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# THE NORTH ATLANTIC TREATY: ARTICLE 9 AND NATO'S INSTITUTIONALIZATION<sup>†</sup>

*Andrés B. Muñoz Mosquera\**

## Article 9

The Parties hereby establish a Council, on which each of them shall be represented, to consider matters concerning the implementation of this Treaty. The Council shall be so organised as to be able to meet promptly at any time. The Council shall set up such subsidiary bodies as may be necessary; in particular it shall establish immediately a defence committee which shall recommend measures for the implementation of Articles 3 and 5.<sup>1</sup>

## INTRODUCTION

The Charter of the United Nations (“U.N. Charter”) and its constitutional nature provide the necessary grounds for the institutionalization, around the idea of the promotion of international peace and security under the inspiration of Article 51 of the U.N. Charter, of “communities of interest,” like the North Atlantic Treaty Organization (NATO).<sup>2</sup> This Note submits that NATO is a “community of interest,” where the constituents have vested the necessary legal framework based on the U.N. Charter. NATO’s legal order is not only part of public international law, but also contributes to the most constitutional part of public international law, the U.N. Charter.

Over time, a series of NATO structures and procedures have been created—i.e., international institutions—to implement the goals of the North Atlantic Treaty (“Treaty”) and, thus, contribute to achieve the frontispiece of the U.N. Charter, i.e., the maintenance of international peace and security. Although the “O” in NATO was not expressly mentioned in the Treaty,<sup>3</sup> it is evident from

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<sup>†</sup> This Article contains views provided in the author’s personal capacity and may not reflect agreed upon views of the Supreme Headquarters Allied Powers Europe (SHAPE), Allied Command Operations (ACO) or the North Atlantic Treaty Organization.

<sup>\*</sup> NATO Commander’s Legal Advisor, Director of the ACO/SHAPE Office of Legal Affairs.

<sup>1</sup> North Atlantic Treaty, art. 9, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

<sup>2</sup> *Future Development of NATO, Other than in Connection with Defence Plans: Note by the Executive Secretary*, NATO ARCHIVES, (Sept. 19, 1951), archives.nato.int/uploads/r/null/1/9/19674/C\_7-D\_18\_ENG.pdf (“The preservation of peace is the very essence of that [North Atlantic] community.”).

<sup>3</sup> The word “Organization” appears first in the text of the communiqué of the first meeting of the NAC and it was materialized due to the signs sent by the Korea War and the deteriorating situation in the Eastern Flank of Europe, which made the Allies create the Supreme Headquarters Allied Forces Europe (SHAPE) in

Article 9, that among the primary intentions of the drafters was that of giving options to the constituent states in order to turn an “alliance” into an “organization” as and when deemed appropriate.<sup>4</sup> This intention becomes explicit in September 1948 with discussions of “adequate *machinery* for implementing [the Treaty] terms,”<sup>5</sup> the “[r]esolution to combine their efforts in a *North Atlantic Organization* designed effectively to accomplish these aims in accordance with the purposes and principles of the [U.N.] Charter,”<sup>6</sup> and the “[p]rovision for establishment of *agencies* necessary for the effective implementation of the Treaty.”<sup>7</sup> This particularity makes NATO’s institutionalization an interesting field of research and study to track the process of creating NATO institutions. Indeed, France’s plenipotentiaries presented NATO’s dichotomy of “alliance” and “organization” during the preliminaries of its withdrawal from NATO’s integrated military structure in 1966. Some of the most senior French leaders stated that France left the “Organization” while it remained an active member to the “Alliance.”<sup>8</sup>

With Article 9 and the “rules of the organization”<sup>9</sup> as the setting for NATO’s institutionalization, NATO’s institutionalization is not a snapshot of history but a reactive, dynamic, and continuous process.

The sections below describe the original elements of NATO’s institutionalization, focusing on Article 9 and its interaction with other key Articles of the Treaty.

## I. ARTICLE 9 AND THE NORTH ATLANTIC COUNCIL

Through Article 9, the drafters of the Treaty established the North Atlantic Council (NAC) to implement the Treaty provisions. The NAC is the main

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December 1950. See Final Communiqué of the first Session of the North Atlantic Council, Sep. 17, 1949. “The *organization* established under the North Atlantic Treaty should be operated with as much flexibility as possible and be subject to review from time to time. The establishment of this machinery does not preclude the use of other means for consultation and co-operation between any or all of the Parties on matters relating to the Treaty,” *Id.* (emphasis added).

<sup>4</sup> See North Atlantic Treaty, *supra* note 1, art. 9.

<sup>5</sup> Memorandum by the Participants in the Washington Security Talks, July 6 to September 9, Submitted to Their Respective Governments for Study and Comment in FOREIGN RELATIONS OF THE UNITED STATES, 1949, WESTERN EUROPE, III, 243–47 OFFICE OF THE HISTORIAN (1948) (emphasis added).

<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> *Id.* (emphasis added).

<sup>8</sup> Jean Charpentier, *Organisation de l’Europe: Le Retrait Français de l’OTAN*, 12 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL, 409, 411 (1966).

<sup>9</sup> “Article 2 (b) ‘rules of the organization’ means, in particular, the constituent instruments, decisions,

political decision-making body of NATO, controlling the political and military bodies of the organization. Secondary and tertiary decision-making bodies are the subordinate boards and committees—NATO's committee system,<sup>10</sup> an equivalent to EU "comitology."<sup>11</sup>

The NAC is composed of representatives from all NATO Member States<sup>12</sup> and convenes at four levels: (a) permanent representatives; (b) foreign ministers; (c) defense ministers; and (d) heads of state and government.<sup>13</sup> NAC decisions, regardless of the level, have the same status.<sup>14</sup> The Secretary General is not the head of NATO; rather (s)he supports NATO's constituents by chairing the NAC and providing it with a secretariat.<sup>15</sup> The Secretary General ensures that NAC's decisions are executed, recorded, and circulated.<sup>16</sup> The Secretary General relies on a small Secretariat—the International Secretariat/Staff—that takes care of organizational and logistical matters to enable the NAC's work and support the work of boards and committees.<sup>17</sup> The Chairman of the Military Committee (MC) presides over the military representatives and serves, *inter alia*, as a link between the political leaders of NATO Headquarters and the two Strategic Commanders.<sup>18</sup> The MC is supported by the International Military Staff.<sup>19</sup> The

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resolutions and other acts of the international organizations adopted in accordance with those instruments, and established practice of the organization" Int'l Law Comm'n, Rep. on the Work of its Sixty-Third Session, U.N. Doc. A/66/10, at 49 (2011)[hereinafter U.N. Doc. A/66/10].

<sup>10</sup> Bjarne Eriksen, *The Committee System of the NATO Council* N.Y. HUMANITIES PRESS 66 (1967). "Over the years, the Council has established a network of committees to facilitate the Alliance's work and deal with all subjects on its agenda. The principal NATO committees are the NAC, the Nuclear Planning Group (NPG) and the Military Committee (MC). The Defence Planning Committee (DPC), which was also one of NATO's top decision-making bodies, was dissolved under the June 2010 committee reform and its functions were taken over by the NAC." *Id.* Although there are many more boards and committees preparing NAC's decisions. *Committees*, NORTH ATLANTIC TREATY ORG. (Oct. 12, 2017), [www.nato.int/cps/en/natolive/topics\\_49174.htm](http://www.nato.int/cps/en/natolive/topics_49174.htm).

<sup>11</sup> *Comitology*, EUROPEAN COMMISSION, [ec.europa.eu/info/implementing-and-delegated-acts/comitology\\_en](http://ec.europa.eu/info/implementing-and-delegated-acts/comitology_en).

<sup>12</sup> See Final Communiqué, *supra* note 3. The Terms of Reference of the NAC address five areas: Time and Frequency of Sessions, Location of the Council Sessions, Chairmanship, Languages and Permanent Coordination. *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *NATO Secretary General*, NORTH ATLANTIC TREATY ORG. (Apr. 13, 2016), [https://www.nato.int/cps/en/natohq/topics\\_50094.htm?](https://www.nato.int/cps/en/natohq/topics_50094.htm?).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> NATO's two Strategic Commanders are, the Supreme Allied Commander Europe (SACEUR), responsible for operations, and the Supreme Allied Commander, Transformation (SACT), responsible for transformation. *Military Organisation and Structures*, NORTH ATLANTIC TREATY ORG. (May 25, 2018), [www.nato.int/cps/en/natohq/topics\\_49608.htm](http://www.nato.int/cps/en/natohq/topics_49608.htm).

<sup>19</sup> The MC advises the North Atlantic Council (NAC) on military policy and strategy. Some scholars see the relationship between the NAC and the MC is as ambiguous as is that of the MC and the Supreme Headquarters. See HANS BORN & HEINER HÄNGGI, *THE 'DOUBLE DEMOCRATIC DEFICIT': PARLIAMENTARY*

Supreme Commander—SACEUR and SACT—provide military advice and expertise to the NAC and the MC, and lead the NATO Command Structure, NATO Force Structure and the structures and assets placed at the disposal of NATO.<sup>20</sup> Their Supreme Headquarters, Supreme Headquarters Allied Forces Europe (SHAPE) and HQ Supreme Allied Commander Transformation (SACT), and all their subordinate headquarters support the Supreme Commanders.<sup>21</sup>

NATO's Command Structure (NCS) is the backbone of NATO. It is composed of permanent multinational headquarters at the strategic, operational and component levels of command, distributed geographically and commonly funded.... Today, NATO maintains personnel in 6,800 posts across seven commands [and multiple units]. The reforms also improved the NCS's operability with the NATO Force Structure (NFS). The NFS is a distinct pool of Allied national and multinational forces and headquarters placed at the Alliance's disposal on a permanent or temporary basis.<sup>22</sup>

Permanent representatives of the NAC meet, at a minimum, on a weekly basis.<sup>23</sup> The ministers of foreign affairs meet twice a year, while the ministers of defense meet three times each year. "NATO Summits" are held occasionally and the heads of NATO's state and government attend them.<sup>24</sup>

NATO is an intergovernmental international organization, not a supranational one. NATO Members maintain their sovereignty at the Council and at any of the subordinate committees. NATO members are also responsible for their own decisions.<sup>25</sup> This is clearly identified in NATO's comments made in the United Nations Draft Articles of Responsibilities of International

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ACCOUNTABILITY AND THE USE OF FORCE UNDER INTERNATIONAL AUSPICES, Ch. IV (Born & Hänggi eds., 2004).

<sup>20</sup> *NATO Command Structure*, NORTH ATLANTIC TREATY ORG. (Feb. 2018) [www.nato.int/nato\\_static\\_fl2014/assets/pdf/pdf\\_2018\\_02/1802-Factsheet-NATO-Command-Structure\\_en.pdf](http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2018_02/1802-Factsheet-NATO-Command-Structure_en.pdf).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *North Atlantic Council*, NORTH ATLANTIC TREATY ORG. (Oct. 10, 2017), [https://www.nato.int/cps/en/natohq/topics\\_49763.htm?](https://www.nato.int/cps/en/natohq/topics_49763.htm?),

<sup>24</sup> *Id.*

<sup>25</sup> Responsibility of Int'l Orgs. Docs. Of the Fifty-Sixth Session, U.N. Doc. A/CN.4/637, at 7 (2004). [legal.un.org/ilc/documentation/english/a\\_cn4\\_545.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_545.pdf) (last visited 24 February 2019).

Organizations (DARIO), which state that “[e]ach member State retains full responsibility for its decisions [taken within the North Atlantic Council].”<sup>26</sup>

## II. ARTICLE 9 AND SUBSIDIARY BODIES

### A. *Subsidiary Bodies*

In Article 9 the drafters gave the NAC authority to set up subsidiary bodies as necessary.<sup>27</sup> Of note, Articles 3 and 5 appear to be the leading elements of NATO's institutionalization. The former requires institutions to maintain and develop individual and collective capacities to resist an armed attack, and the latter requires structures and procedures to coordinate the actions deemed necessary to restore and maintain the security after an armed attack occurs.<sup>28</sup> Article 4 of the Treaty enables the interaction of Articles 3, 5, and 9.<sup>29</sup> This readiness to resist and respond to an armed attack allows the Alliance to become an Organization. The Korean War and the deteriorating security situation in Europe presented a credible scenario against which a decision was made to create NATO bodies.<sup>30</sup> The first NATO body, and international organization of NATO, was the SHAPE.<sup>31</sup>

The International Law Commission (ILC) in its commentaries to DARIO posits that among the rules of the different international organizations there are a variety of interpretations of what is an organ of the organization.<sup>32</sup> The commentaries state, “[a]n example of a very economical list is provided by

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<sup>26</sup> *Id.*

<sup>27</sup> SNEŽANA TRIFUNOVSKA, NORTH ATLANTIC TREATY ORGANIZATION 47 (2nd ed., 2010) (“[T]he need to create subsidiary bodies that would make possible the functioning of the Alliance became immediately apparent. Setting up of a number of bodies led to the establishment of NATO, which implements the Council's decision and provide practical means of collaboration between Member States in areas determine by the Washington Treaty.”).

<sup>28</sup> See North Atlantic Treaty, *supra* note 1, art. 3, 5.

<sup>29</sup> See *id.*, art. 4.

<sup>30</sup> Andres B. Munoz Mosquera & Mette Hartov, *NATO International Military Headquarters in THE HANDBOOK OF THE LAW OF VISITING FORCES* 459 (D. Fleck eds., 2nd ed., 2018).

<sup>31</sup> “The French delegation is perfectly conscious of the fact that SHAPE in its character of an *international organisation* is different from the Franco-American organisation.” (emphasis added). *Provision of Budget for SHAPE: Note by the Secretary*, NATO ARCHIVES, Appendix B, 13, 22 (February 20, 1951), [archives.nato.int/uploads/r/null/3/1/31054/D-D\\_51\\_52\\_ENG.pdf](https://archives.nato.int/uploads/r/null/3/1/31054/D-D_51_52_ENG.pdf).

<sup>32</sup> U.N. Doc. A/66/10, *supra* note 9, at 52.

NATO. Article 9 of the Treaty establishes a single organ, the NAC, which is given the competence to create ‘subsidiary bodies as may be necessary.’”<sup>33</sup>

The ILC considers the scope of the term “organ” to be governed by the “rules of the organization”—i.e., it is up to an international organization to define its own organs.<sup>34</sup> NATO members define its own organs based on the simple, yet powerful wording of Article 9, which vests powers on the NAC to set up bodies as may be necessary. Indeed, Escott Reid argues that Article 9 of the Treaty “is a *broad rather than specific definition of functions* and is not intended to exclude the performance at appropriate levels in the organization of such planning for the implementation of Articles 3 and 5 or other functions as the Parties may agree to be necessary.”<sup>35</sup>

As particularity can be seen in Articles 1 and 2 of the 1951 Ottawa Agreement where the term “subsidiary bodies” is separately defined from “military bodies.”<sup>36</sup> However, the broadness noted by Reid, who was a witness to the crafting of the Treaty, makes sense under the following facts: (a) the first NAC-approved international institution was precisely a military body, SHAPE;<sup>37</sup> (b) the *travaux préparatoires*<sup>38</sup> of the Deputies, which was the NAC permanent representatives at the time, extended the Ottawa Agreement to Allied Headquarters when the NATO 1951 Status of Forces Agreement (SOFA) provisions were not sufficient—hybridity of the Paris Protocol;<sup>39</sup> (c) the NAC created “subsidiary bodies” in their variant of “subsidiary military bodies” subordinate to the Defence Committee;<sup>40</sup> and (d) in 1951 the Supreme

<sup>33</sup> *Id.*

<sup>34</sup> “Article 2 (c) ‘organ of an international organization’ means any person or entity which has that status in accordance with the rules of the organization” *Id.* at 49.

<sup>35</sup> ESCOTT REID, *TIME OF FEAR AND HOPE, THE MAKING OF THE NORTH ATLANTIC TREATY 1947-1949* 267 (McClelland & Steward, eds. 1977) (emphasis added). Reid takes this interpretation verbatim from the wording of the ‘Minutes of the Eighteenth Meeting of the Washington Exploratory Talks on Security, March 15, 1948’ held in Washington. Minutes of the Eighteenth Meeting of the Washington Exploratory Talks on Security, March 15, 1949 in *FOREIGN RELATIONS OF THE UNITED STATES, 1949, WESTERN EUROPE, IV, OFFICE OF THE HISTORIAN* 223–24 (1949).

<sup>36</sup> Agreement on the Status of the North Atlantic Treaty Organisation, National Representatives and International Staff signed in Ottawa [hereinafter Ottawa Agreement].

<sup>37</sup> Final Communiqué, Dec. 18–19, 1950.

<sup>38</sup> English translation: “preparatory work.”

<sup>39</sup> Protocol on the Status of Allied Headquarters, January 3, 1952, Doc. D-D(52)2, in Joseph Snee, *NATO Agreements on Status: Travaux Préparatoires* INT’L L. STUD., NAVAL WAR C., Vol. LIV, 592 (1961).

<sup>40</sup> See *Defence Committee*, NORTH ATLANTIC TREATY ORG., <http://archives.nato.int/defence-committee-2> (“The Military Committee, the Standing Group, a sub-committee of the Military Committee, the five strategic regional groups (the Northern European Regional Planning Group, Western European Regional Planning Group, Southern European-Western Mediterranean Regional Planning Group, Canadian-United States Regional

Headquarters took over the functions and responsibilities of a selected group of “subsidiary military bodies,” the Regional Planning Groups. Three groups came under SHAPE and one under the Supreme Allied Commander Atlantic (SACLANT),<sup>41</sup> which “serve as a *basis for the subordinate commands* [headquarters] which would each be under a Commander-in-Chief.”<sup>42</sup> These aforementioned reasons show why the term “subsidiary bodies” can be legitimately used for denomination of the Supreme Headquarters and their subordinate headquarters. Paul Reuter gives an explanation to this phenomenon through the contention that the “*organes subsidiaires*”<sup>43</sup> are founded by the voluntary manifestation of the organization.<sup>44</sup> Reuter presents the “voluntary manifestation” as the element that creates subsidiary bodies.<sup>45</sup> In other words, the fact the NAC created civil and military organs, like the International Staff, and the Supreme Headquarters and its subordinate headquarters, makes these by their origin, subsidiary bodies.<sup>46</sup> However, it is NATO practice to not use the term “subsidiary bodies” but rather the more general “NATO bodies” in reference to entities related to the organization.

The term “subsidiary body” can be used in an expansive manner and intends to cover all bodies, civil and military, under the authority of the NAC. However, the practice of using the term “NATO body” to avoid the use of “subsidiary body,” has created confusion among entities which are not part of the Ottawa bodies or the Paris NATO Command Structure. Such entities include those of the NATO Force Structure, other assets at the disposal of NATO, and Centres of Excellence, as well as the field headquarters in operations to which NATO contributes.<sup>47</sup>

On the one hand, the term “NATO body” may apply the Paris Protocol to entities of the NATO Force Structure, specific structures and other assets at the disposal of NATO, as well as to Centres of Excellence. This takes place per

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Planning Group and the North Atlantic Ocean Regional Planning Group), and the Military Production and Supply Board.”)

<sup>41</sup> The fifth group, U.S.-Canada, did not change authorities.

<sup>42</sup> HASTINGS LIONEL ISMAY, *NATO-THE FIRST 5 YEARS 1949–1954*, 72 (1954) (emphasis added).

<sup>43</sup> English translation, “subsidiary organs.”

<sup>44</sup> Paul Reuter, *Les Organes Subsidiaires des Organisations Internationales*, in *HOMMAGE D'UNE GÉNÉRATION DE JURISTES AU PRÉSIDENT BASDEVANT* 423–25 (1960).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Andrés B. Muñoz Mosquera, *The North Atlantic Treaty Organization: An International Institutional Law Perspective* (Part I: *The North Atlantic Treaty Organization: From the United Nations Charter to a Dynamic Institutionalization*)(Thesis pending on defense) 61–67 (2019).

NAC decision based on Article 14 of the Paris Protocol and NAC document C-M(69)22.<sup>48</sup> This is done under the denomination “NATO Military Body” and gives them the status granted to “international military headquarters” under the Paris Protocol. The status of “international military headquarters” is not to say they fully enjoy the legal position established per the Paris Protocol, since these headquarters and units only receive the privileges and immunities of the Paris Protocol and not its legal status—legal personality, legal status, powers—and responsibility.<sup>49</sup> Rather, these entities exist prior to being granted international status; their legal personality is objective, and their legal capacity and powers, as well as responsibility, are established by: (a) the concept by which they were created; (b) the provisions of their respective Memorandum of Understanding (MOU) for their administration, financing, manning and governance;<sup>50</sup> and (c) the decisions taken at the senior policy and resources committee formed by the different states signatories of their respective founding MOU. Therefore, the fact of being a “NATO [Military] Body” does not make them “subsidiary bodies” or suggest that they are established by the NAC pursuant to Article 9. Rather, they have a national or multinational nature; they are not financed by the NATO common budget nor are they directly subordinate to SHAPE<sup>51</sup> or HQ SACT. Instead, they are resourced and controlled by the participating states contributions.

On the other hand, and with respect to field headquarters, an analysis on their applicable legal framework removes any dangerous confusion intended to apply the term “NATO body” to them. NATO governing treaties<sup>52</sup> apply, totally or partially, to “NATO bodies,” while U.N. Security Council resolutions, mission-

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<sup>48</sup> J.A. Burger, *Headquarters IFOR/SFOR in FLECK*, *supra* note 30, at 329 (see Document C-M(69)22).

<sup>49</sup> Legal position is made of legal status (legal personality, legal capacity, powers), privileges and immunities and responsibility. “The term ‘Legal *position*’ is coined by Bekker based on the relevant work of El-Erian and others in the International Law Commission.” See PIETER H.F. BEKKER, *THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS. A FUNCTIONAL NECESSITY ANALYSIS OF THEIR LEGAL STATUS AND IMMUNITIES* 51 (1994); see also El-Erian, [1963] 1 Y.B. INT’L L. COMM’N 298, ¶110, U.N. Doc. A/CN.4/SERA/1963.

<sup>50</sup> Andrés B. Muñoz Mosquera, *Memorandum Of Understanding (MOU): A Philosophical and Empirical Approach (Part I)* (2014), NATO LEGAL GAZETTE, 34, 55–69, <[www.ismllw.org/NATO%20LEGAL%20GAZETTE/Legal%20GazetteIssueNo%2034.pdf](http://www.ismllw.org/NATO%20LEGAL%20GAZETTE/Legal%20GazetteIssueNo%2034.pdf)>.

<sup>51</sup> However, they have Command and Control arrangements in the form of Technical Arrangements, which give SACEUR (SHAPE) the Operational Command, while the administration remains in the hands of the constituents of those organizations or entities.

<sup>52</sup> See generally Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (June 19, 1951) [hereinafter NATO SOFA]; Ottawa Agreement, *supra* note 36; The 1952 Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Aug. 28, 1952) [hereinafter Paris Protocol]; and their supplementary agreements.

specific status of forces/military technical agreements, or specific bilateral agreements—Afghanistan, Iraq—apply to field headquarters.<sup>53</sup> The use of the term “NATO body” for field headquarters is an erroneous practice from a legal standpoint since it creates legal uncertainty and confuses the legal position of those multinational and in-theatre organizations—which do not fall within the NATO governing treaties—with that of the genuine and unique NATO bodies.

The above shows that NATO's institutionalization has not been well studied and many still think that NATO is a monolithic international organization. However, although NATO is an international organization, it is formed by three other and distinct international organizations<sup>54</sup> with different legal positions. These international organizations are: the “Organization”—known colloquially as the NATO HQ—although in practice it goes much beyond and includes the International Staff, International Military Staff and Agencies—and the two “Supreme Headquarters”—which form the NATO Command Structure. The former is governed by the 1951 Ottawa Agreement,<sup>55</sup> and the latter two derive their status from the 1952 Paris Protocol,<sup>56</sup> which enjoys a hybrid nature. Finally, other bodies depend on these treaties via both specific charter or activation and delegation of authority. This does not include entities or organizations of the NATO Force Structure, specific structures, assets at the disposal of NATO, and Centres of Excellence.

On the hybrid nature of the Paris Protocol, the drafters understood that International Military Headquarters would be something beyond any visiting force.

With regard to such headquarters and their personnel, civilian and military, the Protocol has two purposes. First, it adapts to the headquarters and personnel the provisions laid down in the Status of Forces Agreement in regard to sending States and their personnel (Articles 3-8). Secondly, it creates a special status for such headquarters which is *analogous to* that created for the Council and

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<sup>53</sup> See also, Andrés B. Muñoz Mosquera & N. Chalanaoui, North Atlantic Treaty. *Travaux Préparatoires Reconstructed* (2019) (under peer review) (copy on file with author).

<sup>54</sup> This format is replicated in the World Bank [Group], i.e., it is an international organization formed by international organizations with their own distinct legal positions.

<sup>55</sup> Ottawa Agreement, *supra* note 36.

<sup>56</sup> See NATO SOFA, *supra* note 52; Paris Protocol, *supra* note 52.

its subsidiary civilian bodies by the Agreement of 20 September 1951 [Ottawa Agreement].<sup>57</sup>

Based on this understanding, the drafters of the three general multilateral treaties specified their intent and goal. It is submitted that the Paris Protocol is dependent upon both the NATO SOFA—expressly cited in the Paris Protocol’s provisions—and the Ottawa Agreement—expressly mentioned in the *travaux préparatoires*—D-D (52) 2:

26. The object of the present Protocol is to apply to Allied Headquarters the Agreement of 19 June 1951 on the Status of Armed Forces. For the question not covered by that Agreement—and for this question only—it is possible to refer to the Agreement signed at Ottawa on 20 September 1951, concerning the status of NATO civilian agencies.<sup>58</sup>

### B. *The Principle of Consultation*

Articles 2, 3, and 9 of the Treaty implicate Article 4.<sup>59</sup> Consultation gives the Alliance its “political dimension.”<sup>60</sup> Moreover, “the consultative provision should be construed broadly in order to enable [NATO members] to air their interest before the response is taken ... in a manner most likely to promote cooperative efforts.”<sup>61</sup>

NATO’s main institution, the NAC, bases its procedures on the “principle of consultation”<sup>62</sup> per Article 4 for effectively and efficiently implementing the functions and principles of the Treaty.<sup>63</sup>

Per Article 4, “[t]he Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened.”<sup>64</sup> There is no decision by majority; NAC decisions are

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<sup>57</sup> Snee, *supra* note 39, at 6 (emphasis added).

<sup>58</sup> *Protocol on the Status of Allied Headquarters – Report and Comments by France and SHAPE on the Draft Protocol and the Draft France-SHAPE Agreement* (Jan. 3, 1952), ¶ 26, in Snee, *supra* note 39, at 596.

<sup>59</sup> *The Evolution of NATO Political Consultation 1949-1962*, NORTH ATLANTIC TREATY ORG., II, (May 2, 1963), [www.nato.int/archives/docu/d630502e.htm](http://www.nato.int/archives/docu/d630502e.htm).

<sup>60</sup> *Consultation Process and Article 4*, NORTH ATLANTIC TREATY ORG. (Mar. 17, 2016), [https://www.nato.int/cps/en/natolive/topics\\_49187.htm](https://www.nato.int/cps/en/natolive/topics_49187.htm).

<sup>61</sup> Frederic Kirgis, *NATO Consultations as a Component of National Decisionmaking* 73 AJIL, 372, 374–76 (1979).

<sup>62</sup> *Consultation Process and Article 4*, *supra* note 63.

<sup>63</sup> See North Atlantic Treaty, *supra* note 1, art. 4.

<sup>64</sup> *Id.* art. 9.

supported by and “are the expression of the collective will of all the sovereign states that are members of the Alliance and are accepted by all of them.”<sup>65</sup>

There are no majorities of any type, and since the 1970s the NAC abandoned the practice of “unanimity” for daily decision-making and adopted gradually that of “consensus.” The decision-making process of consensus helps Member States to maintain sovereignty when participating in the NAC. Today, unanimity is used only for the admission of new members in accordance with Article 10.<sup>66</sup> At the NAC there is not *primus inter pares*,<sup>67</sup> since all members have the same right to express their views.

Article 4 not only gives “soul” to NATO bodies created by the NAC under Article 9, but it also builds resilience and capacities for self-defense and collective-defense. Additionally, Article 9, via Article 4, gives NATO constituents the ability to address security and defense matters beyond Articles 5 and 6:

[T]he principle that NATO political consultation is not necessarily confined to the area defined in 1949 follows from the Treaty which mentions no such geographical limits to consultations: Article 6 refers to the commitments mentioned in Article 5 not to Article 4 or other relevant articles. The desirability of NATO consultation going beyond the NATO area was subsequently reaffirmed at the Ottawa meeting in 1951, by the Committee of the North Atlantic Community (Pearson Committee), of 1951, by Three Wise Men in 1956, by Mr. Spaak’s Political Appraisal Report in 1958 and, finally, in the Long-Term Planning Exercise of 1960/61.<sup>68</sup>

The creation of the NAC under Article 9 shows “the will of governments to consult.”<sup>69</sup> This gives NATO Members’ common organs democratic status, which explains the “combination of Article 4—the obligation/commitment—and Article 9—the forum/platform—that creates the skeleton of NATO’s institutional ‘regime.’”<sup>70</sup> In 1952 and based on these foundations, the NAC reorganized and augmented its incipient structures—at the time only military: SHAPE and its planning groups—to reinforce and particularize NATO’s

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<sup>65</sup> *North Atlantic Council*, *supra* note 23.

<sup>66</sup> A thorough analysis of the history and paradoxes of NATO’s decision-making process can be found in, Muñoz Mosquera, *supra* note 47, at 82–101.

<sup>67</sup> English translation: “First among equals.”

<sup>68</sup> *The Evolution of NATO Political Consultation 1949-1962*, *supra* note 59.

<sup>69</sup> *Id.* at V.

<sup>70</sup> See Muñoz Mosquera, *supra* note 47, at 49–50.

institutionalization<sup>71</sup> and to add the civilian structures of the International Staff and civil agencies.

### III. ARTICLE 9 AND ARTICLES 3 AND 5

Article 9 refers to the immediate implementation of Articles 3 and 5 by the defense committee.<sup>72</sup> This implies that structures and procedures run by NATO bodies will “maintain, and develop, individual and collective capacity to resist an armed attack.”<sup>73</sup> Furthermore, should an attack occur, actions will be taken “in concert” to restore and maintain the security in the North Atlantic area.<sup>74</sup>

The inherent right of self-defense is considered the cornerstone for collectively acting to restore international peace and security and developing collective capabilities to resist an armed attack. These capabilities are not necessarily of a military nature. Current hybrid environments prove this statement to be true.

René Mayer argues, in analyzing Article 3 in the context of Article 9, that the parties to the Treaty intend to implement the mutual assistance by coordinating their defenses.<sup>75</sup> This coordination requires time to mature, and agents and institutions to keep the momentum of the international obligations approved through the Treaty. This goal can be reached only with a proper network of functional institutions whose tasks are fully oriented in the framework of the functions and principles of NATO. This network shall contribute to mission success and satisfy the collective interests and needs of the constituents. Today Article 3’s international obligations take the form of memoranda of understanding, normally responding to a concept prepared by SHAPE or HQ SACT and approved by the nations at the MC, providing an opportunity for NATO members to jointly develop capabilities on a multinational or bilateral basis.

Article 5 carries NATO’s seed for dynamic institutionalization as set up in Article 9. Article 5 follows the U.N. Charter formulation as Arthur Vandenberg

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<sup>71</sup> *The Contours of Today’s NATO*, NATO DECLASSIFIED, [https://www.nato.int/ebookshop/video/declassified/#/en/encyclopedia/from\\_treaty\\_to\\_organization/new\\_structures,\\_faces\\_and\\_home/the\\_contours\\_of\\_today\\_s\\_nato/](https://www.nato.int/ebookshop/video/declassified/#/en/encyclopedia/from_treaty_to_organization/new_structures,_faces_and_home/the_contours_of_today_s_nato/).

<sup>72</sup> See North Atlantic Treaty, *supra* note 1, art. 9.

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> RENÉ MAYER, LE PACT DE L’ATLANTIQUE, PAIX OU GUERRE? 20 (1952).

proposed<sup>76</sup> and is drafted as a strong collective resolution with respect to responding to an armed attack. “In particular, Article 5 with its recognition that an armed attack against one of the parties is an attack against them all, and its reference to the use of force, is much stronger than at one time we thought possible.”<sup>77</sup>

It is crucial to understand why Article 9 is an Article 5 enabler. NATO's collective defense is first based on the following agreement: each NATO member is sovereign to judge the *casus foederis*<sup>78</sup> as well as the type of contribution or conduct it wants to take while acting in self-defense. Second, after the September 11, 2001 attacks in New York and Washington, NATO members exhibited a willingness to apply Article 5 to non-conventional attacks.<sup>79</sup> NATO's adaptability to these new requirements is the result of NATO's flexible institutionalization, which integrates NATO's collective defense into the institutional network created by the Treaty. “[NATO's] collective defense has become a more integrated part of the continuum of institutional cooperation and consultation activities . . . [and] Article 5 can no longer be viewed as a Cold War provision . . . .”<sup>80</sup>

NATO's dynamic institutionalization can also be seen in the different “strategic concepts” the NAC has approved since the 1990s.<sup>81</sup> A resilient and adaptable institutionalized “community of interest” feeds NATO's strength. Additionally, NATO's institutions are adaptable enablers, capable of confronting existing threats by keeping alive the 70-year-old NATO's momentum. The 1991 Strategic Concept allowed NATO to enter the new out-of-area approach.<sup>82</sup> However, it was not until the 1999 Strategic Concept that the out-of-area operations were formally taken as part of NATO's functions and

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<sup>76</sup> “[There is nothing in the North Atlantic pact] which is not written within the four corners of the United Nations Charter.” THE OTTAWA JOURNAL, Mar. 19, 1949, at 4.

<sup>77</sup> Foreign Office document FO 371/79238, Z2476/1074/72/G. Brief for Mr. Bevin for Consultative Council meeting, Mar. 14, 1949 in T. Insall and P. Salmon, *The Brussels and North Atlantic Treaties, 1947-1949*, in DOCUMENTS ON BRITISH POLICY OVERSEAS, SERIES I, VOL. X, 431 (Insall & Salmon eds., 2015).

<sup>78</sup> English Translation: “A case or event covered by the provisions or stipulations of a treaty.”

<sup>79</sup> NATO Secretary General, Lord George Robertson, Speech to the NATO Parliamentary Assembly, Ottawa, Canada, Oct. 9, 2001.

<sup>80</sup> Kenneth Klima, *Interpretations of Article 5 of the North Atlantic Treaty, 1949-2002* 83 (2002) (thesis, Naval Postgraduate School, Monterey, California).

<sup>81</sup> “[P]rovisions of the NAT were reinterpreted and given new meaning by the parties...” REID *supra* note 35, at 103.

<sup>82</sup> *The Alliance's New Strategic Concept*, NORTH ATLANTIC TREATY ORG. ¶ 12 (Nov. 8, 1991), [https://www.nato.int/cps/en/natohq/official\\_texts\\_23847.htm](https://www.nato.int/cps/en/natohq/official_texts_23847.htm).

purposes.<sup>83</sup> This approach is consistent with NATO's function of providing security and defense to its Members and is "fueled" by Articles 4 and 9. In this respect NATO's transformation into an institutional regime in 1950—i.e., the materialization of Article 9—may explain NATO's survivability over the years in several distinct international scenarios. NATO's institutionalization enablers and processes enshrined in the Treaty, as it has been described above, predisposed NATO, from the very beginning, to institutionalization and adaptability. This permits NATO Members to stay ready to successfully confront external conventional and hybrid threats and stand for their individual and collective interests.

[T]he establishment of institutional regimes can only succeed where a community of interest exists and where these regimes can work in an interdependent environment. Decades ago, western nations were conscious of the existence of an Atlantic community of interest. However, it was not until after two world wars and an actual unequivocal threat on their common western identity that procedures were needed to safeguard the community of interest. This idea [of NATO] was enacted through the establishment of working institutions within a legal framework. However, while the inspiring idea of NATO has remained throughout the institution's history, it does not guarantee the survival of a function-oriented institutionalized regime. The materialization of the idea was also affected by reality. Since 1949, the evolution of international relations has shaped NATO by subjecting it to a reality check inspired by the principle of the functional necessity. This has characterized the organization as a transformative institution.<sup>84</sup>

The natural "hand over-take over" process between idealism and functionalism is an important element of NATO's success.

## CONCLUSION

Through the Treaty, NATO's community of interest depends on a legal framework to contribute to the maintenance of international peace and security. This is done, *inter alia*, consistent with Article 51 of the U.N. Charter. NATO's

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<sup>83</sup> "24. Any armed attack on the territory of the Allies, from whatever direction, would be covered by Articles 5 and 6 of the Washington Treaty. However, Alliance security must also take account of the *global context*. Alliance security interests can be affected by other risks of a wider nature... Arrangements exist within the Alliance for consultation among the Allies under Article 4 of the Washington Treaty and, where appropriate, co-ordination of their efforts including their responses to risks of this kind." *The Alliance's Strategic Concept*, NORTH ATLANTIC TREATY ORG. ¶¶ 3, 24 (Apr. 10, 1999), [https://www.nato.int/cps/su/natohq/official\\_texts\\_27433.htm?selectedLocale=en](https://www.nato.int/cps/su/natohq/official_texts_27433.htm?selectedLocale=en).

<sup>84</sup> See Muñoz Mosquera, *supra* note 47, at 56–57.

structures and procedures make this contribution real; its international institutions are in charge of implementing the organization's functions and principles.

Although Article 9 was immediately implemented in 1949, it was not until 1950 and the Korean War that NATO understood that it was an "alliance" without teeth. In December 1950 General Eisenhower took over the task of NATO's institutionalization and created an integrated military structure headed by SHAPE, which was the "Organization" well before the international staff, civil agencies or other supreme headquarters.

NATO's institutionalization remains a living process, which continues to evolve through the review of existing conventional and hybrid threats and by succinctly adapting NATO's institutions to confront them.<sup>85</sup> It is an impressive dynamic practice whose legal frame is Article 9 and the "rules of the organization."

The NAC is created by Article 9 and is NATO's main political decision-making body. Additionally, and as envisaged in Article 9, the NAC is supported by several subordinate boards and committees, while member States retain sovereignty through NATO's consensus decision-making process.

NATO has been poorly—or not at all—studied under international institutional law. As a result, it is the misconception of many that NATO is a monolithic international organization with one legal position. A thorough study of original correspondence and exchanges during the Treaty negotiations, the *travaux préparatoires* and texts of NATO's general multilateral agreements indicates an unprecedented international organization. NATO is, indeed, an international organization, but it is at the same time the "container" of three other

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<sup>85</sup> "[A]t the February 2018 Defence Ministerial Conference, the leaders agreed to bolster maritime security, logistics and military mobility, and cyber defence. A new joint force command for the Atlantic will aid the protection of sea lines of communication between North America and Europe. The establishment of a new command to support logistics, reinforcement and military mobility will facilitate the movement of troops and equipment for NATO's collective deterrence and defence. New elements within each of the commands including a new cyber operations centre at Supreme Headquarters Allied Forces Europe (SHAPE) are aimed at adapting and further strengthening NATO's defences for today's dynamic security environment. These reforms will also improve NATO's ability to integrate the NATO Force Structure (NFS), a group of Allied national and multinational forces as well as headquarters at the NATO's disposal. This adaptation directly supports the three core Alliance tasks: collective defence, crisis management and cooperative security. While a large scale and complex effort, the reformed NATO Command Structure will maximise the deterrent effects of NATO forces and ensure realignment to today's geopolitical context in time of peace, crisis and conflict." *NATO Command Structure Adaptation: The Way Ahead*, NORTH ATLANTIC TREATY ORG. [shape.nato.int/structure/nato-command-structure-adaptation/the-way-ahead](http://shape.nato.int/structure/nato-command-structure-adaptation/the-way-ahead).

international organizations with their own and distinct legal position and with a series of subordinate elements; all constitute the different NATO bodies.

NATO's three international organizations are an original and democratic arrangement exemplifying NATO constituents' interest in separating the civil and military institutions of NATO. It also illustrates that the NAC runs NATO's institutions, not the Secretary General or the Supreme Commanders. The NAC is the actual *primus inter pares* among NATO's institutions and its aim is to generate harmony among the different common organs: *Harmonia est unitas in varietate*<sup>86</sup> while implementing the Articles 3, 4, and 5 and balancing the political and military dimensions of NATO with the sovereignty of the Allied Member States.

Robert Jordan summarizes NATO's particular and unprecedented institutionalization: "NATO stands as much in the growing tradition of functional international organization as in that of military alliances. In NATO the two are intertwined to an unprecedented extent."<sup>87</sup>

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<sup>86</sup> English Translation: "Harmony is unity in diversity."

<sup>87</sup> ROBERT JORDAN, *THE NATO INTERNATIONAL STAFF/SECRETARIAT 1952-1957* vii (1967).