled under their own respective national procedures.⁴⁰¹ TCNs are encouraged to use the HQ KFOR procedure as model if they do not have one of their own.⁴⁰² The HQ KFOR claims officer is responsible for maintaining oversight of all claims in Kosovo, and to report to the HQ KFOR LEGAD on their status.⁴⁰³ The claims officer is also the fund manager for the HQ KFOR claims account, and in this role coordinates closely with the HQ KFOR J8.⁴⁰⁴ When the specific TCN at fault for an otherwise meritorious claim cannot be identified, the claims officer will seek guidance from JFC Naples whether payment should be made from the HQ KFOR claims account.⁴⁰⁵ Finally, the claims officer is responsible for convening the Kosovo Claims Appeals Commission when necessary.⁴⁰⁶

In the event a claimant is dissatisfied with a claims decision, and it is against either HQ KFOR or a TCN which voluntarily participates in the Kosovo Claims Appeals Commission process, he can

³⁹² 1LT Marco Paccoj, "Kosovo's new Claims Office at Film City," KFOR CHRONICLE (accessed at http://www.nato.int/kfor/chronicle/2001/nr_010629d.htm, 3 August 2007).

³⁹³ "Claims in Kosovo," briefing by Commander Lone Kjelgaard, HQ KFOR Claims Officer (11 April 2002).

³⁹⁴ *Id.*

³⁹⁵ Interview with Ms. Lone Kjelgaard, Deputy Legal Adviser, JWC (former HQ KFOR Claims Officer)(17 August 2007).

³⁹⁶ *Id.*

³⁹⁷ Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, Art. VIII, para.5e(i), London, 19 June 1951.

³⁹⁸ KOSOVO, p. 66.

³⁹⁹ "KFOR Statement on road traffic accidents on Saturday 28 and Sunday 29 August in FYROM," KFOR Press Statements, 30 August 1999 (accessed at <http://www.nato.int/kosovo/press/1999/k990830b.html>, 3 August 2007).

⁴⁰⁰ HQ KFOR Main SOP 3023, "Claims," para. 4 (22 March 2003).

⁴⁰¹ *Id.*, para. 6.

⁴⁰² *Id.*, referring to Annex B.

⁴⁰³ *Id.*, para. 4(a).

⁴⁰⁴ *Id.*, para. 4(b).

⁴⁰⁵ *Id.*, para. 4(c).

⁴⁰⁶ *Id.*, para. 4(d).

appeal a decision to the commission.⁴⁰⁷ The commission will be composed of three judicial officers, one appointed by the force against whom the claim lies, and two appointed by the HQ KFOR LEGAD, or if authorized, the HQ KFOR claims officer.⁴⁰⁸ The decisions of the commission must be unanimous, but they are not binding.⁴⁰⁹ If the TCN does not participate in the commission process, the HQ KFOR claims office may still play a non-binding advisory role in disputes about claims.⁴¹⁰ Although only three TCNs and HQ KFOR currently participate in the Claims Appeal Commission process,⁴¹¹ on the whole the program has been successful. In the eight years since the beginning of the operation, the total number of claims filed in Kosovo is now slightly over 900, and claims settlements have paid out approximately € 250,000.⁴¹²

C. AFGHANISTAN⁴¹³

Under the Military Technical Agreement between Afghanistan and NATO, ISAF is not legally liable for “any damages to civilian or government property caused by any activity in pursuit of the ISAF mission.”⁴¹⁴ Claims resulting from property damaged or injuries incurred outside the scope of the mission, however, were to be submitted to the Afghan Transitional Authority, which would forward them to ISAF for disposition.⁴¹⁵ At least as early as ISAF IV (August 2003), however, the ISAF commander made a policy decision that for force protection reasons ISAF would compensate for mission-related damages where it was at fault, or where the TCN which caused the damage could not be identified. The command recognized that the payment of otherwise proper claims supported ISAF efforts to help restore the rule of law in Afghanistan.⁴¹⁶ Ordinarily, TCNs would handle their own claims, and although not legally obligated to pay them, could decide to settle them on an *ex gratia* basis.⁴¹⁷ The ISAF Legal Advisers Office drafted a claims policy based in part on the SFOR and KFOR policies, and provided guidance and reviewed cases and documentation for TCNs upon request.

Although the draft policy was not formally approved at this point, it was staffed with SHAPE and it served as a working document for successive ISAF rotations.⁴¹⁸ The current policy reflects in certain respects the evolution of the ISAF mission over successive ISAF headquarters rotations. It sets out the responsibilities and processes of the ISAF HQ Claims Office, which include assisting TCNs with claims when requested, forwarding claims to TCNs, maintaining claims files and databases, investigating and adjudicating claims against the ISAF HQ, and serving as the fund manager of the ISAF HQ claims fund.⁴¹⁹ Each TCN is required to appoint a claims representative,⁴²⁰ and routine coordination takes place between TCNs and the ISAF HQ Claims Office. One practical benefit of this coordination, that the TCNs being encouraged to provide claims forms to those who may have suffered damages, was quickly seen in the area of traffic accidents. After accidents, potential

⁴⁰⁷ *Id.*, Preamble; Annex C.

⁴⁰⁸ *Id.*, para. 11.

⁴⁰⁹ *Id.*, Preamble; para. 12.

⁴¹⁰ UNMIK Reg. No. 2000/47, § 7.

⁴¹¹ Letter from Captain Olivier Troian, HQ KFOR Claims Officer, 15 August 2007.

⁴¹² *Id.*

⁴¹³ For an NGO perspective on national practices of claims management in operations, especially in Afghanistan, see: CIVIC Campaign for Innocent Victims in Conflict <http://www.civicworldwide.org/>.

Addressing Civilian Harm in Afghanistan: Policies & Practices of International Forces / www.civicworldwide.org/.../afgh%20white%20paper%20color%20final.pdf

REPORT: US Military Compensation to Civilians in Armed Conflict http://www.civicworldwide.org/storage/civicdev/documents/dod_condolence.pdf

⁴¹⁴ Military Technical Agreement, between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, Annex A, para. 10 (5 March 2003).

⁴¹⁵ *Id.*

⁴¹⁶ Letter from Mr. Michael Hokenson, Deputy Chief Counsel, U.S. Army Test & Evaluation Command (ISAF IV LEGAD) (8 August 2007)(hereinafter “Hokenson Letter”).

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ ISAF HQ SOP 1151, “Claims Against ISAF,” paras. 1, 2, 5-8; Annexes A-C (15 April 2007).

⁴²⁰ *Id.*, para. 2.

claimants who were given such forms tended to go back to their business, whereas those who received no forms tended to follow ISAF vehicles back to their compounds.⁴²¹

Claimants are not required to submit their claims through Government of Afghanistan officials because of the austere conditions, and in cases where the responsible TCN cannot be identified, the ISAF HQ Claims Office will file the claims if they are meritorious.⁴²² Claims against the TCNs are handled under those countries' respective procedures.⁴²³ Claims against the ISAF HQ must ordinarily be filed within six months of the damage suffered, and claims for contractual issues, and because of combat damage and operational necessity are not accepted.⁴²⁴ The ISAF HQ claims procedures also set out a limited appeals mechanism for claimants who are dissatisfied with decisions on their cases. In cases involving claims against TCNs, the ISAF HQ Claims Officer will offer a non-binding, advisory opinion on the claims if the claimants file a request for reconsideration.⁴²⁵ The TCNs are required to forward the claims files to the ISAF HQ Claims Officer when such requests are made.⁴²⁶ If a claimant is unhappy with the ISAF HQ Claims Officer's decision on a case, then the claimant may "submit a request for reconsideration to the ISAF HQ Senior LEGAD."⁴²⁷ The standard applied on requests for reconsideration is whether the original decision is "clearly erroneous" or is a "manifest injustice."⁴²⁸

As the ISAF mission developed to encompass the entirety of Afghanistan, ISAF forces found themselves in combat situations with Taliban forces and others that probably had not been fully contemplated when the claims provisions were agreed to in the MTA – which was only intended to cover Kabul and its environs. It is one thing to deal with the claims business that results from conducting lightly armed patrols in a largely peaceful capital city – quite another to be engaged in brigade-sized combat operations against an unscrupulous and determined foe.⁴²⁹ The increased scale of the ISAF mission has led to an increase in claims, and unfortunately, an increase in the numbers of Afghan civilian casualties and property damage. These losses have become a very significant concern of both the Government of Afghanistan and NATO,⁴³⁰ and efforts are being made to find ways to both reduce the impact of combat related damage.

Realizing the negative mission impact and the inequity of being unable to reimburse innocent Afghans for the losses they suffered because of combat, certain NATO countries created and contributed to Post-Operational Humanitarian Relief Fund.⁴³¹ Unfortunately, only a handful of countries have contributed to this account, and at the time of this writing approximately a third of the €400,000 in the fund had already been disbursed.⁴³² By way of rough comparison, between 2003 and 2006, the U.S. Department of Defense reported that it had disbursed about \$1,900,000 in *solatia* payments from unit funds and more than \$29,000,000 in condolence payments under the Commander's Emergency Response Fund (CERP) to Iraqi and Afghani civilians who had suffered property damage, injury or death as a result of combat (the majority obviously paid to Iraqis).⁴³³ While both the NATO and U.S. military programs are complemented (and in instances overshadowed) by the efforts of other national and international aid donors in Afghanistan, they are the only ones under commanders' control. Reports from the field in Afghanistan suggest that such

⁴²¹ Hokenson Letter.

⁴²² *Id.*, para. 3.

⁴²³ *Id.*, para. 4.

⁴²⁴ *Id.*, para. 6.

⁴²⁵ *Id.*, para.13.

⁴²⁶ *Id.*, para. 14.

⁴²⁷ *Id.*, para. 15.

⁴²⁸ *Id.*, Annex B, para. 9.

⁴²⁹ See General David Richards, "A Firm Foundation," NATO REVIEW (Spring 2007).

⁴³⁰ "Hearts, minds and death," THE ECONOMIST, p. 46 (12 May 2007).

⁴³¹ RADIO FREE EUROPE.

⁴³² Sarah Holewinski, "Fixing The Collateral Damage," INTERNATIONAL HERALD TRIBUNE, reprinted on CIVIC (accessed at http://www.civicworldwide.org/index.php?option=com_content&task.html, 3 August 2007).

⁴³³ "Military Operations: The Department of Defense's use of Solatia and Condolence Payments in Iraq and Afghanistan," Abstract, GAO-07-699, U.S. Government Accountability Office, 23 May 2007.

payments, either in cash or in kind, can be effective in relieving both the hardship and the heartache that accompanies combat damages.⁴³⁴

D. PAKISTAN

Pakistan requested humanitarian assistance from NATO in the aftermath of the devastating earthquake it suffered on 8 October 2005. Negotiations to allow NATO forces access to Pakistan culminated in a Draft Exchange of Letters (DEOL) between Pakistan and NATO on 4 November 2005. In the DEOL, NATO personnel and foreign contractors were essentially given the status of experts-on-mission.⁴³⁵ Specifically with regard to claims, the DEOL provided that Pakistan and NATO would waive all claims against each other for unintentional death, injury, or property damage caused to their forces by the acts or omissions of the other. Claims for damages against NATO personnel and contractors by third parties, however, were not waived, and were to be “transmitted through the governmental Pakistani authorities to the designated NATO Representative.”⁴³⁶

The aid mission to Pakistan lasted three months, and concluded in January 2006. The number of third party claims against NATO appears to have been very small, and in fact, there may only have been one.⁴³⁷ The Joint Command Lisbon legal adviser drafted a claims policy for use during the operation, but it was not approved by SHAPE for use prior to the end of the mission.⁴³⁸ Regardless, a review of its essential features is worthwhile, because it is a significant example of a practical and expedient means to deal with claims in a mission of short duration. First, the role of the deployed headquarters regarding claims was to serve as a point of contact with the Pakistani Ministry of Foreign Affairs (MFA), and as a conduit to pass the claim to the TCN that was alleged to have caused the damage.⁴³⁹ Second, the headquarters required TCNs to notify it of the final disposition of the claims, so that it could inform the MFA.⁴⁴⁰ Third, “In cases involving rescue, where a TCN is the rescuing party unless the TCN has caused the situation that requires rescue, the TCN should not normally pay damages as a rescuer.”⁴⁴¹ Finally, in the event the proper TCN could not be found, the headquarters would determine whether it would pay the claim on an *ex gratia* basis.⁴⁴² The policy also contained a claims form which required the claimant to provide basic information, briefly described the claims process, and provided an MFA point of contact.⁴⁴³

E. CURRENT POLICY

NATO has its first claims policy from 2004. It represents a consensus as to the major features of past operational claims programs that were found to be generally acceptable.⁴⁴⁴ Importantly, however, it recognizes what is probably the most significant factor in developing any operational claims policy or program. A headquarters may impose an obligation upon itself to pay claims in a particular way, and may suggest that its process is a model – but the NATO members and other TCNs must be free to follow their own fiscal laws and regulations.⁴⁴⁵

⁴³⁴ Peter Lloyd, “Interview with Sarah Hoewinski,” CIVIC (accessed at http://www.civicworldwide.org/index.php?option=com_content&task.html, 3 August 2007).

⁴³⁵ “Draft Exchange of Letters between NATO and the Islamic Republic of Pakistan,” SG(2005)0795, 3 November 2005, paras. 7-11.

⁴³⁶ *Id.*, para. 17.

⁴³⁷ Letter from the Pakistani Embassy in Belgium to Ms. Burcu San, Office of the Secretary General, NATO, No. Pol/RO-1/2006 (8 June 2006).

⁴³⁸ Interview with LtCol John Hardy, LEGAD, JC Lisbon (22 April 2007).

⁴³⁹ Operation Pakistan Earthquake Relief Claims Policy (Draft), para. 6.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*, para. 7.

⁴⁴² *Id.*, para. 10.

⁴⁴³ *Id.*, Annex A.

⁴⁴⁴ “NATO Claims Policy for Designated Crisis Response Situations,” Annex 1, AC/119-N(2004)0058 (19 May 2004).

⁴⁴⁵ *Id.*, § A, para. 1.

Currently however, in agreeing "Taking Forward General McChrystal's Initial Assessment" (PO(1010)0023), Defence Ministers had decided that policy work in a number of areas should be taken forward. The new NATO policy approved in June 2010 is the Non-Binding Guidelines for Payments in Combat-Related Cases of Civilian Casualties or Damage to Civilian Property - ANNEX to SG(2010)0377 - (approved on 11 Jun 2010).

It is a non-binding approach with the objective to acknowledge the seriousness of the suffering caused by civilian casualties, and which is sent out for consideration for nations.. However, it is not intended to alter the legal position and obligations of the forces.

The new policy contains no reference to the other claims policy from 2004, therefore they shall be applied in consistent with each other.

The full non-classified text of the policy is as follows:

Non-Binding Guidelines for Payments in Combat-Related Cases of Civilian Casualties or Damage to Civilian Property

ISAF is making every effort to reduce the impact of the conflict on civilians. However when combat-related civilian casualties or damage to civilian property occur, NATO/ ISAF considers that easing civilian suffering is of tremendous importance. For this reason, NATO has developed a set of non-binding policy guidelines for dealing with cases of civilian combat-related casualties. Decisions on making payments in combat-related cases of civilian casualties or damage remain a matter of national discretion. The following non-binding guidelines do not alter the legal position and obligations of ISAF forces in Afghanistan.

1. Promptly acknowledge combat-related cases of civilian casualties or damage to civilian property.
2. Continue to fully implement the ISAF standard operating procedures for investigating possible cases of civilian casualties, or damage to civilian property, and endeavour to provide the necessary information to the ISAF civilian casualties tracking cell.
3. Proactively offer assistance for civilian casualty cases or damages to civilian property, in order to mitigate human suffering to the extent possible. Examples of assistance could include ex-gratia payments or in-kind assistance, such as medical treatment, the replacement of animals or crops, and the like.
4. Offers of such assistance, where appropriate, should be discussed with, and coordinated through, village elders or alternative tribal structures, as well as district-level government authorities, whenever possible. Assistance should also, where possible, be coordinated with other responsible civilian actors on the ground.
5. Offering and providing such assistance should take into account the best way to limit any further security risk to affected civilians and ISAF/PRT personnel.
6. Local customs and norms vary across Afghanistan and should be fully taken into account when determining the appropriate response to a particular incident, including for potential ex-gratia payments.
7. Personnel working to address cases of civilian casualties or damage to civilian property should be accessible, particularly, subject to security considerations, in conflict-affected areas, and local communities made fully aware of the investigation and payment process.
8. The system by which payments are determined and made should be as simple, prompt and transparent as possible and involve the affected civilians at all points feasible.
9. Payments are made and in-kind assistance is provided without reference to the question of legal liability.

PART XV
EU CRISIS MANAGEMENT OPERATIONS
AND
THEIR RELATIONS WITH NATO OPERATIONS

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Suggested reading:

- See the literature in notes 1-3 and 35.

Websites:

- EU Common Security and Defence Policy: <http://www.consilium.europa.eu/showPage.aspx?id=261&lang=EN&mode=g>;
- EU-NATO at EU: <http://www.consilium.europa.eu/showPage.aspx?id=282&lang=en>;
- NATO-EU at NATO: <http://www.nato.int/issues/nato-eu/index.html>.

Selected references:

- Treaty on European Union and Treaty on the Functioning of the European Union, Official Journal (O.J.) C 83, 30 March 2010 (see also <http://eur-lex.europa.eu/en/index.htm>);
- Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA), *O.J.* C 321, 31 December 2003, p. 6;
- Agreement between the Member States of the European Union concerning claims introduced by each Member State against any other Member State for damage to any property owned, used or operated by it or injury or death suffered by any military or civilian staff of its services, in the context of an EU crisis management operation, Brussels, 28 April 2004, *O.J.* C 116, 30 April 2004, p. 1;
- EU-NATO Security Agreement of 14 March 2003 *O.J.* L 80, 27 March 2003, p. 35/36;
- Council Decision of 22 January 2001 setting up the Military Committee of the European Union (2001/79/CFSP), *O.J.* L 27, 30 January 2001, p. 4;
- Council Decision of 22 January 2001 on the establishment of the Military Staff of the European Union (2001/80/CFSP), *O.J.* L 27, 30 January 2001, p. 7, as amended by Council Decision 2005/395/CFSP of 10 May 2005, *O.J.* L 132, 26 May 2005, p. 17 and Council Decision 2008/298/CFSP of 7 April 2008, *O.J.* L 102, 12 April 2008;
- Council Joint Action of 12 July 2004 on the establishment of the European Defence Agency (2004/551/CFSP), *O.J.* L 245, 17 July 2004, p. 17, as amended;
- Council Decision 2008/975/CFSP of 18 December 2008 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications (Athena), *O.J.* L 345, 23 December 2008, p. 96;
- European Security Strategy. A Secure Europe in a Better World, adopted by the 12-13 December 2003 Brussels European Council, and 2008 implementation report (<http://www.consilium.europa.eu/showPage.aspx?id=266&lang=EN>);
- EU Concept for the Use of Force in EU-led Military Operations (currently second revision, EU Council Doc. 17168/09 of 4 December 2009, EU RESTREINT, declassified to a very limited extent in EU Council Doc. 17168/09 EXT 1 of 2 February 2010);
- Model status of forces agreement for EU military operations, EU Council Documents 12616/07 of 6 September 2007 and 11894/07 of 20 July 2007 and COR 1 (5 September 2007);
- EU Capability Development Mechanism, EU Council Doc. 6805/03 of 26 February 2003.

Introduction

The European Security and Defence Policy (ESDP) was launched in 1999 and has developed rapidly since then.⁴⁴⁶ It has mainly manifested itself through a wide array of civilian and military crisis management operations: in the period from 1 January 2003, until 31 March 2010, some 23 operations have been launched, including 7 military operations, 15 civilian ones, and one mixed civil-military operation (sometimes the term operations is reserved for military operations and missions for civilian missions but I will use both interchangeably).⁴⁴⁷ The ESDP was renamed Common Security and Defence Policy (CSDP) by the Treaty of Lisbon (which entered into force on 1 December 2009) and, for the sake of convenience, CSDP is used throughout this contribution also for the pre-Lisbon period.

This chapter briefly sets out the basic features of the CSDP (I), the overall framework of EU-NATO relations (II), the legal framework for CSDP operations (III) and the relations with NATO in the framework of these operations (IV).⁴⁴⁸

A. THE BASIC FEATURES AND INSTITUTIONAL FRAMEWORK OF THE EU'S COMMON SECURITY AND DEFENCE POLICY

1. Basic features

The key elements of the CSDP are set out in Article 42 EU Treaty,⁴⁴⁹ which merits full quotation:

1. The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States.
2. The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.

⁴⁴⁶ See generally <http://www.consilium.europa.eu/showPage.aspx?id=261&lang=EN&mode=g>. See also G. Grevi *et al.* (eds.), *European Security and Defence Policy: the First Ten Years (1999-2009)*, Paris, EU Institute for Security Studies, 2009, http://www.iss.europa.eu/uploads/media/ESDP_10-web.pdf and J. Howorth, *Security and Defence Policy in the European Union*, Basingstoke, Palgrave, 2007.

⁴⁴⁷ See extensively http://www.consilium.europa.eu/cms3_fo/showPage.aspx?id=268&lang=EN&mode=g; F. Naert, 'ESDP in Practice: Increasingly Varied and Ambitious EU Security and Defence Operations', in M. Trybus & N. White (eds.), *European Security Law*, Oxford, Oxford University Press, 2007, pp. 61-101 and F. Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights*, Antwerp, Intersentia, 2009, pp. 97-191. The number depends to some extent on how one counts them. This number excludes missions launched before 1999 which would probably qualify as crisis management operations today.

⁴⁴⁸ For a more extensive analysis of the CSDP from a legal perspective, see e.g. S. Blockmans (ed.), *The European Union and International Crisis Management: Legal and Policy Aspects*, The Hague, TMC Asser Press, 2008); S. Dietrich, *Europäische Sicherheits- und Verteidigungspolitik (ESVP). ...*, Baden-Baden, Nomos, 2006; F. Naert, *supra* note 2 (2009); N. Ronzitti (ed.), *Le forze di pace dell'Unione Europea*, Rome, Rubbettino, 2005; M. Trybus & N. White (eds.), *European Security Law*, Oxford, Oxford University Press, 2007; M. Trybus, *European Union Law and Defence Integration*, Oxford, Hart, 2005 and S. Graf von Kielmansegg, *Die verteidigungspolitik der Europäischen Union*, Stuttgart, Boorberg, 2005.

⁴⁴⁹ The post-Lisbon consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union are published in the Official Journal (O.J.) C 83, 30 March 2010 (see also <http://eur-lex.europa.eu/en/index.htm>).

The policy of the Union in accordance with this Section shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.

3. Member States shall make civilian and military capabilities available to the Union for the implementation of the common security and defence policy, to contribute to the objectives defined by the Council. Those Member States which together establish multinational forces may also make them available to the common security and defence policy.

Member States shall undertake progressively to improve their military capabilities. The Agency in the field of defence capabilities development, research, acquisition and armaments (hereinafter referred to as 'the European Defence Agency') shall identify operational requirements, shall promote measures to satisfy those requirements, shall contribute to identifying and, where appropriate, implementing any measure needed to strengthen the industrial and technological base of the defence sector, shall participate in defining a European capabilities and armaments policy, and shall assist the Council in evaluating the improvement of military capabilities.

4. Decisions relating to the common security and defence policy, including those initiating a mission as referred to in this Article, shall be adopted by the Council acting unanimously on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy or an initiative from a Member State. The High Representative may propose the use of both national resources and Union instruments, together with the Commission where appropriate.

5. The Council may entrust the execution of a task, within the Union framework, to a group of Member States in order to protect the Union's values and serve its interests. The execution of such a task shall be governed by Article 44.

6. Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework. Such cooperation shall be governed by Article 46. It shall not affect the provisions of Article 43.

7. If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States that are members of it, remains the foundation of their collective defence and the forum for its implementation.

The main features can be summarised as follows:

- The CSDP is part of the EU's broader Common Foreign and Security Policy (CFSP)⁴⁵⁰ and is consequently subject to the primarily intergovernmental rules governing this area of EU activity, including decision-making by the Council by unanimity (with only a few specific exceptions);

⁴⁵⁰ The provisions on the CSDP are in the Title on the CFSP: see Title V, Chapter 2, Section 2 EU Treaty.

- As part of the EU's external relations, and of the CFSP in particular, the CSDP shall respect international law and the principles of the United Nations Charter as well as the primary role of the UN Security Council;⁴⁵¹ this has been specifically confirmed with regard to the CSDP;⁴⁵²
- The core of the CDSP consists of “missions outside the Union for peace-keeping, conflict prevention and strengthening international security”; these missions are further defined in Article 43 EU Treaty: they “shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation” and may all “contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories”; while this wording is different from the pre-Lisbon Article 17 EU Treaty, it arguably does not really bring about any change in the kind of operations which the EU is authorised to conduct, namely a wide range of crisis management operations, including high intensity peace enforcement (see below);
- This comprises both military and civilian missions (see e.g. the reference to both military and civilian assets/capabilities);
- Member States have a mutual assistance obligation; however, this “shall not prejudice the specific character of the security and defence policy of certain Member States” and therefore exempts the neutral/non aligned Member States (see the Decision of the Heads of State or Government of the 27 EU Member States meetings within the European Council on the concerns of the Irish people on the Treaty of Lisbon, adopted on 18-19 June 2009⁴⁵³); furthermore, it does not yet amount to a common defence since that decision has not yet been taken (*ibid.*); moreover, the EU Treaty does not provide for this obligation to be implemented in the framework of the Union (e.g. the Political and Security Committee's role is only defined in relation to crisis management operations outside the EU);
- Both the CSDP generally and the mutual assistance clause in particular are without prejudice to NATO and the obligations of NATO Member States (see also below);
- Member States commit to making civilian and military capabilities available to the Union and undertake progressively to improve their military capabilities; the European Defence Agency (which has already been established in 2004) is to play a role in this respect; those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments shall establish permanent structured cooperation within the EU; one of the criteria laid down in the Protocol (No. 10) on Permanent Structured Cooperation is the capacity to supply targeted combat units for the missions planned, structured at a tactical level as a battle group; these EU Battle Groups are “the minimum militarily effective, credible, rapidly deployable, coherent force package capable of stand-alone operations, or for the initial phase of larger operations (30 days initially, extendable to 120, if re-supplied appropriately), based on a combined arms, battalion sized force and reinforced with Combat Support and Combat Service Support elements (meaning some 1500 troops), of a multinational nature and able to be formed by a Framework Nation or a multinational coalition and associated with a (Force)Headquarters and pre-identified operational and strategic enablers, such as strategic lift and logistics”,⁴⁵⁴ two EU Battle Groups are on standby at all times, for a six-month period according to an agreed schedule, and it should be possible to deploy two EU Battle Group size operations simultaneously.⁴⁵⁵ The ambition of the EU is to be able to take the decision to launch such an operation within five days of the

⁴⁵¹ See Articles 3(5); 21(1) and 21(2)c EU Treaty and Declaration (No. 13) concerning the CFSP (“the EU and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its Members for the maintenance of international peace and security”).

⁴⁵² See Article 42(1) EU Treaty (cited above); § 2 of the 1999 Cologne Presidency Report and § 26 of the Helsinki European Council Presidency Conclusions, 10-11 December 1999.

⁴⁵³ Presidency Conclusions of the Cologne European Council of 3-4 June 2009, §§ 3-5 and Annex I, Section C. See also the Irish and EU declarations made at the Seville European Council of 21-22 June 2002.

⁴⁵⁴ See the EU Battle Group Concept (declassified sections), EU Council Doc. 13618/06 EXT 1 of 27 April 2007 and <http://www.consilium.europa.eu/uedocs/cmsUpload/BattlegroupsNov05factsheet.pdf>.

⁴⁵⁵ EU Council Doc. 10418/06 of 12 June 2006, § 41.

approval of the Crisis Management Concept by the Council and that the forces start implementing their mission on the ground no later than ten days after the EU decision to launch the operation.⁴⁵⁶

- The Council may entrust the execution of a task to a group of Member States; this goes beyond the pre-Lisbon practice where not all Member States always participated in all operations but where there was no delegation to group of Member States.

Two further features must be mentioned:

- Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications;⁴⁵⁷ however, it does participate in civilian crisis management;
- The EU may conduct CSDP operations conducted either autonomously or with recourse to NATO assets and capabilities; this has been very clear from the outset and has also been quickly and consistently confirmed in practice (see below).⁴⁵⁸

2. Institutional framework

The European Council – i.e. the Heads of State or Government – identify the Union's strategic interests, determine the objectives of and define general guidelines for the common foreign and security policy, including for matters with defence implications (Article 26(1) EU Treaty). For instance, the 2003 *European Security Strategy* was adopted by the European Council.⁴⁵⁹

Within these guidelines, the main decision-making body is the Council (of Ministers). As indicated above, on CSDP issues it normally decides by unanimity. In order to adequately develop the CSDP and conduct operations pursuant to this policy, the Council may meet composed of Defence Ministers, albeit so far not as a Defence Ministers Council.⁴⁶⁰

The work of the Council is prepared by a series of preparatory bodies, also consisting of representatives from the Member States. The Committee of Permanent Representatives (COREPER) is the highest of these bodies preparing the work of the Council. The Political and Security Committee (PSC) is situated just below COREPER and is the main preparatory body in the field of the CFSP and CSDP. Article 38 EU Treaty defines its mandate as follows:

... a Political and Security Committee shall monitor the international situation in the areas covered by the [CFSP] and contribute to the definition of policies by delivering opinions to the Council at the request of the Council or of the High Representative of

⁴⁵⁶ Headline Goal 2010, <http://www.consilium.europa.eu/uedocs/cmsUpload/2010%20Headline%20Goal.pdf>, § 4, approved by the Council on 17 May 2004 and endorsed by the European Council of 17-18 June 2004. See also the EU Military Rapid Response Concept (EU Council Doc. 5654/1/09 REV 1, 27 April 2009) and EU Air and Maritime Rapid Response Concepts (respectively EU Council documents 16838/07, 21 December 2007 and 15294/07, 15 November 2007; both partially available in the Council's register).

⁴⁵⁷ See Article 5 Protocol (No. 22) on the Position of Denmark.

⁴⁵⁸ According to § 1 of the Cologne Declaration of the European Council and Presidency report on strengthening the European common policy on security and defence (3-4 June 1999, Presidency conclusions, Annex III), the EU "must have the capacity for autonomous action". According to § 4 of the Presidency report annexed thereto, the European Union "will have to determine, according to the requirements of the case, whether it will conduct: EU-led operations using NATO assets and capabilities or EU-led operations without recourse to NATO assets and capabilities".

⁴⁵⁹ *European Security Strategy. A Secure Europe in a Better World*, adopted by the 12-13 December 2003 Brussels European Council. See <http://www.consilium.europa.eu/showPage.aspx?id=266&lang=EN> (including the 2008 implementation report).

⁴⁶⁰ There is only one Council but it meets in different formations. Discussions on defence matters normally take place in the Foreign Affairs Council (formerly General Affairs and External Relations Council), which meets about once a month, but decisions on such issues can also be adopted by any other Council format, especially in case of urgency and when agreement has already been reached at lower level (a 'non discussion point'). The Defence ministers have met informally since 1998; since 1999 they also meet within the General Affairs/External Relations Council together with the Foreign Affairs Ministers and since 2002 they may also meet in this Council format by themselves.

the Union for Foreign Affairs and Security Policy or on its own initiative. It shall also monitor the implementation of agreed policies, without prejudice to the powers of the High Representative.

Within the scope of this Chapter, the Political and Security Committee shall exercise, under the responsibility of the Council and of the High Representative, the political control and strategic direction of the crisis management operations referred to in Article 43.

The Council may authorise the Committee, for the purpose and for the duration of a crisis management operation, as determined by the Council, to take the relevant decisions concerning the political control and strategic direction of the operation.⁴⁶¹

The practice of CSDP operations so far has confirmed this key role. In particular, the PSC is usually granted the authority to amend the operation plan, the chain of command, sometimes including the appointment of the Head of Mission or Operation and Force Commander, and the rules of engagement, to accept third States' contributions and to set up a committee of contributors, while the powers of decision concerning the objectives and termination of the operation remain vested in the Council.

The PSC is in turn assisted by a number of other preparatory bodies. In the field of the CSDP, these are especially the:

- the EU Military Committee (EUMC), which is composed of the Member States' Chiefs of Defence, represented by their military representatives; it normally meets once a week in military representatives format and twice a year at the level of Chiefs of Defence; it *"is responsible for providing the PSC with military advice and recommendations on all military matters within the EU" and "exercises military direction of all military activities within the EU framework"*,⁴⁶²
- the Committee for Civilian Aspects of Crisis Management (CIVCOM);⁴⁶³ and
- the Political-Military Group (PMG).

The Council and its preparatory bodies are assisted by the Council's General Secretariat, which includes, *inter alia*:

- various Directorates within the Directorate General External Relations (DGE), including the recently established Crisis Management and Planning Directorate (CMPD), which is a single civilian-military strategic planning structure for CSDP operations and missions (CMPD);⁴⁶⁴
- the EU Military Staff (EUMS);⁴⁶⁵ two particular elements should be mentioned in this respect: the EUMS maintains the capacity to rapidly to set up an EU operations centre for a specific

⁴⁶¹ See also Council decision of 22 January 2001 setting up the Political and Security Committee (2001/78/CFSP), *O.J. L* 27, 30 January 2001, p. 1.

⁴⁶² See Council decision of 22 January 2001 setting up the Military Committee of the European Union (2001/79/CFSP), *O.J. L* 27, 30 January 2001, p. 4. See also <http://www.consilium.europa.eu/showPage.aspx?id=1648&lang=EN>.

⁴⁶³ See Council Decision of 22 May 2000 setting up a Committee for Civilian Aspects of Crisis Management (2000/354/CFSP), *O.J. L* 127, 27 May 2000, p. 1.

⁴⁶⁴ See § 30 of the Presidency Conclusions of the 11-12 December 2008 European Council and § 6 of the Declaration by the European Council on the Enhancement of the European Security and Defence Policy in Annex II thereto. The CMPD merges the former military and civilian crisis management directorates DGE VIII and IX.

⁴⁶⁵ See Council decision of 22 January 2001 on the establishment of the Military Staff of the European Union (2001/80/CFSP), *O.J. L* 27, 30 January 2001, p. 7, as amended, and <http://www.consilium.europa.eu/showPage.aspx?id=1039&lang=en>.

operation (see also below)⁴⁶⁶ and the role of the EUMS in the early stages of planning for a military CSDP operation has been enhanced;⁴⁶⁷

- the Civilian Planning and Conduct Capability (CPCC), established in 2007 to function as a permanent headquarters for the EU's civilian crisis management operations (at the same time, guidelines for the Command and Control Structure for EU Civilian Operations in Crisis Management were adapted to reflect this;⁴⁶⁸ they *inter alia* provide that “a Civilian Operation Commander will exercise command and control at strategic level for the planning and conduct of all civilian crisis management operations, under the political control and strategic direction of the [PSC] and the overall authority of the [SG/HR]; these Guidelines further provide that the Director of the Civilian Planning and Conduct Capability (CPCC) established within the Council Secretariat will, for each civilian crisis management operation, be the Civilian Operation Commander”⁴⁶⁹);
- the Policy Unit;
- the joint Situation Centre.

It is envisaged that the CSDP services in the Council's General Secretariat will be integrated into the European External Actions Service that is to be established under the Lisbon Treaty, while retaining their specificity.⁴⁷⁰

The Council's General Secretariat is headed by the Secretary General of the Council, who was also the High Representative for the CFSP (SG/HR, namely Javier Solana) and who assisted the Presidency of the Council (which rotates every 6 months between Member States) in its responsibilities of implementing CFSP decisions, representing the EU on CFSP issues, and chairing the meetings of the Council and its preparatory bodies. Under the Lisbon Treaty, the former functions of both the Presidency and the SG/HR in the CFSP are now exercised by the High Representative of the Union for Foreign Affairs and Security Policy (Baroness Catherine Ashton) and have even been enhanced. Moreover, the High Representative is also Vice-President of the European Commission. She is therefore a key actor in the CFSP and CSDP and will be assisted by the European External Action Service (see Article 27 EU Treaty; see also above).

The PSC exercises political control and strategic direction over CSDP operations. The EU has no standing military command structure and headquarters. For military operations, the command and control structure goes from the Operation Commander (and his headquarters), who has the highest level of *military command*, to the Force Commander (and his headquarters) and to subordinate commanders and forces.⁴⁷¹ Therefore the arrangements for commanding an operation and in particular its headquarters are each time determined on an *ad hoc* basis (similar to the generation of the necessary forces⁴⁷²) and headquarters have to be made available by NATO or by Member States individually or jointly.

⁴⁶⁶ See Council Decision of 10 May 2005 amending Decision 2001/80/CFSP on the establishment of the Military Staff of the European Union (2005/395/CFSP), *O.J. L 132, 26 May 2005, p. 17*.

⁴⁶⁷ See Council Decision of 7 April 2008 amending Decision 2001/80/CFSP on the establishment of the Military Staff of the European Union (2008/298/CFSP), *O.J. L 102, 12 April 2008, p. 25* and the EU Concept for Military Planning at the Political and Strategic Level, Council Doc. 10687/08 of 16 June 2008.

⁴⁶⁸ See, e.g. External Relations Council of 19-20 November 2007, conclusions on ESDP, § 36; Council Doc. 9919/07 EXT 1 of 6 July 2007 and Council Doc. 11277/07 of 28 June 2007.

⁴⁶⁹ See, e.g. Council Joint Action of 13 November 2007 amending Joint Action 2007/369/CFSP on the establishment of the European Union Police Mission in Afghanistan (EUPOL AFGHANISTAN) (2007/733/CFSP), *O.J. L 295, 14 November 2007, p. 31* (2nd recital). See also EU Council Doc. 10116/07 (5 June 2007) on the 'Watchkeeping Capability (WKC) for ESDP Operations within the General Secretariat of the Council' (partially public).

⁴⁷⁰ See the Presidency report to the European Council on the European External Action Service dated 23 October 2009 (EU Council Doc. 14930/09); the guidelines set out in this report were approved by the 29-30 October 2009 European Council, see § 3 of the conclusions of this European Council) and the proposal for the Council decision submitted by the High Representative on 25 March 2010 (EU Council Doc. 8029/10).

⁴⁷¹ On the command and control (C2) arrangements in military ESDP operations, see the EU Military C2 Concept (Council Doc. 11096/03 EXT 1 of 26 July 2006; this is a partially declassified version).

⁴⁷² See on this EU Concept for Force Generation, Council Doc. 10690 of 16 June 2008.

Nevertheless, as the CSDP has evolved, there has been a greater acceptance for the nucleus of a proper headquarters within the EU in defined circumstances. To this effect, a civilian military (planning) cell was set up in the EUMS and the mandate of the EUMS⁴⁷³ was amended to give it the responsibility, initially through the Civil/Military Cell, “of generating the capacity to plan and run an autonomous EU military operation, and maintains the capacity within EUMS rapidly to set up an operations centre for a specific operation, in particular where a joint civil/military response is required and where no national HQ is identified, once a decision on such an operation has been taken by the Council, upon the advice of the EUMC”.⁴⁷⁴ The EU Operations Centre reached operational capability on 1 January 2007 and has been successfully activated for exercises. In addition, the role of the EUMS in the early stages of planning for a military CSDP operation has been enhanced (see above). Very recently, the Civil/Military Cell’s functions were partially redistributed within the EUMS and partially transferred to the newly established CMPD. The capacity to generate the EU Operations Centre remains within the EUMS.

Furthermore, mention should be made of the EU Satellite Centre,⁴⁷⁵ the EU Institute for Security Studies,⁴⁷⁶ the European Defence Agency (see also above)⁴⁷⁷ and the European Security and Defence College.⁴⁷⁸

The role of the European Commission and of the European Parliament is rather limited (as is the case under the CFSP more generally).⁴⁷⁹

B. EU – NATO RELATIONS⁴⁸⁰

To understand EU-NATO relations, it is necessary to very briefly recall their origins, including the role of the Western European Union (WEU).

1. The establishment of the WEU and its relations with NATO

When the WEU was established in 1954, based on the amended 1948 Brussels Treaty,⁴⁸¹ and following the rejection of the European Defence Community by the French parliament, it was agreed not to duplicate a military structure within the WEU: “Recognising the undesirability of duplicating the military staffs of NATO, the Council and its Agency will rely on the appropriate military authorities of NATO for information and advice on military matters” (Article IV amended Brussels Treaty).

⁴⁷³ Council fact sheet (February 2005), <http://www.consilium.europa.eu/uedocs/cmsUpload/Battlegroups.pdf>. See also the December 2003 European Council approved document on NATO-EU Consultation, Planning and Operations, <http://www.consilium.europa.eu/uedocs/cmsUpload/78414%20-%20EU-NATO%20Consultation,%20Planning%20and%20Operations.pdf>.

⁴⁷⁴ See Council Decision 2005/395/CFSP, *supra note 21*. On the Civ-Mil Cell and the EU Operations Centre, see also EU Council Doc. 13990/04 EXT 1 of 28 January 2005.

⁴⁷⁵ See Council Joint Action of 20 July 2001 on the establishment of a European Union Satellite Centre (2001/555/CFSP), *O.J. L* 200, 25 July 2001, p. 5, as amended, and <http://www.eusc.org/>.

⁴⁷⁶ See Council Joint Action of 20 July 2001 on the establishment of a European Union Institute for Security Studies (2001/554/CFSP), *O.J. L* 200, 25 July 2001, p. 1, as amended, and <http://www.iss.europa.eu/>.

⁴⁷⁷ See Council Joint Action of 12 July 2004 on the establishment of the European Defence Agency (2004/551/CFSP), *O.J. L* 245, 17 July 2004, p. 17, as amended, and <http://www.eda.europa.eu/>.

⁴⁷⁸ See currently Council Joint Action of 23 June 2008 establishing a European Security and Defence College (ESDC) and repealing Joint Action 2005/575/CFSP (2008/550/CFSP), *O.J. L* 176, 4 July 2008, p. 20.

⁴⁷⁹ See Article 24 as well as Articles 36, 22(2), 27(3), 30(1), 42(4) and 45(2) EU Treaty as well as Declaration (14) concerning the CFSP.

⁴⁸⁰ For an extensive overview, see M. Reichard, *The EU-NATO Relationship: A Legal and Political Perspective*, Aldershot, Ashgate, 2006. See also <http://www.consilium.europa.eu/showPage.aspx?id=282&lang=en> and <http://www.nato.int/issues/nato-eu/index.html> and A. Toje, *The EU, NATO and European Defence – A Slow Train Coming*, Paris, EU ISS, Occasional Paper No. 74, December 2008.

⁴⁸¹ Treaty on Economic, Social and Cultural Collaboration and Collective Self-Defence, Brussels, 17 March 1948, as amended by the Protocol(s) Modifying and Completing the Brussels Treaty, Paris, 23 October 1954.

2. The development of the EU's security and defence policy with the WEU as defence component of the EU and European pillar of NATO

When the European Union was established by the Treaty of Maastricht (7 February 1992, entered into force on 1 November 1993) and European integration was significantly broadened, the existing European (Economic) Community competences were supplemented by a Common Foreign and Security Policy and cooperation in the field of Justice and Home Affairs. The CFSP comprised “*all questions related to the security of the Union, including the eventual framing of a common defence policy, which might in time lead to a common defence*” but the Union had to request the WEU, which was “*an integral part of the development of the Union*”, “*to elaborate and implement decisions and actions of the Union which have defence implications*” and the EU and the WEU had to adopt the necessary practical arrangements to that effect (Art. J.4 EU Treaty). As regards relations with NATO, it was clearly stipulated that this policy “*shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework*” (Art. J.4(4) EU Treaty).

The role of the WEU was set out in more detail in a Declaration by the States who were then members of the WEU and the EU on the role of the WEU and its relations with NATO adopted on 10 December 1991, and annexed to the Maastricht Treaty. In essence, it provided for strengthening the role of the WEU in the longer term perspective of a common defence policy within the European Union and that “*WEU will be developed as the defence component of the European Union and as a means to strengthen the European pillar of the Atlantic Alliance*”. Furthermore, the WEU adopted the ‘Petersberg tasks’ in its 19 June 1992, Bonn Ministerial Declaration, which provided that, apart from contributing to the common defence, WEU could conduct “*humanitarian and rescue tasks; peacekeeping tasks; [and] tasks of combat forces in crisis management, including peacemaking*”.

NATO had accepted the idea of a European Security and Defence Identity (ESDI). E.g., the 6-7 June 1991, NAC final communiqué read (in §§ 1 and 3):

“... the agreement of all Allies to enhance the role and responsibility of the European members. We welcome efforts further to strengthen the security dimension in the process of European integration and recognise the significance of the progress made ... towards the goal of political union, including the development of a [CFSP]. ... The development of a European security identity and defence role, reflected in the strengthening of the European pillar within the Alliance, will reinforce the integrity and effectiveness of the Atlantic Alliance. [...] we will develop practical arrangements to ensure the necessary transparency and complementarity between the European security and defence identity as it emerges in the Twelve and the WEU, and the Alliance. There will be a need, in particular, to [...] ensure that the Allies that are not currently participating in the development of a European identity in foreign and security policy and defence should be adequately involved in decisions that may affect their security.”

Hence, the WEU became the security and defence component of the EU and the (Western) European pillar of NATO. In reality, the ESDI initially concentrated on the WEU. To implement this role, the WEU established far-reaching cooperation mechanisms with NATO and the EU and developed special categories of membership for the non-WEU NATO and non-WEU EU members (associated members and observers respectively).

The WEU – NATO arrangements were adopted at the 11 January 1994, NAC Meeting and were further developed and agreed, especially at the 3 June and 10 December 1996, NAC Meetings. They included in particular the elaboration of European command arrangements within NATO able to prepare and conduct WEU-led operations; the arrangements for identifying NATO capabilities and assets which might be made available to the WEU for a WEU-led operation; arrangements for the release, monitoring and return or recall of Alliance assets and capabilities; modalities of cooperation with the WEU and planning and conducting exercising for WEU-led operations, following receipt of illustrative profiles for WEU missions. However, it would take another couple of years before these

arrangements were fully implemented and by that time, the EU had decided to take on military and defence issues itself, incorporating the WEU *acquis*.

3. The development of a security and defence policy within the EU and direct EU – NATO relations

The Treaty of Amsterdam (2 October 1997, entered into force on 1 May 1999) introduced significant changes in the field of security and defence, which were found in revised Article 17. First, or instance, the framing of a common defence policy became “progressive” and no longer “eventual”. Second, pursuant to paragraph 2 of Article 17, “Questions referred to in this Article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking.” This meant that from then on the EU’s (direct) competences included the ‘Petersberg tasks’ adopted by the WEU (see above).

The relationship with the WEU was defined in Article 17(1) and in Article 17(3) as follows:

“The [WEU] is an integral part of the development of the Union providing the Union with access to an operational capability notably in the context of paragraph 2. It supports the Union in framing the defence aspects of the common foreign and security policy as set out in this Article. The Union shall accordingly foster closer institutional relations with the WEU with a view to the possibility of the integration of the WEU into the Union, should the European Council so decide. ... The Union will avail itself of the WEU to elaborate and implement decisions and actions of the Union which have defence implications. ... When the Union avails itself of the WEU to elaborate and implement decisions of the Union on the tasks referred to in paragraph 2 all Member States of the Union shall be entitled to participate fully in the tasks in question. The Council, in agreement with the institutions of the WEU, shall adopt the necessary practical arrangements...”

NATO’s role was fully safeguarded: pursuant to Article 17(1), third subparagraph, “The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in [NATO], under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework”.

The ‘Declaration relating to Western European Union’ annex to the Treaty of Amsterdam noted the ‘Declaration of Western European Union on the role of Western European union and its relations with the European Union and with the Atlantic Alliance’, adopted by the Council of Ministers of the WEU on 22 July 1997, which updated the 1991 Maastricht declaration on the same topic (see above). It *inter alia* reaffirmed the WEU’s role as an integral part of the development of the EU and an essential element of the development of the ESDI within NATO, detailed the WEU’s operational role and stated that it was to further enhance its capabilities and addressed both enhanced relations with the EU and NATO. The latter included mechanisms for consultation between the WEU and NATO in the context of a crisis; the WEU’s active involvement in the NATO defence planning process; operational links between the WEU and NATO for the planning, preparation and conduct of operations using NATO assets and capabilities under the political control and strategic direction of the WEU, including military planning, conducted by NATO in co-ordination with the WEU, and exercises; a framework agreement on the transfer, monitoring and return of NATO assets and capabilities and liaison between the WEU and NATO in the context of European command arrangements. The arrangements for enhanced EU-WEU cooperation were adopted on 10 May 1999.⁴⁸²

Less than one month later, on 3-4 June 1999, in Cologne, Germany, the European Council decided to launch the ESDP within the EU and to integrate the WEU’s crisis management functions into the EU.

⁴⁸² Council Decision of 10 May 1999 (1999/404/CFSP), *O.J. L* 153, 19 June 1999, p. 1, and annexed Arrangements, *id*, p. 2 and Council decision of 10 May 1999 (1999/321/CFSP), *O.J. L* 123, 13 May 1999, p. 14.

4. The founding decisions of the CSDP

The founding decisions of the CSDP *inter alia* set out the following premises for EU – NATO relations:

- the development of the CSDP was without prejudice to NATO (this has consistently been stated in the EU Treaty, see above);
- the EU could act with recourse to NATO assets or autonomously (see above);
- there would be no *unnecessary* duplication with NATO;⁴⁸³
- the EU will only act when NATO as a whole is not engaged;⁴⁸⁴ however, the latter element has been narrowed down significantly (see below);
- the non-EU European NATO members should be able to participate in CSDP operations, though without affecting the EU's decision-making autonomy;⁴⁸⁵
- these developments require direct EU – NATO relations.

Some of these elements will now be elaborated.

- First, NATO remains responsible for the implementation of the collective defence of the Allies, even under the Lisbon Treaty.
- Second, the EU should only conduct operations where NATO as a whole is not engaged. However, this has been interpreted very narrowly over time and there are many cases where both organisations have (had) parallel operations in the same theatre. In most cases the operations have been of a sufficiently distinct nature and have corresponded to the expertise of each of the organizations involved. This is/was, e.g., clearly the case with the EU Police Mission in Bosnia alongside NATO's military S-FOR operation; the EU's rule of law mission EULEX Kosovo alongside NATO's KFOR and the EU's Police Mission in Afghanistan alongside NATO's ISAF. Yet in some cases the differences appear to be less significant. See e.g. the EU and NATO support for AMIS II and, more recently, the EU and NATO anti-piracy operations off the coast of Somalia (although there is de-confliction and some coordination and the area is big enough for both operations to operate without unnecessary overlap).
- Third, while the arrangements for the EU to conduct operations with access to NATO assets proved a tough challenge and could only be agreed upon in March 2003, they have since been applied in Concordia (FYROM), are being applied in Althea (Bosnia) and function well. The package on these arrangements was finalized on 17 March 2003, and *inter alia* consists of the 16 December 2002, NATO-EU 'Berlin Plus' agreement governing EU access to NATO planning, NATO European command options and EU use of NATO assets and capabilities,⁴⁸⁶ the 16 December 2002 EU-NATO Declaration on ESDP setting out the principles governing

⁴⁸³ See § 3 *in fine* of the 1999 Cologne Presidency Report and Helsinki European Council Presidency Conclusions, 10-11 December 1999, § 27.

⁴⁸⁴ Helsinki European Council Presidency Conclusions, 10-11 December 1999, § 27: "*an autonomous capacity to take decisions and, where NATO as a whole is not engaged, to ... conduct EU-led military operations*".

⁴⁸⁵ According to § 1 of the Cologne European Council Declaration on strengthening the European common policy on security and defence, the EU wants to develop an effective EU-led crisis management "*in which NATO members, as well as neutral and non-allied members, of the EU can participate fully and on an equal footing in the EU operations*" and the EU "*will put in place arrangements that allow non-EU European allies and partners to take part to the fullest possible extent in this endeavour*". The annexed Presidency Report adds in § 5 that a successful ESDP will require "*satisfactory arrangements for European NATO members who are not EU Member States to ensure their fullest possible involvement in EU-led operations, building on existing consultation arrangements within WEU*" and "*arrangements to ensure that all participants in an EU-led operation will have equal rights in respect of the conduct of that operation, without prejudice to the principle of the EU's decision-making autonomy, notably the right of the Council to discuss and decide matters of principle and policy*".

⁴⁸⁶ The agreement itself (an exchange of letters with a long list of annexes) is not in the public domain. Its content is summarized in 'EU-NATO: The Framework for Permanent Relations and Berlin Plus', <http://www.consilium.europa.eu/uedocs/cmsUpload/03-11-11%20Berlin%20Plus%20press%20note%20BL.pdf>.

their mutual relations⁴⁸⁷ and the EU-NATO Security Agreement of 14 March 2003.⁴⁸⁸ 489 However, Cyprus, an EU but non NATO member, still does not have a security agreement with NATO and is not involved in NATO's Partnership for Peace programme. Therefore it cannot participate in EU operations with recourse to NATO assets, such as ALTHEA (this was also the case for Malta until it rejoined NATO's Partnership for Peace programme in 2008).⁴⁹⁰

- Fourth, and closely related to this, agreement was reached on the participation of the European non-EU NATO members in the CSDP (Bulgaria and Romania, who have become EU Member States in the meantime, and Iceland, Norway and Turkey). All of these countries have participated quite actively in CSDP operations and have concluded a permanent agreement on their participation in such operations (see below). The same is true for Canada, for which separate arrangements have been adopted⁴⁹¹ and which has also concluded a framework participation agreement with the EU.⁴⁹² Detailed provisions on the involvement of third States in the CSDP - essentially consultation and participation in operations - were adopted in particular at the European Council meetings in Nice in December 2000 and in Brussels on 24-25 October 2002.
- Fifth, avoiding unnecessary duplication has given rise to considerable debate, including within the EU, and is closely related to the degree of autonomy of the CSDP. A compromise was adopted in late 2003 to have a (civilian/military planning) cell at the EU Military Staff, an EU cell at SHAPE and NATO liaison arrangements with the EUMS, which would become the NATO Permanent Liaison Team.⁴⁹³ While the EU initially had to rely either on NATO or on Member States for Operation Headquarters, the Council may now also decide to activate the EU Operations Centre to serve as Operation Headquarters, on the basis of the capacity maintained by the EUMS (see also above). Also, the efforts to enhance Member States' capabilities in both organizations should be complementary,⁴⁹⁴ including through the EU-NATO Capability Group.⁴⁹⁵
- Sixth, there are arrangements on permanent consultations and cooperation, including regular joint meetings of the NAC and the PSC and of the NAC and the Council of the EU.⁴⁹⁶ However, due to political difficulties between Cyprus and Turkey, discussions at formal meetings have been limited to Berlin plus issues.⁴⁹⁷ This has prevented discussions on Kosovo and Afghanistan and has prevented the conclusion of NATO-EU arrangements for cooperation between both organizations' missions there at headquarters level. Even France's re-integration into NATO's military structures in 2009 has not de-blocked this issue. It is not for want of efforts. E.g., the December 2008 *“European Council ... reaffirms the goal of strengthening the strategic partnership between the EU and NATO in order to address current needs, in a spirit of mutual enhancement and respect for their decision-making autonomy. To this end, it backs the setting up of an informal EU-NATO high-level group to improve cooperation between the*

⁴⁸⁷ See <http://www.nato.int/docu/pr/2002/p02-142e.htm>.

⁴⁸⁸ *O.J. L* 80, 27 March 2003, p. 35/36, entered into force 14 March 2003.

⁴⁸⁹ See 'EU-NATO: The Framework for Permanent Relations and Berlin Plus', *supra* note 41.

⁴⁹⁰ The Berlin Plus arrangements are limited to Partnership for Peace members. Malta reactivated its participation in the Partnership for Peace (which it had joined in 1995 but suspended in 1996) in 2008.

⁴⁹¹ See EU Council Doc. 8721/02 of 6 May 2002.

⁴⁹² 24 November 2005, *O.J. L* 315, 1 December 2005, p. 20/21, entered into force 1 December 2005.

⁴⁹³ Presidency Conclusions, 12-13 December 2003, § 90 and <http://www.consilium.europa.eu/uedocs/cmsUpload/78414%20-%20EU-NATO%20Consultation,%20Planning%20and%20Operations.pdf>. See also EU Council Documents 13990/04 EXT 1 of 28 January 2005 and 10596/04 REV 1 of 1 April 2009.

⁴⁹⁴ See the 16 December 2002 EU-NATO Declaration on ESDP, *supra* note 42.

⁴⁹⁵ See, e.g. EU Council Doc. 6805/03 (26 February 2003), pp. 4 (especially note 2), 13 and 15-17.

⁴⁹⁶ This was first laid down in an exchange of letters between the NATO Secretary-General and the EU Council Presidency in January 2001; see the reference thereto in § 42 of the final communiqué of the 29 May 2001 NAC.

⁴⁹⁷ In particular, on the one hand, NATO classified documents are often not released to all EU Member States and this prevents their discussion in the presence of all EU Member States, and, on the other hand, Cyprus has rejected NATO-EU discussions without the presence of Cyprus except concerning Berlin Plus issues.

*two organisations on the ground in a pragmatic manner. It recalls the need to exploit fully the approved framework that enables European allies which are not members of the EU to be associated with the ESDP, in compliance with EU procedures”.*⁴⁹⁸

Furthermore, although the post-Lisbon EU Treaty does not specifically mention cooperation with NATO, NATO is undoubtedly among the “international, regional or global organisations which share the principles” which have inspired the EU’s “own creation, development and enlargement, and which it seeks to advance in the wider world”⁴⁹⁹ and with which the EU “shall seek to develop relations and build partnerships” pursuant to Article 21(1) EU Treaty.

Finally, the Lisbon Treaty has deleted all the references to the WEU in the EU Treaty. However, it has added Protocol (No. 11) on Article 42 EU Treaty, which provides that “The [EU] shall draw up, together with the [WEU], arrangements for enhanced cooperation between them”. This is rather surprising as there does not seem to be any subject on which the two organisations could enhance their cooperation. In fact, on 31 March 2010, the 10 WEU member States announced that they will terminate the amended Brussels Treaty and will disband the WEU.

C. LEGAL ASPECTS OF CSDP OPERATIONS

1. The scope of CSDP operations

The scope of CSDP operations as defined in the EU Treaty has been mentioned above. Three points can be added to that:

- Although the contrary is often thought, “tasks of combat forces in crisis management, including peacemaking” cover peace enforcement and hence potentially high intensity operations involving combat;
- CSDP operations can be tailored to the specific situation and vary greatly, ranging from consensual rule of law, police, security sector reform, border assistance or monitoring missions, to peacekeeping and even peace enforcement. Operations have started in the Balkans but have spread out further, in particular to the Middle East, Africa and Asia. They have also expanded in size and level of difficulty. See the list below;
- This wide range of missions and operations has consequences in terms of the applicable law.

2. List of CSDP operations:

Military operations: **CONCORDIA** in the Former Yugoslav Republic of Macedonia (FYROM); **ARTEMIS** and **EUFOR DR Congo** in the Democratic Republic of the Congo (DRC); **ALTHEA** in Bosnia and Herzegovina (BiH), **EUFOR Tchad/RCA** in Chad and in the Central African Republic; **EU NAVFOR Somalia / Atalanta** in the waters off the coast of Somalia, which was preceded by the military coordination action **EU NAVCO**; and the EU Training Mission **EUTM Somalia** (about to be launched).

Police operations: **EUPM** in BiH; **PROXIMA** in FYROM, succeeded by the EU Police Advisory Team **EUPAT** there; **EUPOL KINSHASA** in the DRC, followed by the police security sector reform mission **EUPOL RD Congo**; **EUPOL COPPS** for the Palestinian Territories and **EUPOL Afghanistan**.

Rule of law missions: **EUJUST THEMIS** in Georgia; **EULEX KOSOVO** and **EUJUST LEX** for Iraq.

Security sector reform missions: **EUSEC DRC** in the DRC and **EU SSR GUINEA-BISSAU**.

⁴⁹⁸ Declaration European Council on the Enhancement of the European Security and Defence Policy in Annex II to the 11-12 December 2008 European Council Presidency Conclusions, § 7.

⁴⁹⁹ I.e. “democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”.

EU monitoring mission: **AMM** in Aceh (Indonesia) and **EUMM Georgia**.

Other missions: the mixed civilian-military **EU Support to AMIS II** (Sudan); the (civilian) EU Border Assistance Mission at Rafah Crossing Point in the Palestinian Territories (**EU BAM Rafah**) and the coordination cell **EUCO Haiti** (to coordinate contributions by Member States of military and security assets).

3. Council decision (previously Council joint action) and launching decision

The basic legal instrument governing each EU operation is a Council decision, adopted on the basis of Article 43 EU Treaty, in conjunction with Article 28 EU Treaty. This legal instrument is the successor to the joint actions that were adopted pursuant to Article 14 pre-Lisbon EU Treaty.

Joint actions or decisions on military operations generally, *inter alia*, set out the mission and mandate, political and military control and direction, designate the commanders and headquarters, specify the command and control relations and contain provisions on the status of forces, financial arrangements, participation of third States (i.e. non-EU Member States), relations with other actors, handling of EU classified information and on the launching and termination/duration of the operation.

In all military operations launched so far, the joint action was adopted before the planning process was completed and the Council adopted a separate decision launching the operation together with the approval of the Operation Plan and Rules of Engagement. Most likely, there will continue to be separate launching decisions as a rule.

4. Planning, decision-making and command and control

The PSC plays a crucial role and *inter alia* exercises, under the responsibility of the Council and of the High Representative, “*political control and strategic direction*” of EU operations, and can be delegated some decision-making powers (Article 38 EU Treaty, see also above).

The planning and decision-making process is a back and forth between the planners/experts and the politicians, with key decisions being taken by the Council itself (i.e. Ministers). Furthermore, once an Operation Commander (for military operations) or Head of Mission (for civilian missions) has been appointed, he/she also plays a key role in the planning process.

In terms of command and control, the highest level of military command in EU military operations rests with the Operation Commander. The Operation Commander will normally receive operational control over forces put at his disposal by the participating States via a transfer of authority.⁵⁰⁰ The next command level, the highest one in the field, is the Force Commander.

The planning for and conduct of civilian and military operations differ in a number of respects, including the Council Secretariat services and preparatory bodies concerned (below PSC level), the financing mechanisms and the command and control structure (with a permanent Civilian Operation Commander, who, as a rule, commands all civilian operations, supported by the Civilian Planning and Conduct Capability, on the civilian side, as opposed to *ad hoc* designations of Operation Commanders and Operational Headquarters on the military side).

5. Operation Plan, Rules of Engagement and other operational documents

As a rule, for each operation there is an Operation Plan and, when the use of force may be required, also rules of engagement⁵⁰¹ (for coordination or supporting actions, the planning documents

⁵⁰⁰ For the C2 arrangements in EU military operations, see the EU Military C2 Concept (partially declassified version *supra* note 26).

⁵⁰¹ The EU's equivalent of NATO's MC 362/1 is the EU Concept for the Use of Force in EU-led Military Operations (currently second revision, EU Council Doc. 17168/09 of 4 December 2009, EU RESTREINT, declassified to a very limited extent in EU Council Doc. 17168/09 EXT 1 of 2 February 2010).

may be somewhat different). The OPLAN and ROE are agreed by the Council (by unanimity). Member States may issue caveats applicable to their contingents but these may only impose further *restrictions* on the use of force. The operation-specific planning takes into account generic CSDP documents, including a series of concepts.⁵⁰²

6. Political and Security Committee decisions

The PSC is usually authorised to take a number of decisions (see also above), including decisions to amend the planning documents, including the Operation Plan, the Chain of Command and the Rules of Engagement, and decisions on the appointment of the EU Operation Commander and/or EU Force Commander, while the powers of decision with respect to the objectives and termination of the operation remain vested in the Council.

7. International agreements and arrangements, including on the status of forces/mission

On the basis of Article 24 pre-Lisbon EU Treaty, the European Union (not the Member States jointly) concluded a number of international agreements in the CFSP. Most of the agreements concluded so far relate to EU operations, including especially agreements on the participation of third States in CSDP missions and status of forces/mission agreements. Such agreements are now governed by Articles 37 EU Treaty and 318 Treaty of the Functioning of the European Union. Since the EU now explicitly has legal personality, the status of such agreements is now reinforced (in fact, in practice, it does not seem that their status has given rise to significant problems so far anyway).⁵⁰³

Status of forces agreements

The EU will normally conclude a status of forces/mission agreement (SOFA/SOMA) with the host State which will regulate the status and activities of an operation in the host State. There is a model status of forces agreement for EU military operations.⁵⁰⁴

Pending the conclusion or entry into force of such agreements, which may not occur in time, especially if the operation is launched on short notice, host States may grant certain privileges and immunities through unilateral declarations. Alternative arrangements on the status may also be put in place, including the extension of a status of forces agreement for a non-EU operation to an EU operation by a UN Security Council resolution (as was the case for Althea and EUFOR RD Congo) or by agreement.

There may also be transit agreements with third States which are similar to status of forces agreements but are likely to be less comprehensive and may contain some different rules. E.g., in the framework of EUFOR TCHAD/RCA, a transit agreement was concluded with Cameroon.⁵⁰⁵

Participation agreements

When a third State participates in an EU military operation, the modalities of its participation are laid down in a participation agreement with the EU. Such agreements may be concluded on an *ad hoc* basis for a given operation (on the basis of a model agreement) or may take the form of framework agreements covering the participation to EU operations generally. The latter agreements have been concluded with the former acceding States Bulgaria⁵⁰⁶ and Romania⁵⁰⁷ (these agreements

⁵⁰² E.g. the EU Concept for Logistic Support for EU-led Military Operations (Council Doc. 10963/08 of 19 June 2008); the EU Concept for Reception, Staging, Onward Movement & Integration (RSOM&I) for EU-led Military Operations (Council Doc. 10971/08 of 19 June 2008) and the EU Concept for Strategic Movement and Transportation for EU-led Military Operations (Council Doc. 10967/08 of 19 June 2008).

⁵⁰³ In contrast to the European *Communities*, the European *Union* had not been explicitly accorded international legal personality before the Lisbon Treaty and its legal status was long controversial.

⁵⁰⁴ See EU Council Documents 12616/07 of 6 September 2007 and 11894/07 of 20 July 2007 and COR 1 (5 September 2007).

⁵⁰⁵ Yaoundé, 6 February 2008, entered into force on this date, O.J. L 57, 1 March 2008, p. 30/31.

⁵⁰⁶ O.J. L 46, 17 February 2005, p. 49/50, provisionally applied as from 24 January 2005 and entered into force on 1 August 2006.

have become irrelevant after their accession) and with Turkey,⁵⁰⁸ Iceland,⁵⁰⁹ Norway,⁵¹⁰ Canada⁵¹¹ and Ukraine.⁵¹²

In participation agreements the participating State normally associates itself with the joint action (now Council decision) establishing an operation, commits itself to providing a contribution and bears the costs thereof (it may be exempted from a share in the common costs). Generally, such agreements also provide that its personnel are covered by any status of forces agreement concluded by the EU and contain provisions on the (transfer of) command and control, jurisdiction and claims (via declarations on waivers of claims). EU decision-making autonomy is safeguarded but usually all Participating States have the same rights and obligations in terms of day-to-day management of the operation as participating EU Member States and the EU will consult with Participating States when ending the mission. Participation agreements also contain provisions on classified information.

Status / claims agreements between Member States

In addition to SOFAs with host States, the Member States have concluded amongst themselves the Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA),⁵¹³ to regulate the status of their forces within each others' territory. However, this agreement has not yet entered into force. Pending this entry into force, other existing agreements are applied (e.g. the NATO SOFA) or specific arrangements made (e.g. between an EU Operations Headquarters and its host State).

This is complemented by the Agreement between the Member States of the European Union concerning claims introduced by each Member State against any other Member State for damage to any property owned, used or operated by it or injury or death suffered by any military or civilian staff of its services, in the context of an EU crisis management operation,⁵¹⁴ which also has not yet entered into force.

MOUs and other arrangements

There are likely to be additional arrangements, often memoranda of understanding and technical arrangements, between participating States dealing with various aspects of their cooperation within an EU operation.

8. The law of armed conflict (LOAC) and human rights law

The EU and its Member States accept that if EU-led forces become a party to an armed conflict, the LOAC will fully apply to them. This was *inter alia* reflected in the Salamanca Presidency Declaration, which provided that "*Respect for International Humanitarian Law is relevant in EU-led operations when the situation they are operating in constitutes an armed conflict to which the forces are party*".⁵¹⁵

However, given that only some EU military operations might involve the use of armed force as combatants, the LOAC is likely to be applicable only in few EU operations. EU policy is therefore

⁵⁰⁷ O.J. L 67, 14 March 2005, p. 1/14, entered into force on 1 December 2004.

⁵⁰⁸ O.J. L 189, 12 July 2006, p. 16/17, entered into force on 1 August 2007.

⁵⁰⁹ O.J. L 67, 14 March 2005, p.1/2, entered into force on 1 April 2005 and provisionally applied as of the date of signature.

⁵¹⁰ O.J. L 67, 14 March 2005, p. 1/8, entered into force on 1 January 2005.

⁵¹¹ *Supra* note 47.

⁵¹² O.J. L 182, 13 July 2005, p. 28/29, entered into force on 1 May 2008.

⁵¹³ O.J. C 321, 31 December 2003, p. 6.

⁵¹⁴ Brussels, 28 April 2004, O.J. C 116, 30 April 2004, p. 1.

⁵¹⁵ The outcome of the international humanitarian law European seminar of 22-24 April 2002 in Salamanca, Doc. DIH/Rev.01.Corr1 (on file with the author).

that the LOAC does not necessarily apply in all EU operations. However, even when it does not apply to EU-led forces, it may be relevant for the relations between the parties to the conflict. Moreover, the EU and its Member States remain fully aware of the potential obligations of EU-led forces under the LOAC, in particular when the situation escalates.

In fact, so far EU-led forces have not become engaged in combat as a party to an armed conflict in any of the EU's military operations. While the LOAC could have become applicable if the situation would have escalated in some of the operations, especially Artemis and EUFOR Tchad/RCA, this did not happen.

Similarly to the situation in NATO, not all EU Member States have the same LOAC treaty obligations and they may interpret shared obligations differently. Fortunately, several factors mitigate the potential difficulties arising from this. First, the LOAC treaty obligations of Member States converge very strongly. In particular, all 27 EU Member States are parties to the 1949 Geneva Conventions, the two 1977 Additional Protocols thereto and the ICC Statute, as well as to the 1980 Convention on Certain Conventional Weapons and the 1993 Chemical Weapons Convention. Nevertheless, if one looks at the full range of LOAC treaties, there are still some divergences. Also, reservations entail differences even where treaties are ratified by all EU Member States. Second, policy choices may overcome different legal views. For instance, in the framework of the CSDP, there are efforts to reach a common view on some issues, at least as a matter of policy. To facilitate this, the EU Military Committee Working Group can meet in a format reinforced by legal experts when necessary (e.g. when addressing the EU's use of force concept). Another example is that Finland has accepted that its forces will not use anti-personnel mines in CSDP operations even though Finland has no LOAC treaty obligation to this effect. Third, as explained above, for specific operations, there is always a strong collective dimension in the form of a common Council decision, Operation Plan and rules of engagement.

When the LOAC does not apply, the EU primarily looks towards human rights law as the appropriate standard for the conduct of EU operations (that does not mean that human rights law is irrelevant when the LOAC does apply).

Admittedly, the applicability of human rights *as a matter of law* remains controversial in some respects, such as the extraterritorial application of the European Convention on Human Rights, the question of derogation in times of emergencies and its applicability to peace operations, the relationship between human rights and the LOAC⁵¹⁶ and the impact of UN Security Council mandates on human rights.⁵¹⁷

Nevertheless, at least as a matter of *policy and practice* human rights provide significant guidance in EU operations. Furthermore, pursuant to Article 6 post-Lisbon EU Treaty, the EU "*recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties*", it is bound by human rights as general principles of EU law (as was the case before the Lisbon Treaty) and it shall accede to the European Convention on Human Rights.⁵¹⁸ In practice therefore, EU operational planning and rules of engagement take into account internationally recognised standards of human rights law.⁵¹⁹

This has been explicitly reflected in legal instruments relating to some of the more recent EU operations. In particular, EULEX Kosovo is to "*ensure that all its activities respect international standards concerning human rights and gender mainstreaming*"⁵²⁰ and suspected pirates or armed robbers at sea

⁵¹⁶ For a partial EU perspective, see paragraph 12 of the European Union Guidelines on promoting compliance with international humanitarian law (IHL), *O.J. C 303*, 15 December 2009, p. 12.

⁵¹⁷ On the scope of Article 103 UN Charter in the context of the EU, see especially European Court of Justice, Case C-402/05 P, *Kadi v. Council and Commission*, judgment of 3 September 2008.

⁵¹⁸ See also Article 17 of Protocol 14 to the ECHR, inserting a new paragraph 2 into Article 59 ECHR to permit the EU's accession.

⁵¹⁹ See also the compilation of documents on mainstreaming human rights and gender into the ESDP, available on the Council's website at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/hr/news144.pdf.

⁵²⁰ See Article 3(i) of Council Joint Action of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO (2008/124/CFSP), *O.J. L 42*, 16 February 2008, p. 92.

captured by EUNAVFOR Somalia / Atalanta may not be transferred to a third State “unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment”.⁵²¹ The latter has led to the conclusion of the Exchange of Letters between the EU and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, which contains substantial provisions aiming to ensure respect for human rights.⁵²² A similar agreement was also concluded with the Seychelles.⁵²³

9. Financing

Pursuant to Article 41 post-Lisbon EU Treaty, operating expenditure arising from operations having military or defence implications is not charged to the budget of the European Union but is charged to the Member States. As a rule, such costs lie where they fall – i.e. every participating State pays for its forces and assets contributed to an EU military operation. However, a number of costs are common and administered by a mechanism called Athena.⁵²⁴ This reflects the pre-Lisbon rules (Article 28 EU Treaty). However, the Lisbon Treaty provides for a start-up fund made up of Member States' contributions to fund preparatory activities for EU operations which are not charged to the Union budget. It remains to be seen how this will be implemented and whether it will result in significant improvements compared to the existing arrangements, especially those already developed within the framework of the Athena mechanism.

10. Transparency

Many of the documents relating to EU operations are accessible to the public and this includes almost all of the legal instruments, which are usually published in the *Official Journal*. Key sources are the CSDP pages on the Council's website⁵²⁵ as well as the online public register of Council documents.⁵²⁶

D. RELATIONS BETWEEN CSDP OPERATIONS AND NATO

Relations between a CSDP operation and NATO differ significantly depending on whether or not it is an operation with recourse to NATO assets and capabilities under the Berlin plus arrangements.

1. Operations under the Berlin plus arrangements

These operations take place when both the EU and NATO agree that a given EU operation will be conducted with recourse to NATO assets and capabilities. Once that is decided, the Berlin plus

⁵²¹ See Article 12 Council Joint Action of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (2008/851/CFSP), *O.J. L 301, 12 November 2008, p. 33 (corrigendum O.J. L 253, 25 September 2009, p. 18).*

⁵²² *O.J. L 79, 25 March 2009, p. 49.*

⁵²³ Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer, *O.J. L 315, 2 December 2009, p. 37.*

⁵²⁴ See Council Decision 2008/975/CFSP of 18 December 2008 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications (Athena), *O.J. L 345, 23 December 2008, p. 96 and <http://www.consilium.europa.eu/showPage.aspx?id=746&lang=EN>.*

⁵²⁵ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=268&lang=EN&mode=g.

⁵²⁶ <http://www.consilium.europa.eu/showPage.aspx?id=1279&lang=EN>.

arrangements provide the general framework, which must be supplemented by an operation specific arrangement on the modalities of putting at the disposal NATO assets and capabilities.

In such operations, operational planning may be carried out by the Alliance's planning bodies, the EU Operational Headquarters will be located *at* SHAPE and D-SACEUR is the preferred option for designation as Operation Commander.

However, it is important to note that the entire chain of command of an EU Force remains under the political control and strategic direction of the EU throughout the EU military operation, after consultation between the EU and NATO. Within this framework, the EU Operation Commander reports on the conduct of the operation to EU bodies only and NATO is informed of developments in the situation by the appropriate EU bodies, in particular the PSC and CEUMC. Furthermore, such operations are conducted in accordance with EU rules, concepts, etc.

The non-EU European NATO members will participate in such an operation if they so wish, upon a decision by the Council to launch the operation.

2. Autonomous operations

In the case of autonomous CSDP operations, i.e. where the EU does not have recourse to NATO assets and capabilities, the relations with NATO and/or NATO operations in the same theatre are not subject to standing arrangements – except for information and consultation – and are determined on a case-by-case basis. In addition, the non-EU European NATO members may be invited to take part in such operations, on a decision by the Council.

The abovementioned political obstacle to enhanced EU-NATO coordination and cooperation has limited coordination and cooperation at 'Brussels' level. For instance, the EU and NATO have not concluded cooperation agreements regarding their respective operations in Kosovo and Afghanistan.

However, in the field, a number of mechanisms have been developed with a view to appropriate coordination and/or cooperation.

For instance, despite the lack of an overall EUPOL Afghanistan – ISAF arrangement, both missions cooperate and at the provincial level, EUPOL personnel are deployed through ISAF's Provincial Reconstruction Teams.⁵²⁷ Similarly, KFOR and EULEX Kosovo have developed good working level relations and have, e.g., held joint exercises.

As another example, the EU and NATO counter-piracy operations off the coast of Somalia – respectively Atalanta and Ocean Shield (and its predecessors) – deconflict and coordinate at working level through SHADE (Shared Awareness and Deconfliction) meetings. In these meetings, both operations, as well as other navies/operations in theatre (e.g. CTF 151), try to deconflict and coordinate their activities so as to maximise their effectiveness.

⁵²⁷ Article 5(2) of the EUPOL Afghanistan Joint Action (2007/369/CFSP of 30 May 2007, O.J. L 139 of 31 May 2007, p. 33) provides that “*Technical arrangements will be sought with ISAF and Regional Command/PRT Lead Nations for information exchange, medical, security and logistical support including accommodation by Regional Commands and PRTs*”.

PART XVI

HUMAN RIGHTS IN MILITARY OPERATIONS

References and suggested reading:

- Additional Protocol I and II of 1977 to the Geneva Conventions of 1949
- African (Banjul) Charter of Human and Peoples' Rights (African States Member of the Organization of the African Unity)
- American Convention on Human Rights (ACHR) (not all Member States of the Organization of American States are a party to this convention)
- Cairo Declaration on Human Rights in Islam (Member States of the Organization of the Islamic Conference)
- common Article 3 of the Geneva Conventions
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
- Convention on the Elimination of All Forms of Discrimination against Women (1979)
- Convention on the Prevention and Punishment of the Crime of Genocide (1948)
- Convention on the Rights of Persons with Disabilities (2006)
- Convention on the Rights of the Child (1989)
- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (Member States of the Council of Europe, in future also: EU)
- ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories of 9 July 2004,
- International Convention for the Protection of All Persons from Enforced Disappearance (2006)
- International Convention on the Elimination of All Forms of Racial Discrimination (1966)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990)
- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002)
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999)
- Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006)
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000)
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000)
- Optional Protocol to the International Covenant on Civil and Political Rights (1966)
- Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (1989)
- Vienna Convention on the Law of Treaties of 1969

A. INTRODUCTION

In former times of the so-called Cold War it was often asserted that there was a clear line between the applicability of Law of Armed Conflict (LOAC) on the one hand and Human Rights (HR) on the other hand. LOAC was supposed to be applied during times of war, armed conflict or occupation, whereas HR were to be applied during peace times (and – as a principle – within the own State territory only).

However, the reality of present military operations since 1990ies including the so-called Peace Support, Peace Keeping or Peace Enforcement Operations shows that the issue is of a more complex nature. It might be challenging to clearly judge the situation within respective operations areas as being a situation of armed conflict or peace time. Correspondingly, it might be also challenging to determine, whether LOAC or HR is to be applied. In addition, it is increasingly argued that in some cases both the LOAC and HR apply and consequently it may be necessary to examine how these two regimes interact.

As for LOAC, it must be examined in every case of a military operation whether the situation in the operations area indeed does present an armed conflict (or war or occupation), and, in addition, whether the armed force conducting the operation is engaged in the conflict or is an occupying power. Only then LOAC has to be applied (regardless, States can decide as a policy decision to apply LOAC, or its restrictions, in any military operation as it provides a minimum standard of humanitarian protection). In a second step, it must be analyzed whether the conflict is of an international or non-international nature as different sets of provisions apply (see Additional Protocol I and II of 1977 to the Geneva Conventions of 1949).

As for HR and its relationship to LOAC, the issue is complex and must be considered as a matter still evolving.

1. Applicability of Human Rights in Time of Armed Conflict

(1) Human Rights as Peremptory Norms of Public International Law

It is to be taken for granted that States always have to comply with HR obligations which are to be considered as so-called peremptory norms of Public International Law (*ius cogens*). This applies in any situation, might it be peace, war, armed conflict or occupation. A peremptory norm of Public International Law is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character” (see definition of Article 53 sentence 2 of the Vienna Convention on the Law of Treaties of 1969).

A reliable listing of human rights which would present peremptory norms of Public International Law does not exist. However, it is widely recognized within academia that

- the prohibition of genocide,
- the prohibition of torture,
- the prohibition of slavery and slave trade, and
- basic rights of the human person

are to be considered as *ius cogens* provisions. However, it is not clear what exactly “basic rights of the human person” are. It is partly asserted that it equals the “elementary considerations of humanity”, which the International Court of Justice⁵²⁸ (situated in The Hague / The Netherlands) said to be rights

⁵²⁸ The ICJ is the principal judicial organ of the United Nations. It is responsible inter alia for “advisory opinions” on any legal question issued at the request of the UN Security Council, UN General Assembly or other UN organs and specialized agencies (letter only when authorized by the General Assembly and only on

erga omnes (i.e. rights obliging States toward all other States). It could be argued that “elementary considerations of humanity” also are to be considered as *ius cogens* rights.

It could be asserted that the following human rights may be considered as being peremptory:

- life / no arbitrary deprivation of life
- prohibition of torture, inhuman, humiliating and degrading treatment / dignity of the human person
- prohibition of racial discrimination
- prohibition of taking hostages
- (basic) judicial guarantees
- self-determination of peoples (as a “collective” human right)

There are mainly two theories dealing with the relationship between LOAC and HR which will now be addressed.

(2) Theory of Convergence between HR and LOAC

The theory of convergence is a minority view, though is interesting in its approach. It asserts that LOAC and HR do have the tendency to obtain a common result (*convergere* means in Latin “to bend toward each other”). The theory points out that basic human rights are already included in LOAC provisions.

E.g. common Article 3 of the Geneva Conventions (GCs), setting out the minimum protection for non-international armed conflicts, bans inhuman treatment and discrimination of persons. It specifies this by prohibiting violence to life and person, in particular *inter alia* mutilation, cruel treatment and torture, taking of hostages, outrages upon personal dignity, in particular humiliating and degrading treatment. Finally, it also refers to “judicial guarantees which are recognized and indispensable by civilized peoples”.

All in all, common Article 3 of the GCs, being a LOAC stipulation, indeed seems to contain human right provisions.

Within LOAC, as codified in international treaties, further human rights provisions can be detected, e.g.:

- Articles 65-78 of the IV. Geneva Convention refer to several judicial guarantees, Article 75 prohibits the arbitrary deprivation of life.
- Article 72 of the Additional Protocol I to the Geneva Conventions refers to “fundamental human rights” (without further specification). Article 75 states fundamental guarantees as contained in the aforementioned common Article 3 of the Geneva Conventions, referring further to specific judicial guarantees, the freedom of religion etc.
- Article 4 of the Additional Protocol I to the Geneva Conventions resembles the aforementioned common Article 3 of the Geneva Conventions. Article 5 refers to the treatment of detainees, Article 6 states judicial guarantees.

All in all, the theory of convergence describes the relationship between LOAC and HR by asserting that human rights are already included in LOAC provisions and even by affirming an evolution towards a merger of both LOAC and HR.

(3) LOAC as *lex specialis* to Human Rights

The majority view asserts that LOAC is a set of provisions special (*lex specialis*) to HR.

legal questions arising within the scope of their activities). For more information on the Court see Art. 92-96 UN-Charter and: <http://www.icj-cij.org>.

Indeed, the provisions of the major human right treaties foresee the possibility of derogation of the HR provisions during times of war or other public emergency (of a scope threatening the life of a nation or the security or independence of a state), like e.g.: Article 4 International Covenant on Civil and Political Rights (ICCPR), Article 27 American Convention on Human Rights (ACHR), and Article 15 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). According to the abovementioned provisions, some basic human rights cannot be derogated at all - even in times of war or armed conflict (those HR partially overlap with the *ius cogens* basic human rights). Additionally, it has to be considered that a formal - and detailed pursuant to the requirements of the relevant provisions - declaration is necessary in order to derogate from HR during a situation of war or other public emergency. Thus, the conclusion can be drawn that in cases of war or armed conflict some basic HR do always apply and the whole set of HR as contained in the ICCPR, ACHR and ECHR does apply unless formally derogated by the State Party to the relevant HR treaty.

This conclusion shows that - as a principle - HR indeed do apply during times of war or armed conflict.

This view was confirmed by the International Court of Justice in the following advisory opinions:

- Advisory Opinion on the Legality of the Treat or Use of Nuclear Weapons of 8 July 1996⁵²⁹, and
- Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories of 9 July 2004.⁵³⁰

The latter states: "As regards to the relationship between international humanitarian law and human rights, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law, yet others may be matters of both these branches of international law, namely **human rights and, as *lex specialis*, international humanitarian law.**"⁵³¹

The following examples show the *lex specialis* relationship between HR treaty obligations and LOAC during the times of war or armed conflict:

- Article 9 ICCPR and Article 5 ECHR state the prohibition of arbitrary arrest or detention; LOAC contains - as *lex specialis* - the special provisions in regard to "prisoners of war". In contrast, the legal status of "security detainees" or "criminal detainees" in military operations may need to be assessed pursuant to the HR obligations as the "general law". In this case, the possibility of derogation from HR treaty obligations may become relevant.
- Article 6 ICCPR and Article 2 ECHR state the prohibition on arbitrary deprivation of life; LOAC defines as *lex specialis* what is to be considered as arbitrary during the conduct of hostilities in the context of armed conflict. However, the use of lethal force in the context of situations bear resemblance to law enforcement operations would be governed by HR as the "general law".

However some questions remain with regard to the relationship between HR and LOAC (the latter generally being *lex specialis* during times of war or armed conflict). Some HR provisions, such as Article 10 ECHR (freedom of expression), Article 3 ICCPR (equal treatment of men and women) or Article 11 ACHR (right of privacy) state obligations slightly "unreasonable" in times of war or armed conflict, but do not show a corresponding LOAC provision which would then apply as *lex specialis*. With regard to such HR provisions, as for example the right to privacy or data protection, those rights would have to be officially derogated from according to the requirements of the relevant provisions in ICCPR, ACHR and ECHR.

529 See: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&case=95&code=unan&p3=4>.

530 See: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4>.

531 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories of 9 July 2004, para. 106 (accentuation by the author).

2. Extraterritorial Applicability of HR Deriving From International Treaty Obligations

Before exploring the question of extraterritorial applicability of each of the major above mentioned HR treaties (ICCPR, ACHR and ECHR), an overview over the diversity of universal (i.e. global) HR treaties will be given.

(1) Universal HR Treaties

Under the auspices of the UN, since 1948 the following universal HR treaties have been concluded:

- Convention on the Prevention and Punishment of the Crime of Genocide (1948)
- International Convention on the Elimination of All Forms of Racial Discrimination (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- International Covenant on Civil and Political Rights (1966)
- Optional Protocol to the International Covenant on Civil and Political Rights (1966)
- Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (1989)
- Convention on the Elimination of All Forms of Discrimination against Women (1979)
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002)
- Convention on the Rights of the Child (1989)
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000)
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990)
- Convention on the Rights of Persons with Disabilities (2006)
- Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006)
- International Convention for the Protection of All Persons from Enforced Disappearance (2006)

The most prominent is the International Covenant on Civil and Political Rights of 1966 which will be discussed later.

(2) UN HR Declaration

The above listing is – purposely – missing the “Universal Declaration of Human Rights” of 10 December 1948, often referred to in the context of HR obligations. The text is a mere declaration of the UN General Assembly and thus not binding pursuant to Article 10 - 17 of the UN Charter. Although many scholars consider the declaration as reflecting norms of customary international law, it is not clear which parts of the declaration would be of a customary nature.

(3) International Covenant on Civil and Political Rights (ICCPR)

The ICCPR of 1966 is to be distinguished from the International Covenant on Economic, Social and Cultural Rights of 1966. The latter is a mere declaration of political aims casted in the form of a treaty. However, the provisions containing rights are not binding.

The majority⁵³² of States – including all NATO Member States – are Party to the ICCPR.

With regard to the territorial applicability of the ICCPR Article 2 para. 1 of the treaty states that “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals **within its territory and its jurisdiction** the rights recognized in the present Covenant ...”

Historically this provision aimed to reduce the responsibility of States which *de facto* did not have jurisdiction over certain parts of their territory. An example would be Cuba which – based on a treaty with the USA – does not have jurisdiction over Guantanamo. In this case Cuba would not to be held responsible for any possible human rights violations committed within this geographical area. Thus, historically, Article 2 para. 1 ICCPR stated that the corresponding HR treaty obligations were applicable within the territory and – at the same time – within the jurisdiction of a Party.

Nowadays, according to the prevailing opinion Article 2 para. 1 of the ICCPR states that the treaty is applicable within the territory of a State Party and (additionally) within the jurisdiction of the State Party. Thus, an area over which a State Party might have jurisdiction can be also located outside the State territory. Therefore, the extraterritorial applicability of the ICCPR is possible.

Accordingly, the Human Rights Committee monitoring the ICCPR issued consistent decisions on the extraterritorial applicability of the ICCPR, *inter alia*, in regard to:

- **arrests** carried out by Uruguayan agents in Brazil or Argentina (e.g. case No.52/79, *López Burgos v. Uruguay*), and
- confiscation of a passport by **agents of a Uruguayan consulate** in Germany (e.g. case No.106/81, *Montero v. Uruguay*).

Based on the decisions of the Committee, as a principle the ICCPR is to be applied within the territory of the State Party and **extraterritorially, *inter alia*** in the following exceptional circumstances:

- **“the State agent authority” exception** (State exercises authority over person or property through its agents operating on the territory of another State), and
- **“diplomatic” exception** (the activities of a State’s diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of that State).

In 2004, the aforementioned Human Rights Committee monitoring the ICCPR stated in para. 10-11 of the General Comment No. 31 [80]⁵³³, that the ICCPR was to be applied to anyone within the power or effective control of a State Party, even if not situated within the territory of the State Party and regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation. Further, the Committee stated that the ICCPR applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. It pointed out that in respect of certain Covenant rights more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights; both spheres of law are complementary, not mutually exclusive.

532 All States in the world are Party to the ICCPR, but the following: Andorra, Antigua and Barbuda, Bahamas, Bahrain, Bhutan, Brunei Darussalam, China, Comoros, Cook Islands, Cuba, Fiji, Guinea-Bissau, Holy See, Indonesia, Kazakhstan, Kiribati, Lao People’s DR, Liberia, Malaysia, Maldives, Marshall Islands, Mauritania, Myanmar, Nauru, Niue, Oman, Pakistan, Palau, Papua New Guinea, Qatar, Saint Kitts and Nevis, Saint Lucia, Samoa, Sao Tome and Principe, Saudi Arabia, Singapore, Solomon Islands, Tonga, Tuvalu, United Arab Emirates and Vanuatu.

533 See: <http://www.unhcr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument>.

However, a number of States oppose this view. E.g., the USA affirm that the ICCPR does not apply outside the territory of the State Party referring to the historic interpretation (*travaux préparatoires*) and the “plain meaning” of Article 2 para. 1 ICCPR.

(4) Regional HR Treaties

The major regional HR treaties are:

- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (Member States of the Council of Europe, in future also: EU)
- American Convention on Human Rights (ACHR) (not all Member States of the Organization of American States are a party to this convention)
- African (Banjul) Charter of Human and Peoples’ Rights (African States Member of the Organization of the African Unity)
- Cairo Declaration on Human Rights in Islam (Member States of the Organization of the Islamic Conference)

In the following, only the ECHR will be discussed as all NATO Member States apart from Canada and the USA are Party to the ECHR.⁵³⁴ Therefore, the restriction opposed by the ECHR on its Parties can and do have influence on NATO-led operations.

The ECHR is a treaty elaborated and concluded under the auspices of the Council of Europe⁵³⁵. The Council of Europe is an international organization (as opposed to the European Council⁵³⁶ and the Council of the European Union⁵³⁷), virtually covering the whole European continent and going beyond (the Russian Federation is also a State Party) with 47 Member States. The ECHR is monitored by the European Court of Human Rights (ECtHR, situated in Strasbourg / France). Complaints against a State Parties allegedly violating the rights granted by the ECHR can be not only be brought by another States Party before the ECtHR, but – more importantly – also by individual victims (or their relatives in cases of fatalities or severe impediment).

Article 1 of the ECHR states that „[t]he High Contracting Parties shall secure to everyone **within their jurisdiction** the rights and freedoms defined in Section I of this Convention.”

The convention does not refer to the territory of the State Parties to the ECHR but to the jurisdiction only. Usually, a State does have jurisdiction over its own territory only. Though, in exceptional cases, it might have jurisdiction also outside its own territory. To determine in which cases this is given is crucial for the assumption of the extraterritorial application on the ECHR.

Based on the diverse jurisdiction of the ECtHR, extraterritorial jurisdiction and thus applicability of the ECHR can be deemed as recognized for the following exceptional circumstances:

534 States parties to the ECHR are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, FRYOM, Turkey, Ukraine, United Kingdom.

535 For more information see: <http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en>.

536 The European Council, an institution of the EU, provides the Union with the necessary impetus for its development and defines the general political directions and priorities thereof. It does not exercise legislative functions. It consists of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy takes part in its work. For more information see: <http://www.european-council.europa.eu/home-page.aspx?lang=en>.

537 The Council of the European Union (formerly: “Council of Ministers”) is an institution of the European Union. The Council is the main decision-making body of the European Union. The ministers of the Member States meet within the Council of the European Union. Depending on the issue on the agenda, each country will be represented by the minister responsible for that subject (foreign affairs, finance, social affairs, transport, agriculture, etc.). The presidency of the Council is held for six months by each Member State on a rotational basis. For more information see: <http://www.consilium.europa.eu/showPage.aspx?id=242&lang=en>.

- **“the effective control over an area” exception** (a State has effective *de iure* or *de facto* control of an area outside its national territory, e.g. as a consequence of military actions, see *Loizidou v. Turkey*; *Bancovic et al. v. Belgium et al.*; *Issa et al. v. Turkey*),
- **“the State agent authority” exception** (State exercises authority over person or property through its agents operating on the territory of another State, e.g. in cases of detention of an individual by armed forces, see *Al-Skeini et al. v. UK*, *Al-Saadoon and Mufdhi v. UK*), *Öcalan v. Turkey*),
- **“diplomatic” exception** (the activities of a State’s diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State).

Although the ACHR will not be discussed as no NATO Member State is a Party⁵³⁸ (the USA signed but did not ratify the treaty), it should be mentioned that the Inter-American Commission on Human Rights, the body which monitors the ACHR, does not regard as decisive the territory of a Member State when determining application of the Convention. Instead, the Commission underlines the importance of examining two exemptions listed above, the jurisdiction or authority and control over a person.⁵³⁹

3. Accountability for HR Breaches

In the case of HR violations during a NATO-led military operation the question arises of who is to be held accountable for the actions taken: the acting official, the official’s sending state, NATO or even the UN (latter if the military operation is based on an UN Security Council Resolution).

As a rule it can be asserted that the contributing State is accountable for HR breaches committed by its officials as HR treaty obligations bind States. If the acting official commits atrocities which result in a war crime, there will be – additional - individual responsibility of the acting official (for States Party to the Rome Statute the acts could result in a situation or a case before the ICC or generally before an *ad hoc* tribunal if given).

With regard to the question of accountability for HR violations, the jurisdiction of the ECtHR must be considered.

In the case *Agim Behrami and Bekir Behrami v. France* (Application no. 71412/01) and *Ruzhdi Saramati v. France, Germany and Norway* (Application no. 78166/01)⁵⁴⁰ of 2 May 2007 the ECtHR ruled that the United Nations (UN) was responsible for HR violations committed by KFOR troop contribution State officials. In short: Mr. Saramati was detained by KFOR forces in Kosovo and was not brought promptly before a judge or officer authorized by law to execute judicial power as required by Article 5 para. 3 of the ECHR. Consequently, he complained that his rights deriving from the aforementioned provision were violated. The ECtHR stated that the United Nations Security Council (UN SC) does have the primary responsibility for the maintenance of international peace and security pursuant to Article 24 para. 1 of the UN-Charter. The UN SC delegated only the establishment and operational control over KFOR to NATO by issuing the KFOR mandate, UN SC Res. 1244 (1999) of 10 June 1999, but did not delegate the ultimate authority and operational control over KFOR. Thus, KFOR was an international structure established by and answerable to UN SC. Further, the UN SC mandate authorized KFOR to undertake all means necessary to create a secure environment (para. 7 - 9) and thus covered issuing of detention orders. Therefore, KFOR was exercising lawfully delegated UN Charter Chapter VII powers of the UN SC while detaining Mr. Saramati. As the Court ruled, the impugned actions were “attributable” to the UN. As the UN is not

538 States Parties to the ACHR are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Trinidad & Tobago, Uruguay and Venezuela.

539 See: Inter-Am.C.H.R., Coard et al. v. United States, Case 10.951, Report N° 109/99 of 29 September 1999, para. 37: “In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.”, see: <http://www1.umn.edu/humanrts/cases/us109-99.html>.

540 Available e.g. at <http://hei.unige.ch/~clapham/hrdoc/docs/ECHRBehrami.doc>.

Party to the ECHR, the complaint was dismissed on the grounds of lack of *ratione personae* of the ECHR.

In contrast, the UK House of Lords ruled on 12 December 2007 in the case *R. (on the application of Al-Jedda) v. Secretary of State for Defence*⁵⁴¹ that UK was accountable for HR violations committed by a UK soldier. The Court ruled in para. 23 of the judgment that “[...] [i]t cannot realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant.” The case is currently pending before the ECtHR (Application No. 27021/08). The hearing will take place on 9 June 2010.⁵⁴² It is to be expected that the ECtHR will elaborate in detail on the topic of command and control of the troop contributing State in a military operation based on a UN SC resolution.

Further, in the Decision on Admissibility of 30 June 2009 in the case of *Al-Saadoon and Mufdhi v. United Kingdom* (Application No 61498/08)⁵⁴³ the ECtHR ruled that the UK did have the territorial jurisdiction and was accountable in relation to detention of Iraqi nationals by British Armed Forces in Iraq. The ECtHR did not follow the argument of the English Court of Appeal, UK forces detained the appellants at the request and to the order of the Iraqi High Tribunal (IHT) and thus acted like agents of the IHT which would make the actions attributable to the IHT. The ECtHR underlined that the detainees were *de facto* and (and later also) *de iure* under the control and authority of UK Forces. The Court stated that the ECHR was therefore applicable extraterritorially and that the UK – and not Iraq – was responsible for any HR violations.

As the jurisdiction on the accountability of HR violations by soldiers during military operations is still evolving and crucial for almost all NATO Allies Party to the ECHR, the future case law of the ECtHR should be observed closely.

4. Concluding Remarks

In conclusion, it can be taken for granted that HR obligations which can be considered as peremptory norms of Public International Law (*ius cogens*) always – be it in time of peace or armed conflict – apply including therefore during a NATO-led military operation. It can also be stated that LOAC is generally *lex specialis* to HR obligations.

Further, it must be considered that in certain circumstances HR obligations deriving from international treaties can apply extraterritorially in theatre. This fact must be considered particularly by troop contributing States which are States- Parties to the ECHR, especially with regard to administrative or criminal arrests and detentions.

Finally, it must be considered that the question of application of HR obligations during times of armed conflict and/or in any NATO-led operation is of a complex nature and can result in legal restraints for some NATO Allies.

541 Available at: <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda-1.htm>.

542 See:

<http://www.echr.coe.int/ECHR/EN/Header/Pending+Cases/Pending+cases/Calendar+of+scheduled+hearings/>. The statements of the facts are available at:

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=848079&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

543 Available at: <http://www.unhcr.org/refworld/topic,4565c2252,4565c25f11,4a5360060,0.html>.

PART XVII

ENVIRONMENTAL PROTECTION

References and suggested reading:

- Agreement between the parties to the North Atlantic Treaty regarding the status of their forces. Done at London June 19, 1951. (NATO SOFA) Article II.
- Basel Convention on Transboundary Movements of Hazardous Waste and Their Disposal: <http://www.basel.int>
- Convention on International Trade in Endangered Species of Fauna and Flora (CITES)
- Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques, 1976
- MC 469, NATO Military Principles and Policies for Environmental Protection (EP), 30 June 2003, Annex B, defines "environment" as "[t]he surroundings in which an organism operates, including air, water, land, natural resources, flora, fauna, humans and their interrelation. Citing AAP-6.
- North Atlantic Treaty (1949), Preamble, Articles I and II.
- Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 9 June 1977, Article 55.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 9 June 1977
- STANAG 2510 (Edition 2, Ratification Draft 1), Joint NATO Waste Management Requirements During NATO-Led Military Activities, dated 16 December 2008
- STANAG 2510, Annex B: Disposal of Health Care Waste on Operations from Healthcare Facilities
- STANAG 7102, Environmental Protection Handling Requirements for Petroleum Handling Facilities and Equipment (Ed 2) dated 27 February 2009
- STANAG 7141, Joint NATO Doctrine for Environmental Protection During NATO LED Military Activities, dated 26 February 2008.
- Stockholm Convention on Persistent Organic Pollutants: <http://www.pops.int>.

A. INTRODUCTION

Environmental issues confront NATO Commanders and their staff at all levels of operations.⁵⁴⁴ NATO legal advisers serve critical roles advising their Commanders and staff on environmental protection laws, regulations, and standards.

The purpose of this chapter is to provide a basic understanding of NATO's environmental protection principles, policies, and doctrine. This chapter also address important environmental protection requirements that deployed NATO forces must follow and discuss international treaties concerning environmental protection that legal advisers to NATO Commanders should know of.

B. LEGAL BASIS

The North Atlantic Treaty, the NATO SOFA, and the Paris Protocol do not mention environmental protection. However, within its general principles, the North Atlantic Treaty seeks to promote stability and well-being through international peace, security, justice, and the rule of law.⁵⁴⁵ Additionally, the NATO SOFA recognizes the duty of a force to respect the laws of a receiving state.⁵⁴⁶ Since the 1960s, NATO member nations have adopted a growing body of domestic and international laws and agreements to protect the environment.

In course, NATO has developed principles, policies and guidance for environmental protection in the following documents: Military Committee document 469, *Principles and Policies for Environmental Protection*, and in Standardization Agreements (STANAG) 7141 (*Joint NATO Doctrine for Environmental Protection During NATO Led Military Activities*), 2510 (*Joint NATO Waste Management Requirements During NATO-Led Military Activities*), and 7102 (*Environmental Protection Handling Requirements for Petroleum Handling Facilities and Equipment*).

C. NATO PRINCIPLES AND POLICIES FOR ENVIRONMENTAL PROTECTION

MC 469, *NATO Military Principles and Policies for Environmental Protection*, dated 30 June 2003, establishes the environmental protection principles and policies for NATO-led military activities. Under MC 469, NATO Commanders must respect environmental principles and policies during NATO-led military activities; however, should environmental protection conflict with mission success or security considerations, operative imperatives take priority over environmental protection. Factors such as reduced preparation time, limitations of resources, expertise and/or equipment may hinder compliance with environmental protection requirements, particularly during the initial states of an operation.

1. Principles

MC 469 sets out eight basic principles guiding environmental protection:

(1) Host Nation Law. Unless otherwise agreed, NATO-led forces will respect cooperating host nation environmental laws. If there are no host nation environmental laws, theatre-agreed environmental protection standards apply where practicable.

(2) Responsibility. NATO and sending states have a collective responsibility to protect the environment, however, each nation is ultimately responsible for the actions of its own forces.

(3) Authority. The designated NATO Commander has the authority to establish mandatory environmental protection procedures and negotiate environmental protection arrangements in accordance with MC 334/2, *NATO Principles and Policies for Host Nation Support*.

⁵⁴⁴ MC 469, *NATO Military Principles and Policies for Environmental Protection (EP)*, 30 June 2003, Annex B, defines "environment" as "[t]he surroundings in which an organism operates, including air, water, land, natural resources, flora, fauna, humans and their interrelation. Citing AAP-6.

⁵⁴⁵ The North Atlantic Treaty (1949), Preamble, Articles I and II.

⁵⁴⁶ NATO SOFA Article II.

(4) Coordination. NATO military authorities, cooperating host nations and sending nations should coordinate environmental protection at appropriate levels.

(5) Information Exchange. The designated NATO Commander, sending nations, and cooperating host nation authorities should exchange information on environmental protection procedures, standards, concerns and arrangements early and frequently.

(6) Transparency. The designated NATO Commander should ensure, when appropriate, that the host nation and public are informed of environmental damage and environmental protection measures taken.

(7) Mission Development. As the mission develops, the NATO-led force should regularly review and update environmental protection procedures and standards.

(8) Environmental Expertise. NATO Commanders must have access to environmental protection expert advice and support.

2. Policies

Under MC 469, NATO Commanders and sending nations should consider environmental issues at the earliest opportunity during planning and throughout the execution of NATO-led military activities. They should apply the best practicable environmental protection measures. Operational plans should include specific guidance in an environmental protection annex, and host nation support arrangements should address host nation environmental protection standards. NATO Commanders should consider those activities that potentially threaten the environment and apply appropriate mitigating measures. Finally, NATO-led forces must immediately report significant adverse environmental impacts or threats to appropriate NATO and national authorities.

The Designated NATO Commander should:

- (1) Identify the environmental protection requirements necessary to establish proper environmental protection arrangements in coordination with sending nations and local authorities;
- (2) Issue environmental protection directives and provide sending nations with details on applicable host nation standards;
- (3) Consider environmentally sensitive areas when planning military activities, and
- (4) Require reports from sending nations on the status of locations that they are using.

Sending Nations should:

- (1) Provide appropriate environmental protection education and training to their forces;
- (2) Provide appropriate environmental expertise, and
- (3) Ensure that their contingents comply with the designated NATO Commander's directives for environmental protection.

The host nation should cooperate with the designated NATO Commander to permit the conduct of military activities with due regard for environmental protection, to include providing environmental expertise, information, resources, and advice to the NATO Commander and sending nations on host nation environmental protection standards.

D. THE NATO ENVIRONMENTAL PROTECTION DOCTRINE

STANAG 7141, *Joint NATO Doctrine for Environmental Protection During NATO-LED Military Activities*, dated 26 February 2008, establishes NATO's environmental doctrine, lists environmental

responsibilities of NATO Commanders, addresses environmental training standards, and lists national military points of contact for environmental matters. While operational requirements are paramount, NATO Commanders should consider the potential environmental impacts of military activities as early as possible in order to minimize adverse effects without compromising military readiness or mission accomplishment. Moreover, a full understanding of applicable environmental laws and regulations enables Commanders and their staff to plan effectively and act appropriately.

Further, NATO Commanders should integrate environmental risk management into the overall planning for military activities to balance environmental protection against the risks to the force and mission accomplishment.⁵⁴⁷

1. Planning Guidelines for Military Activities

When planning military activities, NATO commanders and their staffs should follow the following planning guidelines:

- (1) Identify activities that could impact the environment and consider alternatives and contingencies. For example, consider the handling of petroleum products, solid waste, hazardous waste, waste water, and emissions into the air.
- (2) Identify pertinent environmental characteristics of the area of operation, such as climate, water quality, air quality, natural and cultural resources, endangered and exploited species and their critical habitat, and the presence of birds and their migration routes.
- (3) Identify potential impacts on air, water, soil and ground water from military activities such as vehicle emissions, open air burning, disposal of grey and black water, oil and petroleum product spills, disposal of solid waste, hazardous waste, medical and infectious wastes, use of pesticides and herbicides, noise, and activities that affect wetlands and other environmentally or culturally sensitive areas.
- (4) At the beginning of the operation, prepare an environmental baseline study (EBS) for any NATO occupied or used site and, at the end of the operation or when handing over the site, prepare a closure or hand-over EBS to document the condition of the site.
- (5) Identify feasible mitigation measures to reduce the risk to the environment and to human health and safety. Consider alternative locations or activities that can achieve the mission while reducing the risk to the environment or human health.
- (6) Identify measures to prevent pollution and conserve resources. STANAG 7141 provides six strategies to conserve resources and reduce clean-up or remediation requirements:
 - (a) Source reduction – reduce or eliminate the use of hazardous materials;
 - (b) Preventative measures – take precautions such as using drip pans;
 - (c) Re-use – when practical, use the same products over again;
 - (d) Recycle;
 - (e) Treatment – rendering hazardous waste non-hazardous;
 - (f) Disposal – last resort.
- (7) Determine the national and international environmental laws that apply to the military activities.

⁵⁴⁷ "Environmental risk management is the process of detecting, assessing and controlling risks arising from operational factors together with balancing risk with mission benefits." See page A-1, Annex A to STANAG 7141, Joint NATO Doctrine for Environmental Protection During NATO LED Military Activities, dated 28 February 2008.

(8) Identify operational limitations and restrictions caused by environmental regulations and policies.

2. Environmental Risk Management

NATO Commanders and their staff should thoroughly plan both exercises and operations to minimize unnecessary risks to the environment and human health. They should conduct exercises under peacetime conditions in a manner consistent with applicable environmental regulations. During operations, they should balance environmental protection with mission objectives. According to STANAG 7141, the key elements of risk management are:

(1) Commander's Environmental Policy. The commander should provide clear guidance and objectives for environmental protection as early as possible in the planning process.

(2) Environmental Planning. In line with the Commander's policy, develop an environmental plan and include it as an annex to the operational plan (OPLAN). The annex should address contingencies, identify risks, and prescribe mitigation measures.

(3) Implementation. Ensure that all personnel are trained, aware of the environmental issues, and understand their responsibilities. Commanders should also assign responsibilities and resources for environmental protection, and work with local authorities to address problems and concerns.

(4) Checking and Correcting Actions. Continuously monitor activities to ensure consistency with the Commander's objectives. Conduct periodic inspections of sites, monitor for changes, and use periodic inspection reports for baseline studies.

(5) After Action Review. Identify and report lessons learned to improve future planning.

3. Commander's Environmental Responsibilities

The principle responsibility for all NATO commanders is to achieve their mission; nevertheless, to the extent possible, under STANAG 7141, NATO commanders should: promote environmental protection and awareness; assign responsibilities and resources to achieve environmental protection objectives; consider environmental impacts when making decisions; comply with environmental laws and agreements; responsibly use the natural resources under their control; address environmental problems when they arise, and promote pollution prevention and resource conservation.⁵⁴⁸ Additionally, commanders should plan and specify guidelines for waste management, including agreements for waste disposal, and ensure that any transboundary movements of waste comply with international and national laws.

E. SOLID WASTE MANAGEMENT DURING NATO-LED MILITARY ACTIVITIES

NATO military activities often produce solid waste, which consists of non-hazardous discarded material and hazardous waste.⁵⁴⁹ Generally, there are four phases of managing solid waste: generation, storage, transportation, and disposal. Waste management requires involvement of environmental protection specialists, preventive medicine/health care personnel, logisticians, finance

⁵⁴⁸ See page B-1, Annex B to STANAG 7141, Joint NATO Doctrine for Environmental Protection During NATO LED Military Activities, dated 28 February 2008.

⁵⁴⁹ "Waste" is any substance, material or object which the holder discards or intends or is required to discard. "Hazardous waste" is waste that, because of its chemical reactivity, toxic, explosive, corrosive, radioactive or other characteristic causes danger or is likely to cause danger to health or the environment if improperly handled, treated or disposed of. See STANAG 2510, Annex C, Definitions.

and procurement professionals, and legal advisers. STANAG 2510 (Edition 2, Ratification Draft 1), *Joint NATO Waste Management Requirements During NATO-Led Military Activities*, dated 16 December 2008, provides the joint requirements for NATO solid waste management during NATO-led military activities.⁵⁵⁰

1. Principles of Waste Management

STANAG 2510 recognizes the following common principles that govern safe waste management:

- (1) Precautionary Principle. Avoid, minimize, and remediate environmental damage to the fullest extent possible.
- (2) Waste Hierarchy Principle. First, avoid creating waste; secondly, if you cannot avoid creating waste, reuse or recycle it; finally, the last option is to dispose of it.
- (3) Polluter Pays Principle. Producers of waste are responsible for the safe and environmentally sound disposal of the waste they produce.
- (4) Proximity Principle. Minimize the risks associated with transporting waste by legally disposing of waste as close as possible to the location where the waste originated.⁵⁵¹

2. Waste Management Requirements

Either a status of forces agreement, a memorandum of understanding, technical arrangement, or exchange of letters between the host nation and the NATO-led forces should address the applicable waste management regulations. It is NATO policy to respect host nation laws, unless otherwise agreed. Where such laws do not exist, applicable national laws and theatre-agreed environmental protection guidelines in accordance with MC 469, *NATO Principles and Policies for Environmental Protection* apply. If the host nation can offer adequate disposal facilities, the NATO-led forces should use those facilities in accordance with local laws and agreements.

Otherwise, transboundary shipments of hazardous waste must comply with the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (Basel Convention),⁵⁵² as well as with applicable national laws and regulations of the host nation, transit states, and receiving states. Consequently, proper transboundary movements of hazardous waste require early planning, legal adviser's involvement, and detailed memoranda of understanding with participating nations.

It is essential that, prior to deployment, the NATO-led force collect detailed information on the environmental situation in the host nation. In addition to identifying host nation environmental laws and regulations, the NATO-led force should determine the local capabilities for handling, storing, and disposing of waste. Additionally, as soon as possible, the NATO-led force should prepare detailed environmental baseline assessments of the property that it uses for its operations. During the deployment, the lead nation should ensure that all wastes are managed and disposed of in accordance with applicable laws, regulations, and agreements.

550 STANAG 2510 does not address the treatment of wastewater, warfare agents and explosive ordnance, ammunition, decontaminating agents, radioactive substances, or waste in connection with maritime operations. NATO requirements for waste management during NATO-led maritime operations are addressed in the Allied Maritime Environmental Protection Publication (AMEPP) series. See STANAG 2510 at page 2.

551 When transporting waste to the European Union, apply the Regulation on Shipments of Waste of the European Parliament and Council (EC 1013/2006, Regulation on Shipments of Waste). See STANAG 2510 at page A-1 and Annex C for more details. As for shipping waste to non-European Union states, apply the Basel Convention, which prohibits the shipment of hazardous waste to countries that lack both the facilities and the expertise to dispose of the waste safely. For more on the Basel Convention, see discussion below.

552 Details of this Convention is detailed later.

3. Responsibilities

STANAG 2510 sets out the following responsibilities:

(1) The NATO Commander. The Commander should assess the situation and ensure waste management planning, specify basic objectives and guidelines for waste management, and ensure that there are agreements in place to address waste disposal. The Commander should issue waste management directives and ensure that any transboundary movements of waste comply with international and national laws.

(2) Lead Nation. During a NATO-led operation, one participating nation may accept the lead responsibility for managing solid waste. Lead nation management responsibilities include: provide disposal capacities to sending nations to the extent possible in view of local conditions and capabilities; develop the waste management plan, and regularly review and update the plan.

(3) Sending Nations. Sending nations are obliged to comply with the waste management plan, correctly manage the wastes that their forces produce, and whenever possible, promote reduction and recycling of wastes.

(4) Host Nation. Host nations are expected to provide all information necessary for waste management, to include information about their national environmental laws and regulations, and available waste management capabilities.

4. Waste Management Plan

Under STANAG 2510, the waste management plan provides the basis for directives and orders, and often justifies expenditures of funds; consequently, it should address all aspects of waste management and must include the following:

(1) A list and map depicting waste generation activities, locations and waste collection points for each different waste stream;

(2) A list of types of waste, including estimated quantities and disposal capacities;

(3) Necessary safety and health information for each type of waste;

(4) Lists of local laws, regulations, authorities, and approved contractors;

(5) Separation of wastes into different categories;

(6) Instructions for safe handling and disposal;

(7) Assignment of responsibilities.

5. Hazardous Waste

STANAG 2510 recognizes special rules for handling, storing, transporting, and disposing of hazardous wastes.

(1) If the properties of the waste are unknown, test and classify it.

- (2) Label it and provide Material Safety Data Sheets (MSDS) for all hazardous wastes.
- (3) Only trained personnel with appropriate protective equipment may handle hazardous waste.
- (4) Publish a spill response plan.
- (5) Maintain safe and secure storage locations and receptacles for hazardous waste for limited duration.
- (6) Transport and dispose of hazardous waste in accordance with applicable national and international laws.⁵⁵³ Ensure that hazardous wastes are properly labelled and documented. When contracting for transport and disposal of hazardous waste, choose appropriate contractors, monitor and verify their performance, and ensure that they follow approved disposal routes and use proper disposal facilities. Contracting for transfer or disposal of hazardous waste does not relieve a generator of waste of the responsibility to ensure that the waste is properly managed and disposed of. Finally, maintain adequate disposal records.

6. Health Care Waste

Health care activities often produce wastes that, if not properly handled, may threaten human health as biological, chemical, and/or physical hazards.⁵⁵⁴ Accordingly, the *Basel Convention* and the *Stockholm Convention on Persistent Organic Pollutants*⁵⁵⁵ prescribe practices for handling health care waste.⁵⁵⁶ Additionally, Annex B of STANAG 2510, *Disposal of Health Care Waste on Operations from Healthcare Facilities*, establishes principles for the management of waste generated in NATO health care facilities.

Under STANAG 2510, Commanders of medical treatment facilities are responsible for the proper management of health care wastes that their facilities generate. This responsibility is usually fulfilled by a health care facility waste manager whose duties include implementing procedures for marking and containing health care wastes, overseeing emergency spillage response, ensuring that spot-checks of containers or bags are conducted, that organic wastes are stored at the proper temperature, and that handlers of health care wastes have proper vaccinations. Depending upon the role of a treatment facility, the health care waste manager is required to produce a plan for storing, transporting, and disposing of health care waste.

F. PETROLEUM, OIL AND LUBRICANTS (POL)

Deployed military forces often use substantial amounts of POL products. Improper handling of POL products can result in leaks and spills which can cause widespread and long-term damage to

⁵⁵³ See discussion of the Basel Convention at the end of this chapter.

⁵⁵⁴ Health care waste is any waste consisting wholly or partly of human or animal tissue, blood or other bodily fluids, excretion, drugs or other pharmaceutical products, swabs or dressings, or syringes, needles or other sharp instruments which, until rendered safe, may prove hazardous to any person coming into contact with it, and any other waste arising from medical, nursing, dental, veterinary, pharmaceutical or similar practice, investigation, treatment, care, teaching or research, or the collection of blood for transfusion, which may cause infection to any persons coming into contact with it. See STANAG 2510, Annex B, page B-2.

⁵⁵⁵ Details of this Convention is detailed later.

⁵⁵⁶ See Annex B to STANAG 2510, *Disposal of Health Care Waste on Operations from Healthcare Facilities*, and cited references for the Basel Convention on Transboundary Movements of Hazardous Waste and Their Disposal: <http://www.basel.int>, and the Stockholm Convention on Persistent Organic Pollutants: <http://www.pops.int>.

host nation groundwater and surface water resources. To address this concern, STANAG 7102, *Environmental Protection Handling Requirements for Petroleum Handling Facilities and Equipment* (Ed 2) dated 27 February 2009, establishes technical standards and procedures for operating and maintaining fixed and mobile fuel storage and fuel handling equipment while deployed to another nation. It is NATO policy that deploying forces will comply with host nation standards for handling POL products and, where conditions allow, deploying forces will follow their own national standards when those standards are more stringent.

STANAG 7102 places specific responsibilities on host nations and deploying forces. Host nations are expected to brief incoming personnel on their national environmental requirements, to include proper handling, storage, and transportation of POL, and provide a brief written synopsis of their environmental protection standards. Host nation authorities should explain their national requirements for spill prevention, containment, clean-up, and reporting of spills and leakage. Additionally, it is important that host nations provide detailed information about environmentally sensitive areas such as protected ground water sites.

In turn, Commanders of deploying forces are expected to emphasize to their personnel the need to follow host nation environmental requirements and the importance of spill prevention, containment, and clean-up. When time allows, deploying forces should identify host nation environmental standards prior to deployment and train their personnel accordingly. Deploying forces equipment should meet host nation or the forces' own national environmental requirements, whichever is more stringent. Commanders should ensure that personnel who handle POL products are properly trained, all petroleum transfer operations are properly supervised, and petroleum storage facilities are inspected for spills and leakage daily.

G. INTERNATIONAL TREATIES

1. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal⁵⁵⁷

The Basel Convention and its subsequent amendments, restricts the movement of hazardous waste across international boundaries.⁵⁵⁸ It prohibits export of hazardous wastes to certain countries, particularly developing countries which prohibit the import of hazardous wastes or are not capable of managing the waste in an environmentally sound manner. Additionally, transboundary movements of hazardous wastes must have prior written consent of competent authorities from the countries of export, transit, and import, and detailed movement documents must accompany each shipment of hazardous waste. The Basel Convention also promotes sound environmental management practices, including waste reduction and improved technology. Proper transboundary movement of hazardous waste requires early planning, specialized advice, and detailed documentation. Competent authorities at the points of origin, transit, and destination should receive prior detailed notice of the hazardous waste shipment.

2. The Stockholm Convention on Persistent Organic Pollutants⁵⁵⁹

Persistent organic pollutants (POPs) are organic chemicals, including pesticides, herbicides, industrial chemicals and their by-products, which can remain throughout the environment, accumulate in the fatty tissues of animals, and may cause health problems such as cancer and damage to the nervous system. The purpose of the Stockholm Convention is to promote environmentally

⁵⁵⁷ The Basel Convention was signed on 22 March 1989 and entered into force on 5 May 1992. There are presently 172 parties to the Basel Convention. See Secretariat of the Basel Convention International Environmental House website at <http://www.basel.int>.

⁵⁵⁸ The Basel Convention defines "hazardous wastes" as wastes considered hazardous by the country of export, transit, or import, or are listed in Annex I of the Convention and possess one or more of the characteristics listed in Annex III, such as explosive, flammable, corrosive, toxic, infectious, etc. See the Basel Convention Article I, Annexes I and III.

⁵⁵⁹ The Stockholm Convention was signed on 22 May 2001 and entered into force on 17 May 2004. See the Secretariat of the Stockholm Convention website at <http://www.chm.pops.int>.

sound management of persistent organic pollutants, to include limiting their production, preventing unintentional releases of POPs into the environment, and restricting their transboundary movement.

NATO forces using persistent organic pollutants or engaging contractors who use them should ensure that individuals using these pollutants understand and comply with the restrictions for their use.

3. The Convention on International Trade in Endangered Species of Wild Fauna and Flora⁵⁶⁰

NATO forces deploying to areas where there are endangered or exploited species, should know that members of the force may not ship endangered or exploited species or their specimens without proper authority; otherwise the headquarters may suffer serious embarrassment and the offending individuals could face severe criminal sanctions. The Convention on International Trade in Endangered Species of Fauna and Flora (CITES) restricts international trade in species threatened with extinction or over-exploitation through a system of export and import permits based on varying degrees of protection. For instance, species listed in Appendix I of the Convention, which are species identified as threatened with extinction, may only be imported when the scientific authority of the State of import determines that the import of the species or its specimen is for purposes which are not detrimental to the survival of the species, the recipient of a living species is suitably equipped to house and care for it, and the management authority of the State of import is satisfied that the recipient will not use the species for “primarily commercial purposes.”⁵⁶¹

4. Armed Conflict and the Environment

In addition to the basic principles of the law of armed conflict: distinction, military necessity, proportionality, and humanity, there are international treaties that attempt to limit the impact of armed conflict on the environment.

(1) Additional Protocol I to the Geneva Convention of 1949, Relating to the Protection of Victims of International Armed Conflicts (1977), requires care “in warfare to protect the environment against widespread, long-term severe damage,” and prohibits “methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.”⁵⁶² It also prohibits attacks, destruction or removal of objects indispensable to the survival of a civilian population, such as food, livestock, drinking water facilities, and irrigation works.⁵⁶³ Additionally, *Protocol I* prohibits attacks against works and installations containing dangerous forces, such as dams, dykes, and nuclear electrical generating stations, if such attacks may cause the release of dangerous forces resulting in severe losses among civilian populations.⁵⁶⁴ However, this special protection may not apply if the facility provides regular, significant and direct support to military operations and if such attack is the only feasible way to terminate the facility’s support to military operations.⁵⁶⁵ Of course, the attacking force must take all reasonable precautions to avoid release of the dangerous force. It must also apply the principle of proportionality and not use force where the expected incidental loss of life or injury to civilians or civilian objects is excessive in relation to the direct military advantage anticipated.⁵⁶⁶ With respect to non-international armed conflicts Articles 14 and 15 of Protocol II⁵⁶⁷ prohibit attacks, destruction or

⁵⁶⁰ The Convention on International Trade in Endangered Species of Fauna and Flora (CITES) was signed on 3 March 1973 and entered into force 90 days later. CITES currently has 175 participants. See the CITES website at: <http://www.cites.org>.

⁵⁶¹ See CITES, Article III, Regulation of Trade in Specimens Included in Appendix I.

⁵⁶² Protocol I, Article 55.

⁵⁶³ Protocol I, Article 54.

⁵⁶⁴ Protocol I, Articles 54, 55, and 56.

⁵⁶⁵ Protocol I, Article 56.

⁵⁶⁶ Protocol I, Article 51.

⁵⁶⁷ Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 9 June 1977

removal of objects indispensable to the survival of civilian population (Article 14), and also prohibit attacks against works and installations containing dangerous forces, such as dams, dykes, and nuclear electrical generating stations, if such attacks may cause the release of dangerous forces resulting in severe losses among civilian populations (Article 15).

(2) *The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention)* prohibits the hostile use of “environmental modification techniques” against the environment as a means of warfare.⁵⁶⁸ Article I of the Convention states that each party to the Convention “undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.” Article II defines “environmental modification techniques” as “any techniques for changing - through deliberate manipulation of natural processes - the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or outer space.”

H. CONCLUSION

NATO’s environmental protection doctrine requires commanders and their staff to consider environmental impacts of military activities as early as possible in the planning process. A deploying command should identify the environmental conditions of the host nation, potential environmental impacts of its military activities, host-nation environmental laws and standards, and the capabilities of the force and the host nation to properly address environmental issues. Through early and continuous liaison with the host nation, the deploying command can properly plan for environmental protection and avoid unnecessary and costly environmental damage.

Additionally, in conducting military operations, it is important to recognize that the law of armed conflict prohibits the disproportionate use of force, especially as it may impact civilian populations. Consequently, it is unlawful to use a method of warfare likely to release dangerous forces upon a civilian population, result in widespread, long-term damage to the environment, or otherwise cause severe hardship or jeopardize the population’s survival. NATO commanders and their staff therefore rely upon their legal advisers and environmental specialists to know the applicable environment protection laws and standards, to understand environmental issues, and recommend appropriate solutions.

⁵⁶⁸ Adopted by Resolution 31/72 of the United Nations General Assembly on 10 December 1976. The Convention was opened for signature at Geneva on 18 May 1977, and entered into force on 5 October 1978. See International Committee of the Red Cross, *Advisory Service on International Humanitarian Law, 1976 Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques*, dated 01/2003.

ANNEX I

List of NATO Treaties

Source: <http://www.state.gov/s/l/treaty/depositary/index.htm>

- North Atlantic Treaty. Done at Washington April 4, 1949. ([Status List](#))
- Protocol to the North Atlantic Treaty on the Accession of Greece and Turkey. Done at London October 17, 1951. ([Status List](#))
- Protocol to the North Atlantic Treaty on the Accession of the Federal Republic of Germany. Done at Paris October 23, 1954. ([Status List](#))
- Protocol to the North Atlantic Treaty on the Accession of Spain. Done at Brussels December 10, 1981. ([Status List](#))
- Protocol to the North Atlantic Treaty on the Accession of the Czech Republic. Done at Brussels December 16, 1997. ([Status List](#))
- Protocol to the North Atlantic Treaty on the Accession of the Republic of Hungary. Done at Brussels December 16, 1997. ([Status List](#))
- Protocol to the North Atlantic Treaty on the Accession of the Republic of Poland. Done at Brussels December 16, 1997. ([Status List](#))
- Protocol to the North Atlantic Treaty on the Accession of the Republic of Bulgaria. Done at Brussels March 26, 2003. ([Status List](#))
- Protocol to the North Atlantic Treaty on the Accession of the Republic of Estonia. Done at Brussels March 26, 2003. ([Status List](#))
- Protocol to the North Atlantic Treaty on the Accession of the Republic of Latvia. Done at Brussels March 26, 2003. ([Status List](#))
- Protocol to the North Atlantic Treaty on the Accession of the Republic of Lithuania. Done at Brussels March 26, 2003. ([Status List](#))
- Protocol to the North Atlantic Treaty on the Accession of Romania. Done at Brussels March 26, 2003. ([Status List](#))
- Protocol to the North Atlantic Treaty on the Accession of the Slovak Republic. Done at Brussels March 26, 2003. ([Status List](#))
- Protocol to the North Atlantic Treaty on the Accession of the Republic of Slovenia. Done at Brussels March 26, 2003. ([Status List](#))
- Protocol to the North Atlantic Treaty on the Accession of the Republic of Albania. Done at Brussels July 9, 2008. ([Status List](#))
- Protocol to the North Atlantic Treaty on the Accession of the Republic of Croatia. Done at Brussels July 9, 2008. ([Status List](#))
- Agreement between the parties to the North Atlantic Treaty regarding the status of their forces. Done at London June 19, 1951. ([Status List](#))
- Agreement on the Status of the North Atlantic Treaty Organization National Representatives and International Staff. Done at Ottawa September 20, 1951. ([Status List](#))
- Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty. Done at Paris August 28, 1952. ([Status List](#))
- Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany and Protocol of Signature. Done at Bonn August 3, 1959. ([Status List](#))

- Agreement to implement Paragraph 5 of Article 45 of the Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany. Done at Bonn August 3, 1959. ([Status List](#))
- Agreement to amend the Agreement of 3 August 1959 to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany. Done at Bonn October 21, 1971. ([Status List](#))
- Agreement to amend the Protocol of Signature to the Agreement of 3 August 1959 to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany, as amended by the Agreement of 21 October 1971. Done at Bonn May 18, 1981. ([Status List](#))
- Agreement to amend the Agreement of 3 August 1959, as amended by the Agreements of 21 October 1971 and 18 May 1981, to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany. Done at Bonn March 18, 1993. ([Status List](#))
- Agreement to implement Paragraph 1 of Article 45 of the Agreement of 3 August 1959, as amended by the Agreements of 21 October 1971, 18 May 1981 and 18 March 1993, to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany. Done at Bonn March 18, 1993. ([Status List](#))
- Administrative Agreement to implement Article 60 of the Agreement of 3 August 1959, as amended by the Agreements of 21 October 1971, 18 May 1981 and 18 March 1993, to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany. Done at Bonn March 18, 1993. ([Status List](#))
- Agreement to Amend the Protocol of Signature to the Agreement of 3 August 1959, as amended by the Agreements of 21 October 1971 and 18 May 1981, to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany. Done at Bonn May 16, 1994. ([Status List](#))
- Agreement for the Mutual Safeguarding of Secrecy of Inventions relating to Defence and for which Applications for Patents have been made. Done at Paris September 21, 1960. ([Status List](#))
- Agreement between the Parties to the North Atlantic Treaty for Cooperation Regarding Atomic Information, with annexes. Done at Paris June 18, 1964. ([Status List](#))
- Protocol Amending the Security Annex to the Agreement between the Parties to the North Atlantic Treaty for Cooperation Regarding Atomic Information. Done at Brussels June 2, 1998. ([Status List](#))
- NATO Agreement on the Communication of Technical Information for Defence Purposes. Done at Brussels October 19, 1970. ([Status List](#))
- Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of their Forces. Done at Brussels June 19, 1995. ([Status List](#))
- Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace regarding the Status of their Forces. Done at Brussels June 19, 1995. ([Status List](#))
- Further Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace regarding the Status of their Forces. Done at Brussels December 19, 1997. ([Status List](#))
- Agreement between the Parties to the North Atlantic Treaty for the Security of Information. Done at Brussels March 6, 1997. ([Status List](#))

ANNEX II

Treaties and Conventions in the Law of Armed Conflict

- Declaration Respecting Maritime Law. Paris, 16 April 1856.
- Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864
- Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grams Weight, signed at St Petersburg on 29 November/11 December 1868.
- Declaration (IV, 3) concerning Expanding Bullets, signed at The Hague on 29 July 1899.
- Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 6 July 1906.
- Convention (IV) respecting the Laws and Customs of War on Land, signed at The Hague on 18 October 1907.
- Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, signed at The Hague on 18 October 1907.
- Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, signed at The Hague on 18 October 1907.
- Convention (VII) relating to the Conversion of Merchant Ships into War-Ships, signed at The Hague on 18 October 1907.
- Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, signed at The Hague on 18 October 1907.
- Convention (IX) concerning Bombardment by Naval Forces in Time of War, signed at The Hague on 18 October 1907.
- Convention (XI) relative to Certain Restrictions with regard to the Exercise of Right of Capture in Naval War, signed at The Hague on 18 October 1907.
- Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, signed at The Hague on 18 October 1907.
- Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, signed at The Hague on 18 October 1907.
- Hague Rules of Air Warfare, drafted by a Commission of Jurists at The Hague on 19 February 1923.
- Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925.
- Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 27 July 1929.
- Convention relative to the Treatment of Prisoners of War. Geneva, 27 July 1929.
- Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948.
- Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, signed at Geneva on 12 August 1949.

- Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, signed at Geneva on 12 August 1949.
- Convention (III) relative to the Treatment of Prisoners of War, signed at Geneva on 12 August 1949.
- Convention (IV) relative to the Protection of Civilian Persons in Time of War, signed at Geneva on 12 August 1949.
- Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on 14 May 1954.
- Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on 14 May 1954.
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, opened for Signature on 10 April 1972 at London, Moscow and Washington.
- Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, adopted by the General Assembly of the United Nations on 10 December 1976.
- Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted at Geneva on 8 June 1977.
- Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted at Geneva 8 June 1977.
- Convention on Prohibitions or Restrictions on the use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, adopted at Geneva on 10 October 1980. (Amendment article 1, 21 December 2001)
 - a. Protocol on Non-Detectable Fragments (Protocol I) 10 October 1980
 - b. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) 10 October 1980
 - c. Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) 10 October 1980
 - d. Protocol on blinding laser weapons (Protocol IV) 13 October 1995
 - e. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended on 3 May 1996) 3 May 1996
 - f. Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28 November 2003
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction opened for signature at Paris on 13 January 1993.
- Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993.
- Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, 8 November 1994.

- Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction, done at Oslo on 18 September 1997.
- Rome Statute of the International Criminal Court, 17 July 1998
- Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999
- Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)
- Convention on Cluster Munitions, 30 May 2008



ANNEX III

Links for LOAC websites

General information on international humanitarian law:

- ICRC <http://www.icrc.org/eng/ihl>
- International Law of War Association: <http://lawofwar.org/>
- Crimes of War Project: <http://www.crimesofwar.org/>
- Helpful collection of historical LOAC documents: <http://avalon.law.yale.edu/default.asp>
- Marine SJA to the Commandant website:
<http://sja.hqmc.usmc.mil/jao/sources/sources.htm>
- Groklaw - Legal research tool with intellectual property and Technology focus
<http://www.groklaw.net/index.php>

- Customary International Humanitarian Law Volume I
[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/pcustom/\\$File/Customary-International-Humanitarian-Law-I-icrc-eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/pcustom/$File/Customary-International-Humanitarian-Law-I-icrc-eng.pdf)

Volume II
[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/pcustom/\\$File/Customary-International-Humanitarian-Law-II-icrc-eng](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/pcustom/$File/Customary-International-Humanitarian-Law-II-icrc-eng).

- International Humanitarian Fact-Finding Commission
<http://www.ihffc.org/en/index.html>

- United Nations / UN Charter:
<http://www.un.org/aboutun/charter/>
Library of the United Nations Office at Geneva : <http://www.unog.ch/library/start.htm>

- International Law Commission : <http://www.un.org/law/ilc/index.htm>

- ICRC website to other links:
<http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/links?OpenDocument>

Hague Conference of 1899:

- Hague I, Pacific Settlement of International Disputes (1899):
http://avalon.law.yale.edu/19th_century/hague01.asp
- Hague II, Laws and Customs of War on Land (1899):
<http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument>
- Hague III, Adaptation of Maritime Warfare of Principles of Geneva Convention of 1864 (1899): <http://www.icrc.org/ihl.nsf/FULL/155?OpenDocument>
- Hague IV, Prohibiting Launching of Projectiles and Explosives from Balloons (1899):
<http://www.icrc.org/ihl.nsf/FULL/160?OpenDocument>
 - Declaration I, on the Launching of Projectiles and Explosives from Balloons (1899):
<http://www.icrc.org/ihl.nsf/FULL/160?OpenDocument>

- Declaration II, Declaration on the Use of Projectiles the Object of Which is the Diffusion of Asphyxiating or Deleterious Gases (1899):
<http://www.icrc.org/ihl.nsf/FULL/165?OpenDocument>
- Declaration III, Declaration on the Use of Bullets Which Expand or Flatten Easily in the Human Body (1899):
<http://www.icrc.org/ihl.nsf/FULL/170?OpenDocument>
- Final Act of the International Peace Conference (1899):
<http://www.icrc.org/ihl.nsf/FULL/145?OpenDocument>

Hague Conference of 1907:

- Hague I, Pacific Settlement of International Disputes:
http://avalon.law.yale.edu/20th_century/pacific.asp
- Hague II, Limitation of Employment of Force for Recovery of Contract Debts:
http://avalon.law.yale.edu/20th_century/hague072.asp
- Hague III, Opening of Hostilities:
<http://www.icrc.org/ihl.nsf/FULL/190?OpenDocument>
- Hague IV, Laws and Customs of War on Land:
<http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument>
- Hague V, Rights and Duties of Neutral Powers and Persons in Case of War on Land:
<http://www.icrc.org/ihl.nsf/FULL/200?OpenDocument>
- Hague VI, Status of Enemy Merchant Ships at the Outbreak of Hostilities:
<http://www.icrc.org/ihl.nsf/FULL/205?OpenDocument>
- Hague VII, Conversion of Merchant Ships into War Ships:
<http://www.icrc.org/ihl.nsf/FULL/210?OpenDocument>
- Hague VIII, Laying of Automatic Submarine Contact Mines:
<http://www.icrc.org/ihl.nsf/FULL/215?OpenDocument>
- Hague IX, Bombardment by Naval Force in Time of War:
<http://www.icrc.org/ihl.nsf/FULL/220?OpenDocument>
- Hague X, Adaptation to Maritime War of the Principles of the Geneva Convention:
<http://www.icrc.org/ihl.nsf/FULL/225?OpenDocument>
- Hague XI, Restrictions With Regard to the Exercise of the Right of Capture in Naval War:
<http://www.icrc.org/ihl.nsf/FULL/230?OpenDocument>
- Hague XII relative to the Creation of an International Prize Court:
<http://www.icrc.org/ihl.nsf/FULL/235?OpenDocument>
- Hague XIII, Rights and Duties of Neutral Powers in Naval War:
<http://www.icrc.org/ihl.nsf/FULL/240?OpenDocument>
- The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict:
<http://www.icrc.org/IHL.NSF/FULL/400?OpenDocument>
Protocol 1:
<http://www.icrc.org/ihl.nsf/FULL/410?OpenDocument>
Protocol 2:
<http://www.icrc.org/ihl.nsf/FULL/590?OpenDocument>
Article hereon:
<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList260/FF7F81319B1F96DAC1256B66005D8A96>

Geneva Conventions:

- Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva (1949):
<http://www.icrc.org/ihl.nsf/FULL/365?OpenDocument>

- Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949):
<http://www.icrc.org/ihl.nsf/FULL/370?OpenDocument>
- Convention (III) relative to the Treatment of Prisoners of War (1949):
<http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument>
- Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949):
<http://www.icrc.org/ihl.nsf/FULL/380?OpenDocument>
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977):
<http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977):
<http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument>
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) (2005):
<http://www.icrc.org/ihl.nsf/FULL/615?OpenDocument>

Conventional Weapons:

- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Geneva, 10 October 1980: <http://www.icrc.org/ihl.nsf/FULL/500?OpenDocument>
- Protocol I: Non-detectable fragments:
<http://www.icrc.org/ihl.nsf/FULL/505?OpenDocument>
- Protocol II: Landmines and booby traps:
<http://www.icrc.org/ihl.nsf/FULL/510?OpenDocument>
- Protocol III: Incendiary weapons: <http://www.icrc.org/ihl.nsf/FULL/515?OpenDocument>
- Protocol IV: Blinding lasers: <http://www.icrc.org/ihl.nsf/FULL/570?OpenDocument>
- Protocol V: Explosive Remnants of War:
<http://www.icrc.org/ihl.nsf/FULL/610?OpenDocument>
- Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction (1993):
<http://www.icrc.org/ihl.nsf/FULL/553?OpenDocument>
- Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare (1925):
<http://www.icrc.org/ihl.nsf/FULL/280?OpenDocument>
- 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (1972):
<http://www.icrc.org/ihl.nsf/FULL/450?OpenDocument>
- Convention on Cluster Munitions, 30 May 2008
<http://www.icrc.org/ihl.nsf/FULL/620?OpenDocument>

Landmines:

- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Mine Ban Convention 1997):
<http://www.icrc.org/ihl.nsf/FULL/580?OpenDocument>

Weapons of Mass Destruction:

- United Nations Office for Disarmament Affairs: <http://www.un.org/disarmament/>
- Treaty on the Non-proliferation of Nuclear Weapons:
http://www.un.org/disarmament/WMD/Nuclear/pdf/NPTEnglish_Text.pdf

- Comprehensive Nuclear Test Ban Treaty:
<http://www.un.org/disarmament/WMD/Nuclear/CTBT.shtml>
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction:
<http://www.un.org/disarmament/WMD/Chemical/index.shtml> and
<http://www.opcw.org/chemical-weapons-convention/>
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction:
<http://www.un.org/disarmament/WMD/Bio/index.shtml> and
http://www.un.org/disarmament/WMD/Bio/pdf/Text_of_the_Protocol.pdf

Historical Documents:

- Instructions for the Government of Armies of the United States in the Field (Lieber Code) (1863): <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>
- Project of an International Declaration concerning the Laws and Customs of War. Brussels (1874): <http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument>
- Manual of the Laws of Naval War. Oxford (1913):
<http://www.icrc.org/ihl.nsf/FULL/265?OpenDocument>

General Reference Sites:

- Naval Operations :
 - The Commander's Handbook on the Law of Naval Operations
[http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP))
 - Annotated Supplement to Commander's Handbook: <http://www.usnwc.edu/Research--Gaming/International-Law/RightsideLinks/Studies-Series/documents/Naval-War-College-vol-73.aspx>
- Army Operational Law handbook (2008):
http://www.au.af.mil/au/awc/awcgate/law/oplaw_hdbk.pdf
- Army ROE Handbook (2009):
<http://www.nwc.navy.mil/getattachment/7b0d0f70-bb07-48f2-af0a-7474e92d0bb0/San-Remo-ROE-Handbook>
- Army DOPLAW Handbook (2009):
http://www.loc.gov/rr/frd/Military_Law/pdf/domestic-law-handbook-2009.pdf?bcsi_scan_076AAF43CC69A5E1=1
- The Army Law of War Handbook (2005):
http://www.loc.gov/rr/frd/Military_Law/pdf/law-war-handbook-2005.pdf
- AR 190-8 Enemy POWs, retained Personnel, Civilian Internees and Other Detainees:
http://www.apd.army.mil/pdffiles/r190_8.pdf DoDD 5100.77, Department of Defense Law of War Program (1998): www.pegc.us/archive/DoD/docs/DoD_Dir_5100.77.pdf
- DoDD 2310.1, DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees (Short Title: DoD Enemy POW Detainee Program) (1994):
biotech.law.lsu.edu/blaw/dodd/corres/pdf2/d23101p.pdf
- Joint Non-lethal Weapons Directorate:
http://www.jnlwp.com/gen_info/purpose.asp
- Canadian JAG website for law of armed conflict:
http://www.forces.gc.ca/jag/publications/Training-formation/LOAC-DDCA_2004-eng.pdf
- UK military lawyer resource: <http://www.aspals.com/>

ANNEX IV

Detailed Law of Armed Conflict & Other Issues Organised by OPOD Annexes

This law of armed conflict (LOAC) checklist is an instructional device to demonstrate the vast range of LOW and related issues that arise during the operational staff planning process. Some of the issues raised obviously will not concern staff officers at the small unit level, others are of universal import and require close attention at all levels, and some would be considered only by the higher headquarters or national authorities. The checklist has been prepared to assist staff officers and commanders in the development and review of operation plans (OPLANs) and concept plans (CONPLANs).

This checklist assumes, without further emphasis, that all regular members of the force to be deployed (1) are equipped with the ID tags and cards required by the 1949 Geneva Conventions; and (2) have received the required accession level LOW training and the additional training required for commanders and those filling billets requiring specialized LOW training. It further assumes that all non-nuclear weapons to be employed by the force have been reviewed for compliance with the LOAC.

CONCEPT OF OPERATIONS (CONOPS) DEVELOPMENT

A Legal Adviser's work must begin at the very early stages of operational planning, with the development of the Commander's Concept of Operations (CONOPS). Since this CONOPS will provide the basis for later plan and order development, it is essential that the Commander have the benefit of timely and comprehensive legal review and advice. The following considerations should be addressed:

- What is the mandate or mission authorized by the NAC? Is the CONOPS consistent with that mandate?
- What is the legal environment within which the operation may take place?
 - Is there a governing UN Security Council Resolution?
 - What is the nature of the conflict – is it an international armed conflict, a non-international armed conflict, a peacekeeping mission or other limited mission (such as a non-combatant evacuation operation)?
 - Is there a SOFA or SOFA-like regime in place? Is there a need for coordination or permission of the Host nation within which the operation will occur?
- What is the command and control arrangement being contemplated?
- Will the CONOPS contain a use of force paragraph? Should there be at the least a description of the type of use of force regime being contemplated – whether it will be “robust,” “constrained,” “limited to self-defence” or some other description that will help subordinate planners and higher headquarters understand the commander's intent?

MAIN BODY OF THE OPLAN

___ Does the OPLAN include all necessary references, including UN and/or NAC guidance, applicable international agreements (SOFA, HNS, etc)

___ Review the described Joint Area of Operations (JAO) – are there SOFA, diplomatic, clearance, or other issues raised in connection with movement throughout as well as into and out of the JAO?

ANNEX A - CONDUCT OF OPERATIONS

ANNEX B - TASK ORGANIZATION AND COMMAND RELATIONSHIPS

ANNEX C - FORCES, MISSIONS/TASKS

Appendix 1 - Time-phased force and deployment list (TPFDL).

ANNEX D - INTELLIGENCE

Appendix 1 - Essential Elements of Information

Should the plan call for:

___collection of information about enemy's policies, attitudes and practices concerning compliance with LOW?

___collection of information about allied policies, attitudes and practices concerning compliance with LOW?

___collection of information about enemy and allied protective emblems and insignia?

___locating enemy PW camps?

___locating civilian and military hospitals or other medical installations?

___locating civilian concentrations, including refugee camps?

___locating civilian artistic, scientific or cultural institutions within the contemplated area of operations?

___information on governance, police, or judicial authorities that might affect CIMIC operations or other Rule of Law reconstruction efforts ?

Appendix 2 - Signals Intelligence

Appendix 3 - Counterintelligence

Appendix 4 - Target List/Target Intelligence

Appendix 5 - Human Source Intelligence

Appendix 6 - Reconnaissance

Appendix 7 - Intelligence Support to EW, C3CM

Appendix 8 - Imagery Intelligence

Appendix 9 - Intelligence Estimate for OPS EX, PSYOPs, Military Deception Plan

Appendix 10 - Measurement and Signature Annex

Appendix 11 - Planning Guidance - Captured Enemy Equipment

ANNEX E - Rules of Engagement / Use of Force

___Are any ROE affected in any way, especially restricted or prohibited, because of national caveats? If so, they should be promptly identified to the issuing authority along with an assessment of the impact of such caveats.

___Do any ROE restrict the operational freedom of action of the force because of an erroneous interpretation of the requirements of the LOW? If so, they should be promptly identified to the issuing authority.

___Do any of the ROE erroneously make avoidance of collateral civilian casualties and/or damage to civilian objects a primary concern? Only intentional attacks of civilians and employment of weapons and tactics that cause excessive collateral civilian casualties are prohibited. Any actions taken to avoid collateral civilian casualties and damage must be consistent with mission accomplishment and force security.

___Do the ROE recognize the inherent right of self-defense of all persons?

___Is plan consistent with restrictions on unnecessary killing and the devastation, destruction, or seizure of property (Arts 27 and 56 of Hague IV and GC Art. 53)?

___If plan contemplates any military actions which could only be justified as reprisals, is it consistent with the requirement that reprisals may only be conducted with the approval of the NAC?

ANNEX F - MARITIME OPERATIONS

___ Are there any national caveats that need to be addressed, either because of geographic or operational limitations imposed by national authorities on personnel or contingents?

___Are the obligations with regard to passage and conduct as provided for by the United Nations Convention on the Law of the Sea (UNCLOS) abided by, in particular those regulations appertaining to Territorial Waters (Part II of UNCLOS) and the High Seas (Part VII of UNCLOS)?

___Have appropriate Notices to Mariners (NOTAM) and Navigational Warnings (NAVWARN) been issued as required?, etc.

Appendix 1 - Maritime Interdiction/Interception Operations Plan

Appendix 2 - Naval Gunfire Plan

Enclosure 1 - Naval Gunfire Support Operations Overlay

Enclosure 2 - Schedule of Fires

Enclosure 3 - Naval Gunfire Reports

Enclosure 4 - Radar Beacon Plan

ANNEX G - LAND OPERATIONS

___ Are there any national caveats that need to be addressed, either because of geographic or operational limitations imposed by national authorities on personnel or contingents?

___Are fire support plans consistent with IL governing the attack of defended places only (arts. 25 and 26 of Hague IV)?

___If a fire support plan contemplates the bombardment of a defended place containing a concentration of civilians, does plan provide for the giving of an appropriate (i.e., either specific or general) warning (art. 26 of Hague IV)?

___Are the fire support plans consistent with the restrictions on intentional attack of buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, hospital zones, safety zones, and places where the sick and wounded are collected (provisions of Hague IV, Hague IX, GC, GWS, GWS(Sea), the Roerich Pact and the Hague Cultural Property Convention)?

___If the fire support plans contemplate the attack or bombardment of any buildings or zones of the type described in the preceding para. on the grounds that the buildings or zones are being used for military purposes, do they require the prior authorization of a sufficiently responsible level of command prior to such attack or bombardment?, etc.

Appendix 1 - Artillery Fire Plan

Enclosure 1 - Target Overlay

Enclosure 2 - Fire Support Table (Preparation Fires)

Enclosure 3 - Fire Support Table (Groups of Fires)

ANNEX H - AIR OPERATIONS

___ Are there any national caveats that need to be addressed, either because of geographic or operational limitations imposed by national authorities on personnel or contingents?

___ Are air operations plans consistent with IL governing the attack of defended places only (arts. 25 and 26 of Hague IV)?

___If an air operations plan contemplates the bombardment of a defended place containing a concentration of civilians, does plan provide for the giving of an appropriate (i.e., either specific or general) warning (art. 26 of Hague IV)?

___Are the air operations plans consistent with the restrictions on intentional attack of buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, hospital zones, safety zones, and places where the sick and wounded are collected (provisions of Hague IV, Hague IX, GC, GWS, GWS(Sea), the Roerich Pact and the Hague Cultural Property Convention)?

___If the air operations plans contemplate the attack or bombardment of any buildings or zones of the type described in the preceding para. on the grounds that the buildings or zones are being used for military purposes, do they require the prior authorization of a sufficiently responsible level of command prior to such attack or bombardment?

___Do the air operations plans reference or identify appropriate protective symbols (art. 27 of Hague IV, art. V of Hague IX, arts. 23 and 38 and Annex I of GWS, arts. 36, 38 and 40- 44 of GWS(Sea), art. 23 of GPW, arts. 14 and 83 and Annex I of CC, arts. I and III of the Roerich Pact, and arts. 6 and 16-17 of the Hague Cultural Property Convention)?

___Do the air operations plans identify the requirement for warnings and the appropriate level of authorizing authority where protective emblems and areas are abused (art. 26 of Hague IV, art. 21 of GWS, art. 34 of GWS(Sea), and art. 11 of the Hague Cultural Property Convention)?

___Are the air operations plans consistent with the fundamental right of self-defense in situations where protective emblems and protected areas are misused against our forces?

___Do maps and overlays of the AO identify targets entitled to special protection?

___Are hospital, safety and neutral zones, if any, identified? Are they visibly marked (art. 23 and Annex I of GWS and art. 14 and Annex I of GC)?

___Are special agreement hospital ship safety zones identified?

___Are friendly/neutral embassies, consulates and chanceries identified?, etc.

Appendix 1 - Air Fire Plan

Enclosure 1 - Preplanned Close Air Support

Enclosure 2 - Air Target List

Enclosure 3 - Air Fire Plan Target Overlay

ANNEX I - AMPHIBIOUS OPERATIONS

ANNEX J - FORCE PROTECTION

___ Are there any national caveats that need to be addressed, either because of geographic or operational limitations imposed by national authorities on personnel or contingents?

___Does this annex contain any use of force guidance? If so, is it consistent with the Use of Force/ROE Annex?

___ Is any guidance in this Annex affected in any way, especially restricted or prohibited, because of national caveats? If so, this should be promptly identified to the issuing authority along with an assessment of the impact of such caveats.

ANNEX K - SPECIAL OPERATIONS

___Does the plan contemplate clandestine operations designed to kill high ranking or key enemy officers or authorities? If so, are such plans compatible with the prohibition against assassination (art. 23(b) of Hague IV and para. 2.11 of Exec Order 123331? (NOTE: Lawful targets and combatants may be attacked whenever and wherever found.)

___ Does the plan require unconventional warfare personnel to conduct operations in uniform to the extent practicable in order to avoid denial of PW status if captured (art. 29 of Hague IV and art. 4 of GPW)?

ANNEX L - ARMS CONTROL

ANNEX M - NUCLEAR OPERATIONS

Tab A - Nuclear Options

Tab B - Nuclear Option Analysis

Tab C - Reconnaissance Operations to Support Nuclear Options

___ If nuclear weapons are to be deployed with forces, will any deployment route be over or through foreign countries that prohibit or restrict such weapons?

Tab D - Nuclear Fire Support Table/Target Lists.

Tab E - Nuclear Target Overlay

ANNEX N - INFORMATION OPERATIONS

___ Is this annex consistent with the Annex on Psychological Operations and with the guidance on Use of Force/Rules of Engagement

Appendix 1 - Deception

Appendix 2 - Operations Security Measures

ANNEX O - ELECTRONIC WARFARE OPERATIONS

ANNEX P - COMMUNICATIONS AND INFORMATION SYSTEMS

Appendix 1 - Communications Security

Appendix 2 - C3 Protection

Appendix 3 - Communications Planning

Appendix 4 - Courier Service

ANNEX Q - LOGISTICS

SERVICE SUPPORT

Appendix 1 - Petroleum, Oils, and Lubricants Supply

Appendix 2 - Mortuary Services

Appendix 3 - Sustainability Operations

Appendix 4 - Environmental Services

PERSONNEL SUPPORT

_____ Is there a SOFA or SOFA-like regime in place? Is there a need for coordination or permission of the Host nation within which the operation will occur. Are all members of the force subject to the National Authorities for LOW purposes?

___ Is there a JA designated to deal with the ICRC?

___ Is a POC designated to collect evidence on war crimes?

Appendix 1 - Enemy PWs, Civilian Internees, and Other Detained and Retained Persons

Appendix 2 - Processing of Formerly Captured, Missing or Detained NATO Personnel

Appendix 3 - Military Postal Service

Appendix 4 - Chaplain Services

MEDICAL SUPPORT

___Is plan consistent with the limitations on capture or destruction of enemy medical material, stores and equipment imposed by art. 33 of GWS and art. 38 of GWS(Sea)?

___Is plan consistent with the qualified requirement of arts. 23 and 56 of GC for the free passage of medical and hospital stores intended only for civilians of the opponent?

___If plan contemplates an occupation does it provide for medical supplies for the occupied population to the fullest extent of the means available (as required by art. 55 of GC)?

___Is plan consistent with the limitations on requisition of medical materials and stores of an occupied population contained in art. 57 of GC?

___Does the plan provide, subject to the Commander's discretion, for the marking with the red cross of all NATO medical vehicles, facilities and stores in accordance with arts. 39 and 42 of GWS and art. 41 of GWS(Sea), and for their use exclusively for medical purposes if so marked?

___Are medical personnel of the force (art. 24 of GWS) equipped with the protective emblems provided for by art. 38 of GWS and art. 41 of GWS(Sea), and with the special identification cards referenced in those conventions?

___Are such personnel assigned exclusively to medical duties or to the administration of medical organizations (art. 24 of GWS), etc.

ANNEX R - MOVEMENTS

___Is medical transport marked, at the discretion of the Commander, with the protective emblem provided for by art. 39 of GWS and art. 41 of GWS(Sea), and is their intended use restricted exclusively to medical purposes if so marked?

___Will the plan support the possible requirement for evacuation of PWs, civilian internees, refugees, and the sick and wounded?

___Have the parties to the conflict been notified of the names and descriptions of all hospital ships been at least ten days before their employment, as required by arts. 22, 24 and 25 of GWS(Sea)?

___Have all converted hospital ships been stripped of inappropriate armament and cryptographic equipment?, etc.

ANNEX S - ENVIRONMENTAL SUPPORT

___Do maps and overlays of the contemplated area of operations of NATO forces identify targets that may be entitled to special protection?

___Are hospital, safety and neutral zones, if any, identified? Are they visibly marked (art. 23 and Annex I of GWS and art. 14 and Annex I of GC)?

___Are special agreement hospital ship safety zones identified?

___Are friendly/neutral embassies, consulates and chanceries identified, etc.

ANNEX T - OPERATIONS IN A NBC WEAPONS ENVIRONMENT

___Does the plan contemplate the use of riot control agents, defoliants, chemical agents or gases of any kind? If so, is the intended use consistent with the Geneva Gas Protocol and any national laws or regulations of TCNs?

___If plan contemplates the use of any of the above, is the prior authorization of a sufficiently responsible level of command required?

___Is the contemplated use consistent with the provisions of the UN Environmental Modification Convention?

Enclosure 1 - Chemical Fire Support Table/Target List

Enclosure 2 - Chemical Target Overlay

ANNEX U - COMBAT SURVIVAL

Appendix 1 - Escape and Evasion Operations

Appendix 2 - Search and Rescue Operations

ANNEX V - CIVIL-MILITARY CO-OPERATION

___Is plan consistent with the guidance contained in MC 411/1 (NATO Policy on CIMIC) and with AJP-9 (NATO CIMIC Doctrine)?

Appendix 1 - Public Safety

___Does the plan provide guidance on requests for asylum and temporary refuge ? If not, should it?

___If plan contemplates the internment of civilians, does it provide guidance on the establishment and operation of internee camps in accordance with the requirements of arts. 79-135 of GC until such time that the camps can be turned over to other agencies?

___If plan contemplates occupation of foreign or enemy territory by NATO forces, does plan provide that civil affairs operations conform to IL relating to occupations as set forth in arts. 42- 56 of Hague IV and arts. 47-78 of GC?

___Is the plan consistent with the obligation of an occupier to restore and preserve public order and safety while respecting, in accordance with art. 43 of Hague IV, the laws in force in that country?

___If the plan includes draft proclamations, laws, or ordinances for use in the occupied territory, do those documents conform to requirements of IL as set forth in arts. 42-56 of Hague IV and arts. 64-78 of the GC?

___Is plan consistent with IL to avoid the unnecessary destruction of public utilities and safety facilities?

___Does plan comply with IL regarding methods of property control and does it recognize the limitations on the requisitioning, seizure and use of civilian property (see, e.g., arts. 43 and 47-56 of Hague IV and arts. 33, 53, 97 and 108 of GC)?

___Is plan consistent with IL in affording maximum protection to shrines, buildings, symbols, etc., associated with the religion and culture of the civilian populace?

___If plan contemplates the utilization of the services and labor of the civilian population, are the procedures consistent with the requirements of Hague IV and GC in addition to NATO policy? Are they consistent with existing alliance agreements and SOFAs?

___Does the plan allow procedures for civilians to send and receive news of a strictly personal nature to members of their families in accordance with arts. 25 and 26 of GC?

___Is plan consistent with the prohibition against the improper transfer, deportation or evacuation of civilians in occupied territory contained in art. 49 of GC?

Appendix 2 - Public Health and Welfare

___Does plan ensure that all aspects of the civil affairs program conform to the requirements of IL, and in particular to GC, with a view to giving maximum attention to alleviating the human suffering of the civilian population?

___Does the plan ensure refugee collection points and routes of evacuation are consistent with scheme of manoeuvre and as remote as practicable from areas where combat can be expected?

___Does the plan allow, where tactically appropriate, for the evacuation from besieged areas of wounded, sick, infirm, young and aged civilians as set forth in art. 17 of GC?

___Is plan consistent with the special obligation imposed by art. 16 and other provisions of GC to give particular protection and respect to civilian wounded and sick, aged and infirm, and expectant mothers?

___Does plan provide that displaced persons, refugees and evacuees be treated in accordance with the requirements of IL?

___Does the plan comply with the protection required for civilian hospitals and staff set forth in arts. 18-20 and 57 of GC?

___Does plan provide for or reference draft agreements for the establishment of safety or neutral zones for civilians as permitted in art. 15 of GC?

Appendix 3 - Information and Education

___If plan includes draft proclamations, laws, or ordinances for use in the occupied territory, do those documents conform to the requirements of IL as set forth in arts. 42-56 of Hague IV and arts. 64-78 of the GC?

ANNEX W - PUBLIC INFORMATION POLICY AND PROCEDURES

___Is plan consistent with the serious incident reporting requirements of higher headquarters as they pertain to alleged war crimes and related misconduct (the various directives in the Appendix)?

Appendix 1 - Personnel Requirements

Appendix 2 - Equipment Requirements

ANNEX X - CASUALTY ESTIMATION

ANNEX Y - CONFLICT TERMINATION AND DE-ESCALATION (TRANSITION STRATEGY)

ANNEX Z - LEGAL

Wartime Host Nations Support

___Are support agreements consistent with the provisions of DA Pam 660-80, Administration of Foreign Labor During Hostilities (1971) (NAVSO P-1910; AFM 40-8; MCO P 12190.1) and with any relevant alliance agreements, Acquisition and Cross Servicing Agreements or SOFA's? [See Chapter 9]

Legal Assistance

___Are there any special requirements or resources available for personal legal support to assigned personnel?

Military Justice

___Are all members of the force (including civilians and contractors) subject to the TCN national laws for LOW purposes?

___Are units properly attached to a national contingent for jurisdiction?

___Are there procedures for ensuring that the NATO Commander is made aware of incidents, provided input to and copies of investigative reports, and provided a report of action taken by national authorities?

Claims

___Is there guidance on determining whether claims matters will be addressed by the NATO Command or by national contingents?

___ Are there procedures for ensuring that the NATO Commander is made aware of incidents, provided input to and copies of investigative reports, and provided a report of action taken by national authorities?

___ Is there guidance on the payment of ex gratia amounts as part of the claims procedures?

___ Are there limits placed on the availability of NATO common funds for payment of claims?

___ Is there a claims office SOP that provides guidance on how to set up and run the office, including the adjudication of claims?

___ Are the procedures for obligating common funds for claims understood within the headquarters

___ What sorts of claims information packets should be given (in translated form) to local officials to assist in the processing of claims?

International Law Considerations

___ Have the various elements of plan been reviewed for LOAC and Human Rights considerations by the appropriate staff sections and members of the executive and special staffs?

___ Does the concept of operations contain any limitations on the operational freedom of action of the force which are erroneously attributed to LOAC and Human Rights requirements? If so, they should be promptly identified to the issuing authority.

___ Do any of the ROE restrict the operational freedom of action of the force because of an erroneous interpretation of the requirements of the LOAC and Human Rights ? If so, they should be promptly identified to the issuing authority.

___ Do any of the ROE erroneously make avoidance of collateral civilian casualties and/or damage to civilian objects a primary concern? Only intentional attacks of civilians and employment of weapons and tactics that cause excessive collateral civilian casualties are prohibited by LOAC, although more restrictive rules may be imposed as a matter of policy. Any actions taken to avoid collateral civilian casualties and damage must be consistent with mission accomplishment and force security.

___ Do ROE recognize the inherent right of self-defence of all persons?

___ Have the requirements for any special LOAC and/or Human Rights law training, planning and equipment been met? In particular:

___ Are civilians or other non-military personnel accompanying the force equipped with the proper identification provided for such individuals (see, e.g., art. 40 of GWS, art. 4(A) (4) and Annex IV(A) of GPW), and have they been instructed in their LOW rights, duties and obligations?

___ Does the force include personnel of any voluntary aid societies assigned exclusively to medical and medical support duties (arts. 24 and 26 of GWS)? If so:

- Are they subject to national military laws and regulations?
- Has their intended assistance been notified to the enemy?
- Have they been instructed in their LOW rights/duties/obligations?
- Have they been furnished the ID cards required by art. 40 of GWS?
- ___ Does the force include personnel of a recognized national red cross society or other voluntary aid societies of a neutral country (art. 27 of GWS)? If so:
- Are they present with NATO authorization and the previous consent of their own government?
- Are they under official NATO control?
- Has their intended assistance been notified to the enemy?

- Have they been instructed in their LOW rights/duties/obligations?
- Have they been furnished the ID cards required by art. 40 of GWS?

___Does the force include personnel of the American Red Cross Society whose duties are not exclusively medical? If so, are they aware of the restrictions on their use of the red cross emblem contained in art. 44 of GWS?

___Are the medical and religious personnel of the force equipped with the protective identification provided for such individuals (art. 40 and Annex II of GWS and art. 42 and the Annex to GWS(Sea)), and have they been trained in their special rights, duties and obligations under the LOW?

___Has a model of the protective ID card for such personnel been communicated to the enemy as required by art. 40 of GWS?

___Are there any theater-specific LOW training requirements or ROE for the area into which the force is to be deployed?

___Should the plan call for:

___the collection of information about the enemy's policies, attitudes and practices concerning compliance with the LOW?

___the collection of information about allied policies, attitudes and practices concerning compliance with the LOW?

___the collection of information about enemy and allied protective emblems and insignia, etc.

International Agreements , NAC Decisions and National Government Enactments

If plan contemplates deployment of NATO forces into a foreign territory, the following questions should be answered:

___Will deployment of NATO forces into the foreign territory be at the request of or with the consent of the lawfully constituted government? Consider arts. 2 and 51 of the UN Charter, and relevant provisions of any regional defence treaties, SOFAs, or other agreements applicable to the foreign territory involved.

___Will deployment of NATO forces into the foreign territory be part of a peacekeeping mission undertaken pursuant to the UN Charter or other international agreements, including regional treaties? Consider arts. 11, 12, 14, 24, 39-49, and 52-54 of the UN Charter.

___Is deployment of NATO forces into the foreign territory an act of individual or collective self-defence against an armed attack, either direct or indirect?

Consider arts. 51 and 103 of the UN Charter, and any collective defence arrangements involving the foreign territory and the NATO. Also, consider any Congressional enactment that may be applicable.

___Is deployment of NATO forces into the foreign territory to protect or extract NATO or foreign nationals? Consider the traditional theories of justifiable intervention developed under the customary and codified IL, etc.

ANNEX V

Recommended Format for Legal Adviser's After Action Report

1. In an effort to standardize the production of written After Action Reports (AAR) across many different legal offices, the format found in this Appendix is provided as a recommended beginning format for use in creating a written legal office AAR.

2. The format is based upon six core legal disciplines addressed in the emerging areas of our practice in coalition operations, and the concept of Doctrine, Organization, Training, Material, Leadership, Personnel, and Facilities (DOTMLPF) as it is used to translate emerging joint operational concepts into joint war fighting capabilities.

3. The attached framework is meant to provide a guide to legal advisers and other legal personnel as they capture specific lessons learned during an exercise or a deployment. Use of this format will permit the standardization of data collection in such a way as to provide an improved, systemic ability to cross reference data trends across different organizations. Some of the areas concern issues under NATO cognizance, while other matters are normally of national concern; nevertheless, it is desired that information be collected on as many substantive areas as possible in order to further the goals of interoperability and knowledge management. Working with the JALLC, JWC, JFTC, and NATO School, this information will be used to refine course content and will be collected and stored on the ACT LEGAD Website for reference and use by the field.

4. The directory of substantive areas should be reviewed using the Issue, Decision, Recommendation (IDR) methodology. As an example, was there a particular issue such as whether soldiers were permitted or prohibited from possessing a local souvenir associated with the conflict that was addressed by a discrete area of the law (Artifacts and War Trophies, International & Operational Law) ? what decision was made and why was that particular decision reached? Finally, what recommendations can be made to better prepare future forces to deal with such an issue. Sufficient clarity should be provided when using the IDR methodology to ensure the proper context is painted to understand the issue, decision, and recommendation.

Accordingly, for each subject area listed in this Appendix, you should seek to provide input discussing the following three aspects of the matter:

- **Issue:** What is the legal or other issue that was confronted?
- **Decision:** How was the issue resolved/solved and why?
- **Recommendation:** What should be improved in this particular area to make dealing with this particular issue easier of future forces?

While this terminology may differ from other published guidance on collecting lessons identified/lessons learned, the substantive information should be easily transportable into other formatted information requests (such as Observation, Discussion, Recommendation). What is important is that the information be collected and forwarded to the training and education facilities so that training is as current and relevant as possible.

Legal Lessons Identified and After-Action Report

Subjects of Interest List

Submitted by :

Contact info :

E-mail:

Billet:

Date:

(Suggested Topic Areas are listed alphabetically. Add a subcategory under any category if you deem it necessary to highlight an issue.)

1. International & Operational Law

- A. After Action Reports
- B. Arms Control
 - Chemical Weapons/RCA
 - Biological Weapons
 - Nuclear Weapons (components or nuclear materials (e.g. uranium, plutonium))
 - Delivery systems for CBN Weapons
 - WMD
- C. Artefacts and War Trophies
 - Artefacts
 - War Trophies
- D. Civil Military Cooperation (CIMIC)
 - NATO/host nation interaction
 - NATO/ coalition interaction
 - NATO/ International Organization interaction
 - NATO/Non-Governmental Organization. (NGO)/Private Voluntary Organizations
 - (PVO), International Organizations (IO) relations
 - Humanitarian Assistance
- E. Civilians / Contractors on the Battlefield
- F. Detention Policy/PoW Issues
 - Article 5 Tribunals
 - Article 78 Reviews
 - Code of Conduct
 - Detainees and Detention Policy
 - Interrogation / Questioning Policies and Procedures
- G. Environmental
 - Environmental damage from military operations
 - Environmental issues of concern from civilian activities or sabotage
- H. Fiscal Law Issues/FINCON
 - Contract Law
 - Deployed Contracting
- I. General Orders
- J. Human Rights Law
- K. Information Operations
- L. Law of War/LOAC
 - Law of War Training

- M. Legal Basis for Conducting Operations
- N. Intelligence Law
- O. Interrogations
- P. Rule of Law / Judicial Reform
 - Rule of Law Training and Training Support
 - Assistance to Local Law Enforcement/Judicial Authorities
- Q. Post Conflict Stability Operations
- R. Rules of Engagement/Targeting
 - Planning & Development of ROE
 - Training
 - National Caveats
 - Soldier’s cards
 - Implementation Issues
- S. Treaties and Other International Agreements
 - Status of Forces / Military Technical Agreements
 - Acquisition and Cross-Service Agreements
 - Mission-Specific Agreements
 - Other International Agreements/Treaty Issues
- T. United Nations
 - Security Council Resolutions
 - UN Reports
- U. War Crimes
- V. Weapon Systems
 - Legal Review on Weapons
 - Lethal Weapons
 - Less than Lethal Weapons

2. Administrative Law

- A. Canteen/Duty-Free Store Issues (Including importation/exportation of goods)
- B. Customs and Passports
- C. Draw downs
- D. Ethics/Personal Conduct Issues
- E. Personal Data Protection
- F. Inspections
- G. Internet Use
- H. Investigations
 - (1) In General
 - (2) Personal Injury
 - (3) Safety and Mishap Incident Investigations
 - (4) Loss of Official Property
 - (5) Claims Investigation
- I. Labour/Employment Law
- J. Law of Military Installations
- K. Medical Issues
- L. Military Personnel Law
- M. Morale, Welfare and Recreation

3. Claims

- A. Individual and corporate claims against NATO force or National Forces under NATO cognizance.
 - Claims of Host Nation or third-party governments
 - Claims within the host nation that could affect NATO interests and operations

- B. Personnel Claims
- C. Solatia
- D. Technical Arrangements

4. Military Justice Coordination with TCN authorities

- A. General Orders
- B. Searches
- C. Jurisdiction
- D. Magistrates/Judiciary

5. Coalition Operations

- A. Points of contact

6. Other Operations

- A. Defence against Terrorism
- B. Disaster Relief and Consequence Management
- C. WMD Issues
- D. Countering Trafficking in Human Beings
- E. Counter Drug Operations
- F. Intelligence Law & Policy Considerations
- G. Rules for the Use of Force (when distinct from ROE)
- H. Funding

7. Doctrine, Organization, Training, Material, Leadership, Personnel, and Facilities (DOTMLPF) and Country Materials

- A. Doctrine
- B. Organization (Force Structure)
- C. Training and Readiness
 - (1) NATO Force Structure and Operational Planning
 - (a) Annexes
 - (b) Office METL
 - (2) National Training and Schools
 - (a) National Training (General Issues)
 - (b) Pre-deployment Training
 - (3) NATO Training
 - (a) NATO School
 - (b) JFTC
 - (c) JWC
 - (d) Exercises
 - (4) Pre-deployment Training Information and Resources
- D. Material
 - (1) Deployment Kits (National or NATO-provided resources)
 - (2) Equipment Issues (Information Technology, Communications, etc.)
- E. Leadership
- F. Personnel
- G. Facilities
- H. Country Materials
 - (1) In general
 - (2) Turn-over materials (Binder, folders, files, briefings, computer training)
 - From predecessor
 - From Higher HQ or other organisations

ANNEX VI

Examples of the use of force based on of self-defence

- **Korea** – North Korea invaded South Korea in 1950. In the absence of the Soviet Union in the UNSC, who were protesting the seating of the Nationalist Chinese delegation and therefore did not exercise their power of veto, the UNSC passed a UNSCR recommending states assist SK as necessary to repel the armed attack and to restore international peace and security. This was the first time the SC authorized full scale armed force. It also recommended that the forces be placed under US Command. This is an example of collective Self Defence under Article 51.

After the Soviet Union returned to the Security Council, then the issue was submitted to General Assembly „Uniting for Peace” – UN General Assembly Resolution 377 – 3 November 1950:

„1. Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.”

- **Falklands** – This involved the Argentinean invasion of British colonial territory (1982). The UK was relying on Self Defence – a state in possession of territory is entitled to use force in SD against an invasion by a rival claimant even if the rival considers that it has a better title to territory. Although a month passed before the British forces could attack, due to the distance, the UK responded immediately by ordering the Royal Navy to leave for the area of conflict. Regardless of the doubts to British claim, after the Argentinean invasion, the UK claimed to have the right to act to restore the status quo ante and remove Argentinean troops. The SC determined that there had been a breach of the peace and demanded a cessation of hostilities and immediate withdrawal of all Argentinean forces in UNSCR 502. The SC therefore implied condemnation of Argentina's use of force. It called upon the governments of UK and Argentina to seek a diplomatic resolution.
- **Iraqi Nuclear Reactor** - Israel bombed a nuclear reactor in Iraq (1981) claiming that it was going to be used to make atom bombs for use against Israel - Israel claimed anticipatory Self Defence. The Security Council condemned the action as a violation of Article 2(4) but did not pronounce on the doctrine. Israel relied on juristic writings for support but not on state practice. The US and UK said that anticipatory self defence was not justified on the facts as there was no evidence that the reactor was going to be used for atom bombs. However they did not discuss whether Israel would have been entitled to rely on anticipatory self defence if the reactor had constituted a real threat to Israel. The UK has argued in favour of anticipatory self defence but many states including the US state that it is illegal. The US invoked anticipatory self defence against acts of state sponsored terrorism to justify the bombing of Libya.
- **Kuwait** – The invasion of Kuwait by Iraq in 1990 raised the issue of collective Self Defence in the context of allied states in a coalition to end the occupation and conquest. The Kuwaiti

government - who were in exile - requested for help. Armed action was taken from 16 January 1991 pursuant to a UNSCR but the consideration of collective self defence is also relevant. The UNSC responded immediately to the invasion and condemned the act as a breach of peace and international security and required Iraq's immediate and unconditional withdrawal. Iraq did not comply and the SC issued a number of further UNSCRs. It imposed an arms and trade embargo upon Iraq and Kuwait. A naval blockade and, acting under Chapter VII, the UNSC authorised member states to use all necessary means to uphold and implement UNSCR 660 and all subsequent relevant resolutions to restore international peace and security in the area. Under the authority of the US, the coalition led Operation Desert Storm in January 91 with airborne attacks on Iraq and Kuwait, followed by a land offensive on 24 February 1991. Hostilities were suspended on 28 February after allied forces had occupied Kuwait and part of South Iraq. UNSCR 678 stated to use all necessary means which provided the authority to use armed force.

- **Afghanistan** - This raised the question whether the right of SD applies in response to terrorism and whether terrorist acts constitute an armed attack within the meaning of Art 51. On 12 September 2001 the SC adopted UNSCR 1368 which specifically referred to the inherent right of individual or collective self defence in accordance with the UN Charter. It noted it was 'determined to combat by all means threats to international peace and security caused by terrorist attack', unequivocally condemned the attack and declared that it considered such attacks 'like any of international terrorism as a threat to international peace and security'.

This was reaffirmed in UNSCR 1373 and under Chapter VII a series of binding decisions were adopted, including a provision that all states shall take the necessary steps to prevent the commission of terrorist acts. On 7 October 2001 the US notified the UNSC that it was exercising its right of self defence in Afghanistan against Al-Qaeda, considered responsible, and the Taliban regime for providing bases for organisational-.

NATO invoked Article 5 of the Washington Treaty to provide other counter-measures against terrorism, such as Operation Active Endeavour, under which NATO ships are patrolling on the Mediterranean Sea and are monitoring ships to help detect, deter and protect against terrorist activity.