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The International Responsibility of NATO and Its Personnel during Military Operations

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2020-12

Klabbers , J 2020 , ' The International Responsibility of NATO and Its Personnel during Military Operations ' , International organizations law review , vol. 17 , no. 3 , pp. 683-686 . <https://doi.org/10.1163/15>

<http://hdl.handle.net/10138/336803>

<https://doi.org/10.1163/15723747-2019014>

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David Nauta, *The International Responsibility of NATO and Its Personnel During Military Operations*,

Leiden: Martinus Nijhoff, 2018, 194 pp, ISBN 9789004354616

The academic discipline of international organizations law is a strange discipline (if discipline it is¹). While several hundreds of international organizations are in existence, most of them operate below the scholarly radar screen. Much writing focuses on a handful of organizations (the UN, the EU, the WTO, the World Bank), but we know very little of, say, the International Geodetic Union, or the International Meteorological Organization. The leading monograph on the ICAO dates back to the 1960s²; the leading monograph on the IOM was commissioned by the IOM itself³, and one would be hard pressed to find monographs on quite a few other international organizations. As a result, we often draw general conclusions on the basis of very selective – and possibly highly specific – materials when writing about international organizations, and without making analytical distinctions between regional and universal organizations, specialized or general organizations, or technical or not-so-technical organizations.

In this light, the study by David Nauta, based on a doctoral dissertation defended at the Radboud University of Nijmegen in 2016, is a more than welcome addition to the library on international organizations. In systematic manner Nauta, in daily life a lawyer with NATO's Joint Warfare Centre in Stavanger, Norway, explores to what extent NATO and its personnel can be held responsible under international law, and for which sort of activities. From practice, he derives three types of scenarios. The first involves human trafficking and forced prostitution in Kosovo, engaged in by KFOR, a NATO operation. His second case involves the rendition of prisoners from NATO custody to the Afghan authorities, exposing the prisoners to serious risks of torture and similar activities. And the third scenario involves the Kunduz incident in Afghanistan, where a NATO military official ordered an air strike on two fuel tankers, allegedly disregarding the risk this posed to civilians who may have been present.

The three scenarios, set out in the second chapter, recur throughout the study, as vehicles for discussion of distinct types of actions, but the mode of analysis is generalized. Having discussed NATO's establishment and institutional set-up in chapters three and four, Nauta delves into the legal questions in chapters five through seven, essentially asking himself three questions. First, there is the matter of NATO's international legal personality; second, what obligations does NATO have under international law, and third, which acts can be attributed to NATO? As this enumeration indicates, the resulting work is a fairly conventional doctrinal legal study, which studiously follows the requirements for responsibility set out in the ILC's 2011 Articles on the Responsibility of International Organizations.

But even a conventional doctrinal legal study must make some hard choices, especially perhaps when applying the ILC Articles. Following the ILC Articles, Nauta pays a lot of attention to the question whether NATO has international legal personality. The founding fathers never explicitly endowed it with such personality, but then again, there is nothing unusual about that: until the fiasco involving the Maastricht Treaty and the EU, few

¹ See Jan Klabbbers, 'The Paradox of International Institutional Law', (2008) 5 *International Organizations Law Review*, 151-173.

² See Thomas Buergenthal, *Law-making in the International Civil Aviation Organization* (1969).

³ See Marianne Ducasse-Rogier, *The International Organization for Migration, 1951-2001* (2001).

organizations were expressly given international legal personality.⁴ As a result, much comes to rely on implied evidence of personality: treaty-making powers, for instance, make little sense in the absence of personality, and immunities may signify much the same. In the end, then, Nauta concludes that NATO is best seen as an international legal person, and that is a conclusion that is difficult to resist. What Nauta does not address is the preliminary question why personality would be a threshold condition. Obviously, the quick answer resides in the 2011 ILC Articles, which make it a pre-condition, but even so, it remains nebulous why an entity could only be held responsible if it possesses a formal quality in a legal order which generally declines any insistence on formal qualities. Why would it not be possible to hold a temporary alliance responsible, or a short-lived 'coalition of the willing'? Admittedly it may be difficult to freeze the assets of a non-person or devise other kinds of personalized sanctions, but then again, these are exceptional in the international legal order at any rate. The ILC Articles follow the International Court of Justice's (ICJ) approach in *Reparation*⁵ but there too the insistence on personality was only asserted, never argued. There might be good reasons to insist on formal personality, but the argument is never provided.

Likewise, Nauta, as so many others, insist that international organizations are bound by customary international law (including humanitarian law and human rights law), but without properly explaining why this would be the case, and why customs developed in practices between states would also become binding on actors other than those same states, regardless of whether their own proper actions can be construed as consent.⁶ That said, if one accepts that NATO is an international legal person (plausible enough) and accepts that NATO is legally bound to respect international humanitarian law and human rights law (somewhat less immediately plausible), then Nauta's analysis is forceful and compelling.

Perhaps the most troubling issue is that of attribution: when can acts done by soldiers engaged in NATO operations actually be attributed to NATO? When, by contrast, are their acts attributable to their sending states, or even to military personnel individually? These are complicated matters⁷, generally thought to be revolving around notions of effective control, but this hardly exhausts the matter. For one thing, an organization can distribute liability in advance, as NATO does with regard to its peace-time operations: if an accident happens, for instance during a joint exercise, the general rule seems to be that the home state of the 'culprit' is to be held liable.⁸ For another, the notion of 'effective control' is famously elusive, not to say manipulable. And third, attribution sounds nice in the abstract, but different attributions trigger different institutional responses, with different rules on standing, different tribunals to engage (if any), *et cetera*.

Still, in the end Nauta reaches sensible conclusions and, what is more, he does not treat NATO with velvet gloves or otherwise toe the party line, as could have been feared: he is perfectly willing to hold his employer responsible for possible (and actual) violations of humanitarian law and human rights law. As with most studies, sometimes tangential claims are all too easily made and accepted, e.g. the claim that so-called

⁴ See, e.g., Jan Klabbers, 'Presumptive Personality: The European Union in International Law', in Martti Koskeniemi (ed.), *International Law Aspects of the European Union* (1998) 231-253.

⁵ *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, [1949] ICJ Reports 174.

⁶ On this, see Jan Klabbers, 'The Sources of international Organizations' Law: Reflections on Accountability', in Samantha Besson and Jean d'Aspremont (eds.), *The Oxford Handbook of the Sources of International Law* (2017), 987-1006. For contrasting opinions, see August Reinisch, 'The Sources of International organizations' Law: Why Custom and General Principles are Crucial', in *ibid.*, 1007-1024, and Kristina Daugirdas, 'How and Why International Law Binds International Organizations', (2016) 57 *Harvard International Law Journal*, 325-381.

⁷ See generally Rain Liivoja, *Criminal Jurisdiction over Armed Forces Abroad* (2017).

⁸ See Kirsten Schmalenbach, *Die Haftung internationaler Organisationen* (Frankfurt am Main: Peter Lang, 2004).

Memoranda of Understanding would only create political but not legal obligations.⁹ But this takes nothing away from the fact that *The International Responsibility of NATO and Its Personnel during Military Operations* is a fine, balanced, well-researched and well-written study of a complex phenomenon, and is a study, moreover, which in passing manages to be highly informative on what NATO is and what it does.

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⁹ The claim runs counter to established case-law and runs into serious philosophical difficulties as well: see Jan Klabbers, *The Concept of treaty in International Law* (The Hague: Kluwer, 1996).