HQ AIRCOM and the hybrid nature of the Paris Protocol: Customary and Conventional Immunities

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Introduction

In 2017, Mr K, a former NATO employee, separated from the Organization and convicted of espionage, summoned NATO HQ AIRCOM to appear before the German Kaiserslautern Labour Court. Mr K turned to the court as he wanted the return of several personal documents that, following his separation, had remained in the possession of HQ AIRCOM, a subordinate military headquarters to SHAPE.

This case is of particular interest from a legal perspective, not because of the criminal background of Mr K or his relation to the international civil service, but because the case sets a precedent confirming the immunity from jurisdiction of SHAPE and its subordinate military headquarters on both customary and conventional grounds.

Contrary to immunity from execution which is explicitly mentioned in SHAPE's governing treaty, the 1952 Paris Protocol, some have questioned whether there is a treaty basis to apply immunity from jurisdiction to NATO's military headquarters. Nonetheless, legal principles of immunity, NATO treaties, and practice all point in the same direction and support the recognition of this immunity from jurisdiction, not only on a customary basis, but also on a conventional basis. This recognition is essential for the military side of the Organization which is, because of its executive nature, the most exposed and therefore the most vulnerable to legal challenges.

1. Immunity from Jurisdiction in International Law

Although immunities of international organizations bear some resemblance to state immunity, their respective legal foundations and framework must be distinguished.[2] State immunity from

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jurisdiction entails that they cannot be summoned to appear before a foreign court. This immunity is based on the sovereign equality of states, i.e., no hierarchy applies between nations, as they are legally equal.[3]

On the other hand, nations that jointly found a public international law organization having its own legal personality create a subject of international law that belongs to everyone and no one at the same time. Unlike nations, international organizations do not have their own territories and by default genuine sovereignty. Instead, they must necessarily use the territory of one or more nations. This creates the risk of the Host State, in particular through its domestic courts, influencing the functioning and execution of the duties of the international organization linked to its territory. Therefore, the immunity from jurisdiction protects the international organization's independence and autonomy against any State's unilateral influence, and that of the Host Country in particular, to ensure its functioning and ultimately its ability and capability to fulfil its tasks unhindered, and that it can pursue its objectives in the interest of all member states based on equivalence.[4] The Netherlands' Advisory Committee for instance on Issues of Public International Law[5] captured this in a recent opinion:

> *"[t]he full submission of international organizations to the jurisdiction of the [state of establishment] would not only prejudice the (international) functioning of the organization, but also the rights and interests of other Member States."*[6]

Hence, the reason to grant privileges and immunities to international organizations is functional by nature: privileges and immunities allow an international organization to operate without the

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[2] In *Reparation of Injuries Suffered in Service of the U.N*., Advisory Opinion, 1949 I.C.J. 174 the Court came to the conclusion that "the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is 'a super-State'". According to the ICJ's *Nuclear Weapons* Advisory Opinion, international organisations are invested by States with powers, the limits of which are a function of the common interests whose promotion those States entrust to them, in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J.

[3] This is a time-honoured rule of customary international law, codified in Article 4 of the 1933 Montevideo Convention on Rights and Duties of States (165 LNTS 19 (1934)).

[4] See the opinion of the European Commission of Human Rights (merged in the ECtHR) of 2 December 1997 (appl. No. 26083/94) in the case *Waite & Kennedy v. Germany*, par. 70: "*[T]he constitutional instruments of intergovernmental organisations elaborately define their decision-making processes, and in particular the type and degree of influence each government is to have in respect of the organization. It is therefore considered unacceptable for individual governments to be able, whether through their executive, legislative or judicial organs, to require an intergovernmental organisation to take certain actions by commands addressed to the organisation itself or to any of its officials*."

[5] The Advisory Committee on Issues of Public International Law (CAVV) is an independent body that advises the government, the House of Representatives and the Senate of the Netherlands on international law issues.

[6] Advisory Committee on Issues of Public International Law (CAVV), *Advice Regarding Accountability of International Organizations* No. 27, The Hague, December 2015, p. 12

interference of national authorities and fulfil its functions and purposes.[7] Consequently, immunity from jurisdiction guarantees that the international organization can operate in an independent and unbiased manner. This principle for international organisations to enjoy immunity from jurisdiction in order to guarantee the autonomy, independence and functional effectiveness has been confirmed by jurisprudence and is widely accepted by international courts and scholars.[8]

2. NATO, SHAPE and HQ AIRCOM and their governing treaties

As an Organization, NATO is comprised of three different international organizations with a distinct legal position: the 'Organization' (International Staff/ International Military Staff and the Agencies) and two Supreme Headquarters (SHAPE and HQ SACT). The 'Organization' (known colloquially as the NATO HQ, located in Brussels) is ruled by the 1951 Ottawa Agreement, and the two Supreme Headquarters by the 1952 Paris Protocol. Furthermore, whenever NATO forces move to other allied countries, their status is regulated by the 1951 Status of Armed Forces Agreement (NATO SOFA) which enshrines different rights, privileges, immunities and duties of the military forces deployed.[9]

The Paris Protocol is directly linked to the 1951 NATO SOFA as it aims to enable provisions of the NATO SOFA to be applied - directly or tailored – to NATO International Military Headquarters (IMHQs) like HQ AIRCOM and SHAPE, in order to ensure their independent functioning in the territory of the respective Host Nation. The Paris Protocol provides the status of such IMHQs and has several provisions which are similar to the provisions foreseen in the Agreement on the status of the North Atlantic Treaty Organization, National Representatives and International Staff signed in Ottawa (Ottawa Agreement), while in other provisions it also invokes and makes applicable articles of the NATO SOFA. The Paris Protocol is hence a hybrid Agreement which requires from the NATO SOFA and the Ottawa Agreement for its completeness.[10]

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[7] See, for example, Reinisch, A. *International Organizations Before National Courts*. Cambridge University Press, 2000. pp.233-235.

[8] Fourth report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz-González, Special Rapporteur, UN Document A/CN.4/424, Extract from the *Yearbook of the International Law Commission:*1989,vol. II(1), paragraph 24; also compare Restatement (third) of foreign relations law § 467(1) (Am. Law Inst. 1987); European Court of Human Rights, *Waite and Kennedy* v. *Germany*, 26083/94, paragraph 63.

[9] ACO/SHAPE Legal Advisor, "A closer approach to the Alliance's institutionalization NATO, three international organizations in one", SHAPE Community Life Magazine, September 2018 edition.

[10] "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 questions not covered by that Agreement – and for those questions only – it is possible to refer to the Agreement signed at Ottawa* on 20 September 1951, concerning the status of NATO civilian agencies." (emphasis added). North Atlantic Treaty Organization. 'Protocol on the Status of Allied Headquarters', Document D-D(52)2, 3 January 1952, in J. Snee, NATO Agreements on Status: Travaux Préparatoires' (1961) *International Law Studies, Naval War College,* Vol. LIV, p. 596.

From a historical perspective, an integrated military structure capacity was the first and primary endeavour of NATO. This is, *inter alia*, why the NATO SOFA, allowing for cross border cooperation of allied forces, was the first treaty following the North Atlantic Treaty, setting the first stone for the later institutionalisation of NATO under the Ottawa Agreement and the Paris Protocol.[11] The functional principle of immunity was mentioned above and it is important to understand that the execution of military operations led by SHAPE really forms the core of NATO's functioning. It is exactly in the execution of the mandate of SHAPE that safeguarding an efficient and independent functioning is of the utmost importance.

HQ AIRCOM is a military headquarters in Germany that is subordinate to SHAPE and has *ad hoc* delegated authority to act on SHAPE's behalf. It is also only SHAPE that has a distinct legal personality that can be delegated to HQ AIRCOM. As such, HQ AIRCOM falls under the Paris Protocol which possesses a hybrid nature and interacts with the other two treaties to complete the legal position of IMHQs. Below is explained how SHAPE and also HQ AIRCOM's immunity from jurisdiction follows from the incorporated reference to the Ottawa Agreement provisions.

3. A conventional Immunity from Jurisdiction following from the interaction between the Ottawa Agreement and the Paris Protocol

Immunity from jurisdiction can find its basis in treaties, but also in customary international law. It is well-established jurisprudence by domestic[12] and international courts[13] that international organizations in principle enjoy immunity from jurisdiction based on customary international law.

[11] ACO/SHAPE Legal Advisor, "NATO's institutionalization, its functions & purposes: Self-defence of the Alliance", SHAPE Community Life Magazine, October 2018 edition.

[12] See, for example: *International Institute for Agriculture* v. *Profili* (Italian Court of Cassation), 26 February 1931, 5 ILR 413; *Cristiani* v *Istituto italo-latino-americano*, (Italian Court of Cassation), 23 November 1985, No. 5819, 87 ILR 21; INPDAI v. FAO, 18 Oct. 1982, No. 196 (Italian Court of Cassation); *Carretti* v. *FAO*, 23 Jan 2004, No. 180 (Italian Court of Cassation); *Spaans* v *Iran-US Claims Tribunal*, Netherlands' Supreme Court, 20 December 1985, 94 ILR 321, 18 NYIL 357 (1987); *Eckhardt* V *EUROCONTROL* (No.2), Netherlands' Maastricht District Court, 12 January 1984, 16 NYIL 464 (1985); 94 ILR 338; *Mendaro* v *The World Bank*, 717 F.2d 61o (DC. Cir. 1983), 99 ILR 92 (United States); *Weidner* v *International Telecommunications Satellite Organization* 382 A.2d, 508 (DC, 1978) (United States); *Union Européene Occidentale* v. *S.M.*, 21 Dec. 2009, No. s.04.0129.F (Belgium); and *ZM* v *Permanent Delegation of the League of Arab States to the UN*, n6 ILR 643, in which (at p. 647) the Swiss Labour Court held that "[c]ustomary international law recognised that international organizations, whether universal or regional, enjoy absolute immunity from jurisdiction (...) This privilege of international organizations arises from the purposes and functions of assigned to them. They can only carry out their tasks if they are beyond the censure of the courts of member states or their headquarters."

[13] *Waite and Kennedy v Germany*, App No 26083/94, European Commission of Human Rights, 2 December 1997, Report, concurring opinion judge Herndl. ; ECtHR, in *Mother of Srebrenica and others v. the Netherlands*, 11 June 2013, appl. No. 65542/12, when talking about immunity from jurisdiction, the Court states the following: "Measures taken by a High Contracting party which reflect generally recognised rules of public international law on state immunity (the Court would add: or the immunity of international organisations)…"

Moreover, during the last years, every time SHAPE argued its immunity on this basis, it was recognized by the courts, as it was also recognized by the German court in the Mr K case:[14]

> *"…immunity arises from international customary law at least, according to which supranational organisations enjoy immunity for their key functions […] It corresponds to the widely existent practice of states to grant autonomous regulatory and decision-making power in respect of their employees to the international organisations established by them"* [translated]

As recognizing SHAPE's immunity through customary international law is less controversial, this article focusses rather on the conventional basis for SHAPE's immunity from jurisdiction. Although either basis might lead to a similar result and therefore renders this discussion a bit academic, establishing consensus also on the conventional basis for this immunity remains important. The conventional basis for SHAPE's immunity from jurisdiction might be a bit less straightforward at first sight, but it offers an opportunity to look closer and find answers in NATO's institutional structure, its purpose and its history.

As the focus here is on SHAPE and its subordinate headquarters, a look into the Paris Protocol is essential. When interpreting the Paris Protocol, several arguments can be found to explain why the IMHQs should enjoy immunity from jurisdiction. One could argue that it is logically inferred from the immunity from execution that is expressed in the Protocol,[15] [16] but it also follows from practice, from the preparatory works and this interpretation is also supported by other instruments related to the treaty. The Vienna Convention on the Law of Treaties provides some rules on how to understand the Paris Protocol. Part III, Section 3, Article 31, on the interpretation of treaties, establishes as a general rule that

> "[a] *treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".

[14] 8 February 2017, *Supreme group* v *SHAPE/JFCBS*, Limburg District Court C/03/217614 / HA ZA 16/130; 20 February 2018, *K* v *HQ AIRCOM*, Kaiserslautern Labour Court , 3 Ca 843/17, *Entscheidungsgründe* §2

[15] Article XI paragraph 2 of the Paris Protocol: "No measure of execution or measure directed to the seizure or attachment of its property or funds shall be taken against any Allied Headquarters, except for the purposes of paragraph 6 a. of Article VII and Article XIII of the Agreement." (C. Ryngaert, 'The immunity of international organisations before domestic courts: recent trends', in: 7 *International Organisations Law Review* 121 (2010), on p.144.)

[16] The phenomenon of inferring immunity from jurisdicition from immunity from execution is not uncommon in jurisprudence: "Surprisingly, in many headquarters agreements with international organizations only immunity from execution/enforcement is regulated. Various courts have inferred immunity from jurisdiction from conferral of immunity from execution in such agreements, however. (...) This inference is logical, as ordinarily an international organization will have to appear in court before measures of execution are considered."

The Vienna Convention goes on, in article 31, to define the context, to include, among others:

> "*any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an* ***instrument related to the treaty***";
>
> "*any* ***subsequent practice*** *in the application of the treaty which establishes the agreement of the parties regarding its interpretation";*
>
> *"any* ***relevant rules of international law*** *applicable in the relations between the parties*"[17].

In article 32, the Vienna Convention, furthermore, adds that:

> "[r]*ecourse may be had to supplementary means of interpretation, including the* ***preparatory work of the treaty*** *and the circumstances of its conclusion in order to confirm the meaning resulting from the application of article 31".*

Applying these Vienna Convention methods of interpretation to the Paris Protocol can lead to no other conclusion than recognizing that SHAPE and its subordinate headquarters enjoy immunity from jurisdiction. Below it is explained why the Ottawa Agreement applies as a default rule to the Paris Protocol, which reflects the intention of the NATO constituents. Once this has been established, it becomes easier to understand why the immunity from jurisdiction also found in the Ottawa Agreement should apply to the military headquarters under the Protocol. This close link between the NATO treaties, and especially between the 'hybrid' Paris Protocol and the Ottawa Agreement and also the NATO SOFA, is key to enable the Protocol to become operational. This perspective comes forth in the first instance from the preparatory works of the treaty. Indeed, it was the Protocol's Parties' position that the Ottawa Agreement effectively functions as a default rule, as stipulated by the *Travaux Preparatoires* of the Paris Protocol:

> "*The object of the present* [Paris] *Protocol is to apply to Allied Headquarters the Agreement of 19 June 1951 on the Status of Armed Forces* [NATO SOFA]. *For the questions not covered by that Agreement -and for those questions only- it is possible to refer to the Agreement signed at Ottawa on 20 September 1951, concerning the status of NATO civilian agencies.*" [18]

[17] Article 31 of the Vienna Convention on the law of treaties (23 May 1969)

[18] D-D (52) 2, *Rapport de présentation aux Suppléants du Conseil de l'Atlantique Nord un projet de protocole sur le fonctionnement des G.C. Interalliés, annexe à la convention sur le statut des Forces du 19 Juin 1951*, dated 3 January 1952.

In application of Article 31 Vienna Convention, a consistent practice of NATO Member States using the Ottawa Agreement provisions as a default rule in the application of the Paris Protocol can be identified. In particular, this is proven by the inclusion in the national Supplementary Agreements to the Paris Protocol of areas not provided for in the Protocol, and in the general status granted to civilian personnel attached to the IMHQs.

These Supplementary Agreements to the Paris Protocol are bilateral agreements concluded between the Supreme Headquarters and a NATO member State meant to tailor or apply the Protocol to IMHQs established in the territory of such State under its Article 16. Through a comprehensive reading of the different Supplementary Agreements of NATO member states, several areas can be identified that draw directly from Ottawa Agreement provisions where the other multilateral treaties (NATO SOFA and Paris Protocol) remain silent, and hence proving that Ottawa Agreement legal consequences also apply, as default rule, to IMHQs. These areas, which are included in the Supplementary Agreements, relate to, among others:

- the privileges and immunities of high-ranking officers, which are not provided for by the Paris Protocol but only by the Ottawa Agreement;[19]

- the inviolability of the IMHQs, which is not to be found in the Paris Protocol but it is provided for in the Ottawa Agreement;[20]

- the possibility of waiver of immunities, which is not recognized as a possibility by the Paris Protocol either but is stipulated in the Ottawa Agreement;[21]

[19] Articles 12 to 15 and 17 to 18 of the Ottawa Agreement stipulate a series of immunities and privileges accorded to the national representatives and the International (civilian) Staff officials. No similar provision can be found in the Paris Protocol or the NATO SOFA beyond the common ones included in relation to the visiting forces. Most Supplementary Agreements contain provisions granting high ranking officers of the IMHQ with, at least, immunity from legal process and, at most, all the diplomatic privileges and immunities of the Ottawa Agreement. Hence, these high ranking officers enjoy the privileges accorded to a force under the Paris Protocol, but also the immunities/privileges granted to national representatives and the international staff under the Ottawa Agreement.

[20] Article 6 of Ottawa Agreement states that "[t]he premises of the Organization shall be inviolable"; and article 7 that "[t]he archives of the Organization and all documents belonging to it or held by it shall be inviolable". Paris Protocol provides for the inviolability of "[t]he archives and other official documents of an Allied HQ", in its article XIII, but not for the inviolability of the premises. In most Supplementary Agreements, different variations of the wording "The premises of an Allied HQ are inviolable" or "any access to an Allied HQ [by national authorities] shall require the approval of the commander" can be found and also provide for "the inviolability of archives". Hence, the bilateral agreements draw both from the Paris Protocol and Ottawa Agreement to provide the IMHQs with, respectively, inviolability of archives and inviolability of premises.

- and the express recognition of immunity from jurisdiction in international civil service issues.[22]

Unrelated to the supplementary agreements, the same practice of using Ottawa Agreement provisions to complete and complement the Paris Protocol can be identified in the way the organization deals with the status of the civilian personnel. For example, the privileges and immunities specific to the Ottawa Agreement are in practice, through the NATO Civilian Personnel Regulations (NCPR), also applied to the IMHQs civilian personnel. This includes the resolution of disputes (NCPR Chapter XIV) as well as the NATO Administrative Tribunal and its competence with regard to IMHQs. The above thus reflects a well-established practice that allows reading the Paris Protocol together with the Ottawa agreement, sometimes supplementing or completing the Protocol where certain issues lack specific guidance.

4. The application of the Ottawa provision on immunity from legal process to the IMHQs

Once it has been established that there is a close interaction between the Ottawa Agreement and Paris Protocol, it can be explained why also the immunity from jurisdiction provision as found in the Ottawa Agreement should apply to IMHQs. SHAPE and the German Labor Court believed there was good reason to extend this immunity to SHAPE and its subordinate headquarters like HQ AIRCOM.

It cannot have been the intention of the treaty parties that the independence of the NATO politico-civilian side under the Ottawa Agreement would enjoy more protection than that of the military side, which is precisely in charge of executing NATO's tasks with regard to the "*collective defence and the preservation of peace and security".* It is only logic and consistent to provide the IMHQs, who execute their tasks on behalf of and under the direction of the politico-civilian side of

[21] Article 5 of Ottawa Agreement stipulates that "the Chairman of the Council Deputies [current NATO Secretary-General], acting on behalf of the Organization, may expressly authorize the waiver of this immunity [immunity from every form of legal process]". Article 22 provides for a "right and duty" of the "Chairman of the Council Deputies [current NATO Secretary-General]" to waive the immunity of any official "when this can be waived without prejudice to the interests of the Organization". No similar provision can be found in the Paris Protocol or the NATO SOFA. The majority of concluded Supplementary Agreements provide for a "right and duty" of the Supreme Commander or even the NATO Secretary-General to waive the immunity from legal process insofar as this does not prejudice the interest of the Allied HQ. This "right and duty" of waiver, not supported by the express text of the Paris Protocol, is nevertheless imposed and/or granted to SACEUR/Secretary General drawing from Ottawa Agreement provisions.

[22] See, for instance, the Supplementary Agreements with Albania, Bulgaria, Estonia, Latvia, Lithuania, Poland (in a slightly reworded version), Portugal and Romania, all of which include an identical paragraph in their article 13 with the following wording: "***Recourse to* [national] *courts, tribunals, agencies or similar fora shall not be granted***, *and in the event NICs would attempt to use a national administrative or judicial body to pursue any employment dispute,* [national] ***authorities shall advise the concerned administrative or judicial body of its lack of jurisdiction***."

NATO (Ottawa Agreement) with the very same immunities as the latter. Otherwise it would lead to the unnatural and incoherent result that the military entities under Paris Protocol in charge of, as well as being responsible for executing the North Atlantic Council decisions and finally being accountable to the same Council, are less protected than the politico-civilian side. This vulnerability would directly impact and affect the functioning of the IMHQs and the NATO constituents ultimately, resulting in an uncertainty that was never intended.

The German Labor Court agreed with this perspective and, apart from immunity from jurisdiction on the basis of customary international law, also recognized this immunity on a conventional basis, applying the Ottawa-based immunity to the IMHQs:

> *"Certainly, the immunity of military headquarters was also observed by the courts of the signatory states in the past, which implies that the parties to the agreement did not consider an additional (preferable) explicit regulation of immunity to be necessary. […]Particularly in the range of documents in this case, which were seized in connection with criminal offences charged to the Defendants, reasons ensue for immunity to be awarded to the military headquarters, like SHAPE or HQ AIRCOM, for the functioning of NATO. How the organisation is classified hierarchically cannot be a deciding factor, in contrast, the aim and purpose of the immunity that was supposed to be granted in the Ottawa Agreement is important. The parties to the agreement essentially wanted to grant immunity in the area of so-called "acta iure gestiones", i.e. of sovereign action. Such action exists in this case."* [translated and underlined][23]

In the quote above, the German court correctly decides not to search for the reasons why the Ottawa treaty should be isolated from the Paris Protocol, but rather focusses on the intention and mission of NATO as whole. The German Court believed that in this case, NATO's functioning was at stake, and as no explicit answer was provided in the Paris Protocol, decided to take a practical position, take into account the entire constellation of NATO treaties and look at the intention of the parties and the purpose of the immunity. The Court understood the interdependence between the Ottawa Agreement and the Paris Protocol as set up in the *travaux preparatoires,* leading to the Court's conclusion that also the IMHQs should enjoy immunity from jurisdiction both on a customary and on a conventional basis.

[23] 8 February 2017, *Supreme group* v *SHAPE/JFCBS*, Limburg District Court C/03/217614 / HA ZA 16/130; 20 February 2018, *K* v *HQ AIRCOM*, Kaiserslautern Labour Court , 3 Ca 843/17, Entscheidungsgründe §c.

5. Conclusion

In conclusion, this article has explained the conventional basis for IMHQs' immunity from jurisdiction due to the hybrid nature of the Paris Protocol; a hybrid nature that originates from a historical and institutional context and the legal interpretation of treaties, all of which is clearly reflected by the practice. Establishing recognition of this conventional basis is not always easy, as not all courts and academics can be expected to have advanced knowledge of NATO's background and context. It is therefore important to take a consistent position within and outside NATO, recognizing the true intention of the NATO constituents, providing clarity on this issue and safeguarding the efficient and successful functioning of the Organization.