Use of Military Force in International Conflict Resolution: Case of NATO Response Forces

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The principal purpose of this paper is to elaborate on the reasons for and the manner in which the NATO Response Force, or NRF, is intended to be used and the legal limits on its use. Without question the NRF is about power projection, not for itself, but rather in the quest of maintaining international peace and security. In the context of this work first, the rationale for the NRF, second, the specific role of Legal Services in the future employment of that force in the context of the legal limitations on the use of force will be discussed. NRF is the result of many lessons learned, the cold realities of the world today and the likely future.

History is replete with significant events that have radically altered the way military force is applied and is likely to be applied, principally because of what rightly can be called «technological» advances. The longbow, gunpowder, the tank and the machine gun can be mentioned in this context. The same thing can be said about nuclear weapons.

Deployability has become a so-called buzzword in the projection of military force, particularly in situations short of all out inter-State conflict. Within a country so large as the Russian Federation and within the Commonwealth of Independent States, deployability resonates as much as it does for NATO.

Unquestionably, the threats to national and international security today, at least in the near term, will come less from the kinds of massive, military confrontations anticipated during the

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Cold War than from other threats. Gulf wars I and II show how technology can render fixed, key targets and large military concentrations vulnerable to the point of virtual total destruction or, at the least, neutralization. «Big and more is better» is no longer the golden rule, unless «big and more» relates to high tech. Had one side in the Iran/Iraq war had high tech military capability, that war would not have ended in a stalemate. Given the current world situation, with all the different perceptions as to threats, the name of the game is downsizing the military, most particularly land forces. But technology is also having a dramatic effect on both naval and air forces too. The idea that every country can and should have robust military capabilities across the entire spectrum is now outdated. This even applies to the United States.

Situations possibly requiring the use of armed force will come in a variety of sizes and shapes, but more often they will flow from failed, or failing, States or, more likely, from international terrorism, the most insidious threat to national security today because of its relatively faceless character employing asymmetrical means and obeying the strictures of no laws.

The limitations on the use of armed force firmly enshrined in Articles 2 and 51 of the UN Charter are well known. Those ius ad bellum laws , along with the ius in bello rules (found in the Hague Regulations, Geneva Conventions and its Protocols as well as other customary and conventional limitations which have become known, collectively, as the laws of armed conflict), are all too well known but, regrettably, breached far too frequently. A seminal question seems to be whether the current rules on recourse to armed force are properly synchronized with the world situation of today and tomorrow.

For some time now, the legality of pre-emptive self-defence has been argued about in many fora. The military firmly understand the risks associated with taking the first «hit», so to speak. Technology has made the risks of taking the first hit — or hits — unacceptable. Of course, the magnitude of the first hit determines the penalty for passivity, but the general idea permeates all the way down to, for example, even the loss of a major fighting ship or several aircraft such that national rules of engagement (ROE) are tailored accordingly. So the core question is: are the

legal constraints of relevance today, or is there a shift in thinking that makes the famous Caroline case significantly out of date? Here we suggest that it is, but if that is so, where are the limits of self-defence to be found? Aggression is easily recognizable when we see it. Iraq's invasion and occupation of Kuwait is a classic example, but such scenarios are less likely to occur than other forms of threats to international peace and security. At the other end of the force spectrum, is the unilateral use of armed force justified on claims of humanitarian intervention? An example of that is NATO's operation, Joint Force, in the former Federal Republic of Yugoslavia. From the point of view of many legal experts that operation, in terms of international law as it stood (and still stands) at the time, was illegal.

Today, the confluence of costs and threats has required the nations of NATO to reassess levels of military ambition. One has to have a vision as to how international peace and security can be maintained under vastly different circumstances before there can be an appropriate analysis of just what mixture of military forces is required. As the NATO alliance grows in membership, it is all the more evident that each nation cannot afford self-sufficient self-defence, and there is no reasons for that. An alliance should offer a certain measure of synergism that can be translated into role specialization and combined efforts, such as a standard fighter aircraft. This, however, requires a cultural quantum leap. The people of a State ordinarily look to their State to provide them with national security, and they become nervous when that security is reliant on other States, no matter how friendly they are. Coupled with that is position towards the international community, which may just be a matter of pride or national identity. Who is going to take a State seriously if it cannot defend itself one way or another?

Military alliances lose all sense if they cannot measure up to their raison d'etre. So here the question of the level of ambition arises once again. Where is NATO going? Is it turning into world «policeman»? Certainly not, but no one has drawn the outer geographic limits of organization's responsibility. Should there even be such limits? This question has no answer now. However now it is clear that 19 member States, soon to be twenty-six, will

decide when and where to act militarily under NATO command, but this does not mean that action will take the form of armed force use without a legal underpinning. In this context it is worth noticing that operation Allied Force was developed on the assumption, among other things, that there would be a United Nations Security Council resolution authorizing the use of armed force to stop what the Security Council ultimately termed a «catastrophe». Indeed, all NATO military operation plans proceed upon the presumption that there will be a lawful basis for the use of armed force. However while the nations may listen to legal advice, both from within the NATO military structure and in their own capitals, legal advice is not always followed. It was hardly predictable that all nineteen, member nations of NATO would approve the campaign in Yugoslavia without a Security Council resolution, but that instance may just indicate where States, at least the NATO member States, are going in the area of humanitarian intervention.

What is NATO's military level of ambition? Basically, it is to be ready to carry out several military operations outside NATO territory on very short notice. Those operations could be, at one extreme, the most benign, not requiring the use of force, to a North Atlantic Treaty Article 5 situation, the ultimate core mission of NATO, at the other extreme. Article 5 deals with an armed attack on one of the member countries. The events of 11 September 2001 in the United States led to the NATO Council invoking Article 5 for the first time in the history of NATO. That first instance surely was hardly what the drafters of the North Atlantic Treaty envisaged. Nevertheless, NATO is effectively at «war» with transnational terrorism, but NATO is not alone in that regard. It is, unfortunately, a war of indeterminable duration. It will not be like other wars. The enemy has many faces, wears no uniforms, obeys no laws, holds no territory and is beholden to no particular constituency. The means and methods terrorists might employ could have staggering consequences, and this is what makes this «enemy» so insidious. NATO is preparing itself to deal with the threats posed by international terrorists, but because of the nature of the enemy, the military measures that can be taken are rather finite.

Besides terrorism, there are other scenarios where armed force may be required. It could be as a result of a Security Council resolution. Think of Bosnia and Kosovo, East Timor and other examples. It could be by invitation of a State to deal with some form of grave, internal situation. It could be a result of a request from a regional organization such as OSCE. Last, and most importantly, it could constitute some form of pre-emptive self-defence, for if it is not Security Council sanctioned or not by invitation of the State wherein force will be applied, it can only have a legal foundation if it constitutes some form of self-defence. This leads, unfortunately, into the endless morass of defining self-defence and the temporal element of the appropriate timing of the use of armed force. How long can one wait until a potentially lethal act occurs? By «lethal act» we mean some form of attack that does major physical or psychological damage to a State. For example, some types of cyber intrusion could be so severe as to constitute what today is defined as an armed attack. Weapons of mass destruction are such that they constitute inordinate risks. Since those risks are so high, can one afford not to contemplate proactive (pre-emptive) action under certain circumstances? The response is self-evident, but the problem lies in fears that the floodgates on the unilateral use of armed forces would be opened and international peace and security would suffer as a result. We believe that is a hugely unjustified fear. What State or group of States would possibly benefit in the long run by abusing extended notions of self-defence? It is unlikely that nations that genuinely believe in the rule of law will form part of a coalition of the willing or sanction alliance action where the action or likely action will offend such beliefs. Even in the matter of the second Gulf War, as events have shown, there was less argument with removal of Sadam Hussein than the reason cited as the need for his removal. Hence, the argument was really over whether or not there was a clear and present danger that obviated the need for a Security Council resolution. What makes people nervous is that the perception of a clear and present danger is dependent upon the state of mind of the beholder.

With respect to NRF, one might readily ask, is this old wine in a new bottle? The response can be "yes" and "no". The response

is "yes" to the extent that the initial NRF will have to draw on existing capabilities in the hands of the Alliance members. So there is nothing particularly new. But the response is a strong "no" because a new command and control (C2) structure has just been developed to utilize the NRF in varying scenarios. We will discuss key C2 structure in more details before going into some finite details about the NRF.

The NATO member nations have just approved the most sweeping realignment of the integrated military structure. While there used to be two combat commands, Allied Command Atlantic and Allied Command Europe, with their own, separate, geographic areas of responsibility, in terms of the projection of military power, there is now only one operational command, Allied Command for Operations, or ACO, and one geographic area of responsibility — the entire NATO area. The headquarters of that command is vested in SHAPE, making the Supreme Allied Commander Europe, as he has been known since 1951, the sole, supreme NATO combatant commander. All other operational commanders are subordinate to him. Allied Command Atlantic has disappeared. In its place is Allied Command Transformation, a non-combatant command. Among its missions is the core function of transforming the NATO military structure into a lean, efficient and effective military force tailored to meet the challenges of the XXIst century.

The member nations fully appreciate that NATO has been too slow to realign after the demise of the Cold War. They themselves are down-sizing their armed forces because large standing armies are expensive, but even more compelling is the fact that they simply are not appropriate for current and future circumstances. In any case, fully implemented, down-sized forces would leave the Alliance with sufficient military capability to deal with more classic military threats. Since eighteen of the nineteen member nations fund NATO's integrated military C2 structure, they want economies there too. Until five years ago, the C2 structure had four levels of command. Since that time, three levels have been deemed sufficient, with the fourth having moved from the C2 structure to the force structure that is almost totally funded nationally. In Europe, where the most diversified C2 structure

existed, the three C2 levels were made up of a supreme headquarters (SHAPE), first three and then two regional headquarters, one north and one south, and eleven sub-regional, static headquarters, far too many being land oriented. The integration of those headquarters, the slimmed down progeny of the Cold War era, was nevertheless awkward. There was much duplication of effort, and so a detailed functional review was undertaken of all headquarters to find out just what everyone was doing. This coincided with studies of C2 structures that would better correspond toscarce assets.

The result of the studies led to the Combined Joint Task Force (CJTF) C2 construct. A CJTF headquarters can actually be any size, but the key to it is a core element in what are soon to be two regional joint, forces headquarters (JFHQs) and a smaller joint headquarters (JHQ West). For ease, the three will be referred as JFHQs. Each of those headquarters can be designated to direct joint and combined military action as a CJTF. This can be done from land or afloat. The CJTF can deploy or operate from its peacetime location. Depending on the nature of the mission, attached to it will be land, air and sea components, which are replicated north and south in Europe but can be employed anywhere without geographic limitation.

The JFHQ should not be confused with combat formations, which would be attached to a JFHQ to make up the full CJTF. A JFHQ is a C2 element pure and simple. As for deployability, the core element of a static JFHQ is designed to be ready to deploy, if required, on five days notice. The full CJTF is to be constituted and/or deployed in 30 days. The forces that would be used would come principally from NATO's force structure.

Now the structure of NRF itself will be discussed. It can be spoken of as a catalyst for the Prague Capabilities Committees agreed by the Alliance members in Prague in November 2002. The NRF is to enhance NATO's operational capabilities by having a credible, expeditionary, joint reaction force that will be responsive and tailored to the actual mission.

The NRF is more than just a rapidly deployable military force. It is the centerpiece of Alliance-wide military capabilities, both

national and NATO common-funded, most particularly in the communications and information system domain.

It is designed to rely less heavily on the United States for the ability to project power to deter, pre-empt and/or shape a conflict. It is the basis upon which NATO's restructured C2 is configured. Beyond merely a restructured C2, the NRF obliges the European allies to come up with solutions to theatre missile defence, strategic airlift, air-to-air refueling, precision guided munitions, intelligence, target acquisition sophistication and other capabilities. The NRF also requires the NATO force structure to move to a higher state of overall readiness and modernization, acquire capabilities that are relevant while at the same time divesting those that are not, and, hopefully, will narrow the European-US capability gap. All of this is aimed to meet the challenges of the XXIst century.

A combined, joint statement of requirements has been with the nations for several weeks. They are to reply by today. Depending on national responses to meet the projected requirements, there will very likely have to be a further request to sort out just what the nations think the requirements are. The analysis of the national replies is to take five days. A week later there would be a force generation conference to find out which nations can meet which requirements. This process goes on with the target date of 15 October when an initial operating capability (IOC) is targeted. What this would mean is that one of the JFHQs (the northern JFHQ starts) will be on call so to speak to C2 two NRFs, one on «hot» standby (30 days to move) and another to a lesser notice to move. Each year another JFHQ will be on «hot» standby with the ability to command and control from its static location or a deployed location. Thus, every third year each of the three JFHQs will be in command of two NRFs.

Initial operating capability is hoped in mid-October of this year. The process will be tested through command post exercises and a full field exercise. Full operational capability, or FOC, is looked for in mid-October 2006, after each of the three JFHQs has been at the helm for one year.

The NRF concept is built around the Combined Joint Task

Force (CJTF) construct. A CJTF has land, air and sea elements. This does not mean the full spectrum of those capabilities would be required in every instance, but that is the more likely scenario since the NRF is not intended for benign peacekeeping operations. In this respect it may be recalled that one of the NRF' missions could be pre-emptive. The size of a fully capable NRF is approximately 6,300, which includes the C2, combat and support elements.

Now the role of Legal Services Supreme Headquarters Allied Powers in Europe will be studied with regard to the development of operation plans (OPLANs) and contingency operating plans (COPs) that would be the basis for any NRF use. All planning begins with a NATO Atlantic Council (NAC) decision and guidance. Normally this will be to develop a broad concept of operations (CONOP) that offers a variety of options. Picking one or more options or parts of options, the NAC will order the development of an OPLAN that wi11 actually thoroughly flesh out the CONOP. We would not go into the details of such plans, but there is always a legal annex and an annex dealing with rules of engagement (ROE) governing the use of armed force.

OPLANs are used for situations in peacetime, irrespective of how much of a crisis there might be. Peacetime is a period of time distinct from time of armed conflict. Hence, the legal basis for the use of armed force must take account of that fact since the laws of armed conflict do not apply by operation of law. They may be applied in whole or in part, but one always has to look for the legal basis to use lethal force. If there is a UN Security Council resolution using the code words, «all necessary means», the use of armed force, to include lethal force, is legally permissible, provided fundamental tenets of the laws of armed conflict are respected. This calls for proportionality and respect for rules related to collateral damage. The use of force in self-defence, which is not a NATO rule of engagement (ROE), since it is an inherent right, is explained in detail in the legal annex to each OPLAN. So, too, are the concepts of anticipatory self-defence, hostile act, and hostile intent. These concepts are not without question for some member countries as is, for example, the ROE authorizing lethal force to protect property.

Certainly an important characteristics of the NATO-approved baseline document on ROE for NATO-led operations is that no individual is ever required to carry out authorized military action if to do so would violate the laws of that individual's country. What this illustrates is that the member countries have agreed a Military Committee document (viz., MC 362) dealing with ROE principles and profiles that form the basis of the development of the ROE and legal annexes to every OPLAN. The member countries have to agree, by consensus, any OPLAN before it ever can be used. If the ROE, or any other facet of an OPLAN for that matter, would contravene or likely contravene the laws of a member country, be they based on specific domestic legislation or interpretations of customary international law, that country can enter a caveat explaining why its forces cannot do a particular task. It should be obvious that this is the only way an OPLAN has any hope of reaching consensus.

For the legal services it means that all facets of every NATO-led military mission must be scrutinized for compliance with international humanitarian law and, to the extent applicable, fundamental human rights laws. Having been through a number of military operations, the legal services of NATO are very experienced in weeding out any proposed actions that do not have a firm foundation in law, and it also knows which issues are sensitive for member countries, such as the use of riot control agents. Legal Services Supreme Headquarters Allied Powers in Europe , however, is not the final arbiter of such matters. As just mentioned, the member countries all scrutinize the OPLAN, and this means their lawyers do too.

The NAC has just recently decided that in the future, all targets that would be the subject of air attack are to be reviewed for compliance with the laws of armed conflict. This is a significant demarche, and one that puts a heavy burden on lawyers for they have to become familiar with munitions and methods of their delivery to a target, for the principal consideration is collateral damage, that is, injury or death of protected persons and facilities. In an era of media access to just about any place, a single error in targeting will be on the front pages of all newspapers probably before the aircraft can return to their operating bases.

While errors do occur, the more egregious ones can result in criminal prosecution.

The biggest challenge today is legally reviewing plans dealing with terrorism. Clearly, everyone would admit that a terrorist, however defined, is a criminal. If such criminals are engaged by legitimate armed forces, what legal rules are going to be applied? Apart from rights in individual or unit self-defence, where is the right to use lethal force by military personnel outside their borders and in the territory of another sovereign nation? One should not take the Afghanistan situation as the template, for Afghanistan was a curious situation. The Taliban, the so-called government, was not recognized as the legitimate government by most States. It harbored persons widely believed to be terrorists and allowed them to train. After the events of 11 September 2001, the United States demanded that the Taliban turn over Osama bin Laden. After its refuse to do so, on a claim of self-defence, the United States resorted to self-help and began an armed conflict with Afghanistan in its quest to capture or kill bin Laden and his Al Qaida personnel. This has led to profound legal arguments over the status of persons captured in that armed conflict. The detention of someone gives rise to a fundamental tenet of human rights. The status of the individual, prisoner of war or not, has to be determined, for it carries with it rights and obligations for the capturing power.

Finally we would like to notice that the rule of law is not an idle standard; it applies as much on the battlefield as in peacetime. This principle is reflected in the organizational structure on NATO.