

NATO MILITARY INTERVENTIONS ABROAD: HOW ROE ARE ADOPTED AND JURISDICTIONAL RIGHTS NEGOTIATED

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I. INTRODUCTION

In this short paper, I will attempt to summarily sketch two features impacting NATO¹ military interventions abroad: Rules of Engagement (ROE) and jurisdictional rights negotiated in Status of Forces Agreement (SOFA). This is not a comprehensive analysis of the correlation between those two concepts but an overview on how they are adopted and applied in NATO.

To begin I will present some basic facts about NATO and its structure. I will then explain how this organization adopts ROE and why nations caveat them. Some practical challenges will be presented to illustrate the difficulties of operating in a military alliance with a common set of ROE.

¹ NATO is the North Atlantic Treaty Organization pursuant to the *North Atlantic Treaty* of 4 April 1949 (243 UNTS 34) hereinafter NATO Treaty.

The second part of this paper will explain the jurisdictional rules applicable to NATO forces deployed within and outside the alliance territory. After having reviewed the SOFA rules applicable between NATO States, I will point out some discrepancies. I will give an example of potential negotiated jurisdictional rules enforceable on NATO forces deployed abroad. I will demonstrate that rules that appear to be an excellent arrangement often hide practical challenges.

II. NATO

The North Atlantic Treaty Organisation is an alliance of 26 countries from North America and Europe united to fulfil the goals of the Washington Treaty. The role of NATO is to safeguard the freedom and security of its member states by political and military means.²

According to article 5 of the Washington Treaty, the Alliance is committed to defend its member states against aggression or threat of aggression and to the principle that an attack against one or several members would be considered as an attack against all. Unfortunately, the first time article 5 was invoked in the history of NATO was the day after the 11th September 2001 terrorist attacks in the United States.³

At NATO, each member states retain its sovereignty and all decisions are taken jointly on the basis of consensus. A decision reached by consensus implied that it is the expression of the collective will of the sovereign states members of the alliance.⁴ NATO's most important decision-making body is the North Atlantic Council (NAC),⁵ which bring together representatives of all the Allies at the level of ambassadors, ministers or even heads of state and government.⁶ Each state participates fully in the decision-making process on the basis of equality, irrespective of its size.

It is fundamental to realise that NATO like the United Nations (UN), has no military forces of its own other than those assigned by member States or contributed by partner countries for the purpose of carrying out a specific mission.

2 See Ibid Article 4: «*The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened.*»

3 See generally, Edgar Buckley, *L'invocation de l'Article 5*, Revue de l'Otan, été 2006 at www.nato.int/revue.

4 See *NATO HANDBOOK*, Public Diplomacy Division, Brussels, 2006 403 p. at p.33 also at www.nato.int/docu/handbook/2006/hb-en-2006.pdf

5 See *Supra* 1 Article 9. The NAC is chaired by the Secretary General nominated by member governments. He essentially acts as a decision facilitator and speaks on behalf of the organisation.

6 See also *Supra* 4 p. 36. NATO has two other important policy and decision making institutions. The Defence Planning Committee (DPC) and the Nuclear Planning Group (NPG). The DPC deals with defence matters and subjects related to collective defence planning. All members are represented but France. The NPG discuss specific policy issues associated with nuclear forces.

In addition to its 26 member states, NATO is in a Partnership for Peace with 20 States⁷, has created Mediterranean Dialogue with 7 countries⁸ and keeps close contact with 4 other Nations⁹, as well as with some international organisations.¹⁰

The military components of NATO is comprised of the Military Committee (MC), the two strategic commanders (SC) and the military command structure (MCS). The MC is the senior military authority in NATO under the overall political authority of the NAC. It is the primary source of military advice to the NAC.¹¹ The two SC are *The Supreme Allied Command Europe (SACEUR)*¹² and *The Supreme Allied Command Transformation (SACT)*.¹³ They are responsible to the MC for the overall direction and conduct of all military matters and provide advice. As for the MCS, it is the mechanism enabling NATO's military authorities to command and control assigned forces.¹⁴

III. NATO ROE

NATO defines ROE as «*Directives 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.*»¹⁵ In other words, ROE exist to delineate the circumstances and limitations under which military forces will use force, up to deadly force.

7 The Partnership for Peace (PfP) countries are: Albania, Armenia, Austria, Azerbaijan, Belarus, Bosnia-Herzegovina, Croatia, Finland, FYR Macedonia, Georgia, Ireland, Kazakhstan, Kyrgyz Republic, Moldova, Montenegro, Russia Federation, Serbia, Sweden, Switzerland, Tajikistan, Turkmenistan, Ukraine and Uzbekistan. These states have been offered to signed the PfP SOFA, making the NATO SOFA rules applicable to them and thus extending the NATO SOFA regime to PfP countries.

8 The Mediterranean Dialogue countries are: Algeria, Egypt, Israel, Jordan, Mauritania, Morocco and Tunisia.

9 The Contact Countries are: Japan, Australia, Pakistan, China.

10 The United Nations (UN), The European Union (EU) and The Organization for Security and Co-operation in Europe (OSCE).

11 See also *Supra* 4 page 85 for more information on the Military Committee.

12 *Ibid* p.90.»*The Supreme Allied Commander Europe (SACEUR) for Allied Command Operations (ACO) is task with contributing to the peace, security and territorial integrity of Alliance member countries by assessing risks and threats, conducting military planning, and identifying and requesting the forces needed to undertake the full range of Alliance missions, as and when agreed upon by the [NAC] and wherever they might be required.*»

13 *Ibid* p.91. Essentially, the main responsibilities of SACT are to lead the transformation of NATO's military structures, forces, capabilities and doctrine, to conduct operational analysis and to conduct experiments and training.

14 *Ibid* pages 88-89. The Military Command Structure is based on hierarchical structure of strategic and subordinate commands.

15 AAP-6, *NATO Glossary of Terms and Definitions*, 16 April 2007 449p. at p.198.

NATO ROE like most ROE are based on three pillars: political, military and legal. The political pillar exists to make sure that military operations meet NATO political objectives. The military pillar is essential to guarantee that ROE will be written to facilitate as much as possible the mission accomplishments and force protection. As for the legal pillar, it is paramount since states are bound by domestic and international legal obligations.

Procedurally and contrary to the UN where some contributing nations may have not been consulted in the development of ROE for a particular mission at NATO Nations are consulted all the time. It begins as soon as a draft has been produced by SACEUR based on the mission to accomplish. To prepare his ROE, SACEUR chooses within a compendium of ROE already adopted by NATO¹⁶, those he believes will best serve him within the framework of the above three pillars.

As soon as a draft set of ROE is available, it is reviewed and discussed at different levels but primarily in working groups comprised of representatives of each NATO nation. After a consensus in working groups has been reached on a set of ROE it will be presented to the Military Committee for endorsement and to the NAC for approval. At any time a nation may caveat a particular rule. Once they are adopted, NATO States become individually responsible to make them applicable to their forces.

Six basic statements can be made about ROE:

1) The fact that ROE are approved by the NAC demonstrates that the politic is controlling how force is to be used in operations, down to the individual soldier.

2) ROE are neither the law nor a subset of the law.¹⁷

3) ROE provide the sole authority to NATO Forces to use force including deadly force and should never be interpreted as limiting the inherent right of self defence.¹⁸

4) If ROE are not sufficient to accomplish a mission, new ROE can always be requested.¹⁹

5) A Commander always has the privilege not to use a particular ROE or to restrict its application.

16 Military Committee Document MC 362/1. (2003)

17 Garth J. Carledge, *Legal constraints on Peacekeeping Operations* in H. Durham & T.L.H. McCormack, eds., *The Changing face of Conflict and the Efficacy of International Humanitarian Law*, Kluwer law international, The Hague, 1999, 225p. at p. 123.

18 See generally A.P.V. Rodgers, *Visiting Forces in an Operational Context* in D. Fleck ed., *The Handbook of the Law of Visiting Forces*, Oxford University Press, Oxford, 2001, 625p. at p.546 for an interesting discussion on the source of law (international, host nation or sending state) applicable to self-defence.

19 See generally *Operational Law Handbook*, in Maj. D.I. Grimes ed., The Judge Advocate General's Legal Center and School (TJAGLCS), Charlottesville, Virginia, 2005, 604 p. at Chapter 5, p. 93 available at www.jagcnet.army.mil.

6) The composition of peacetime ROE is the opposite of armed conflict ROE. Peacetime ROE are expressed as authorization where armed conflict ROE are written as prohibitions or restrictions. During an armed conflict the use of force is primarily controlled by international humanitarian law.²⁰

Considering that all decisions are taken jointly on the basis of consensus, NATO nations some time agree to disagree. In the case of ROE, disagreements are expressed by way of exemptions or caveats. Nations generally caveat ROE on four grounds:

(1) National Law: A Nation may caveat a ROE on «*self-defence*»²¹ in order to respect its national law;

(2) International Law: A Nation may caveat a ROE on «*boarding ships on the high sea*» because her interpretation of international law on the procedure to board is different then other NATO nations;

(3) Interpretation: A Nation may caveat a ROE because of her interpretation of the «*UN mandate*» given to NATO; and

(4) Limitation / Restriction:

i) A Nation may invoke a geographical limitation to refuse to send troops in a particular area within the theatre of operation; or

ii) A Nation may refuse to use certain means to accomplish a mission. For example some nations refuse to use rubber bullets or tear gas.

Needless to say that in the context of a military alliance caveats which often exceed the number of ROE raise some challenges. For instance, in conducting operations NATO commander may be precluded in some circumstances to use certain military forces because of caveats. Too many exceptions to the ROE may also undermine the fundamental principle of solidarity needed in a military alliance.

Another reality is the fact that even though NATO adopted ROE, nothing precludes a sovereign State to adopt its own rules. This multiplication of sets of ROE may create divergence for example in the use of force by various States.²²

The question of whether charges can be laid against a soldier for having violated a ROE or whether ROE can be used as a valid defence in a criminal / disciplinary procedure raises other challenges. One difficulty is that States qualified ROE differently. For instance some nations consider ROE to be instructions, directives or

20 See M.N. Shaw, *International Law*, 5th edn, Cambridge, 2003, 1288p. at p.1077.

21 See generally Dale Stephens, *Rules of Engagement and the Concept of Unit Self-Defense*, (1998) 45 Naval L. Review p.126.

22 See J.S.T. Pitzul, *Operational law and the legal professional: a canadian perspective*, (2001) 51 Air Force Law Review at p. 311

guidance²³ where other treats them as valid order to be obeyed and respected.²⁴ So even if NATO ROE are described as authorisation or limits on the use of force their status in criminal procedure will depend on how they are considered in the law of each NATO state.²⁵

IV. STATUS OF FORCES AGREEMENT – CRIMINAL JURISDICTION

I will look at the issue of criminal jurisdiction applicable to NATO forces abroad from two different points of view. The first perspective is when NATO forces operate in the territory of another NATO country and the provisions of NATO SOFA²⁶ apply. The second one is when they deployed outside the territorial area of NATO states.

A. NATO SOFA

Until the end of World War II, I understand that a foreign military force was immune from host nation jurisdiction pursuant to customary international law.²⁷ It has been said since, that the NATO SOFA has made the concept of concurrent jurisdiction, over military forces abroad, an international norm and the customary concept of exclusive jurisdiction, the exception.²⁸ In fact, most provisions on jurisdiction in any SOFA today have been modelled on Art. VII of NATO SOFA.²⁹

23 See W.A. Stafford, *How to keep military personnel from going to jail for doing the right thing: Jurisdiction, ROE & the Rules of deadly forces*, (2000) *The Army Lawyer* 1 at p. 3 where he wrote that «... in the United States forces even though ROE may be based in the law they are directives merely providing policy, authority, mission definition and responsibility.»

24 See *Use of Force Manual*, Canadian Forces Publication (B-GG-005-004/AF-005) (2001) at p. 2-5/14: «In Canada ROE are defined as «orders» that are intended to ensure that commanders and their subordinates do not use force or other measures beyond that authorized by higher command. ROE also provide confirmation as to the level of force that commanders or individuals are legitimately authorized to employ in support of their mission».

25 See generally Muriel Ubéda-Saillard, *L'invocabilité en droit interne des règles d'engagement applicables aux opérations militaires multinationales*, (2004-1) R.G.D.I.P. p.149.

26 *Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces* (NATO SOFA), done in London, 19 June 1951 (199 UNTS 67).

27 *Supra* 19 Chapter 16 p. 355.

28 Paul J. Conderman, *Jurisdiction*, in D. Fleck ed., *The Handbook of the Law of Visiting Forces*, Oxford University Press, Oxford, 2001, 625p. at p.101.

29 For instance see EU SOFA art. 17, Official journal C321, 31/12/2003 p. 0006-0016 at www.eur-lex.europa.eu.

NATO SOFA creates two classes of cases – either a case falls within the exclusive jurisdiction of the receiving or sending State or both States has concurrent jurisdiction.³⁰ Essentially, a State has exclusive jurisdiction for any offence that is punishable only by the law of that state.³¹

For cases of concurrent jurisdiction, NATO SOFA sets up a system of primary and secondary right to exercise jurisdiction. A sending State has primary right to exercise jurisdiction for offences solely against the property or security of that state or a member of its forces or when the offence arise out of an act or omission done in the performance of an official duty.³² In all other cases, the receiving State has primary right of jurisdiction.³³

A State can always waive its right to exercise jurisdiction and shall inform the other if it does not want to exercise it. NATO nations have also agreed to provide each other assistance in arrest,³⁴ in carrying out all necessary investigations (collection and production of evidence) and to notify a sending State when one of its members had been arrested.

In case where a sending State accused faces trial before a receiving State tribunal NATO SOFA provides some procedural safeguards.³⁵ In that context an accused has the right to:

- a prompt and speedy trial;
- be informed in advance of trial of the charges against him;
- be confronted with the witnesses against him;
- compel witnesses to attend his trial;
- choose his legal counsel at trial or have free or assisted legal representation;
- a competent interpreter; and
- communicate with a representative of his government.

30 See generally, Mette, Prassé Hartov, *NATO Status of Forces Agreement: Background and Suggestion for the Scope of Application*, (2003) 10 *Baltic Defence Review* vol. 2, p. 45.

31 This is only a summary of the rules. A State may have exclusive jurisdiction but would not be able to exercise it. Depending on the State, some category of people are not subject to the jurisdiction of the military forces they accompany. For instance if in Canada dependents accompanying members of the armed forces are subject to the jurisdiction of military tribunal (See *National Defense Act*, R.S.C. 1985, c. N-5, s. 60 (1) f and 61 (1) c) this is not the case in the United States forces. (See 10 U.S.C. § 47, *Uniform Code of Military Justice* s.801 article 2.)

32 See *Supra* 23 p. 8. where W.A. Stafford expressed the view that actions taken under a ROE constitute an official duty, protecting soldier subject to an agreement modelled under NATO SOFA from being held criminally responsible in a foreign system.

33 *Supra* 26 Article VII para. 3

34 *Ibid* para. 5

35 *Ibid* para. 9

NATO SOFA provides a balance system of exclusive and concurrent jurisdiction between receiving and sending States and a long list of procedural safeguards but on matters of jurisdiction it is still short on at least three aspects:³⁶

1. In cases of concurrent jurisdiction there are no provisions helping to determine what constitute an offence committed in the performance of an official duty or who is authorised to make that determination;³⁷

2. There are no provisions on how to deal with an accused who allegedly committed a crime in a receiving State but departed the country, and;

3. In terms of safeguards, an accused as no right to counsel upon being arrested, to remain silent or even to appeal a decision.

B. SOFA Agreements

In international law, the consent of the host state is sufficient to invite another state or group of states including NATO, to station or deploy forces on its territory.³⁸ There is no need for a prior defence treaty such as the *Washington Treaty* or a bilateral agreement.

When NATO deployed outside the territory of member states, the organisation try to negotiate jurisdictional provisions similar to those found in the NATO SOFA.³⁹ Needless to say that over the years, NATO has negotiated numerous SOFA type arrangements whatever form it took (*Transit agreement/arrangement, Exchange of Letters, etc.*).

Unfortunately, since agreements already negotiated by NATO have a security classification it is not possible for me to discuss their content in this article. However, to illustrate the type of challenges NATO States face in term of exercising criminal jurisdiction, I am proposing to examine the provisions of Annex A to the Military Technical Agreement signed between the Afghan Interim Administration and ISAF in January 2002⁴⁰ when ISAF was led by the United Kingdom and Ireland. In other words, I will examine the agreement as if NATO was a party although the alliance took command of ISAF only in August 2003.

In matters of jurisdiction, the above agreement makes essentially five key statements that can be summarised as follow:

³⁶ See generally *Supra* 28, pp. 122-130.

³⁷ *Ibid* p. 111.

³⁸ *Supra* 19 Chapter 16 p. 355.

³⁹ Nothing precludes the NAC to rule that NATO SOFA will apply *mutadis mutandis* between NATO nations present outside NATO territory.

⁴⁰ See UN Document S/2002/117 dated 25 January 2002.

1. The *Convention on the Privileges and Immunities of the United Nations*⁴¹ covering experts on mission will apply *mutatis mutandis* to ISAF;

2. ISAF personnel will respect the laws of Afghanistan, insofar as it is compatible with the mandate;

3. ISAF personnel will under all circumstances be subject to the exclusive jurisdiction of the respective national elements in respect of any criminal or disciplinary offences which may be committed by them in the territory of Afghanistan.

4. The Interim Administration will assist ISAF in the exercise of its jurisdiction; and

5. ISAF personnel will be immune from personal arrest or detention.

Negotiation of jurisdictional provisions similar to those above, appears favourably for any sending State. However, it raises some issues. To better appreciate some of them, let's assume for the sake of this paper that a soldier is accused of having committed a crime in Afghanistan. What follows is a list of challenges the above agreement could entail to the sending nation responsible for this soldier:

a) The Afghan interim administration will not be able to arrest or detain him;

b) Only the national contingent of the accused will have jurisdiction on him;

c) How the evidence will be protected and gathered will be challenging since the Afghan interim administration do not have the authority to arrest or detain;

d) If the offence is unique to the receiving State, does the sending State has an obligation to lay a charge? Does the expression «*respecting the law*» in the above agreement (See 2nd statement) means obeying it?

e) Considering that the Afghan interim administration is precluded to arrest, how would she be of any assistance to a sending State if the accused soldier has disappeared within its territory?

f) Contrary to NATO SOFA, there is no mention where the trial should be held.⁴² This raise at least two issues if a trial is conducted in a sending State. One is the perception that the process will be bias. A second problem is that access to evidence including witnesses may be done with some difficulty;

g) The fact that a receiving State agrees to assist a sending State in exercising jurisdiction is a must but when forces are deployed in a failed state, it may amount to a belief based on wishes; and

h) Agreeing that military personnel will respect the local laws is a key commitment but in the above agreement it is conditional to being «*...compatible with the mandate*». Unfortunately, there are no provisions about who will make that determination. Would it be the Organisation that gave the mandate, the NAC, the NATO Force commander or the sending State who has jurisdiction?

41 13 Feb 1946, 1 UNTS 15.

42 See *Supra* 26 Article 1. a.: «*... the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction ...*»

VI. CONCLUSION

In a multinational environment like NATO, it is usual to see that States will expressed reservations about having to respect a particular ROE. The right to caveat gives them some flexibility. As we have seen this raise numerous challenges. But, States still have a prerogative to adopt their own ROE as long as they fall within the purview of those adopted by the alliance.

The issue of exercising criminal jurisdiction is a sensitive issue for any State deploying forces abroad. Nowadays States will most likely refuse to deploy forces abroad without having obtained a minimum of guarantee about their right to exercise jurisdiction. Even NATO States have been extremely careful on the issue of jurisdiction. As we have seen, they have agreed to deploy troops in each other state as long as they were to keep the right to exercise primary jurisdiction on some key offences.

The exercise of criminal jurisdiction in the context of a negotiated status of forces agreement is of course a temporary situation. It may bring some challenges depending on the terms negotiated in the agreement which are always the result of a compromise between what a receiving State is willing to offer in order to have foreign military presence on its territory and what a sending State is ready to accept. Of course, negotiation of status of forces plays on both sides. When a receiving State is in need of foreign forces, the chance that stipulations on jurisdiction will be more favourable to the sending State are obviously greater than when a sending States needs the territory of a receiving State to deploy or transit forces.