Jarin Nijhof[*]

The European Investigation Order and Evidence Requests in Military Criminal Cases: A Matter of 'Uniform Application'?

Abstract

On 3 April 2014, the European Parliament and of the Council of the European Union adopted Directive 2014/41/EU regarding the European Investigation Order in criminal matters. This article explores the applicability of the European Investigation Order with respect to offences committed by members of the armed forces while abroad in connection with their duties. The author identifies and discusses several legal and practical issues that lead to the conclusion that, although it may serve as a template, the European Investigation Order is not a legally appropriate, nor suitable, means for requesting evidence in regard to offences committed by military while serving abroad.
Keywords: European Investigation Order – EIO – Mutual legal assistance – article 351 TFEU – NATO SOFA – EU SOFA – Status of forces agreements – Military criminal cases – Military peace operations

I. Introduction

On 3 April 2014, the European Parliament and of the Council of the European Union adopted Directive 2014/41/EU regarding the European Investigation Order in criminal matters (hereafter: the Directive).[1] The Directive intends to simplify requests for evidence in criminal proceedings and obliges EU Member States to recognise and carry out requests for evidence within strict deadlines.[2] By introducing a single standard form, the Directive should reduce paperwork in view of the introduction of a single standard form.[3] Although certain exceptions and grounds for refusal apply, the Euro-

* Coordinating academic researcher, Netherlands Public Prosecution Service, Centre of Expertise for Military Criminal Law, Arnhem, the Netherlands. The views expressed in this article can be attributed only to the author.

1 OJ 2014 L 130/1.

2 Directive 2014/41/EU, art 2(c).

3 Press Release of the European Commission, '*As of today the "European Investigation Order" will help authorities to fight crime and terrorism*', Brussels, 22 May 2017, http://europa.eu/rapid/press-release_IP-17-1388_en.htm (accessed 17 October 2018).

DOI: 10.5771/2193-5505-2018-3-368

pean Investigation Order (EIO) is presented as the future 'single regime for obtaining evidence' within the EU.[4] For the most part, the EIO is expected to replace requests based on bilateral or multilateral treaties regarding mutual legal assistance since the corresponding provisions as between the Member States are in fact by and large revoked and replaced by the Directive.[5] By 22 May 2017, all EU Member States —with the exception of Ireland and Denmark[6]— were required to have implemented the Directive into national legislation.[7]

However promising its potential may be, the EIO cannot be used for *all* requests for evidence. The Directive provides for a number of situations where existing mutual assistance instruments will continue to apply.[8] The specific area of military criminal cases is, however, not mentioned and thus easily overlooked.

In this article, I will show that, upon closer review, the EIO is generally not applicable, nor suitable —at least not by strict application— for use in regard to offences committed by members of the armed forces while in connection with their duties abroad. For this purpose, I will first briefly describe the specific legal framework that applies to such offences. I will then identify a number of legal issues that apply to the use of the EIO in respect to military criminal cases, after which I will conclude with a recommendation.

II. Legal framework pertaining to offences committed by military abroad

1. NATO Status of Forces Agreement

Since the establishment of the North Atlantic Treaty Organisation (NATO) in 1949,[9] Allied military forces have been present constantly on the territory of other Allied nations, either for military exercises[10] or longer postings.[11] Within NATO, the legal pos-

4 Directive 2014/41/EU, preamble paras 7 and 24.
5 Ibid, art 34(1).
6 Directive 2014/41/EU, preamble paras 43-45 and art 3.
7 A status of implementation is available on https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=120 (accessed 17 October 2018).
8 These are: the establishment of joint investigation teams and the gathering of evidence with such teams (preamble para 8); cross-border surveillance as referred to in the Convention implementing the Schengen Agreement (preamble para 9); mutual assistance requests from or to a non-EU Member States (preamble para 35); and mutual assistance request from and to Ireland and Denmark (preamble paras 44 and 45 respectively).
9 North Atlantic Treaty (adopted 4 April 1949, entered into force 24 August 1949), 34 UNTS 243.
10 A list of upcoming NATO and Allied national exercises is available on https://www.shape.nato.int/nato-exercises and https://www.shape.nato.int/allied-national-exercises respectively (accessed 17 October 2018).
11 See, e.g., the Convention on the Presence of Foreign Forces in the Federal Republic of Germany between Germany and Belgium, Canada, Denmark, France, Luxembourg, the Netherlands, the United Kingdom of Great Britain and Northern Ireland, and the United States of America (adopted 23 October 1954, entered into force 6 May 1955) 334 UNTS 3.

ition of foreign military personnel during their stay in another NATO Member State in connection with official duties[12] is generally governed by the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (NATO SOFA).[13] With this treaty, NATO Member States sought to remove various legal and administrative obstacles so that military units and equipment could easily be moved within the territory of the Alliance.[14] For this purpose, the NATO SOFA also introduced the so-called NATO travel order, an (individual or collective) movement order that serves as a substitute for a passport in view of the fact that military personnel falling under the NATO SOFA are exempt from the passport and visa regulations of the receiving State.[15]

The NATO SOFA also applies in situations where a soldier of a sending State — essentially a State official when present in the receiving State in the performance of his official duties[16]— is suspected of having committed a criminal offence in the receiving State. In the case of offences committed by foreign soldiers there is usually a conflict of jurisdiction. While sending States have (extraterritorial) jurisdiction over their troops abroad on the basis of the flag principle under international customary law,[17] the receiving State also has jurisdiction on the basis of the principle of territoriality. In view of this, the NATO SOFA contains primary jurisdiction arrangements to settle situations where both States have jurisdiction.[18]

12 These duties are not necessarily restricted to 'NATO duties' as it is difficult to determine whether such duties – for example when executed in the framework of a military exercise – are, in fact, directly related to (current or future) NATO tasks or not. According to the negotiation minutes, the contracting parties therefore opted for application of the NATO SOFA to *all* forces of a NATO party present in the territory of another party, *unless* agreed otherwise; While parties can, pursuant to NATO SOFA art I(1)(a), bilaterally agree to limit the application of the NATO SOFA in regard to certain units, it is applicable in the absence of any such specifically agreed exemption: see the Report of the Chairman of the Working Group, D-D(51) 127 (7 May 1951), para 3(b), as included in *J.M. Snee*, ed., NATO Agreements on Status: Travaux Préparatoires, International Law Studies, Vol. 54 (Newport, Rhode Island: U.S. Naval War College, 1966), p. 533.

13 Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (NATO SOFA) (adopted 19 June 1951, entered into force 23 August 1953), 199 UNTS 67.

14 *S. Lazareff, Status of Military Forces under Current International Law* (Leyden: Martinus Nijhoff 1971), p. 1 et seq.

15 NATO SOFA, art III(1).

16 *J.E.D. Voetelink*, Status of Forces: Criminal Jurisdiction over Military Personnel Abroad (The Hague: T.M.C. Asser Press, 2015), p. 151 et seq.

17 According to the flag principle, the State under whose flag a soldier is acting also has jurisdiction over offenses committed outside the Flag State's territory (*S. Lazareff* (fn. 14), p. 11 et seq.); Cf. *R. Liivoja,* Criminal Jurisdiction over Armed Forces Abroad (Cambridge: Cambridge University Press, 2017), p. 242 et seq.

18 *P.J. Conderman and A. Sari*, Jurisdiction, in: D. Fleck (ed.), *The Handbook on the Law of Visiting Forces* (Oxford: Oxford University Press, 2018), p. 224 et seq.

In case of concurrent jurisdiction, the military authorities of the sending State have the primary right to exercise jurisdiction in a number of specific circumstances.[19] In all other cases, the receiving State has primary jurisdiction.[20] Even then, however, the receiving State is required to give *'sympathetic consideration'* to a request from the sending State to waive its primary right in cases where the sending State *'considers such waiver to be of particular importance.'*[21] The scope of this provision has been elaborated in several bilateral and multilateral additional agreements, such as the Supplementary Agreement to the NATO SOFA between Germany and the United States, the United Kingdom, France and the Netherlands (hereafter: Supplementary Agreement).[22] Consequently, in a great number of cases, the military authorities of the sending State are entitled to exercise their nation jurisdiction over foreign personnel.

The NATO SOFA contains a specific provision on carrying out necessary investigations and the collection of evidence, regardless of which State exercises jurisdiction.[23] Moreover, the NATO SOFA specifically requires the States concerned to assist each other in the conduct of enquiries and the collection of evidence regarding offences against customs and fiscal laws regulations.[24] In addition to this, other arrangements regarding mutual legal assistance may also apply.[25] Lastly, the NATO SOFA provides for provisions regarding the handing over of members of the armed forces to the authority which is to exercise jurisdiction, which is to be strictly distinguished from the legal instrument of extradition.[26]

19 This applies in criminal cases in relation to: *'i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent'* and *'ii) offences arising out of any act or omission done in the performance of official duty'* (NATO SOFA, art VII(3)(a)).

20 Ibid, art VII(3)(b).

21 Ibid., art VII(7)(b).

22 Agreement (with Protocol of Signature) to supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (adopted 3 August 1953, entered into force 1 July 1963) 481 UNTS 6986; Pursuant to art 19(1) of this agreement, read in conjunction with the Protocol of Signature, an *'automatic'* waiver system applies, although Germany retains the option to *'recall'* the automatic waiver in compelling individual cases (art 19.3).

23 NATO SOFA, art VII(6)(a) provides *'The authorities of the receiving and sending States shall assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence.'*.

24 NATO SOFA, art XIII(1).

25 The preamble of the NATO SOFA states: *'Bearing in mind that [..] the decision to the conditions under which [the forces] will be sent, in so far as such conditions are not laid down by the present Agreement, will continue to be the subject of separate arrangements between the Parties concerned;* See, e.g., Supplementary Agreement, art 24 and art 25(2).

26 NATO SOFA, art VII(5)(a); Cf. Directive 2014/41/EU, preamble para 25, in which reference is made to the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2000 L 190/1).

2. EU SOFA

The EU adopted the EU Status of Forces Agreement (EU SOFA) in 2003, defining the legal position of military forces and headquarters, as well as their military and civilian personnel, deployed by one EU Member State in the territory of another Member State within the framework of the European Security and Defence Policy (ESDP).[27] While the EU SOFA was drafted as a stand-alone document to appropriately reflect the specific nature and institutional structure of ESDP operations,[28] it is largely based on the NATO SOFA.[29] The scope of the EU SOFA is rather confined, as it exclusively cover activities taking place in the context of the ESDP within the territory of the EU Member State and on the condition that no other status agreement —such as the NATO SOFA— is applicable.[30] The EU SOFA has not entered into force yet.

Remarkably, the EU SOFA does not contain any provisions regarding mutual (legal) assistance in regard to criminal investigations. Presumably, the EU Member States party to this agreement deemed the already existing mutual assistance arrangements, such as Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union,[31] to be sufficient in this context.[32] The fact that these mutual assistance arrangements have now been replaced by the Directive, makes it even more pertinent to consider whether it in fact provides for an appropriate solution to gather evidence in military criminal cases.

III. Issues regarding the use of an EIO in military criminal cases

The aforementioned legal framework pertaining to offences committed by military forces deployed abroad brings about a number of issues in respect to the application of the EIO.

27 Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA) (adopted 17 November 2003, not yet entered into force), CELEX:42003A1231(01).

28 *A. Sari,* 'The European Union Status of Forces Agreement (EU SOFA)', 13 Journal of Conflict and Security Law (2009), p. 361 et seq.

29 *Ibid.,* p. 357 et seq.

30 EU SOFA, art 19(6)(b) and art 19(6)(c); see also *A. Sari* (fn. 28), p. 366.

31 OJ 2000 C 197/3.

32 *A. Sari,* 'The EU Status of Forces Agreement: Continuity and Change in the Law of Visiting Forces', 46
Military Law and the Law of War Review (2007), p. 172 et seq.; *J.E.D. Voetelink*. 'Military Law Enforcement', in: D. Fleck (ed.), The Handbook on the Law of Visiting Forces (Oxford: Oxford University Press, 2018), p. 269.

1. The NATO SOFA predates the EU Treaties

Paragraph 35 of the preamble of Directive 2014/41/EU provides that '*Where reference is made to mutual assistance in relevant international instruments, such as in conventions concluded within the Council of Europe, it should be understood that between the Member States bound by this Directive it takes precedence over those conventions.*' If European Members States wish to continue applying other bilateral or multilateral agreements to which they are a party, they must specifically notify the Commission of such desire.[33]

This provision could —erroneously— convey the impression that the Directive supersedes *all* other pre-existing relevant international agreements. However, pursuant to article 351 of the Treaty on the Functioning of the European Union (TFEU),[34] the rights and obligations arising from agreements before 1 January 1958 —i.e. the initial date of entry into force of this treaty— are explicitly *not* affected by the provisions of the European treaties. As many EU Member States are equally a Member of NATO, this therefore applies, inter alia, to the NATO SOFA which entered into force on 23 August 1953.

According to the principle of international law '*pacta sunt servanda*', parties must, in good faith, comply with the obligations as provided in the NATO SOFA.[35] Not surprisingly, several European Directives, as well as the Schengen Borders Code, therefore contain exemptions for NATO forces.[36] Although Directive 2014/41/EU does not specifically contain such exemption, this does not change the fact that NATO SOFA obligations are, in principle, not affected by posterior European legislation.[37]

As the Directive is not applicable by mere operation of law, it is not surprising that *none* of the EU Members States who are also a party to the NATO SOFA have notified the Commission of their wish to continue to apply this treaty.[38] In view of article 351 TFEU, this automatically follows from EU law and thus does not require a sepa-

33 Directive 2014/41/EU, art 34(4).

34 Treaty on the Functioning of the European Union (adopted 25 March 1957, entered into force 1 January 1958), consolidated version published in OJ 2012 C 326/47.

35 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 26.

36 E.g. Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347/1), art 143(h) and art 151(c); Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community (OJ 2009 L 146/1), art 1(1)(b); and Regulation (EC) 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105/1), art 4(4).

37 After all, art. 351 TFEU applies not only to the Treaties, but also to secondary acts adopted under them: *European Court of Justice* (ECJ), 14.1.1997, case C124/95 (*The Queen ex parte Centro-Com Sri and H. M. Treasury and The Bank of England)* [1997] ECR 1-81, margin no 61.

38 All notifications are available on https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=120 (accessed 17 October 2018).

rate notification. Consequently, if a criminal case falls within the scope of the NATO SOFA, any requests for evidence are equally governed *exclusively* by the NATO SOFA, even if the sending State and the receiving State are both members of the European Union.[39]

The aforementioned legal ramification essentially curtails the discussion on the applicability of the EIO in regard to criminal offences which fall under the scope of the NATO SOFA. This, however, does not count for the EU SOFA, which may come into effect in the future. As the Directive arguably applies to military criminal cases governed by the EU SOFA, I will point out a number of other issues that emerge when applying an EIO in military criminal cases.

2. Lack of double criminality

Article 11 of the Directive provides for a list of circumstances in which an executing State may refuse the recognition or execution of an EIO.[40] For example, if the conduct for which the EIO has been issued is not punishable under the law of the executing State, this constitutes a possible ground for non-recognition or non-execution of the EIO.[41]

Most military legal regimes, however, penalise specific 'military' offences such as absence without leave, desertion, dereliction of duty and disobeying military orders. As such offences generally do *not* constitute an offence under the (military) criminal law of the executing State when committed by a foreign soldier, an EIO could, in principle, be refused in accordance with the Directive.[42] This comes to show that the Directive was apparently never envisaged to cover evidence requests pertaining to military criminal cases. While this is not an issue in cases governed under the NATO SOFA in view

39 All NATO Member States that are equally Member of the EU, acceded NATO *prior* to acceding the EU. Besides, three EU Member states have later acceded NATO's Partnership for Peace (PfP) programme of practical bilateral cooperation between individual Euro-Atlantic partner countries and NATO (i.e., Austria, Ireland and Malta); Accordingly, Art. 351 TFEU may not apply to these EU Member States in reference to the application of the PfP SOFA (adopted 19 June 1995, entry into force January 13, 1996, Treaties and other International Acts Series (TIAS) 12666) —stipulating that Parties to the PfP SOFA shall apply the provisions of the NATO SOFA as if they were Parties to the latter agreement unless provided otherwise (Art. 1 PfP SOFA)— but I will not elaborate on that in this article.

40 Of significance, the Netherlands has implemented this provision by means of *imperative* grounds for refusal. The Netherlands government considered this appropriate because the Directive already requires the Netherlands, as the requested State, to consult with the issuing authority prior to invoking a ground for refusal and provides for the possibility to supplement or improve the EIO (Directive 2014/41/EU, art 11(4)): *Kamerstukken* [Parliamentary Papers] *II*, 2016–2017, 34 611, no. 3, p. 7, https://zoek.officielebekendmakingen.nl/kst-34611-3.html (accessed 17 October 2018).

41 Directive 2014/41/EU, art 11(1)(g).

42 Annex D to the Directive provides for a list of offenses whereby double criminality is not required, but this list does not contain any military offenses.

of its own legal assistance provision, this could prove to be problematic in other cases involving foreign military personnel.

3. Extraterritorial nature of military criminal cases

The Directive also provides that an EIO may be refused if '*the EIO relates to a criminal offence which is alleged to have been committed outside the territory of the issuing State and wholly or partially on the territory of the executing State, and the conduct in connection with which the EIO is issued is not an offence in the executing State.*'[43] In addition to double criminality, territoriality thus also comes into play when assessing the admissibility of an EIO.

By exempting offences committed on the territory of the executing State, the Directive fosters the mutual recognition of judicial decisions[44] while at the same time endorsing the principles of territorial sovereignty and domestic jurisdiction under international law.[45] The NATO SOFA, however, embarked on a different underlying idea. With this treaty, the parties sought to strike a balance between the legitimate interests of the receiving State (in view of its territorial sovereignty) and the sending State (given the principle of the 'Law of the Flag').[46] Consequently, the NATO SOFA specifically looks at offences committed in the territory of another Member State, which are, as a rule, extraterritorial by nature.

As the underlying principles of the NATO SOFA and the Directive are thus incompatible to a large extent, this, too, explains why an EIO generally will not serve a purpose in military criminal cases when strictly applied.

4. No execution outside the requested State's territory

The matter of extra-territoriality poses yet another issue in regard to using an EIO. The preamble of the Directive stipulates that '*The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice.*' In paragraph 8, it continues to provide that '*An EIO is to be issued for the purpose of having*

43 Directive 2014/41/EU, art 11(1)(e).

44 *L. Klimek*, Mutual Recognition of Judicial Decisions in European Criminal Law (Cham: Springer International Publishing, 2017), p. 436.

45 UN Charter, art 2(7); Cf. *James Crawford*, Brownlie's Principles of Public International Law (Oxford: Oxford University Press, 2012), p. 448. Klimek points out that the EIO also looks at a '*partial removal of the double criminality requirement*' (*L. Klimek* (fn. 44), p. 436). This, however, only applies to a limited number of specifically listed offenses and was subject to extensive debate, reason why a complete removal of double criminality as a refusal or non-execution ground is illusionary: *G. Vermeulen, W. De Bondt and Y. Van Damme,* EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence? (Antwerp/Apeldoorn/Portland: Maklu, 2010), p. 83.

46 Summary Record of a Meeting of the Council Deputies, D-R(51) 15, 2 March 1951 (*J.M. Snee* (fn. 12), p. 130 et seq.); Cf. *S. Lazareff* (fn. 14), p. 8 et seq. and p. 444.

one or several specific investigative measure(s) carried out in the State executing the EIO ('the executing State') with a view to gathering evidence'.[47]

The Directive thus apparently envisages a strictly territorial application and arguably precludes the use of an EIO for requests pertaining to the gathering of evidence *outside* the territory of the executing State. Such requests are, however, not unlikely in the context of a military criminal investigation, as EU Member States often jointly conduct military operations outside the European continent and may require mutual (legal) assistance in that respect.[48]

In view of the *'unstable situations'*[49] that may exist in those operational circumstances, any assistance requests within that context should be processed with the utmost expedience and without any delaying administrative hurdles. Consequently, the use of an EIO —even when only by analogy— in such cases may not be desirable.

Notably, the execution of mutual assistance in such cases is not governed by the NATO SOFA, either, as the NATO SOFA does not apply to operations outside the metropolitan territories of NATO Member States.[50] Considering that a status of forces agreement generally contains arrangements with the receiving State only, any mutual assistance between troop-contributing states must therefore be mutually agreed by separate —possibly *ad hoc*— arrangements.[51]

IV. Conclusion

Although the EIO is to be welcomed as the new standard tool for mutual legal assistance requests for obtaining evidence, the EIO is, for various reasons, not suitable to be used in military criminal cases. Clearly, any requests for evidence pertaining to offences which are *not* governed by the NATO SOFA fall under the scope of the Directive and hence can be done by means of an EIO. This is the case, for example, if the

47 Emphasis added.

48 See, E.g., *Jaloud v. the Netherlands*, ECtHR, application no. 47708/08, Judgement 20 November 2014, margin no 215, where the Court found that *'it does not appear unlikely that either or both of the Occupying Powers, or perhaps another Coalition power, had facilities and qualified personnel available'* to perform an autopsy. For the sake of simplicity, I will in this context disregard the viable legal reservations expressed in the Joint Concurring Opinion of Judges Casadevall, Berro-Lefevre, Šikuta, Hirvelä, López Guerra, Sajó and Silvis regarding the Court's findings with respect to the —lacking?— right to claim the legal control of the body and the circumstances of the autopsy (margin no 6).

49 Characterization used in *Jaloud v. the Netherlands*, Joint Concurring Opinion of Judges Casadevall, Berro-Lefevre, Šikuta, Hirvelä, López Guerra, Sajó and Silvis, margin no. 7.

50 NATO SOFA, art XX(1); Cf. EU SOFA, preamble para 3, which specifically provides: *'Specific agreements will have to be concluded with the third countries concerned in the case of exercises or operations taking place outside the territory of the Member States.'*.

51 *J.J.M. van Hoek*, 'The Duty to Investigate: Legal Assistance in Military Operations', XX Recueils of the International Society for Military Law and the Law of War (2015), p. 276 et seq.; Cf. EU SOFA, preamble para 3.

foreign military suspect was present in the executing State for strictly personal reasons, or if the request is submitted by a third State.[52]

When it comes to offences governed by the NATO SOFA, however, this treaty provides for a separate mutual assistance mechanism pertaining to such cases when committed on the territory of NATO Member States. As the NATO SOFA predates the EU Treaties, this mechanism is not affected by the recent Directive regarding the European Investigation Order in criminal matters.

Moreover, the grounds for non-recognition as provided by the Directive underline that the Directive was never intended to cover requests for evidence relating to offences committed by members of foreign forces while in connection with official duties abroad. After all, such offences are, as a rule, committed in the territory of the executing State —which, in principle, is a refusal ground pursuant to the Directive— and often may not constitute an offence under the law of the executing State, which equally constitutes a reason to refuse the execution of an EIO. Consequently, the EIO is generally not an appropriate tool to 'order' the submission of evidence in military criminal cases. In addition, the Directive does not cover evidence requests in military peace operations outside EU territory.

The aforementioned issues equally apply to military criminal cases which will be governed by the EU SOFA once entered into force. Accordingly, the EIO is equally unfit for use in such cases. By simultaneously replacing the mutual assistance instruments previously in place, the Directive thus arguably created a (potential) vacuum in respect to such cases. This further indicates that the matter of mutual assistance in military criminal cases has not been given due attention during the drafting of the Directive, nor the EU SOFA for that matter.

In sum, requests for evidence regarding offences committed by military personnel should not be pushed into the 'straitjacket' format of an EIO, neither by issuing States nor by executing States. After all, doing so could lead to unnecessary and undesirable rejections and delays. As the EIO, however, has some positive elements —such as the strict deadlines that apply for gathering the requested evidence as well as the standardized format— it may well serve as a useful *template* for evidence requests pursuant to the NATO SOFA in certain military criminal cases, albeit by analogous application and on a tailor-made basis only. As it is yet unclear how evidence requests pertaining to offences governed by the EU SOFA —as and when it enters into force— should be administered, the EU will clearly have to give some more thoughts to this particular matter.

52 Cf. *S. Lazareff* (fn. 14), p. 235.