

Law Quadrangle (formerly Law Quad Notes)

Volume 12 | Number 4

Article 4

Fall 1968

France and NATO: Law and Peaceful Change

Eric Stein

University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/lqnotes>

Recommended Citation

Eric Stein, *France and NATO: Law and Peaceful Change*, 12 *Law Quadrangle (formerly Law Quad Notes)* - (1968).

Available at: <https://repository.law.umich.edu/lqnotes/vol12/iss4/4>

This Article is brought to you for free and open access by University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Law Quadrangle (formerly Law Quad Notes) by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

France and NATO: Law and Peaceful Change

Excerpts from an address delivered by Professor Eric Stein on April 10, 1968 at the University of Chicago Law School under the sponsorship of the Norman Wait Harris Committee and based on a study which was published in *62 American Journal of International Law* 577-640 (July 1968).

Our able Ambassador to France, Charles E. Bohlen, who just recently relinquished his post in Paris, has said before a Senate Committee that the withdrawal of France from the NATO integrated commands was "probably the most serious event in European history since the end of the war." When we weigh this assessment we might keep in mind the wise observation by Alexis de Tocqueville. "I am tempted to think," wrote de Tocqueville, "that what we call essential institutions are often only the institutions to which we are accustomed, and that where the pattern of society is concerned, the range of possibilities is far wider than the men living in this society imagine." Yet there is little question that the French move was a significant development in postwar Europe.

The basic thesis underlying the French decisions in the late winter of 1966 was the following: "Although the North Atlantic Treaty itself remained valid and necessary, the measures which were subsequently taken to apply it no longer met the new situation in Europe." As a consequence, France decided *first*, to terminate the assignment to NATO of its forces stationed in Germany, *second*, to withdraw all French personnel from the integrated NATO commands, *third*, to evict, at one year's notice, the headquarters of the two integrated NATO commands located on its territory—and these, incidentally, were the "nerve centers" of NATO—and, *fourth*, to terminate a series of bilateral agreements with the United States and Canada concerning the use of military installations and facilities on French territory, and this, in turn, meant an eviction, again at one year's notice, of a number of United States commands and some one hundred thousand American personnel from French territory.

Legal and Institutional Aftermath

Although some have questioned the continuing military viability of NATO after the French "withdrawal," none of the governments concerned seriously considered its dissolution; on the contrary, intensive activity has centered on seeking solutions of the many multilateral issues within the NATO organs and of the bilateral issues between France, on the one hand, and Germany, the United States, and Canada on the other.

Adjustments of Multilateral Issues

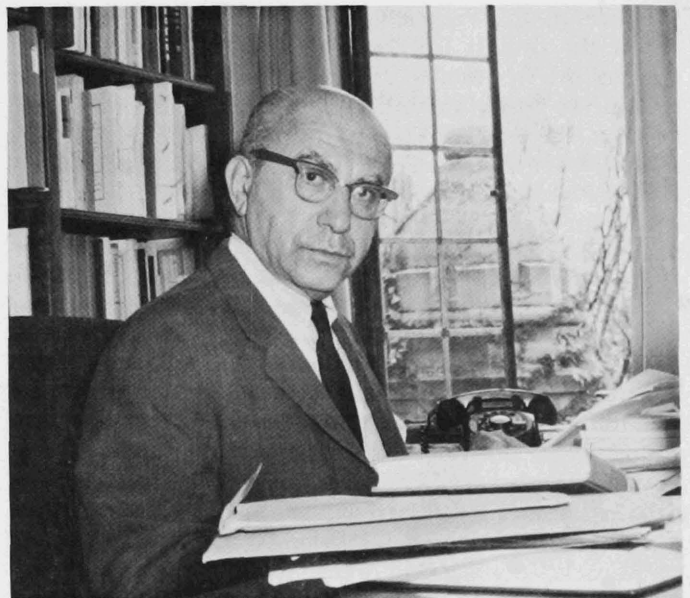
Relocation of NATO establishments: financial and political problems

Responding to the NATO Council invitation, Belgium made available an appropriate site for the Supreme Head-

quarters Allied Powers Europe (SHAPE), Italy for the NATO Defense College, and The Netherlands for the Headquarters of the Allied Forces Central Europe, and the removal of the NATO establishments was completed within the deadline laid down by France. Since the relocation entailed substantial expenditure, the question arose whether the cost should be borne by France alone, or by the fourteen other NATO members, or whether it should be shared by France and its former partners. Thus far France has not been willing to make any contribution. Moreover, the question of compensation for the NATO buildings and installations taken over by France had to be faced. To the extent that France had violated its international commitments, it could be held liable, since, in the words of the Permanent Court of International Justice, "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form" and "the reparation of a wrong may consist in an indemnity corresponding to the damage." France has held the title to the jointly financed NATO infrastructure facilities on its territory, subject, however, to what may be described as an equitable user-interest on the part of the NATO members. Even if the fourteen members should decide not to rely on a violation of any international agreements or decisions, they could invoke an agreed NATO procedure and demand "the residual value" of the installations turned over to France as "no longer required," but, perhaps, no further compensation. In the alternative, they could seek redress on the grounds of unjust enrichment on the part of France or abuse of right.

Reorganization of NATO: simplification, broader planning, new integration

In the first place, in a move toward simplification, the staffs of the Central Europe Commands were consolidated, and the Standing Group composed of American, British, and French military representatives was abolished. The Group's function of coordinating strategic planning was transferred to the Military Committee.



Professor Eric Stein

France has withdrawn from the Military Committee but the Council, in which France continues to sit, deals with the more general military problems in addition to the political and economic subjects within its competence.

Second, in the field of strategic planning the NATO Ministers in 1967 discarded the "massive retaliation" doctrine and formally adopted the "flexible response" strategy, with France participating neither in the discussion nor in the decision. However, potentially the most important development was the establishment by the Council (with France again not participating) of two new bodies for nuclear planning.

Third and last, an instance of additional military integration may be discerned in the creation of a new Standing Naval Force Atlantic, consisting of a squadron of several destroyer-type ships from several NATO countries, placed under the Supreme NATO Commander, Atlantic.

*Present legal position of France in NATO:
"the uneasy ally"*

France remains bound by the North Atlantic Treaty and by the Western European Union Treaty in which the commitment is formulated with considerably greater precision than in the North Atlantic Treaty.

In reaffirming its treaty commitments to the Alliance, the French Government offered to establish French liaison missions at the NATO Commands, and such liaison, in fact, has been preserved following the relocation of the several headquarters, but the efforts to formulate new, meaningful terms of cooperation between NATO and France have met with very little success.

French military cooperation in peace and in war

France has agreed to continue its participation in the air defense warning, communications and control systems; it retains the fuel pipeline to Germany on its territory; and, what is most important, it has continued the permission to Allied military aircraft to fly over French territory. Again, French naval units have continued to participate in NATO maritime exercises.

However, the French Government's determination to retain the utmost freedom of decision in wartime, including the freedom to remain neutral, has made it impossible to reach an understanding on such vital questions as the role of French forces on French territory, access in wartime to French territory and installations, and the definition of circumstances in which France would use its national forces in case of a European conflict involving NATO.

Adjustment of Bilateral Issues

The bilateral issues that required settlement in the wake of the French "withdrawal" concerned the Federal Republic of Germany, because of the French troops stationed in its territory under the Supreme Allied Commander Europe (SACEUR), and the United States and Canada, because of their facilities on French territory.

French troops in Germany: old law and new policy

In the agreement of December, 1966, consisting of two exchanges of notes, the Federal Government surrendered

its legal position and recognized that the legal status of the French forces in Germany remains governed as before by the 1954 Convention, without any impairment of the rights of France. On the other hand, the Federal Republic obtained a more specific voice with respect to the command, strength, equipment, and deployment of the French forces on its territory, and thus this important Franco-German issue appears to have been settled.

Franco-American issues: use of facilities in France and financial responsibility

The negotiations thus far have led only to an agreement which assures the United States of the continuing use and maintenance in peacetime of the 390-mile pipeline system across France, under the management of a French contractor, but the French Government refused to give any guarantee for wartime use.

Similarly, little if any progress has been reported toward the settlement of claims arising from the forced relinquishment of United States-financed military installations in France that represent an investment by the United States estimated at more than \$550 million.

Although the United States and the other members will no doubt continue to pursue in principle a political rather than a legal approach in dealing with France, the issues of financial responsibility may find their way to an arbitration tribunal if they are not settled by negotiation.

Summary and Conclusions

1) The legal obligations of member states with respect to national force levels and commitments of troops to NATO are essentially of procedural nature only. However, when France decided to withdraw all military personnel from the integrated commands and order them removed from its territory, to refuse the common use of joint infrastructure undertakings on its territory, and to end its numerous bilateral agreements, it could have executed its decision lawfully, either by obtaining an agreement with its partners or by ceasing to be a party to the North Atlantic Treaty (on August 24, 1970, at the earliest), in accordance with the termination provisions of the Treaty. France did not follow either of these two alternatives, and thus must be considered in violation of its multilateral and bilateral international obligations, including the North Atlantic Treaty itself, unless the French action could be upheld by the *rebus sic stantibus* (fundamental change of circumstances) exception to the rule prohibiting unilateral termination of international obligations.

2) At some risk to the community policy of stability and respect for shared expectations of parties to a treaty, it may be advisable, as suggested by the United Nations International Law Commission, to legitimize the *rebus sic stantibus* exception in international law as an element of community policy favoring peaceful change, subject, however, to all the feasible safeguards against abuse, including the recourse to the available dispute-settlement procedures. The application of any such rule, however, poses special risks to organized common interests, if it is invoked with respect to obligations arising from constituent instruments of international organizations, or agree-

(continued, page 12)

FRANCE AND NATO, from page 10

ments reached within such organizations or, indeed, from the authoritative acts of international organization organs. In such setting the duty to exhaust the prescribed settlement procedures is particularly compelling. In the case of the French action, the end of the United States "impermeability" to nuclear attack and the widely held perception of the change in the nature of the Soviet threat in Europe might arguably be considered as constituting a sufficiently "fundamental" and not "foreseen" change of circumstances the existence of which was at the basis of the consent. Such change could conceivably be viewed as "radically" transforming the scope of the French NATO obligations, particularly in the light of the acquisition by the Soviet Union of a massive nuclear arsenal and the United States involvement in a war in Asia. However, France has not met the procedural prerequisite of proposing specific modifications of its commitments in the North Atlantic Council, and it has not observed the agreed procedures prescribed in the bilateral agreements. Moreover, its unilateral decision may have been due at least as much to a reorientation of its own national policy after 1958 as to the environmental change in the international system.

3) The NATO rôle as a military alliance suggests a liberal application of the *rebus sic stantibus* rule to allow for peaceful change. The rule, however, lends itself to abuse, if employed in the pursuit of a policy of an unlimited "sovereignty" with its derivatives of complete "independence" and absolute "equality." Even though such policy may be motivated by the lawful objective of reducing great-Power influence, it may stimulate destructive nationalism, substitute narrow-based diplomacy for modern, institutionalized common-interest procedures, and defeat any rational pattern of collective security and international organization.

4) The concept of a "partial" withdrawal from an international organization is hardly compatible with a

rational development of international organizations; yet in the case of the French action, all parties concerned appeared to prefer it, as the lesser of two evils, to a complete withdrawal from the Treaty itself, evidently because they recognized the reality of the continuing common interests. France was willing to discuss the consequences of its unilateral action, but the ties that it has retained with NATO are tenuous and highly ambiguous in both legal and military terms; and the many questions of the financial responsibility of France remain unsettled. The arguments advanced by France against the Organization apply in large measure to the Treaty itself and, in the absence of a change in French policy, it is not unlikely that France may withdraw from the Treaty as well.

5) Although weakened militarily and politically by the French action, the NATO subsystem adjusted rapidly and with relative ease through multilateral and bilateral negotiations. The new strategic and political realities have generated differences of national objectives among the member states, and, since the new "flexible response" strategy contemplates still further centralization of the decision-making in the hands of the United States, the issue of increasing the understanding and influence of the other members on nuclear planning has become still more pressing. The new institutional arrangement within NATO, in which France does not participate, goes some distance toward meeting this need, but any further step that would allow the other members to share in the actual decision-making in this area would require a high degree of integration of national foreign policies. In the short run, there is little question of the continuation of NATO, as long as the global confrontation of the two super-Powers continues in Europe and the German question remains unsolved. Its long-range future will depend upon NATO's ability to play a constructive rôle in a modified subsystem, in which the European element would play a substantially stronger part and which, hopefully, would function on a lower level of armaments balance.