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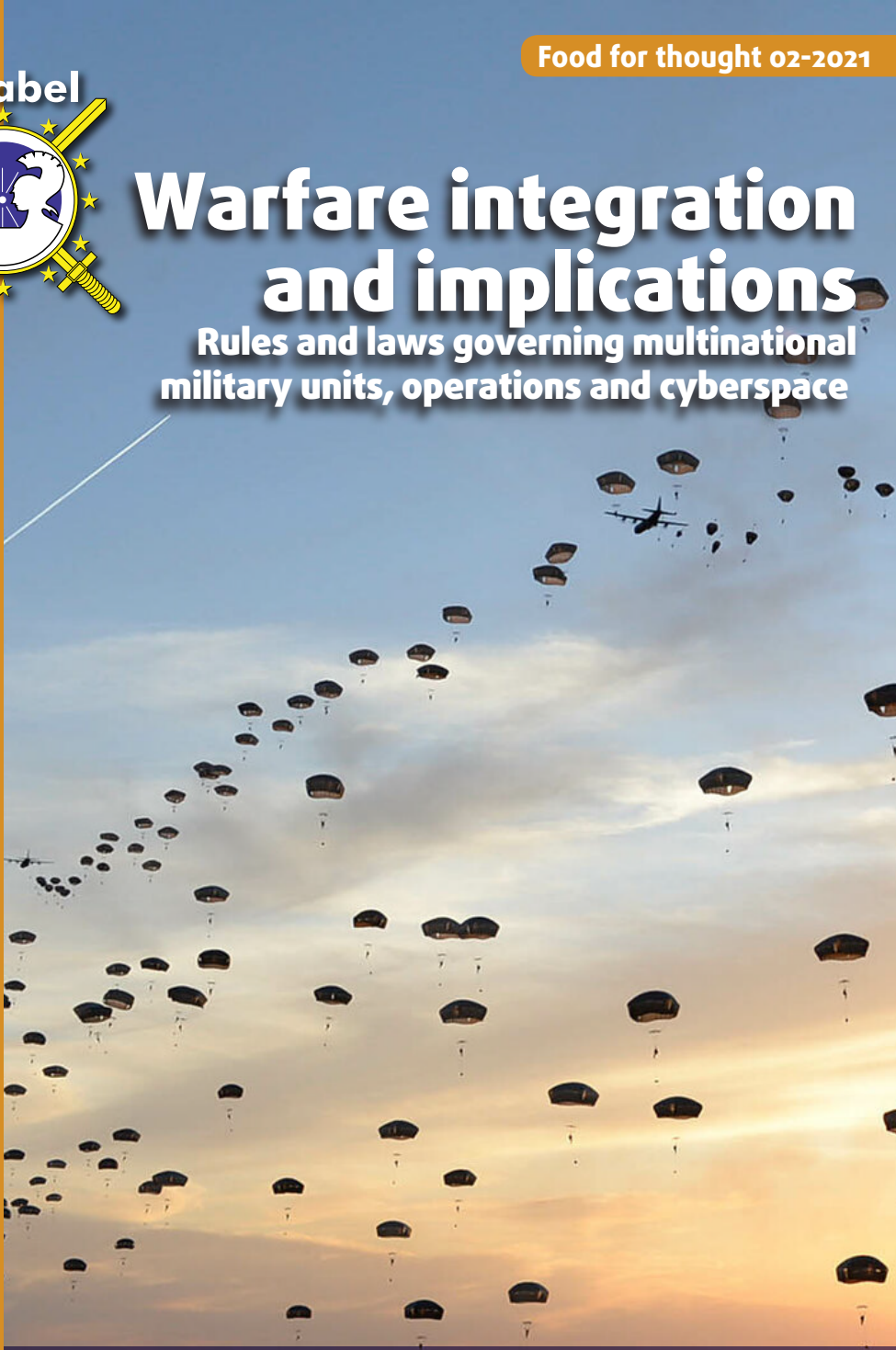
Food for thought 02-2021

Warfare integration and implications

Rules and laws governing multinational military units, operations and cyberspace



AN EXPERTISE FORUM CONTRIBUTING TO EUROPEAN ARMIES INTEROPERABILITY SINCE 1953

FINABEL
European Army Interoperability Center

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This paper was drawn up by Giuseppe Alfio Ira, Madeleine Brach, Alberto Pineda Alcántara and Leandro Pereira Mendes under the supervision and guidance of Mr Mario Blokken, Director of the Permanent Secretariat.

This Food for Thought paper is a document that gives an initial reflection on the theme. The content is not reflecting the positions of the member states but consists of elements that can initiate and feed the discussions and analyses in the domain of the theme. All our studies are available on www.finabel.org

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LIST OF ABBREVIATIONS

ARRC	Allied Rapid Reaction Corps
BALTAP	The Allied Forces Baltic Approaches
C2	Command and Control
CCD COE	Cooperative Cyber Defence Centre of Excellence
CFSP	Common Foreign and Security Policy
CivOpCdr	Civilian Operations Commander
CJTF	Combined Joint Task Force
CoS	Chief of Staff
CPCC	Civilian Planning and Conduct Capability
CSDP	Common Security and Defence Policy
DDoS	Distributed Denial of Service
DPKO	Department for Peacekeeping Operations
EC	European Council
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EMMF	European Multinational Maritime Force
ESDP	European Security and Defence Policy
EU	European Union
EUBG	European Union Battlegroups
EUMS	European Union Military Staff
EUTM	European Union Training Missions
FFT	Food for Thought
ICJ	International Court of Justice
ICTs	Information and Communications Technologies
ILC	International Law Commission
JSCC	Joint Support Coordination Cell
MMO	Multinational Military Operations
MMUs	Multinational Military Units
MND(C)	The Multinational Division Central
MPCC	Military Planning and Conduct Capability
NATO	North Atlantic Treaty Organisation
PSC	Political and Security Committee
OFOF	Order to Open Fire
TCC	Troop-Contributing Countries
TEU	Treaty on the European Union
UK/NL AF	The United Kingdom/ Netherlands Amphibious Force
UN GGE	United Nations' Group of Governmental Experts
USA	United States of America

INTRODUCTION

Allying militarily and entering combat jointly with other sovereign powers is hardly unusual. Such practices extend the length of human history. The first notable altercations, wherein distinctive communities, whose interests did not necessarily align in full and whose power dynamics may have been skewed, entered into a coalition with the purpose of utilising their joint military capabilities towards a shared end can be traced back to ancient Greece. With the growing interconnectedness of this epoch, such practices, rather than having faded in relevance, have instead become a central component of national and international security structures. Indeed, matters of a transnational security nature have progressed, evolving into a concern of multilateral proportions since the Second World War. There is no doubt that the growth of multinational military operations (MMO) is partly due to the fact that they offer a plethora of advantages, from the possibility of increased efficiency and decreased mission expenditures to the supplementary legitimacy such practices may offer[1]. Correspondingly, regional organisations such as the European Union (EU), or even sub-regional entities, habitually play a central function in the mandating of missions and in the assumption of command and control (C2)[2]. Movement in the direction of ever-increasing military integration has featured prominently in the post-Cold War years, with a growing number of organisations moving towards the proper institutionalisation of said multinational approach[3].

Today, when states choose to utilise their militaries, they typically do so in tandem with other nations. Multinational military operations have developed into the default approach for directing global security governance in this epoch[4]. Indeed, they have become such a mainstay that such missions are more likely than not the only kind that states have designed to implement in recent years.

The *Food for Thought* will firstly describe the main forms of European Military Units, their compositions, headquarters and proposes. Subsequently, the recently established EEAS crisis management structures will be discussed, such as the Civilian Planning and Conduct Capability (CPCC) and its military counterpart, the Military Planning and Conduct Capability (MPCC).

The second chapter thoroughly analyses command and control structures (C2) under different models of and configuration possibilities. As a natural follow-up to the chapter, national ceveats' restraining effect in MMOs will be shown. In the third part, an application of the ECHR specifically relating to limitations to the right of freedom in MMO will be presented through case-law and applicable jurisdiction. The comparison between International Humanitarian Law (IHL) in international armed conflicts (IACs) and non-international armed conflicts (NIACs) will make highlight how the latter still needs to be developed. Last but not least, chapter four contains an in-depth analysis of cyber domain regulations. We will start from its very outset

1. Marten Zwanenburg, "International Humanitarian Law Interoperability in Multinational Operations," *International Review of The Red Cross* 95 (891-892): 681-705, 2013. doi:10.1017/s1816383113000660.
2. Vincent, Bernard, "Editorial: Multinational Operations and the Law—Great Expectations, Great Responsibilities," *International Review Of The Red Cross* 95 (891-892): 475-483, 2013 doi:10.1017/s1816383114000319.
3. Council of the European Union, "Defence Cooperation: Council Establishes Permanent Structured Cooperation (PESCO), with 25 member states participating," Press Release, 11 December 2017
4. Vincent, Bernard, "Editorial: Multinational Operations and the Law" 475

and developments undertaken both within states actors, private actors, the academia and international organisations. The cyberattack against Estonia in 2007 illustrate the fragility of states' cybersecurity and its ensuing repercussions. The importance of soft law and the role undertaken by non-state parties, such as the Tallinn Manual initiative, underscores the necessity to find common rules and procedures to assess and condemn cybercrimes.

1. EUROPEAN INTERNATIONAL UNITS

Regionally, the EU has doubled down on the conception of a Common Security and Defence Policy (CSDP). During the 1999 meeting in Helsinki, the European Council (EC) determined that European armed forces apparatuses should be fashioned to take charge of duties related to the so-called 'Petersberg Tasks' within the framework of manoeuvres directed by the EU[5].

The progressively "complex, multifunctional, multidimensional, and protection-oriented contemporary multinational military operations" have as a result drawn an array of actors into their orbit. Inevitably, the legal apparatus

5. Such tasks included humanitarian intervention, peace enforcement, and peacekeeping missions. Georg Nolte, *European Military Law Systems* (Berlin: De Gruyter Recht 2003), 890

of which such structures and entities are built upon have become similarly intricate. Critical questions arise concerning procedures for missions, which are markedly altered depending on the makeup of a combat force: be it under the jurisdiction of a single state, a regional entity, an international organisation, or a complex confluence of partially overlapping, partially distinctive legal regimes[6]. These systems originate from many sources: customary international law, bi and multilateral international treaties, soft law via its role in forming of national multinational codes of conduct, recommendations of best-practice, or mission exclusive guidelines.

Particular note should be taken of the Central European grand alliance of 1813, as it can be considered the prototype to all modern coalitions[7]. Unsurprisingly, some major issues plague such coalitions, concerns regarding strategic incoherence, culture, and unity of command, among others. At its inception, however, both the British and Russians determined that defeating Napoleon posed a formidable challenge that would require the aggregation of several states' military capabilities. In addition, time was of the essence, as any delay of a sizable nature would undoubtedly be in Napoleon's favour, allowing him the necessary space to reconstitute his forces. Accordingly, the first half of 1813 was spent persuading potential allies towards opposing him. A key component to the campaign's success could be attributed to British financing. Indeed, the state expenses that went towards the coalition's formation and preservation of the reached upwards of 10 million GBP– an astonishing figure at that point in history. Two central themes should be garnered from this happenstance. Those challenging Napoleon acknowledged their power limits and determined a coalition necessary with other similarly minded states if they wanted to defeat him. As no one country had the military potency to challenge Napoleon's forces alone, their capabilities' aggregation was the best way forward. Also, the threat he presented was strikingly evident and immediate[8]. Although the unavoidable quibbling between allied forces took place, especially in the early periods of the coalition regarding the post-war end state's architecture, such concerns were ultimately overshadowed. The issue of continental stability took precedence. How these factors of urgency and necessity relate to modern-day practices is a relevant question that will be considered more in-depth in this Food for Thought (FFT).

It should be understood that a defined and universally agreed upon legal definition of the notion of multinational military manoeuvres has yet to manifest. Accordingly, in this FFT, it will will be comprehended in a wide-ranging sense as "any mission involving armed forces relying on contributions of a number of states and other actors such as international organisations. Those operations typically, but by no means exclusively, occur in zones of armed conflict and in areas of limited statehood with deficient or partially absent governance structures"[9]. A noteworthy feature of such zones is a pervasiveness of destabilising factors, such as organised crime. Therefore, multinational military operations must habitually contend with scenarios in which they must fulfil the traditional functions of a military and participate in political matters, including policing and various other governance purposes in the

6. Robin Geiß, and Heike Krieger, eds., *The 'Legal Pluriverse' Surrounding Multinational Military Operations.* (Oxford: Oxford University Press, 2019), Oxford Scholarship Online, 2020. doi: 10.1093/oso/9780198842965.001.0001.
7. Riley, J. P. *Napoleon And The World War Of 1813*. (Hoboken: Taylor and Francis, 2013), 4.
8. Kathleen J. McInnis, "Lessons In Coalition Warfare: Past, Present And Implications For The Future". *International Politics Reviews* 1 (2) 2013: 78-90. doi:10.1057/ipr.2013.8.
9. Geiß and Krieger, *The 'Legal Pluriverse'*, 3

region they operate in.
Often, they encompass a substantial array of troop-contributing nations (TCC). The aims of such operations are as diverse as their mandates and frequently multidimensional. Contingent on the situation, they participate in protecting civilians, conflict management, disarmament, and demobilisation exertions in internal conflict. They can also promote explicit law enforcement duties or endeavours to support the rule of law or restructure and instruct the security sector[10]. Multinational forces participate in a wide range of missions, from combating transnational counter-terrorism to assisting in post-conflict conditions or major disaster relief manoeuvres[11]. Both the assortment of actors on the mission and the variety of local stakeholders that interface and engage with the foreign troops must be taken into account. Such factors are presented to prove that while there are a few key features that characterise all MMOs, the variances are just as noteworthy and must be considered accordingly when analysing this matter[12].

1.1 Eurocorps

The Eurocorps is founded on the integration principle. In the devastating aftermath of the Second World War, French and German leaders came together to ultimately foster security and peaceful relations between the many European states. The resulting Elysée Treaty of 1963 had a section devoted to cooperation in the defence arena. The next phase in French-German defence cooperation occurred in 1989 with the French-German Brigade's inception, stationed in Müllheim, Germany. Both countries, keen to expand their mission to encompass European Defence, adopted "La Rochelle Report" in a bilateral meeting in 1992[13]. In this text, the draft conditions for Eurocorps were first laid down. Entering into service in November 1993 and becoming operational two years later, the entity has grown to encapsulate 60,000 soldiers, when all earmarked national contributions are taken into account[14].
Eurocorps is unique in that it retains a multinational headquarter. In contrast, other NATO Rapid Deployable Corps can only be considered singular, bi or even trinational. From its inception as a French-German Corps, other states were actively encouraged to join and were granted the rights the founding members retained. Three years from its inception, Belgium, Luxembourg, and Spain could be counted among the parties found at the Headquarters. Other states such as Italy, Greece, Turkey, Romania, and Poland became Associated Nations of Eurocorps. The mingling of various nationalities is visible from the start, regardless of cell to division. Branch chiefs alone can be easily recognised as belonging to a specific nation. The branch members themselves are comprised of personnel from Framework and Associated Nations. The established two-year rotation plan supports such cohesion further by allowing each Framework Nation to occupy key positions within the Command Group. All decisions must be agreed upon unanimously by the Framework Nations in the Common Committee. Involvement of Associated Nations to commitments made by the Eurocorps are methodically presented to the approbation of

10. "Home - EULEX - European Union Rule Of Law Mission In Kosovo," Eulex Kosovo, accessed September 2020, https://www.eulex-kosovo.eu.; "Home," Inherentresolve. Accessed September 2020. http://www.inherentresolve.mil.
11. "CTF 150: Maritime Security," Combined Maritime Forces (CMF), Accessed September 2020, https://combinedmaritimeforces.com/ctf-150-maritime-security/.; "UNTAET". 2020. *Peacekeeping UN*. https://peacekeeping.un.org/mission/past/etimor/etimor.htm.; Jennifer D. P. Moroney, Stephanie Pezard, Laurel E. Miller, Jeffrey Engstrom, and Abby Doll. "Lessons From Department Of Defense Disaster Relief Efforts In The Asia-Pacific Region". *Rand.Org*, Accessed September 2020, https://www.rand.org/pubs/research_reports/RR146.html.
12. Geiß and Krieger, *The 'Legal Pluriverse'*,3-5.
13. Nolte, *European Military Law Systems*, 892.
14. "Headquarters – Eurocorps," Eurocorps, accessed September 2020, https://www.eurocorps.org/.

each of the given state's authorities. Due to its proximity to both the North Atlantic Treaty Organisation's (NATO) and the EU decision-making centres in Strasbourg, the entity occupies a privileged position to central political and military powers in the region.

1.2. EU Battlegroups (EUBG)

The EUBG are structured around the framework of the EU's CSDP. They are based on a "combined-arms, battalion-sized force, reinforced with combat-support and combat service-support elements"[15]. In addition to their basic configuration, dependent on the mission, Battlegroups are composed of about 1,500 personnel contingents on the lead state's judgement. They are to be deployed in a radius of 6,000 km from Brussels and are intended to be proficient enough to achieve initial operational competency in a theatre within ten days following the verdict to launch an operation, taken by the European Council (EC). They are also required to possess the ability to operate as a stand-alone force for possibly 120 days from the beginning of Initial Operational Capability. In reality they have yet to be deployed.

1.3. Military Planning and Conduct Capability (MPCC)

The MPCC, established in June 2017, aims to enable the EU to respond more effectively and efficiently as a security source outside its boundaries. The MPCC is liable for the operational preparation and manner of non-executive military missions, such as overseeing EU Training Missions (EUTM) in the Central African Republic, Mali, and Somali[16]. In 2018, the EC decided to allot the MPCC the supplementary responsibility to plan and conduct one EU Battlegroup sized military operation and strengthened its permanent staff capacity accordingly.

The establishment of the MPCC is a component of a broader continuous project directed at strengthening the EU's security and defence in accordance with the execution of the 2016 EU Global Strategy. As a permanent C2 apparatus of the military-strategic kind within the EU Military Staff, it is a part of the European External Action Service (EEAS) in Brussels. The MPCC aimed at bolstering civil-military cooperation. Following the principle of avoiding redundancy with NATO, the MPCC instead augments the EU's competence to respond with increased efficiency to conflict or crisis when EU troops are deployed in coordination with other EU and CSDP actors[17]. The MPCC serves several purposes. It is intended to provide unified direction and command to the array of field missions and assist the in-field mission staff, with a heightened level of support allotted to their security from Brussels. Key partner to the MPCC are its civilian counterparts, most markedly the Civilian Planning and Conduct Capability (CPCC) via the Joint Support Coordination Cell (JSCC). Such an arrangement guarantees concentrated coordination of civilian and military interactions and the distributing of expertise. Finally, the MPCC is intended to increase the coherence of various EU actions on the ground level in line with the EU's integrated approach to external crises and conflicts.

To encourage the utmost cost-effectiveness

15. "Headquarters – Eurocorps."
16. "Military Planning and Conduct Capability (MPCC)," *Firstline Practitioners.Com,* Accessed September 2020 https://www.firstlinepractitioners.com/cve-infrastructure/military-planning-and-conduct-capability-mpcc
17. Yf Reykers, "A Permanent Headquarters Under Construction? The Military Planning And Conduct Capability As A Proximate Principal," *Journal Of European Integration* 41 (6): 783-799, 2019. https://doi.org/10.1080/07036337.2019.1599882

and efficiency, the MPCC has been founded within the EU Military Staff as a short-term solution. The Director-General of said staff (DG EUMS) has also assumed the role of the Director of the MPCC. As such, operational command of all non-executive military missions falls within their purview. The Mission Force Commanders of the three EUTMs are under the leadership of the Director of the MPCC and exert military command authority regarding the Mission Areas. The MPCC must report to the PSC and keeps the EU Military Committee (EUMC) abreast with its activities. Along with the growing responsibilities, the MPCC will continue to be allotted gradual increases in permanent staff until the maximum 60 is reached[18]. The EU has verbalised the necessity of a possible 94 'augmentees' to be on call if the MPCC commands an executive military CSDP operation within the limits of an EU Battlegroup-size.

1.4. Civilian Planning and Conduct Capability (CPCC)

In essence, the CPCC is the organisation whose duty is to plan, deploy, conduct, and review civilian CSDP crisis-management missions. In a 2005 meeting, EU Heads of State and Government advocated for an increased emphasis on four central concerns of the Common Foreign and Security Policy (CFSP): defence capabilities, relevant funding, reinforcement crisis management structures, and effective action in the Balkans[19]. In 2006, a letter was sent in to the EC comprising of proposals for detailed modifications within the Secretariat of the Council of the EU. It aimed at bolstering the planning, implementation, and assessment of European Security and Defence Policy operations (ESDP), including the appointment of a Civilian Operations Commander (CivOpCdr) in reaction to the need for a more evident chain of command for ESDP civilian missions. Established in 2007, the CPCC had reached full operational capability in late 2008.

The CPCC oversees eight CSDP civilian missions in the capacities of border assistance management, police, rule of law, and security reform. The Civilian Operation Commander exerts C2 for the conduct and planning of all civilian CSDP missions that fall within the jurisdiction of the strategic direction and political control of the PSC. As the commander of all civilian Heads of mission, the person is also directly under the High Representative as well as the Council[20]. Members and third states that contribute to a CSDP mission handover the C2 authority of their personnel and units to the Civilian Operations Commander. Full command over national personnel rests with the National Authorities, aided by a deputy civilian operations Commander who stands-in for the CivOpCdr when required to preserve the continuity of C2.

Standing at approximately 60 staff strong, the CPCC's core staff comprises permanent officials from the European External Action Service (EEAS) and personnel attached to Member States who function in an international capacity. This is in accordance with the guidelines pertinent to national experts on secondment to the EEAS. POLITICAL AND SECURITY COMMITTEE (PSC)

The PSC's function and configuration are defined in the Treaty on the European Union (TEU), article 38. As it holds the authority to

18. "Factsheet: The Military Planning and Conduct Capability," EEAS, accessed September 2020. https://eeas.europa.eu/headquarters/headquarters-homepage/54031/factsheet-military-planning-and-conduct-capability_en.
19. "The Civilian Planning and Conduct Capability Of The European External Action Service Joins As A Conference Partner", PeaceTraining.eu, accessed September 2020, https://www.peacetraining.eu/the-civilian-planning-and-conduct-capability-of-the-european-external-action-service-joins-as-a-conference-partner/.
20. "The Civilian Planning," Peacetraining.Eu.

direct the EU's CFSP, and the CSDP, it ultimately is responsible for monitoring international situations. Accordingly, it plays a significant role in advising on strategic tactics and policy decisions. The PSC also provides assistance to the Committee for Civilian Aspects of Crisis Management, the Military Committee, and the Politico-Military Group[21]. It additionally handles the strategic planning and political regulation of crisis management operations. The Committee is based in Brussels, Belgium, and comprises ambassadors from the member states. Chaired by EEAS representatives, it holds twice-weekly meetings, though more can be held depending on necessity.

1.5. Ongoing bi- and multinational Military Units in Europe

There are also smaller bilateral and multinational units within Europe. What follows is a brief description of the more notable ones in chronological order. Both entities that are currently standing as well as those that have been disbanded are touched upon. At times different units mentioned may seem redundant. However, all of them were devised to serve slightly different purposes, whether related to sub-regional objectives, mission types or a host of other factors. Those that did overlap heavily with one another were either disbanded or integrated into other entities, as is shown below.

21. "Political and Security Committee (PSC)," *Consilium Europa*, accessed September 2020, https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/political-security-committee/.

1.5.1. The United Kingdom/Netherlands Amphibious Force (UK/NL AF)

The UK/NL AF, comprising of marines from each state, was formed in 1972. The cooperation between such units is part of the larger European Multinational Maritime Force (EMMF)[22]

1.5.2. EUROMARFOR

EUROMARFOR is a multinational non-standing, military force. It has the capacity to conduct air, naval, and amphibious operations. Formed in 1995, the corps was created to accomplish missions demarcated in the Petersberg Declaration, such as crisis response operations, humanitarian missions, sea control, peacekeeping operations, and peace enforcement[23]. It can be utilised by the UN, EU, or NATO. Missions can also originate from mandates if the four partner nations agree to take action unanimously.

1.5.3. The German-Netherlands Corps

The German-Netherlands Corps, founded in 1995, is currently situated in Germany within NATO's High Readiness Forces Headquarters. Although composed primarily of personnel from the aforementioned states, ten other NATO states contribute to the Corps. The organisation also maintains close relations with relevant civilian entities[24]. It deals with a range of issues, from missions relating to humanitarian assistance, war and deterrence. It can lead missions of up to 60,000 troops strong on a short notice basis and is constituted of land, sea and air components.

1.5.4. The Multinational Corps Northeast

Denmark, Germany, and Poland had been fostering cooperation in numerous areas throughout the 1990s. A trilateral military cooperation system existed among the three since 1995. It gained traction in 1997 when it was decided at a NATO summit to invite the Czech Republic, Poland, and Hungary to become members of the organisation. Following the verdict, in 1999 a Danish-German-Polish corps was established. The resulting Multinational Corps Northeast was headquartered in Szczecin, Poland. The related headquarters for the 'Allied Land Forces Schleswig-Holstein and Jutland' (LANDJUT) was situated in Rendsburg, Germany and became a central authority for its command. Besides the more obvious military and geographical factors that went into the formation of this entity, the Corps also functioned as a political emblem that would considerably hasten the assimilation of the Armed Forces of Poland and other fresh partners into NATO, therefore advancing stability in Europe. As expunged in Article 5 of the North Atlantic Treaty, its mandate is to plan and operate for collective defence[25]. It also is tasked with contributing to the United Nations, NATO, or other regional arrangements pursuant to Chapter VIII of the UN Charter for multinational crisis management operations. An example of this would be their participation in peace support operations as a Land Component Command in a Combined Joint Task Force (CJTF) or as a Force Command. Their 'missions can be conducted with forces subordinated or added to the Corps for those purposes'.[26] Its headquarters also plans and prepares for rescue and humanitarian missions.

22. "British-Dutch Cooperation Between Marine Units," *English Defense*, accessed September 2020, https://1gnc.org/.
23. Cell, EUROMARFOR. 2020. "European Maritime Force". *EUROMARFOR*. https://www.euromarfor.org/overview/1.
24. "1(German/Netherlands) Corps". 2020. *1Gnc*. https://1gnc.org/.
25. "Multinational Corps Northeast (MNC-NE)," United States Army Nato, accessed September 2020 https://www.usanato.army.mil/About-Us/Articles/Article/1457649/multinational-corps-northeast-mnc-ne/.; "Organization," Multinational Corps Northeast, accessed September 2020, https://mncne.nato.int/about-us/organisation.
26. "Multinational Corps Northeast (MNC-NE)," United States Army Nato.

1.6. Former bi- and multinational Military Units in Europe

1.6.1 The Allied Forces Baltic Approaches (BALTAP)

Responsible for the Baltic Sea area, the BALTAP existed from 1962 to 2002 and was comprised of Danish and Western German forces, and other allies for times of war. The BALTAP existed within the NATO Military Command Structure as a Principal Subordinate Command[27]. Generated to bring an end to the previous separation of the latter state's naval forces between the Central and Northern Europe's NATO commands, it was later deactivated in response to transformations in the international security situation.

1.6.2. The Multinational Division Central (MND(C)

The Multinational Division Central (MND-(C) was intended to be the first in NATO and was headquartered in JHQ Rheindahlen, Germany. A multi-national division for Central European security, it was composed of Belgium, Germany, the Netherlands, and the United Kingdom. Created in the atmosphere of the Cold War it achieved operational readiness in 1994. The divisional staff were made up of 50 officers, 54 NCOs, and soldiers. With a theoretical force of 20,000 soldiers, it served as the principal multinational rapid reaction force within Europe with the competence of deploying worldwide for military intervention missions. It could further be put under the jurisdiction of its superior formation, Allied Rapid Reaction Corps (ARRC), when necessary[28]. Since it was also part of the Forces Answerable to WEU (FAWEU) it was feasible for the WEU to mobilise the Division for its military operations. However, since NATO grew increasingly fixated on other crisis reaction forces, MND headquarters (C) were eventually disbanded in 2002.

1.6.3. European Rapid Operational Force (EUROFOR)

The EUROFOR existed from 1995 to 2012. Functioning as a multinational rapid reaction force, it comprised forces from France, Spain, Italy, and Portugal. It maintained a permanent staff qualified in commanding operations of up to a Light Division in scope. Situated in Lisbon, it answered directly to the WEU[29]. EUROFOR primarily dealt with Petersberg tasks. As time passed, due to the fusion of several WEU elements into the EU, EUROFOR had essentially developed into a part of the CSDP and was eventually converted into an EUBG.

1.6.4. The Lithuanian-Polish Battalion (LITPOLBAT)

The LITPOLBAT was created for peacekeeping. From 1997 until its disbandment in 2007, it served as a marked example of military cooperation between them. It conducted missions for the UN, NATO, and the Organisation for Security and Co-operation in Europe[30].

27. Thomas-Durell Young, *Command In NATO After The Cold War*. Carlisle Barracks, Pa.: Strategic Studies Institute, U.S. Army War College, 2001.; "Kennzeichen DK". 2020. *Web Archive*. https://openlibrary.org/works/OL2713037W/Command_in_NATO_After_the_Cold_War
28. Nolte, *European Military Law Systems*.
29. Pike, John, "European Rapid Operational Force (EUROFOR)," Globalsecurity, accessed September 2020, https://www.globalsecurity.org/military/world/europe/eurofor.htm.
30. "Ministry Of National Defence - Polish Army: LITPOLBAT". 7 September, 2007, accessed October. 2020. *Web Arch* https://web.archive.org/web/20070927201825/ http://www.mon.gov.pl/strona.php?lang=2&idstrona=128

2. COMMAND AND CONTROL STRUCTURES

War studies literature often defines command as an art, as the creative process of designing strategies, drafting plans[31]. By contrast, and perhaps just because of the permeation of dualities in war imagery, control is defined as a science; it is supposed to be measurable, and it concerns the observance of the plan, the capability of the commanders to make their forces do what the plan established[32]. Command is about making decisions, assigning missions, and even delegating. Control is about implementing orders by coordinating and taking charge of the available forces and resources. Control is "[t]he authority a commander exercises in the implementation of command and pertains to the monitoring of progress and results"[33].

There are multiple ways in which a Multinational Military Unit (MMU) can be structured, depending on their command-and-control configuration. Of course, one of the options is for a unit composed of soldiers from multiple nationalities to be directly controlled and commanded by an international organisation. Theoretically, the Charter could have such a power, according to Articles 45-47, which lay the framework to establish a Military Staff Committee. However, the UN has never developed this capability[34]. Conversely, in the EU many states have developed different forms of military collaboration by forming multinational military units or participating in MMOs. Multinational operations and multinational units face unique challenges in their C2 structures. The staff is used to a clear chain of command composed almost exclusively of members of the same nationality, all under their respective Chief of Staff (CoS). This situation changes in a multinational setting. It can create tensions that manifest as political quarrels over which individual commander has control over which part of the operation, or the operation as a whole.

There is no clear definition of what the correct C2 structure must be for a mission to be successful. It will depend on multiple factors including the participating units, the environment in which the military action takes place, the type of enemy, the mission's objectives, and so forth. In a multinational operation, it is highly unlikely for any TCC to be willing to fully relinquish control of their units and staff, putting them at the complete disposal of another national authority. Therefore, the term "command" usually carries less weight in an international setting than a national one. In an MMU or MMO it will hardly ever imply absolute control, as every staff member will ultimately view their nation as the highest authority.

Unity of command is a concept that historically had a lot of weight in the design of a successful military mission[35]. This means that there is a hierarchy in which each person is subordinate to only one other person, instead of having different superiors and receiving orders from all of them. This staves off the possibility of

31. Regeena Kingsley. "Fighting against allies: an examination of "national caveats" within the NATO-led International Security Assistance Force (ISAF) campaign in Afghanistan & their impact on ISAF operational effectiveness, 2002-2012." (Ph. D diss, Massey University, 2014). https://mro.massey.ac.nz/handle/10179/6984, 19.
32. Regeena Kingsley. Managing Multnational Complexity – Command & Control (C2), (2017). http://militarycaveats.com/6-managing-multinational-complexity-command-control
33. HQNZDF, "Chapter One: Introducing Command in the New Zealand Defence Force", 1-4
34. Alexandra Novosseloff, *The UN Military Staff Committee*. (New York: Routledge, 2018).
35. Lieut. Col. Michael Canna, "Command And Control Of Multinational Operations Involving U.S. Military Forces" 9-26, 2004, *the Atlantic Council of the United States,* Washington D.C. https://www.files.ethz.ch/isn/10998/doc_11029_290_en.pdf,

receiving inconsistent instructions that may muddle the mission[36]. Unity of command undoubtedly simplifies an already difficult task and averts strategy design problems, objective setting, mission assignation and communication. Due to the unwillingness of participating nations to cede command authority over their troops, it is not always possible to have unity of command in MMOs and MMUs, though effectiveness does not need to be hindered as a result. Unity of command must not be understood as a strict requirement in international contexts, as sometimes there may not be a straightforward unity of command as understood nationally, but there remains *unity of purpose*[37]. As long as actors remain united in their efforts towards achieving the common purpose, coordination and cooperation can achieve the same results as strict unity of command. This could be understood as a consensus-based type of command, in which authority is pooled[38]. Initially seen as a disadvantage, consensus-based command may ultimately prove to be an advantage. Results of consensus decision-making processes will be seen as more legitimate since national actors contributed to them, leading to less tension between partner nations. Creating this type of consensus-command is not an easy task, and it requires a large investment in terms of time and effort and resources. For a multinational force to be successfully commanded by consensus, it requires genuine respect, direct rapport, trust, officials' understanding of culture, doctrines and values of the partner armed forces and intimate knowledge of capabilities, strategic goals and interests[39]. Commanders in these situations have been described as "military diplomats", due to their double position as officers and leaders, managers, negotiators and instigators of unity[40].

There are several types of C2 to be assumed, and sometimes these can be distributed according to nationality, so that every party to the mission has their fair share of responsibility and is more willing to cede command in other aspects. Countries will be more likely to cede Operational Control (OPCON) or Tactical Control (TACON) than Operational Command (OPCOM). *Operational control* would involve the authority to organise and employ commands and forces, assign tasks and designate objectives; however, it normally means that the commander has the authority necessary to make decisions to successfully realise the mission at hand, but they would not have authority over logistics, administration, training or discipline, for example[41]. *Tactical control*, on the other hand, is limited to authority over the direction of manoeuvres within the assigned mission[42].

Mixed forms of command and control have been developed to accommodate these difficulties. Previous literature has identified three main models that have shaped C2 in multinational military situations: the lead nation model, the parallel command model, and deepening integration. The *lead nation model* is perhaps the most prominent model, and the one that brings MMUs' C2 the closest to unity of command. In this model, forces are subordinated to one Lead Nation. The Lead Nation may change, as the participating nations may take rotating turns to lead their

36. Lieut. Col. Lou L. Marich, "Enhancing Command and Control in Multinational Operations". US Army War College 2002, 5, 10. https://apps.dtic.mil/dtic/tr/fulltext/u2/a404313.pdf
37. Also called unity of effort. C.J. Lamb and M. Cinnamond, "Unity of Effort: Key to Success in Afghanistan", *Strategic Forum, Institute for National Strategic Studies National Defence University*, no. 248, October 2009, 1-12, https://www.files.ethz.ch/isn/110221/SF248.pdf
38. Kingsley, 2014, 27.
39. *Ibid*, 28.
40. *Ibid*, 32
41. Canna, 2004, 8, 39.
42. *Ibid*, 8, 13, 40.

joint efforts. In this case, key commanding positions would change every so often[43]. This type of unified command structure would need a strong unity of purpose, by which all participating states have the same –or very similar– priorities and aims for the mission. Even then, political tensions are likely to arise. For a MMO to have this structure for a continued amount of time and still be effective, the participating nations would need a clear and concise mission statement and a detailed plan, designed by consensus, so that the national forces do not have the need to appeal to their own governments for every single move made[44]. Integrating staff at certain levels would be an efficient way of understanding each other's interests and capabilities, creating trust between the forces, and unifying command to the desired level. If national rules and procedures were applied in excess in this type of structure, many issues would arise in C2. This model is common in long-lasting alliances, such as NATO, which allow for a supporting structure and procedures to develop. In European multinational forces this model was the blueprint for initiating some of the corps, even if they might have evolved later to adopt different models. The *framework model* is a variation of the lead nation model, in which just one country provides the "framework" –that is the command control, headquarters, procedures, logistics, etc.–, and the other country's forces simply join in the existing structure[45]. This situation would still highly emphasise on unity of command, but the existing command structure would seldom receive significant cooperation variations.

Parallel command, the option on the opposite end of the "unity of command spectrum", would be more common to *ad hoc* coalitions. Each nation maintains its command structure but cooperates and collaborates on a mission[46]. Lack of communication is one of the main obstacles commanders in this model have to overcome. Insufficient communication can create misperceptions of the effort and cooperation offered from the other side, which fosters tensions and reproaches, worsening the political and military understanding of the partners[47]. This structure is the easiest to organise, as it requires a lesser degree of sharing of interests and objectives, and it is often the arrangement of choice at the earliest stages of operations. Unity of effort can still be emphasised through political understandings and military coordination, but there is no unity of command. Sometimes this model is preferred in low-intensity conflicts, as the forces do not have to transition to a different command structure from the one they already have. The lower degree of connectivity required implies a lesser monetary cost. There can still be some commanding positions common to both parties, but these would mostly act as coordinators, providing strategic guidance and coordinating their ground actions. Therefore, joint officials would have even less authority over sensitive issues such as the sharing of intelligence –which is difficult even in the most unified multinational command structures[48]. This structure relies on coordination centres, making decision-making and information sharing processes more burdensome[49].

There is a third model, the most recent in

43. Dieter Fleck, "Legal Issues of Multinational Military Units: Tasks and Missions, Stationing Law, Command and Control," *International Law Studies* 75, 2000, 162.
44. Lieut. Col. Lou L. Marich. 2002, 10.
45. Fleck, 2000, 162.
46. Lieut. Col. Lou L. 10-11.
47. Joint Chiefs of Staff. Joint Publication 3-16, "Joint Doctrine for Multinational Operations," *Joint Electronic Library*, https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_16.pdf
48. Kingsley, 2017.
49. Heiko Bohnsack, "European Army or Fort Trump? The Case of Polish Participation in Headquarters Eurocorps in the Issue of Multinational Military Echelons in the 21st Century," (2019): 24, 81.

development, known as the *deepening integration*, which is identified as the I. German/ Dutch Corps (1GNC), and LANDJUT use[50]. The 1GNC is an illustrative example, as it was created as an MMU with staff from both parties, with unity of command, and a common headquarters in Germany with the capability to hire personnel and pay claims from the own budget of the Corps[51]. It is a completely equal development, since there is common ownership of assets and funds and it comprises the main parts of both armies. It now also includes staff from 12 other European nations, all working under the command structure created and shared by both countries[52]. Even though the leadership of the corps also rotates between a German commander and a Dutch commander; decisions are still made jointly to a higher degree than in the lead nation model, regardless of the commander's nationality. This model has unity of command embedded in it, but is more difficult to implement successfully. The partners need a very high level of trust and military understanding coupled with a degree of political convergence difficult to replicate. The drive for integration within the European Union has played a role in allowing this model to come to fruition. Both countries' foreign policies include very similar military action views and interpretation of the law, and essentially overlapping interests.

These models do not exist independently. In reality, most multinational C2 structures are a hybrid of the aforementioned, for example, in coalitions. There are two Lead Nations, each has their parallel structure and then a common main headquarters. Lead nation models facilitate the dominance of the country with the superior forces or preponderant local capabilities of action, which can also act as an amplifier for other partners with fewer resources as they act 'under the wing' of the militarily superior power. These models often exist not opposed to each other, but compatible with each other, within each other, or even morphing into each other. In fact, in 2003, both Germany and the Netherlands acted as lead nations of the International Security Assistance Force in Afghanistan (ISAF) through 1GNC[53]. This was an MMU acting as the lead nation in a complex hybrid C2 structure with elements of the lead nation and the parallel command models, creating the foundation for ISAF to transition to a NATO-led operation.

2.1. National Caveats

Each TCC has their own understanding of IHL, the use of force, and their own RoE, developed throughout time and their own armed conflict experience. This is precisely the main operational issue that staff from different national armed forces encounters when they begin to work together, and perhaps one of the most difficult to solve as it not only refers to international law, but also to domestic legal instruments and how differently they have been conceptualised by the forces. Many of these obstacles are beyond the multinational force commander's control, making them more challenging, as they need to work within limits set by governments with little room for manoeuvre[54]. Such restrictions are usually related to the sharing of intelligence and disclosure of information, as well

50. Fleck, 2000, 163-167.
51. *Ibid*, 163.
52. "About Us," 1GermanNetherlands Corps, accessed September 2020 https://1gnc.org/about-us/.
53. Mark Dechesne, Coen Van den Berg and Joseph Soeters, "International Collaboration under Threat: A Field Study in Kabul," *Conflict Management and Peace Science* 24, no.1 (2007): 25-36.
54. Stephen M. Saideman and David P. Auerswald. "Comparing Caveats: Understanding the Sources of International Restrictions upon NATO's Mission in Afghanistan," *International Studies Quarterly* 56, no.1 (March 2012): 67-84.

as more restrictive RoE, which can affect the mission on several levels-namely on training planning, assignation, and execution[55]. National caveats are "constraints imposed by political decision-makers on national armed forces", and they restrict what multinational commanders can do with the forces under their command, therefore placing unilateral limitations on the military decision-making process[56]. These caveats can be placed on both humanitarian missions or security missions, and they are usually kept private for reasons of national security, so that the enemy cannot know which gaps to exploit[57]. National caveats are usually only communicated to the lead nation, and depending on their level of secrecy they may only be communicated orally to the commander, who has to act accordingly[58]. Furthermore, since TCCs are not legally required to disclose their caveats, some of these caveats may only be communicated when necessary, making the commanders' decision-making process more uncertain. Depending on the C2 structure, it might also be necessary to inform lead nations in command of operational sectors of the national caveats relevant for their tasks[59].

Even when certain things seem to be the same at the surface, the staff finds out the differences once they are on the field and have to deal with partners' structure. This is not necessarily always due to a legal barrier, but to a concept barrier, as categories and authorities vary across the different C2 structures. Things can be misinterpreted even when the legal language is the same. For example, Orders to Open Fire (OFOF) can be considered a separate concept from RoE, but several countries (including the UK and the US) and even the UN, consider them an integral part of RoE[60]. These issues can be easily overcome in a long-lasting stable alliance, such as a

55. *Ibid,* 69.
56. Kingsley, 2014, 50.
57. *Ibid.*
58. Saideman and Auerswald, 2012.
59. Kingsley, 2014, 54-55.
60. NATO PfP, "Rules of Engagement in Multinational Operations against Terrorism," 2.

MMU designed to last further than a specific campaign, as they simply require good communication and previous planning. For this purpose, Liaison Officers (LNOs) are often included in the C2 structure. Their role is to facilitate communication, ensure all partners have a correct understanding of procedures and mission priorities[61]. These differences in RoE and interpretations of international law hugely influence the type of missions in which a coalition is more likely to participate. For example, the US adopted an expanded interpretation of the concept of self-defence, as it insisted on defining its 2003 Iraqi intervention as a war of self-defence, and as such, certain European allies decided to collaborate and participate in it; however, it was not as well-received as its intervention in Afghanistan, which was more aligned with traditional definitions of self-defence and therefore garnered wider international support, especially among European forces[62]. These differences also govern what type of multinational C2 structure the partners in a MMO are willing to adopt, as well as how far they are willing to go and what their staff can or cannot do once on the field. National caveats can be categorised in three groups based on what type of action they require or prohibit: authorisation (known as green cards), restriction (yellow cards), or prohibitions (red cards)[63]. They are dealt with differently by the commanders, as the caveats will not have the same effects of the effectiveness of the operations. A national caveat that requires a national commander's authorisation before the contingent in a MMO engages in a type of activity may delay the operation. Still, it will not completely overhaul it and is easier to work around. A red card, however, a national caveat that completely forbids a contingent to engage in an activity at any level is more cumbersome. The commanding takes place in a more oppressive environment.

The existence of caveats and their secretive nature creates a knowledge gap between the forces, undermining trust and cooperation between contingents. This gap can greatly contribute to failures in the mission, as was the case in the Kosovo riots of 2004[64]. Many of the European contingents in the Kosovo Force (KFOR) –a peacekeeping force led by NATO– had multiple national caveats. For example, the German contingent could not be deployed to high-risk areas or participate in high-risk tasks. When the ethnic riots started, they were unable to respond properly to the security crisis, as they were not allowed to use force to defend civilian property and could not participate in riot-controlling actions[65]. This resulted in KFOR's failure to protect the Serb population under attack and allowed a violent ethnic cleansing campaign to go on for three days, therefore losing whatever progress had been made and eroding NATO's reputation. Another mission where national caveats greatly hindered the progress of the operations is the ISAF, which operated without a common set of standardised RoE, and included fifty-one different national contingents throughout its existence, most of which brought their own set of RoE

61. K. Stewart, D. Cremin, M. Mills, and D. Phipps, "Non-technical interoperability: The challenge of command leadership in multinational operations," *10th International Command and Control Research and Technology Symposium: The Future of C2* (2004). http://dodccrp.org/events/10th_ICCRTS/CD/papers/298.pdf
62. Haynes II and William J, "Legal Distinction Between Preemption, Preventive Self-Defense, and Anticipatory Self-Defense". General Counsel of the US Department of Defense, Info Memo, 2002.
http://library.rumsfeld.com/doclib/sp/2564/2002-10-16%20from%20William%20Haynes%20re%20Legal%20Distinction%20Between%20Preemption,%20Preventive%20and%20Anticipatory%20Self-Defense.pdf; and Elizabeth Wilmshurst, "Principles of International Law on the Use of Force by States in Self-Defense", *Independent Thinking on International Affairs* (Chatham House, 2005). https://www.chathamhouse.org/publications/papers/view/108106
63. Kingsley, 2014, 60-64.
64. Bernhard G. Voget, "Chapter 7: Civil-military cooperation of the German armed forces: Theoretical approach and contemporary practice in Kosovo" in *Civil-Military Cooperation in Post-Conflict Operations: Emerging Theory and Practice*, ed. Christopher Ankersen (New York City: Routledge, 2008).
65. Kingsley, 2014, 52.

and national caveats. The broad scope of the mission –which included eliminating hostile insurgent elements, training Afghan forces, nation-building, and reconstruction among others– as well as the large extensions of deployment – divided into regions – made the task of cooperating despite the national caveats ever so more difficult[66]. Some other TCCs had also included national caveats that were equally difficult to work around and this was denounced repeatedly by officials from several TCCs, US Secretary of Defence Robert McNamara, Dutch Defence Minister van Middelkoop, and NATO Secretary-General Jaap de Hoop Scheffer were particularly vocal and made numerous appeals to TCCs to abandon the imposition of national caveats[67]. Of the European nations, many slowly agreed to remove their caveats -notably Norway and Poland in 2006- setting an example for other European countries -such as Romania, Denmark, Estonia, Slovenia, the Czech Republic, Lithuania and Latvia- which reduced or eliminated most of their national caveats[68]. Hungary and Greece also removed all caveats. However, by the official end of ISAF in 2014, there were several TCCs that had participated and had always maintained some number of national caveats, such as Portugal, Italy, Ireland, Iceland, Belgium, Germany and Spain[69]. It is generally accepted that the high number of caveats from many different TCCs

66. John Brophy and Miloslav Fisera. "'National Caveats' and it's Impact on the Army of the Czech Republic" [sic] *Univerzita Obrany* (29 July 2007). https://www.unob.cz/eam/Documents/Archiv/EaM_1_2007/Brophy_Fisera.pdf
67. J. de Hoop Scheffer, "Press Briefing on NATO's Riga Summit by NATO Secretary General, Japp de Hoop Scheffer," *NATO Online Library* (2006) https://www.nato.int/docu/speech/2006/s061206a.htm; U.S. Mission NATO HQ (released by Wikileaks), *06KABUL5414_a, Our Take on Afghanistan Objectives at the Riga Summit.* (9 November 2006). https://wikileaks.org/plusd/cables/06KABUL5414_a.html
68. Kingsley, 2014, 211-216.
69. *Ibid.*

has diminished the overall effectiveness of the mission and caused tensions within NATO[70]. The issue of national caveats is mostly one of political will, as not all governments are as invested in the mission and have different thresholds for the use of violence, deployment of their troops, and military spending. However, it can be partially solved by working together on legal interpretations and their understanding of international responsibilities, specifically a standardised set of RoE upon which all members could agree would be a significant step forward. To that end, the UN Department for Peacekeeping Operations (DPKO) has developed some RoE guidelines, which are often an obligatory basis for national RoEs for TCCs in UN-led peace and security operations[71]. All EU Member States hold that IHL fully applies to EU-led forces that are party to an armed conflict. While commendable, this is a very limited application of IHL, as it would require the EU contingent to be involved *as a party*, which does not necessarily apply to all EU missions and it does not address differences in interpretation. Currently, EU-led forces, while involved in multiple military operations, have not become engaged in combat as parties, and therefore IHL has not become applicable according to this principle. While having a common understanding of IHL and the use of force is useful for the operation, not all Member States have the same international obligations –e.g., Finland only became a party to the Ottawa Treaty (the Mine Ban Treaty) in 2012, before then it was not bound to obey by it– and so it cannot be expected that the RoE will be the same for all missions, as different international laws may apply and the ground context will be different in each case[72]. Therefore, EU missions need flexible RoE that can be adapted to address specific scenarios. Currently, the PSC has the power to amend the RoE – within certain limits –, to ensure a certain level of harmonisation and consistency with international law and other EU foreign missions. A general set of standardised RoE that serves to develop it with more specificity in the OPLAN is useful for the short term. Still, cooperation in the long term may require more work to harmonise legal responsibilities and interpretation of international law.

3. LEGAL FRAMEWORK FOR LIMITATION TO THE RIGHT OF FREEDOM IN MMO

This chapter aims to delve into the complex intertwined overlapping of existing legal frameworks to which MMUs are subject and to which they sometimes abide by when acting in concert. These topics cannot be tackled in just a few pages. They have been subject to heated debates in the academic and military world since the 1990s, when we started witnessing an increasing number of military operations abroad carried out by contingents of different nationalities. Indeed, the purpose of this section is to explore them through real cases brought before the European Court of Human Rights (ECtHR) to give our readers

70. Saideman and Auerswald, 2012.
71. UN Department of Peacekeeping Operations – Military Division, "Guidelines for the Development of Rules of Engagement (ROE) for United Nations Peacekeeping Operations," (May 2002), https://www.aaprc.asia/images/resourcess/9_RULES_OF_ENGAGEMENTS/120_ROE_Guidelines.pdf
72. International Campaign to Ban Landmines, *Landmine Monitor 2012* (November 2012), 6. http://www.the-monitor.org/media/1639374/Landmine_Monitor_2012.pdf

a clearer picture of the legal norms in place, giving particular attention to European troops operations. In construing a European perspective, the jurisprudence of the ECtHR is of crucial importance given that European states are bound by the European Convention on Human Right (ECHR) and the EU itself is in the process of becoming a party to it[73]. Although the United Kingdom (UK) is no longer part of the EU, the UK's posture in multinational overseas military operations has helped the ECtHR to develop its case-law. Furthermore, Brexit does not mean that the United Kingdom is no longer bound by the ECHR. Indeed, it still is, albeit Boris Johnson has recently announced that the UK government wants to "opt out of parts of the ECHR in order to […] protect British troops serving overseas from legal action"[74]. If Johnson were to be successful in his endeavour by repealing the Human Rights Act 1998 (HRA), ECtHR decisions would be less effective, and EU law changes will not bind the UK. Moreover, our analysis will also consider the Third and Fourth Geneva Convention (GC III/IV), the International Covenant on Civil and Political Rights (ICCPR), and more specifically the relationship between the ECHR and GC III/IV, but also ECHR and UNSC resolutions.

The EU has acknowledged the complex relation between IHRL and IHL. To comply with the latter, in its updated Guidelines on promoting compliance with international humanitarian law, it stated that "[IHL and IHRL] may both be applicable to a particular situation and it is therefore sometimes necessary to consider the relationship between them"[75]. The way in which IHL and IHRL intermingle is explained by Murray when he distinguishes 'active hostilities' in MMOs where IHL is applied as the primary legal source, and the 'security operations', where IHRL instead provides the primary legal framework[76]. According to Gentian Zyberi, the EU action in a situation of armed conflict is closer to the "security operations"[77].

We will use these sources to understand how the Court has tackled and ruled on detention and protection to the right to liberty during MMOs.

3.1. Human rights violation, whose responsibility?

It is not by chance that Article 1 of the ECHR starts by declaring that states parties to the Convention "shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I"[78]. The articles concerning the right to liberty inside the convention are Art. 5 ECHR, Art. 9 ICCPR, and Rule 99 ICRC. Before embarking on our discussion, it is necessary to clarify the meaning of the expressions used in this study. The International Committee of the Red Cross (ICRC) helps us define two different kinds of deprivation of liberty, which respectively entail different rights and obligations for the occupying state. Detention "refers to the deprivation of liberty caused by the act of confining a person in a narrowly bounded place, under the control or with the consent of a State, or, in non-international armed conflicts, a non-State actor"[79].

73. Article 6 (2) TEU promises that the EU itself will accede to the Convention
74. Owen Bowcott, " UK government plans to remove key human rights protections," *The Guardian,* September 13, 2020 https://www.theguardian.com/law/2020/sep/13/uk-government-plans-to-remove-key-human-rights-protections?CMP=twt_gu
75. European Union Guidelines on promoting compliance with International Humanitarian Law, adopted by the Council in 2005 and updated in 2009, OJ 2009/C, 303/06.
76. Daragh Murray (ed), *Practitioners' Guide to Human Rights Law in Armed Conflict* (OUP 2016) 88–108, esp 90–92.
77. Gentian Zyberi, "The Applicability of General Principles and Instruments of International Law to Peace Missions of the European Union, "in A. Sari and R.A. Wessel (eds), *Human Rights in EU Crisis Management Operations: A Duty to Respect and to Protect?* CLEER Working Paper Series 2012/6, 21-37
78. Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (adopted 4 November 1950, entered into force 3 September 1953) ETS. No. 5. The rights and freedoms in § I ECHR are enlisted under Art. 2-18.
79. "How does law protect in war?", ICRC Online casebook, https://casebook.icrc.org/glossary/detention.

On the other hand, internment "refers to the deprivation of liberty initiated or ordered by the executive branch – not the judiciary – without criminal charges being brought against the internee. Internment is an exceptional, non-punitive measure of control that may be ordered for security reasons [both for Prisoners of War (POW) and civilians]"[80]. At this point we can make a further fundamental distinction about the type of conflict and the applicable legislation of IHL. Conflict can be classified into four or more different categories, yet for the purpose of our analysis we will take into consideration only international armed conflicts (IACs) and non-international armed conflict (NIACs)[81]. In MMOs, security internment or administrative detention raise substantive legal issues, especially in the context of NIACs given that IHL provides no clear and precise basis for security internment[82]. Both IHL and IHRL (Art. 5 ECHR, Art. 9 ICCPR, Rule 99 ICRC, customary international humanitarian law), prohibit arbitrary detention[83]. Nevertheless, what constitutes 'arbitrary' detention still raises questions and discordance.

Internment is regulated by the GC III regarding POW based on the function of the combatant. With respect to combatants and prisoners of war's internment in IACs, the applicable legal framework is available under GC III. As for civilian's internment it is legal

80. "How does law protect in war?" ICRC, - Online casebook. https://casebook.icrc.org/glossary/internment.
81. For a more detailed classification please see ICRC, "How is the Term "Armed Conflict" Defined in International Humanitarian Law?", Opinion Paper, March 2008. https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf
82. Gentian Zyberi, and Anna Andersson. "A European Perspective on the International Human Rights and Humanitarian Law Relationship in the Context of Multinational Military Operations." In *The 'Legal Pluriverse' Surrounding Multinational Military Operations*, edited by Robin Geiß, and Heike Krieger, (Oxford: Oxford University Press, 2019), Oxford Scholarship Online, 2020. doi: 10.1093/oso/9780198842965.003.0007.
83. Article 5 ECHR, Article 9 ICCPR, Rule 99 ICRC.

when "absolutely necessary" or is justified on grounds of "imperative security" [84] [85].

The ICRC, as well as states in general, in the context of IACs, deem IHL as an adequate legal basis for detention. The same cannot be said for NIACs. Indeed, detention in NIACs remains an open question due to ambiguity of norms, practice and legislation. According to Daragh Murray, "on the basis of current understandings of international law – and the prohibition of arbitrary detention in particular – it is concluded that international humanitarian law must be interpreted as establishing implicit detention authority, in order to ensure the continued regulation of armed groups"[86]. Murray's ideas, however, have been challenged by scholars, such as Kevin Jon Heller[87]. This highlights how this question is still subject to debate amongst academics.

In October 2012, after five years of meetings and debates between international organisations, states, and civil society, the Copenhagen Principles on the Handling of Detainees in International Military Operations were released to address the handling and transfer of detainees in NIACs and peace operations[88]. Amnesty International voiced fears that the Principles could be used by states to either avoid their obligations under IHL and IHRL or undermine the protection of the human person[89].

As mentioned before, EU missions and operations under the CSDP including their operational plan (OPLAN) and rules of engagement (RoE) take into account internationally recognised human rights standards[90]. The right to liberty is strictly connected to the right to life under Art. 2 ECHR, but also to the treatment of the human person under Art. 3 ECHR, where "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment"[91]. In the context of the European Union Naval Force Somalia (EU-NAVFOR-ATALANTA), when European forces capture suspected pirates or armed robbers at sea, they are not to transfer them to third parties "unless [...] transfers have been agreed with that third State in a manner consistent with relevant international […] 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"[92]. During such operation, the frigate of the German Federal Navy "Rheinland Pfalz" captured nine suspects, who after an exchange of letters between the EU and the Kenyan government were transferred to the Kenyan authorities for persecution[93]. EU states are allowed to transfer suspects to third states, provided that there are existing arrangements between the parties to ensure respect of human rights[94].

Similarly, in the case *Al-Saadoon and Mufdhi v the United Kingdom,* two Iraqi nationals were arrested by British servicemen on April 30, 2003, and November 21, 2003, respectively[95].

84. The Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention, GC III) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, Articles 4,5, 21,118,119.
85. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention, GC IV) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, Articles 4, 27(4), 41-43, 78, 132, and 75 AP I.
86. Daragh Murray, "Non-State Armed Groups, Detention Authority in Non-International Armed Conflict, and the Coherence of International Law: Searching for a Way Forward", *Leiden Journal of International Law* (2017), 30, 435–456
87. Kevin Jon, Heller, "IHL Does Not Authorise Detention in NIAC: A Response to Murray", Opinio Juris 2017. https://opiniojuris.org/2017/03/22/33037/
88. Lawrence, Hill-Cawthorne, "The Copenhagen Principles on the Handling of Detainees: Implications for the Procedural Regulation of Internment", *Journal of Conflict and Security Law,* Volume 18, Issue 3, Winter 2013, 481–497.
89. Amnesty International, *Outcome of Copenhagen Process on detainees in international military operations undermines respect for human rights,* 23 October 2012 https://www.amnesty.org/en/documents/IOR50/003/2012/en/
90. Frederik, Naert, "The Application of human Rights and International humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement," *CEDRI/ATLAS*, 2011, 61-71
91. Article 3, ECHR.
92. Article 12 Council Joint Action 2008/851/CFSP of November 10, 2008, *OJ* L 301, 12.11.2008, 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.
93. Administrative Court of Cologne, File No. 25 K 4280/09, 11/11/2011. https://www.justiz.nrw.de/nrwe/ovgs/vg_koeln/j2011/25_K_4280_09urteil20111111.html
94. *OJ* L 79, 25.3.2009, at 49, https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:079:0049:0059:EN:PDF
95. Al-Saadoon and Mufdhi v the United Kingdom App. no 61498/08 (ECtHR, Judgment, 2 March 2010)

The two applicants issued judicial proceedings against the UK on the grounds that their transfer to Iraqi authorities put their life at risk because in Iraq the government reintroduced the death penalty in the Penal Code[96]. The transfer was therefore declared unlawful under Art. 3, 13, and 34 ECHR and Protocol No. 13, where according to the latter: "[t]he death penalty shall be abolished. No one shall be condemned to such penalty or executed."[97] Indeed, unless European states are granted special agreements with third countries in which it is clearly stated and guaranteed that the transfer of individuals will not be subjected to the death penalty, such transfers are illegal.

The third case that deserves attention deals with the overlapping between UNSC resolutions and the ECHR and relates to internment procedures. The case *Al Jedda v the United Kingdom* concerns an Iraqi national, who after refusing to join the Ba'ath Party, left Iraq in 1978, lived in different countries, and finally was granted asylum in the UK in 1992. In 2004, Al Jedda and some family members decided to travel back to Iraq from London via Dubai. When they landed in Dubai, he was arrested and questioned by the United Arab Emirates Officers. After twelve hours, he was released and arrived in Iraq on September 28, 2004. On October 10, 2004 he was arrested by the US based on information provided by the British Intelligence and taken to a detention centre run by the British forces, where he was interned until December 30, 2007. The British authorities' claims against *Al Jedda*'s interment were on grounds of "imperative security"[98]. He was thought to be participating in terrorist activities against the Multinational Forces in Iraq, but no criminal charges were brought against him[99]. The Court has held in *Medvedyev and others v France* that Article 5(1)(c) ECHR does not allow for detention if there is no intent to bring criminal charges within a reasonable timeframe. Moreover, the UK argued that the UNSC 1546 (2004) created an obligation under Art. 103 of the UN Charter that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".[100] In *Behrami and Behrami v France*, the ECHR ruled that soldiers' actions were carried out within the UN framework. Therefore, with regard to multinational operations under the UN mandate in Kosovo (UNMIK), they received immunity from the UN before domestic courts and the case was dismissed[101] .However, in *Al Jedda* the Court decided not to apply the *Berhami* judgments because UNSC Chapter VII resolution does not in itself justify detention unless detention is explicitly provided for and the details of the detention regime are specified or the relevant state has derogated from Article 5 of the European Convention on Human Rights (ECHR)[102]. The outcome is that unless the Security Council expressively and clearly mandates such detention, European countries and third parties to the ECHR shall not detain any person without charging the individual with a criminal offence and internment under IHL should be viewed as a measure of last resort[103].

We decided to describe *Hassan v the UK* as

96. *Ibid.*
97. Article 1, Protocol No. 13, ECHR.
98. Articles 41-43, 78 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War
99. *Al Jedda v The United Kingdom*, App. no. 27021/08, (ECtHR, Grand Chamber Judgement, 7 July 2011, 3).
100. United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 103. https://legal.un.org/repertory/art103.shtml
101. *Behrami and Behrami v France* App no 71412/01 (ECtHR, Grand Chamber Judgement on Admissibility, 2 May 2007)
102. *Al Jedda v the UK*, paras. 100, 107, 109.
103. Ibid. para. 107

the last case study in this chapter, as in its 2014 judgment the ECHR shed some light on the convergence of the GC III and IV with Art. 5 ECHR. The case relates to the issue of whether security internment in IACs may be compatible with Art. 5 ECHR, because as we have just seen in the previous case, Art. 5 ECHR, normally prohibits internment and administrative detention. The case concerns Tarek Hassan, brother of the applicant to the case. Being a member of the Ba'ath party, the latter went into hiding when the US led Multinational Force entered Iraq in 2003. The applicant's brother was found on the roof of his brother's house with an AK-47 machine gun at the moment of his arrest, which he declared to be for personal protection[104]. Hassan was detained at Camp Bucca, Iraq, which as of March 23, 2003 was a UK detention facility, even though it later became a US facility, but for operational convenience the UK continued to use Camp Bucca for detaining individuals[105]. However, Hassan disappeared after an ambiguous release date, and was found dead in unexplained circumstances. The Court held that the UK exercised jurisdiction on the applicant's brother from his arrest until his release by coach under military escort at the drop-off point. This case's uniqueness is brought about by the fact that the British authorities requested the Court to disapply their obligations under Art. 5 ECHR and include IHL in its interpretation of the facts. As a result, the Court welcomed the new interpretation of Art. 5 ECHR in line with the general principles of international law, including the rules of IHL, and held in its final judgement that there had been no violation of Art. 5 (1)-(4) of the Convention. Further, the Court also dismissed the applicant's claims under Art. 2 and 3 of the Convention for insufficiency of evidence[106]. However, the ECtHR findings' in Hassan are focused on the deprivation of liberty during IACs, which does not mean a similar approach and application to NIACs will be followed.

4. INTEGRATION IN CYBERSPACE AND THE VALUE OF SOFT LAW

By providing people across the globe with instant access to information, communication, and novel economic opportunities, cyberspace and the rapid development of Information and Communication Technologies (ICTs) have essentially transformed the world economy and the way of life. As information technology becomes more widespread and integrated into our daily lives, the probability of compromise by malicious cyber activity increases[107]. Cyberattacks that deeply affect international peace and the global economy, therefore, are no longer "futuristic or far-fetched", but rather the reality of cyberspace[108].

The 2007 Estonian attacks illustrate the severity of the threats facing states' cybersecurity. Following the relocation of a Soviet

104. *Hassan v the United Kingdom* App no 29750/09 (ECtHR, Grand Chamber Judgment, 16 September 2014) para. 53
105. *Hassan v the UK. p. 6*
106. *Hassan v the UK. para. 57*
107. John S. Davis II et al., *Stateless Attribution: Towards International Accountability in Cyberspace*, (Santa Monica: RAND Corporation, 2017), 1.
108. Michael N. Schmitt and Sean Watts, "Beyond State-Centrism: International Law and Non-state Actors in Cyberspace", *Journal of Conflict & Security Law*, vol. 21, no. 3 (2016), 596.

war memorial, Estonia was hit by a series of massive cyberattacks lasting three weeks[109]. Taking into consideration that the small Baltic country is one of the most wired societies in Europe, the Distributed Denial of Service (DDoS) attacks were particularly harmful, resulting in a temporary interruption of service on many government and commercial websites and profoundly affecting the functioning of the country's economy[110] [111] [112] [113]. Initially, the attacks were attributed to Russia due to the political atmosphere at the time, as well as past Russian actions. However, this explanation was questioned by technical experts, and even NATO officials were disinclined to assign blame to the Russian government. Because of disagreements over the links between the attackers and Russia, what at first appeared to be a pretty obvious case of aggression became a gridlock. Although it is highly probable that the Russian state launched the cyberattack, its involvement has never been proven[114]. Yet, the attack continues to be an example of Russia's cyber capabilities that following cyberattacks will be measured against[115].

In hindsight, the Estonian attacks were "fairly mild and simple", far less damaging than the cyberattacks that have followed116. Even

109. Ian Traynor, "Russia accused of unleashing cyberwar to disable Estonia", *The Guardian*, May 17, 2007. Available at: https://www.theguardian.com/world/2007/may/17/topstories3.russia.

110. By 2007, 98% of Estonian territory was covered with Internet access, and mobile phone penetration was almost 100%. Eneken Tikk, Kadri Kaska, and Liis Vihul, "International Cyber Incidents: Legal Considerations", (Tallinn: Cooperative Cyber Defence Centre of Excellence, 2010), 17.

111. According to Clark and Landau, DDoS attack is a concerted malevolent effort in which a large number of machines from all over the Internet attack a site or a set of sites in order to disrupt service by overloading a server or a link. David D. Clark and Susan Landau, "Untangling Attribution", Harvard National Security Journal, vol. 2 2011, 6.

112. Heather H. Dinniss, *Cyber Warfare and the Laws of War*, (Cambridge: Cambridge University Press, 2014), 38-39.

113. Eneken Tikk, Kadri Kaska, and Liis Vihul, "International Cyber", 25.

114. Marcus Schulzke, "The Politics of Attributing Blame for Cyberattacks and the Cost of Uncertainty", *Perspective on Politics*, vol. 16 no. 4, 960.

115. Ibid. It is necessary to recognize that this situation poses a threat to international peace since, according to Gomez, the "adversary's past behaviour may motivate a disproportionate response to pre-empt any further threats". Miguel Alberto Gomez, "Past Behavior and Future Judgements: Seizing and Freezing in Response to Cyber Operations", *Journal of Cybersecurity*, vol. 5, no. 1 2019, 1-2.

116. Michel N Schmitt, ed., *Tallinn 2.0 on the International Law Applicable to Cyber Operations* (New York: Cambridge University Press, 2017), xxiii.

so, they brought cyberspace to the forefront of international relations discussions, raising awareness among states about the severe risk posed by the growing dependence on ICTs, and the possibility of conflict in this new and unique environment. Against this background, increasing integration between nations is nothing but essential.

Although the principal building blocks of the World Wide Web were laid more than two decades ago, the community of states was not able to reach a broad international agreement on how to govern cyberspace. In fact, some scholars even suggest that the cyber domain seems "resistant to codification of the applicable rules in a comprehensive multilateral binding treaty"117. However, note that the dearth of cyber-specific regulations is not for lack of trying by major international actors. Already in 1996, the French government pushed for the creation of the *Charter for International Cooperation on the Internet*, which would be "an accord comparable to the international law of the sea"118. The proposal, however, was met with apathy by other international stakeholders.

In January 2002, the UN General Assembly requested the Secretary-General to settle a group of governmental experts to conduct a study on "relevant international concepts aimed at strengthening the security of global information and telecommunications systems"119. The United Nations' Group of Governmental Experts on Developments in the Field of Information and Telecommunications thus became the leading state-based initiative for the codification of international law vis-à-vis the cyber domain, but its success was limited. The Group held promise for the clarification of cyber-related customary international law, but it left the global community with an unresolved legal conundrum in which opinions appear to be diverging and solidifying instead of converging120. According to Herinksen, the collapse of the UN GGE initiative was "fairly predictable" because the debate concerning the regulation of cyberspace is "as much about strategy, politics and ideological differences (if not more so) than it is about law"121 122.

Between 2004 and 2015, the GGE submitted three reports that expressed the participating states' unanimous opinion. The most relevant report for this study was launched in 2013, in which the GGE recognised that "[i]nternational law, and in particular the Charter of the United Nations, is applicable and is essential to maintaining peace and stability and promoting an open, secure, peaceful and accessible ICT environment"123. The Group also claimed that the principles of sovereignty and state responsibility apply to cyberspace124.

Thus, in spite of the lack of a specific legal framework, cyberspace is certainly not a lawless domain beyond the control of public international law. It is well-settled that general principles and rules of international law also apply to cyber operations125. Indeed, if international law is to be an effective governance arrangement, it should be flexible to

117. Kubo Mačák, "Is the International Law of Cybersecurity in Crisis?", NATO CCD COE Publications, 8th International Conference on Cyber Conflict (2016), 130.
118. Timothy S. Wu, "Cyberspace Sovereignty? - The Internet and the International System", *Harvard Journal of Law and Technology*, vol. 10, no. 3 (1997), 660.
119. United Nations General Assembly, "Developments in the field of information and telecommunications in the context of international security", A/RES/56/19 (7 January 2002).
120. Elaine Korzak, "UN GGE on Cybersecurity: The End of an Era?," *The Diplomat*, July 31, 2017. Available at: https://thediplomat.com/2017/07/un-gge-on-cybersecurity-have-china-and-russia-just-made-cyberspace-less-safe/.
121. Anders Henriksen, "The end of the road for the UN GGE process: The future regulation of cyberspace", *Journal of Cybersecurity*, vol. 5, no. 1 (2019), 2.
122. *Ibid.*
123. United Nations General Assembly, "Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security", UN Doc. A/68/98*, June 24, 2013, para. 19.
124. *Ibid.*, para. 20-23.
125. According to Henriksen, the 2013 UN GGE report "reflected an emerging consensus that cyberspace is subject to the same general principles of international law that governs the more physical domains". (Anders Henriksen, "The end of the road", 3). The remaining questions, therefore, is which international law?

new situations without the necessity to recreate a whole set of rules on each occasion126. Despite these advances, however, many underlying questions remain virtually unanswered. Perhaps most importantly, how are international legal norms supposed to apply to the complex cyber domain127?

With this in mind one should be cognisant that, even though cybersecurity has certainly drawn huge attention in recent years, short-term prospects for the establishment of a far-reaching international treaty or the formation of new customary international law have been described as "not encouraging" and even "unfeasible" 128 129. Given this gloomy picture, scholars, cyber-experts, and international stakeholders have been attempting to fill the normative void with their views on how international law applies to the cyber domain. Note that these non-state-driven initiatives were only possible because of the "power vacuum" created by states' reluctance to undertake the international law-making process130. As a result, by moving into this vacated norm-creating space that once was occupied exclusively by state actors, the private sector and academia have been acting as norm entrepreneurs131.

4.1. Leading non-state initiatives

Different proposals have been put forward with distinct scopes of organisational structure, stakeholder participation, and activity to potentially protect the stability and resiliency of the global digital environment[132]. This subject, however, warrants a more extended discussion than the one proposed in this paper. As such, this study focuses on the leading non-state-driven initiative that epitomises the phenomenon described above: the Tallinn Manual Project.

The Tallinn Project brought together an international group of independent experts led by Professor Michael Schmitt. The project published two editions of the Manual, respectively in 2013 and 2017[133], under the auspices of the NATO Cooperative Cyber Defence Centre of Excellence (CCD COE). Their texts, however, must not be seen as representing the views of NATO or sponsoring nations. Rather, the Manuals should be understood as a reflection of the experts' view, all acting in their own private capacity[134]. It should be noted that this project is neither an international treaty on cyber law nor does it set forth *lex ferenda*, but it is a restatement of international law as it is – *lex lata*[135].

The 2013 edition, entitled the *Tallinn Manual on the International Law Applicable to Cyber Warfare*, pays particular attention to cyber activities that occur above the level of use of force and encompasses purported rules of customary international law, the larger part of which related to the *jus ad bellum*[136] and

126. Kubo Mačák, "From Cyber Norms to Cyber Rules: Re-engaging States at Law-makers", *Leiden Journal of International Law*, vol. 30, no. 4 (2017), 9.
127. Anna-Maria Osula and Henry Rõigas, eds., "*International Cyber Norms: Legal, Policy & Industry Perspective*", NATO CCD COE Publications (2016), 14.
128. Oona A. Hathaway et al., "The Law of Cyber Attack", *California Law Review*, vol. 100 (2012), 866.
129. Jack Goldsmith, "Cybersecurity Treaties: A Skeptical View", in *Future Challenges in National Security and Law*, edited by Peter Berkowitz (Hoover Institution, Stanford University, 2011), 12.
130. Kubo Mačák, "From Cyber Norms", 12-13.
131. Martha Finnemore and Duncan B. Hollis, "Constructing Norms for Global Cybersecurity", *The American Journal of International Law*, vol. 110, no. 3 (2016), 446. According to Finnemore and Sikkink, norm entrepreneurs are "agents having strong notions about appropriate or desirable behaviour in their community" (Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change", *International Organization*, vol. 52, no. 4 (1998), 896-97. Henry Dunant, the founder of the International Committee of the Red Cross, is a prime example of norm entrepreneurship.
132. For instance, Chernenko et al. recommend the creation of an "independent, international cyber court or arbitrage method that deals only with government-level cyber conflict" (Elena Chernenko et al., "Increasing International Cooperation in Cybersecurity and Adapting Cyber Norms", *Council of Foreign Relations*, February 23, 2018. Available at: https://www.cfr.org/report/increasing-international-cooperation-cybersecurity-and-adapting-cyber-norms.
133. Michael N. Schmitt, ed., *Tallinn Manual on the International Law Applicable to Cyber Operations* (New York: Cambridge University Press, 2013), (hereinafter 'Tallinn Manual'); Michel N Schmitt, ed., *Tallinn 2.0 on the International Law Applicable to Cyber Operations* (New York: Cambridge University Press, 2017), (hereinafter 'Tallinn Manual 2.0').
134. Tallinn Manual, 23; Tallinn Manual 2.0, 2.
135. Tallinn Manual, 19; Tallinn Manual 2.0, 3.
136. Tallinn Manual, rules 10-19.

the *jus in bello*[137]. The Manual was considered a "remarkable achievement"[138] and, according to Banks, provided "much-needed confidence for states that international law applies in the cyber domain"[139]. Early reviews, nevertheless, criticised the project's emphasis on cyber operations that amount to use of force since the majority of (if not all) cyber activities fall below the use of force threshold[140]. Another major criticism of the Tallinn Manual is the lack of geographic diversity among the group of experts, all of whom hail from Western Europe, Australia, and the USA. Consequently, the project's impartiality is challenged, hindering its acceptability and application by states outside the Global North. As noted by Eichensehr, the Manual is "channelling, even though not officially representing, a particular worldview with respect to the laws of armed conflict"[141].

In 2017, the *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* was published, considerably expanding the project's scope. Now, it also includes the analysis of the international legal framework that applies to malicious cyberattacks that do not meet the use of force threshold. Furthermore, the new Manual addresses peacetime legal regimes, such as state responsibility, human rights law, and the laws of space, air, and the sea. On the whole, the Tallinn 2.0 "reflects a careful effort to move international law forward in the challenging domain of cyberspace"[142]. Mačák further echoes this idea by arguing that the expansion and revision of the document will probably "further strengthen the project's overall relevance as well as its claim to authority"[143]. Banks, on the other hand, explains that the Tallinn 2.0's provisions and commentaries are "necessarily general in nature, sometimes ambiguous, and do not necessarily reflect settled international law"[144].

Despite criticism, the Tallinn initiative provides a comprehensive and attentive analysis of how the *jus ad bellum* and *jus in bello* applies to the cyber environment, along with valuable commentaries on controversial issues that need to be further discussed. Even though the reliance on Western-centric approaches might handicap Tallinn's acceptance in non-Western countries, the project still is an essential tool for scholars, international lawyers, policymakers, and international stakeholders.

Note that the rules brought by the Tallinn Manuals articulate purported customary international obligations that by themselves are binding on all states, persistent objectors notwithstanding[145]. The Manuals, however, are non-state-driven, quasi-legal instruments which do not have any legally binding force[146]. In other words, they are soft law rules[147]. In fact, the Tallinn Manuals could hardly amount to anything but a non-bind-

137. Tallinn Manual, rules 20-95.
138. Rebecca Ingber, "Interpretation Catalysts in Cyberspace", *Texas Law Review*, vol. 95 (2017), 1531.
139. William C. Banks, "State Responsibility and Attribution of Cyber Intrusions After Tallinn 2.0", *Texas Law Review*, vol. 95, no. 7 (2017), 1494.
140. Kubo Mačák, "From Cyber Norms", 16. On this topic, Xinmin explains that the majority of cyberattacks are perpetrated by non-state actors, which are generally seen as cybercrimes or infringements of cyber rights that should be governed by domestic criminal law or the law of torts. Also, she points that "[e]ven if some of these attacks are conducted by states or may be attributable to states, most of them fall far below the threshold of 'threat of use of force' or 'armed attack'. Instead, they are only cyber-attacks of minimal levels of intensity, which are comparable to other internationally wrongful acts such as interference with internal affairs of other states (Ma Xinmin, "Key Issues and Future Development of International Cyberspace Law", *China Quarterly of International Strategic Studies*, vol. 2, no. 1 (2016), 189-92.
141. Kristen Eichensehr "Review of the Tallinn Manual on the International Law Applicable to Cyber Warfare", *The American Journal of International Law*, vol. 108, no. 3 (2014), 588.
142. Tom Ginsburg, "Introduction to Symposium on Sovereignty, Cyberspace, and Tallinn Manual 2.0", *AJIL Unbound*, vol. 111 (2017), 205.
143. Kubo Mačák, "From Cyber Norms", 17.
144. William C. Banks, "State Responsibility", 1494.
145. Tallinn Manual 2.0, 4. According to Currie, a persistent objector is a "state that clearly and consistently manifests its objection to a rule of international law since its inception, thereby escaping its universally binding effect" (John H. Currie, *Public International Law* (Toronto: Irwin Law Inc, 2008), 587).
146. In its introduction, the 2013 Tallinn Manual affirmed that it was designed to be a "non-binding document" (Tallinn Manual, 16). By contrast, in the Tallinn Manual 2.0, there is no indication that it ought to be seen as a non-binding document.
147. Snyder defines 'soft laws' as those "rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects (Francis Snyder, "The Effectiveness of European Community Law: Institutions, Processes, Tools, and Techniques", *The modern Law Review*, vol. 56 (1993), 32. Soft law is normally included within non-binding legal instruments, such as recommendations, declarations, codes of conduct, guidelines, and opinions. Zerilli notes that "even a simple draft proposal elaborated by groups of international experts could possibly fit into the soft law category" (Filippo M. Zerilli, "The Rule of Soft Law: An Introduction", *Journal of Global and Historical Anthropology,* vol. 56 (2010), 9.

ing document[148] since states still are "the legislators of the international legal system"[149]. That said, one may call into question the importance of this initiative to develop international law. Is soft law an authentic law? Is soft law effective to produce norms despite its non-binding nature?

4.2. The value of soft law

According to Besson, international legal norms might have different levels of normativity[150], ranging from "being low (or soft) as with legal norms in the making to being imperative as with norms of *jus cogens*"151. Certainly, the Tallinn Manual project has a lower degree of legal normativity than binding international rules152. Indeed, as stated by the International Law Commission (ILC) in its study on the Identification of Customary International Law, the "conduct of other actors [than states] is not practice that contributes to the formation, or expression, of rules of customary international law"153. This, however, does not imply that these initiatives are utterly irrelevant for the law-making process or even for the development of cyber law. Quite the opposite: considering the normative plurality in international law, non-state-driven initiatives of this kind might be valuable both in quantity and quality154. For Thirlway, "soft law is a vital intermediate stage towards

148. Kubo Mačák, "From Cyber Norms", 18-19.
149. Stefan Talmon, "The Security Council as World Legislature", *The American Journal of International Law*, vol. 99, no. 1 (2005), 175.
150. By 'normativity', I mean "the law's claim to authority, that is, its claim to provide legal subjects with exclusionary albeit *prima facie* reasons for action through binding legal norms or in other words its claim to create obligations to obey the law that in principle preclude some countervailing reasons for action" (Samantha Besson, "Theorizing the Sources of International Law", in *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas (Oxford University Press, 2010), 173.
151. *Ibid.*, 174.
152. Kubo Mačák, "From Cyber Norms", 19.
153. International Law Commission, *Draft Conclusions on Identification of Customary International Law, with Commentaries*, A/73/10 (2018), conclusion 4(3), 130.
154. Samantha Besson, "Theorizing", 170.

a more rigorously binding system, permitting experiment and rapid modification"155.

Moreover, even though these intermediary legal products are not "valid legal norms", they might possess a certain evidentiary importance in the next stages of the development of rules of international law156. Put differently, non-binding documents, such as UN resolutions, might evince the existence of both *opinio juris* and state practice which could later support the formation of customary norms157. By this logic, hard and soft laws are not mutually exclusive and should be seen as "tools provided with a different degree of normativity along a *continuum*"158. It also should be noted that soft law-making processes normally involve non-state actors and thus are more "multicultural and inclusive" than others159.

According to Article 38(1) of the Statute of the International Court of Justice (ICJ), scholarly works are a secondary source of public international law that informs the application of primary sources160. Hence, it seems fair to conclude that the aforementioned initiative is not only highly pertinent, but also "likely to prove especially influential"161. Nevertheless, this situation is by no means ideal since states, and only states, hold the formal authority to create international law162. As Judge Higgins aptly put it, "[s]tates are, at this moment of history, still at the heart of the international legal system"163. However, it is important to bear in mind that the norms proposed by the Tallinn Manual Project might "mature through codification into treaty law or crystallise into customary law", so that it delineates the exact limits of activities in cyberspace164.

This dynamic is certainly not without precedent. The Antarctic legal regime is the epitome of this. In the 1960s and 1970s, many non-legally binding norms were brought in with high hopes of conserving both living and non-living resources of Antarctica165. Joyner argues that the adoption of these non-binding instruments laid the international legal foundation for the treaty that was yet to come166. Ultimately, the majority of these norms were codified into the 1991 *Protocol on Environmental Protection to the Antarctic Treaty*, a binding agreement that has been ratified by all major international actors, including the USA, China, and Russia167.

However, one must be aware that the cyber domain differs in important ways from the Antarctic regime. Perhaps the most notable difference is that while non-state-driven initiatives have spearheaded the law-making process vis-à-vis cyberspace, the development of binding rules for Antarctica's conservation had been led mainly by state actors. Yet, this regime is a valuable example that illustrates

155. Hugh Thirlway, *The sources of International Law*, (Oxford University Press, 2019), 186-87. Available at:
156. Samantha Besson, "Theorizing", 170.
157. *Ibid.*
158. Filippo M. Zerilli, "The Rule", 11.
159. Samantha Besson, "Theorizing", 170-71. Regarding soft law, Joyner has interesting points that are worthwhile looking at. For instance, he notes that states are usually "more willing to be innovative when the adopted instrument is not legally binding" (Christopher C. Joyner, "Recommended Measures Under the Antarctic Treaty: Hardening Compliance with Soft International Law", *Michigan Journal of International Law*, vol. 19, no. 2 (1998), 414.
160. "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
international custom, as evidence of a general practice accepted as law;
the general principles of law recognized by civilized nations;
subject to the provision of Article 59, judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law". United Nations, *Statute of the International Court of Justice,* April 18, 1946, Article 38(1).
161. Michael N. Schmitt and Liis Vihul, "The Nature of International Law Cyber Norms", in Anna-Maria Osula and Henry Rõigas, *International Cyber Norms: Legal, Policy & Industry Perspectives*, NATO CCD COE (2016), 47.
162. Kubo Mačák, "From Cyber Norms", 19.
163. Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, (Oxford: Claredon Press, 1994), 39.
164. Luke Chircop, "A Due Diligence Standards of Attribution in Cyberspace", *International and Comparative Law Quarterly*, vol. 67 (2018), 643.
165. Christopher C. Joyner, "Recommended Measures", 420. In the 1960s, more than seventy recommended measures were adopted by the Antarctic Treaty Consultative Party Meetings (ACTMs); and in the 1970s, more than fifty were adopted.
166. *Ibid.*
167. United Nations, *Protocol on Environmental Protection to the Antarctic Treaty*, United Nations Treaty Series, vol. 2941, A-5778, October 1991.

the codification of soft law norms168. With this in mind, the current status of international cyber law should be seen as an early stage towards the codification or crystallisation of cyber hard law169.

CONCLUSION

From ancient Greece to modern days, MMOs have become a cornerstone of national and international security structures. This argument generates an obvious puzzle: are MMOs the best option for international security? Far be it from us to suggest that they are not a good option. After all, this kind of military operations not only improve cost-effectiveness and efficiency of missions, but also increase their legitimacy before the international community[170]. However, it is important to bear in mind that MMOs are plagued by challenges, such as the language problem, and intricate legal questions that remain unanswered. The more states are involved, the more complex the situation becomes, especially considering that there is no broad, multilateral agreement that sets forth international rules and standards for MMOs. It is perhaps important to underline that, although governments agree to engage in military operations together, that does not necessarily mean that they share the same strategic interests or goals. Conciliating diverging interests and goals, however, is not an easy task.

Regarding cyberspace, by filling the void created by states' reluctance to undertake the international law-making process, non-state-driven initiatives -especially the Tallinn Manuals- have been providing much-needed clarity to some grey areas of international cyber law171. These initiatives, however, are constrained by their state-centric approaches, non-binding character, and interpretative methods, which usually lack the necessary legal safety172. Therefore, non-state initiatives represent a relevant but primitive point in the discussion about the application of international law to the cyber domain173. They should be seen as a means to an end, not an end in itself174.

Considering the ever-increasing costs of insecurity and uncertainty related to an ungoverned cyber domain, states may soon come to realise the necessity for an international legal framework capable of addressing cyber-attacks. As professor Koh aptly put it, "compliance with international law *frees* us to do more, and to more legitimately, in cyberspace, in a way that more fully promotes our national interests"175. Therefore, one can only hope that states do not wait for the occurrence of a "cyber 9/11" to start integrating vis-à-vis cyberspace.

168. Kubo Mačák, "From Cyber Norms", 21.
169. *Ibid.*
170. Geiß and Krieger, *The 'Legal Pluriverse'*, 19.
171. *Ibid.*, 1.
172. Kosmas Pipyros et al., "A New Strategy for Improving Cyber-Attacks Evaluation in the Context of Tallinn Manual", *Computer & Security*, vol. 74 (2017), 381.
173. Banks, "State Responsibility", 1513.
174. In this regard, Mačák points out that non-state initiatives might serve "as norm-making laboratories", permitting states to identify and assess advantages and disadvantages of a number of proposals. Kubo Mačák, "From Cyber Norms", 30-31.
175. Harold H. Koh, "International Law in Cyberspace", *Harvard International Law Journal, vol. 54* 2012, 10-12.

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- Promoting interoperability and cooperation of armies, while seeking to bring together concepts, doctrines and procedures;
- Contributing to a common European understanding of land defence issues. Finabel focuses on doctrines, trainings, and the joint environment.

Finabel aims to be a multinational-, independent-, and apolitical actor for the European Armies of the EU Member States. The Finabel informal forum is based on consensus and equality of member states. Finabel favours fruitful contact among member states' officers and Chiefs of Staff in a spirit of open and mutual understanding via annual meetings.

Finabel contributes to reinforce interoperability among its member states in the framework of the North Atlantic Treaty Organisation (NATO), the EU, and *ad hoc* coalition; Finabel neither competes nor duplicates NATO or EU military structures but contributes to these organisations in its unique way. Initially focused on cooperation in armament's programmes, Finabel quickly shifted to the harmonisation of land doctrines. Consequently, before hoping to reach a shared capability approach and common equipment, a shared vision of force-engagement on the terrain should be obtained.

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