The status of NATO International Military Headquarters under International Institutional Law

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Functional privileges and immunities are a prerequisite for the effective and independent operation of international organizations and their staffs. Traditionally international organizations (IO) are granted the entitlements necessary to enable and perform their functions conferred on them by their constituents. With respect to privileges and immunities, the resources of international organizations are assigned and linked exclusively to the fulfilment of the organization's purposes. One of the prerequisites for the satisfactory performance by an international organization of the functions for which it was established is the enjoyment of autonomy.

Normally those privileges are detailed in the Organizations' founding agreements (siege agreements, *accord de siège*). An *accord de siège* or hosting agreement is a type of agreement concluded between an IO and the State in the territory of which the IO is hosted and defines the IOs' legal position. In particular it guarantees the independence of the IO and its personnel with respect to the host nation and warrants, inter alia, the necessary privileges and immunities for both [IO and personnel] and in some cases affording certain extraterritorial rights for the IOs' premises. The four main privileges and immunities are (a) immunity from jurisdiction and execution; (b) inviolability of installations and immunity of documents and archives; (c) freedom of communication; and (d) facilities in regards to banking, transfer of funds, and fiscal privileges.

NATO is a political and military alliance of 29, at present, sovereign Nations which voluntarily gave to that alliance in 1950 the feature of an intergovernmental organization to ensure their common interests and secure their future in the Euro-Atlantic area. All the Allies equally and by consensus, contribute to the financing of the Organization and make decisions within it. Although NATO is an International Organization it has different legal positions applicable to different bodies, which actually make NATO an international organization made of three different international organizations. It is of note that NATO treaty in its Article 9 gives the North Atlantic Council the prerogative to create subsidiary bodies. SHAPE and HQ SACT are the two Supreme Headquarters, two international organizations with independent legal positions, which have objective legal personality by virtue of Article 10 of the 1952 Paris Protocol that supplements the 1951 NATO SOFA. The third international organization of NATO is the 'Organization', normally identify with the 'NATO

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HQ' and made of the International Staff, International Military Staff, Agencies and representatives and experts.

The legal architecture of NATO includes its founding Treaty (North Atlantic Treaty signed in 1949) – which does not contained any of the necessary features of an IO - and three general multilateral treaties: the Ottawa Agreement (signed in 1951) which defines the status enjoyed by NATO as a full International Organization, as well as the privileges and immunities granted to its staff and to national representatives to 'Organization', the Protocol on the status of International Military Headquarters, done in Paris on 28 August 1952 (hereinafter the Paris Protocol and incorporating by reference key provisions of the NATO Status of Forces Agreement ('NATO SOFA')), which lays down the privileges and immunities afforded to International Military Headquarters which are established pursuant to the North Atlantic Treaty. These treaties can be supplemented in a bilateral basis, detail and operationalize the privileges and immunities afforded by the above three general multilateral treaties. Since 1953, the Supreme Headquarters have concluded Supplementary Agreements to implement and amplify the provisions of the Paris Protocol and its application of the NATO SOFA to NATO International Military Headquarters ('IMHQ').

Moving further down to entities outside of NATO Command Structure ('NCS'), such as the NRDCs – part of the NATO Forces Structure ('NFS') - or the COEs, and in order to understand their legal position that governs their operations one needs to refer to the functions and purposes for their foundation, as well as the applicability of the legal positions of the above mentioned NATO related treaties to them. Taking into account that the legal position is made of the three elements, i.e., legal status (legal personality, legal capacity and powers), privileges and immunities and responsibility, it is submitted that only the privileges and immunities of the above treaties apply to NFS and COEs – as well as assets at the disposal of NATO per MC-586 series. Therefore, it is necessary to identify whether the privileges and immunities referred to International Organizations apply ipso facto and to the IMHQs, set up by the NAC, one needs to analyse in a comparative way their legal regime and the specific provisions that apply to each separate NATO body as agreed with different NATO Nations. The scope remains the same that is to meet the functional needs of the IMHQs and to create a favourable legal environment for an IMHQ to perform its NATO oriented businesses, i.e., NATO's functions and purposes in accordance with the 'rules of the organization'.

IMHQs are set up pursuant to article 14 of the Paris Protocol. To that extent the existent NATO Rapid Deployable Corps which are part of a bigger NFS, offered by the Allies and accredited by the Supreme Headquarters Allied Powers EUROPE ('SHAPE'), is an example of an article 14 IMHQs. IMHQs are normally Memorandum of Understanding ('MOU')- based Organizations whose administration, organisation, manning and funding is described in their founding MOU signed between the Participating Nations and SHAPE and reflects their desire inspired by Article 3 of the North Atlantic Treaty, to unite their efforts for collective defense in even closer cooperation..

IMHQs do not only operate under the so called "NATO SOFA family," meaning the 1951 NATO SOFA on the status of forces, the 1952 Paris Protocol on international military headquarters, and the supplementary agreements between SHAPE and each one of the States hosting such an entity, but also under the Ottawa Agreement, in spite of its Article II and thanks to the *travaux preparatoires*, as well as consistence practice based on them primarily and Supplementary Agreements secondarily. This since the Paris Protocol text could not cover certain aspects necessary for the functioning of IMHQs like privileges and immunities for high-ranking officers, dispute resolutions (Administrative Tribunal), immunity from jurisdiction, international staff (NATO International Civilians), etc. Moreover, by way of institutionalization, international status is granted by the decision of the North Atlantic Council (NAC) which activates them as a 'NATO Military Body' with IMHQ status.

Going further into analysis of the applicable privileges and immunities one should starts with the question whether an IMHQ is subject to the jurisdiction of the host nation or not. To that a comparative analysis of the agreements in place is needed, along with an analysis of the different Supplementary Agreements as applied in different NATO Nations. Commonly, a clause is included that an IMHQ may engage or be engaged in legal proceedings related to non-commercial claims and there is no general statement barring a hosting State from attempting to exercise jurisdiction.[2] The Paris Protocol, and in particular Article 11, paragraph 1, does not submit, in a general manner, an IMHQ to host State jurisdiction, only gives the possibility for engaging in legal proceedings for matters related to NATO SOFA Article VIII claims, which are non-contractual claims. So that, any reference to Article 11.1 to submit that IMHQs do not have conventional immunity from jurisdiction, or immunity from jurisdiction at all, is fundamentally wrong and lacks a rigorous reading of the Article and the *travaux*. Several publicists, like Jenks and Muller, have approached this question superficially and created confusion by affirming that IMHQs do not have immunity from jurisdiction without any deep analysis on the matter, not even considering the possibility of customary law immunity.

Paris Protocol status is complemented by Supplementary Agreements, which (with variations) provide immunities additional to those identified in the Paris Protocol and consistent with the functionality principle. In some areas, the Paris Protocol specifies the immunity enjoyed by IMHQs. For example, fiscal privileges are found in Articles 7 and 8 and the inviolability of archives and documents are set out in Article 13.

Paris Protocol incorporates by reference the NATO SOFA and is complemented by the Ottawa Agreement in accordance with the *travaux*. In turn, the Supplementary Agreement's article on fiscal immunities and entitlements complements the Paris Protocol provisions on this matter. For NATO bodies under the Paris Protocol, the claims provisions found in the Paris Protocol Article 6 are a clear example of how parties settle claims against an IMHQ within the scope of the Paris Protocol and subject to host State substitution.

[2] Where an international organizations appears in court upon being sued, like the IUSCT in the *Spaans* case, it should invoke its jurisdictional immunity at the first opportunity. For further reading see Thomas Henquet, 'The Jurisdictional Immunity of International Organizations in the Netherlands and the View from Strasbourg', *International Organizations Law Review* 10(2013) , 538-571, p. 542

Immunity and jurisdiction must be viewed globally and in accordance with NATO SOFA (criminal), Ottawa Agreement (from legal process) the procedures set out in a Supplementary Agreements. Most Supplementary Agreements have a similar clause (negotiation and no recourse to outside jurisdiction). A claimant is not barred from bringing a claim before a local court. However, it must be noticed that immunity from jurisdiction does not apply for cases involving local workers and if related to their contracts or the conditions set on those contracts.

A rule exists in public international law that IOs are exempt from taxes in the hosting State in order to ensure the independent status of the international organisation, and to respect the principle that one State should not derive revenue from hosting an International Organisation. Additionally, and equally importantly, NATO member nations have adopted the policy that no member nation should derive revenue from hosting Alliance activities. With regards to exemption of an IMHQ from duties and taxes, the Paris Protocol (Article 8, paragraph 1) provides that Headquarters shall be relieved as far as practicable from duties and taxes, in the interest of common defence and for their official and exclusive benefit. Specifics are to be found in the respective Supplementary Agreements, where each NATO Nation following negotiations gave effect and operationalize this provision.

Furthermore, the Paris Protocol and subsequently the Supplementary Agreements provide the general exemption from taxes and duties (i.e. taxes on local purchases), extend the fiscal entitlements of the NATO SOFA, provide the Headquarters with importation rights (vehicles, equipment), and extend the use of the NATO SOFA. Equally important the following articles of the NATO SOFA apply to IMHQ ipso facto: Article XI, paragraph 3 (exemption of official documents from customs exemption), paragraph 4 (import and resale of provisions), paragraph 8 (disposal), and paragraph 11 (petrol, oil and lubricants). Furthermore, an International Military Headquarters, is entitled to import its equipment free of taxes (Article XI paragraph 4 of NATO SOFA) as well as a special status for fuel, oil and lubricants delivery for use in service vehicles, aircraft and vessels of a force which may be delivered free of all duties and taxes following special arrangements made with the receiving State (Article XI, paragraph 11 of NATO SOFA).

With regards to tax exemptions and their compatibility with EU law.[3] The import, export, and re-export of equipment used for official purposes from NATO Nations and entities within EU and to NATO Nations outside the EU is facilitated by Form 302. This is a NATO Form, developed pursuant to NATO SOFA, (Article XI, par. 4), implemented through

[3] Despite the analysis regarding the compatibility of tax exemptions with the EU Law, EU regime is not directly applicable to NATO. On this issue see Art. 42 (ex Article 17) of the Treaty of the European Union. The following cases have established that EU Law does not apply to SHAPE as an international organization: Tribunal de Première Instance Francophone de Bruxelles, Section Civile – or- donnance 9ème chambre affairs civiles (16/06/2017)
and – Tribunal de Première Instance Francophone de Bruxel.les, Section Civile – or- dennance Exequatur Sentence Arbitale – Requête unilatérale (Art. 1719 à 1721 C.J.) affaires civils (12/07/2017).

the Allied Movement Publication series,[4] and recognised in the European Community legislation as a Community transit document for 'equipment for the force and reasonable quantities of provision, supplies and other goods…' . Articles 144, paragraph 3 (e) and 145, paragraph 2 (e) of the Modernised Customs Code provide that internal and external transit of goods can take place 'under cover of the Form 302 provided for in the Convention between the Parties to the North Atlantic Treaty regarding the Status of their Forces'.

Furthermore, Council Directive 2006/112/EC, on the common system of Value Added Tax (VAT),[5] Article 143, paragraph 1 (g) exempts from VAT 'the importation of goods by international bodies […] recognised as such by the public authorities of the host Member State, or by members of such bodies, within the limits and under the conditions laid down by the international conventions establishing the bodies or by headquarters agreements'. This makes clear that Directive 2006/112 is constructed with the intention to allow NATO Nations to 'honour' their NATO commitments. It is to be noted Article 42 of the TEU, which also gives consistency to EU Law with respect to NATO treaties and their obligations.

The privileges and immunities enjoyed by International Organizations are a well-founded principle of international law allowing the IO to successfully fulfil its' mission [functions and purposes of the IO], which in the case of NATO and its international organizations is the collective defense of all allies and the preservation of international peace and security, per the preamble of the North Atlantic Treaty and the continuous statements made by the NAC since its first session in 1949.

[4] Currently Allied Movement Publication (B) Procedures for Surface Movements Across National Frontiers, AMovP-2(B), published in June 2011 (NATO UNCLASSIFIED). Annex A contains Form 302 and provides information relative to NATO Nations and their associated customs procedures.
[5] COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).