

## **PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS: CHALLENGES TO NATO AND ITS INTERNATIONAL MILITARY HEADQUARTERS**

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**RESUMEN:** Los privilegios e inmunidades son necesarios para que las organizaciones internacionales, los cuarteles generales militares internacionales y su personal desempeñen sus funciones laborales. Incluyen la inviolabilidad de locales, activos, archivos y documentos, privilegios fiscales, el derecho a entablar procedimientos en calidad de empleador contra empleados locales o a buscar reparación contractual, la prohibición de incautación de propiedades y fondos, y privilegios diplomáticos y funcionales y inmunidades del personal internacional. En los últimos años, los privilegios e inmunidades de las organizaciones internacionales y los cuarteles generales militares internacionales han sido cuestionados en múltiples foros: este documento proporciona una descripción general del problema, contextualiza los problemas identificados y presenta posibles soluciones a estos desafíos.

**ABSTRACT:** Privileges and immunities are necessary for international organizations, international military headquarters, and their staff to perform their work duties. They include the inviolability of premises, assets, archives and documents, fiscal privileges, the right to institute proceedings in the capacity of employer against local employees or to seek contractual redress, the prohibition of seizure of properties and funds, and diplomatic and functional privileges and immunities to international staff. In the latest years, privileges and immunities of international organizations and international military headquarters have been challenged in multiple fora: this paper provides an overview of the problem, contextualises the identified issues and presents possible solutions to these challenges.

**PALABRAS CLAVE:** Organizaciones Internacionales, Privilegios e Inmunidades, OTAN, Cuartel General Militar Internacional, desafíos, Tratado del Atlántico Norte, Acuerdo de Ottawa, SHAPE, International Hotels Worldwide, El Hamidi & Chlih contra la OTAN.

**KEYWORDS:** International Organizations, Privileges and Immunities, NATO, International Military Headquarters, challenges, North Atlantic Treaty, Ottawa Agreement, SHAPE, International Hotels Worldwide, El Hamidi & Chlih v NATO.

### *Introduction*

Although privileges and immunities ('P&I') of international organizations ('IOs') and their staff members have long been generally accepted and constitute one of the pillars of this area of law, the latest years have witnessed an increasing

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tendency to criticize and challenge them<sup>1</sup>. In order to have a full grasp of the reasons behind this propensity, it is important to first lay out the roots and basis of P&I of IOs. The principle founding P&I is functional necessity: IOs need immunity in order to be allowed to effectively execute their work. They would not be able to perform their duties if national courts could interfere with their work<sup>2</sup> and could exercise pressure on them<sup>3</sup>. On the other side, the Member States ('MS') would not accept jurisdiction over the acts of the IO they are party to. The paper is structured as follows: Section (I) retraces the nature and legal basis of P&I for IOs, Section (II) explains how P&I apply to NATO and NATO bodies, Section (III) describes which P&I are enjoyed by the Supreme Headquarters and Allied Headquarters for the fulfilment of their functions, Section (IV) presents the challenges to NATO's P&I, and Section (V) finally draws the concluding remarks, proposing possible solutions to these challenges.

### *1. Nature and Legal Basis of Privileges and Immunities for International Organisations*

While between the two World Wars it had been agreed that diplomatic P&I would be applicable to IOs and their staff, after the Second World War new rules were negotiated and drafted for IOs, especially for the United Nations and its bodies<sup>4</sup>. The constitution of IOs usually contains a provision declaring P&I for that IO<sup>5</sup>, and further, more detailed rules<sup>6</sup> can be found in other founding documents of the said IO<sup>7</sup>. In this way, diplomatic immunity which was generally accorded to the IOs officials has been replaced by a precise set of rules tailored to the needs of each IO. Scholars still debate whether P&I of IOs form part of Customary International Law ('CIL')<sup>8</sup>. The main P&I are the following: immunity from jurisdiction and execution; inviolability of premises, assets, archives, and documents, freedom of communication, right to bank accounts, to hold currency, and fiscal privileges<sup>9</sup>.

#### *1.1. The Application of Privileges and Immunities to NATO and NATO Bodies*

Rather than a military giant, NATO is a political and structural tool at the disposal of the MS<sup>10</sup>. It is, in fact, composed of multiple bodies, and each of them has a distinct legal status, as established by the North Atlantic Council ('NAC').

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<sup>1</sup> Niels Blokker, 'International Organizations: The Untouchables?' in Niels Blokker and Nico Schrijver (eds.), *Immunity of International Organizations*, Brill Nijhoff, Leiden, 2015, 2.

<sup>2</sup> Ibid.

<sup>3</sup> Eric De Brabandere, 'Immunity of International Organizations in Post-Conflict International Administrations', *International Organizations Law Review*, 7(1), 2010, 79.

<sup>4</sup> Wilfred Jenks, *International Immunities*, Stevens, London, 1961, 1-5 and 12-16.

<sup>5</sup> See, for instance, Article 105 of the UN Charter.

<sup>6</sup> See, for instance, always concerning the UN, the 1946 Convention on the Privileges and Immunities of the United Nations, and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.

<sup>7</sup> Major Vasileios Karatzias, 'The status of International Military Headquarters under the scope of International Law', SOFA, 1.

<sup>8</sup> Andrés Muñoz-Mosquera and Mette Prassé Hartov, 'NATO International Military Headquarters', in Dieter Fleck (ed.), *The Handbook of the Law of Visiting Forces*, Oxford University Press, 2018.

<sup>9</sup> Karatzias, *supra* note 7, at 1.

<sup>10</sup> Peter Olson, 'Immunities of International Organizations: A NATO View', in Niels Blokker and Nico Schrijver (eds.), *Immunity of International Organizations*, Brill Nijhoff, Leiden, 2015, 161.

NATO's founding treaty is the North Atlantic Treaty ('NAT')<sup>11</sup>, signed in 1949, a political agreement which established a military alliance. The mandate of the Organization, provided in the NAT<sup>12</sup>, goes far beyond responding to an armed attack: it encourages interaction and promote the development of relations<sup>13</sup>, and it instructs MS to 'maintain and develop their individual and collective capacity'<sup>14</sup>.

NATO P&I can be distinguished in two main categories: while P&I for the civilian side can be found in the 1951 Ottawa Agreement<sup>15</sup>, those for the military headquarters can be found in the Paris Protocol ('PP')<sup>16</sup> to the NATO Status Of Forces Agreement<sup>17</sup> ('NATO SOFA'). Juridical personality has been afforded both to NATO, by the Ottawa Agreement Article IV, and to the Supreme Headquarters by the PP Article X.

The 1951 NATO SOFA provides functional immunity to the forces of sending States when in the territory of another NATO State, in connection with their official duties, unless otherwise agreed<sup>18</sup>. The NATO SOFA is particularly important for the exercise of NATO functions, as the presence and stationing of foreign troops during peacetime is a practice which is not intended, nor perceived, as occupation, rather as a strategy of military cooperation<sup>19</sup>.

NATO, its properties and its assets enjoy immunity from every form of legal process, except in the case the Chairman of the Council Deputies expressly authorizes the waiver<sup>20</sup>. The immunities of NATO are applicable only in the courts of the 29 MS<sup>21</sup>.

## *2. Privileges and Immunities of NATO's Supreme Headquarters Allied Powers Europe and the Allied Headquarters*

Supreme Headquarters Allied Powers Europe ('SHAPE' or 'Supreme Headquarters') have legal status, granted by Article X PP, which gives them legal personality, legal capacity, and competence<sup>22</sup>. They enter into formal agreements with other NATO bodies, labour contracts with their employees, and commercial contracts for the supply of goods and services<sup>23</sup>. The PP, by granting juridical

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<sup>11</sup> North Atlantic Treaty, concluded on 4 April 1949.

<sup>12</sup> Ibid.

<sup>13</sup> NAT, Articles 2 and 4.

<sup>14</sup> NAT, Article 3. See also Munoz-Mosquera and Prassé Hartov, *supra* note 8.

<sup>15</sup> Agreement on the status of the North Atlantic Treaty Organization, National Representatives and International staff, Concluded on 20 September 1951 ('Ottawa Agreement').

<sup>16</sup> Protocol on the Status of International Military Headquarters Set Up Pursuant to The North Atlantic Treaty, concluded on 28 August 1952 ('Paris Protocol').

<sup>17</sup> Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, concluded on 19 June 1951 ('NATO SOFA').

<sup>18</sup> Mette Prassé Hartov, NATO Status Agreements, *NATO Legal Gazette, Special Issue for NATO School Oberammergau*, Germany, August 2016, 55.

<sup>19</sup> Ibid.

<sup>20</sup> Ottawa Agreement, Article V.

<sup>21</sup> Olson, *supra* note 10

<sup>22</sup> Peter Bekker, *The Legal Position of Intergovernmental Organizations. A Functional Necessity Analysis of their Legal Status and Immunities*, Marinus Nijhoff Publishers, 1994

<sup>23</sup> Munoz-Mosquera and Prassé Hartov, *supra* note 8.

capacity to the Supreme Headquarters<sup>24</sup>. allows the Allied Headquarters to operate in a Receiving State ('RS') only when expressly authorized by the Supreme Headquarters<sup>25</sup>. Article XI PP grants Supreme Headquarters, in particular, the right to institute proceedings, the RS law being the applicable law if not agreed otherwise, in the capacity of employer against local employees, to pursue a tortfeasor, or to seek contractual redress<sup>26</sup>, for the benefit of NATO<sup>27</sup>. However, the widely diffused practice is to recur to arbitration instead of national courts<sup>28</sup>.

While Article V Ottawa Agreement exempts NATO from every form of legal process in the MS, the PP does not have the corresponding statement applicable to International Military Headquarters ('IMHQ'). However, while some experts write that this does not automatically imply that those IMHQ under the scope of the PP are not immune from jurisdiction<sup>29</sup>, others maintain that IMHQ do not enjoy immunity from the legal process<sup>30</sup>. It can be inferred that the PP provides IMHQ with limited, functional immunity<sup>31</sup>.

Article XI integrates the legal framework, granting the possibility for IMHQ to conclude Supplementary Agreements ('SA') with RS, agreeing that the latter acts on the former's behalf in any legal proceedings. This entails that P&I of IMHQ shall be understood in view of the SA<sup>32</sup>. SA generally confirm, elaborate on, further define, and provide additional P&I compared to those granted by the PP<sup>33</sup>, observing the functionality principle<sup>34</sup>.

The PP further provides for the inviolability of premises, assets<sup>35</sup>, archives and documents, grants the right to hold bank accounts and different currencies and to transfer funds<sup>36</sup>, grants fiscal privileges<sup>37</sup>, gives both diplomatic and functional P&I to international staff<sup>38</sup>, grants the right to issue identity cards<sup>39</sup>, prohibits execution or seizure of properties and funds<sup>40</sup>.

### 3. Challenges to NATO's Privileges and Immunities

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<sup>24</sup> Munoz-Mosquera and Prassé Hartov, *supra* note 8.

<sup>25</sup> A.S. Muller, *International Organizations and their Host States – Aspects of their legal relationship*, Brill, Leiden, 1995, 81.

<sup>26</sup> Munoz-Mosquera and Prassé Hartov, *supra* note 8.

<sup>27</sup> Karatzias, *supra* note 7, at 2.

<sup>28</sup> Muller, *supra* note 25, at 97.

<sup>29</sup> Karatzias, *supra* note 7, at 2.

<sup>30</sup> Zdenek Hybl, 'Privileges and Immunities of International Organizations', *The Three Swords Magazine*, 32/2017, 21.

<sup>31</sup> Muller, *supra* note 25, at 159.

<sup>32</sup> Karatzias, *supra* note 7, at 3; See also *NATO Legal Deskbook* for the list of the topics that can be covered by Supplementary Agreements, 105.

<sup>33</sup> Prassé Hartov, *supra* note 18.

<sup>34</sup> Karatzias, *supra* note 7, at 3.

<sup>35</sup> Articles IX and X Paris Protocol.

<sup>36</sup> Article XII Paris Protocol.

<sup>37</sup> Article VIII Paris Protocol.

<sup>38</sup> Articles III, VII and VIII (2)(3) Paris Protocol.

<sup>39</sup> Article V Paris Protocol.

<sup>40</sup> Article XI (2) Paris Protocol.

Multiple reasons lie behind the challenges moved to P&I of IOs, mostly due to the latter's expanding competences and range of action and the increasing importance given to accountability<sup>41</sup>. Today, compared to the aftermath of World War II, when several IOs have been established, the absence of legal remedies against the actions of IOs is considered less acceptable<sup>42</sup>.

NATO has been involved in several court cases since the signing of the Ottawa Agreement. The case *International Hotels Worldwide* ('IHW') was a contractual dispute involving rental<sup>43</sup>. After IHW sued NATO before the Belgian Courts, the latter upheld NATO's affirmation of immunities. However, they did so only after striking a balance between two opposing interests: the right to a fair trial, enshrined in the European Convention of Human Rights ('ECHR') and the interest served by immunities<sup>44</sup>, although NATO was, in that moment, directly implementing a Security Council mandate, thus its actions fell under the scope of functional immunity.

An interesting case was filed before the Belgian Courts<sup>45</sup>: *El Hamidi v NATO*<sup>46</sup>. Claims on the breach of Articles 2<sup>47</sup> and 6<sup>48</sup> ECHR were brought against NATO. The Tribunal concluded that the ECHR is not applicable to persons with no jurisdictional link to Belgium at the time of the occurrences, hence it declared the case inadmissible. The great majority of cases against NATO are labour cases<sup>49</sup> filed before Belgian Courts, based on the alleged breach of Article 6 ECHR<sup>50</sup>, claiming the lack of an adequate internal mechanism for resolving disputes<sup>51</sup>.

#### 4. Conclusions

Three conclusions can be drawn: first, particular importance have, for IMHQ, SA signed with RS, as they can include the duty of the RS to act on behalf of the IMHQ in any legal proceedings.<sup>52</sup> In order to limit the jurisdiction also over the sending state, NATO activity is now limited to air and, to a lesser extent, naval forces with the purpose of avoiding physical presence on the foreign state which would create a link for jurisdiction. This doubtlessly restrains NATO range of action.

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<sup>41</sup> De Brabandere, *supra* note 3.

<sup>42</sup> Niels Blokker and Nico Schrijver, 'Afterwards', in Niels Blokker and Nico Schrijver (eds.), *Immunity of International Organizations*, Brill Nijhoff, Leiden, 2015, 343.

<sup>43</sup> *Belgian State v International Hotels Worldwide*, Brussels Court of Appeal (17<sup>th</sup> Chamber), R.G. no. 2011/AR/558, 29 June 2012.

<sup>44</sup> Olson, *supra* note 10.

<sup>45</sup> Olson, *supra* note 10.

<sup>46</sup> *El Hamidi & Chlih v NATO*, Tribunal of First Instance of Brussels, R.G. no. 11/6647/A, 21 October 2012.

<sup>47</sup> ECHR, Article 2: Right to life.

<sup>48</sup> ECHR, Article 6: Right to a fair trial.

<sup>49</sup> See, for instance, *Gasparini v Italy and Belgium*, ECHR, no. 10750/03, 12 May 2009; *Chapman v Belgium*, ECHR, no. 39619/06, declared inadmissible on 5 March 2013; and *Sevens v NATO*, Brussels Tribunal of First Instance, Case no. 12/1586/C, 12 March 2013.

<sup>50</sup> ECHR, Article 6: Right to a fair trial.

<sup>51</sup> A similarly interesting and relevant case is *Jafara v NATO*, Tribunal of First Instance of Brussels, R.G. no. 12/966/C, 26 April 2013.

<sup>52</sup> Paris Protocol, Article XI.

Secondly, when NATO is called into question, from the ECtHR jurisprudence a tendency emerges to undertake a proportionality analysis of the interests allegedly breached against the IO immunity. Often, linked to the immunity of IOs<sup>53</sup> is the obligation to create alternative dispute settlement mechanisms<sup>54</sup>. Although the ECtHR<sup>55</sup> concluded<sup>56</sup> that the NATO Appeals Board was a sufficient standard according to its own case-law, in 2013 the NAC amended the NATO Civilian Personnel Regulations ('NCPR'), establishing a new internal justice system and creating the NATO Tribunal, competent on employment matters, which replaced the old NATO's Appeals Board<sup>57</sup>. Labour law issues aside, what may still create concerns is the activity of the ECtHR on matters pertaining to NATO and its IMHQ military functions<sup>58</sup>.

Thirdly, in view of encouraging courts to grant immunity to IOs, scholars call for the need to create alternative methods of dispute resolution: establishing an independent claims commission or an Ombudsperson within the same IO<sup>59</sup> for matters beyond employment law, or developing a preliminary ruling procedure before the International Court of Justice to determine whether the IO enjoys immunity<sup>60</sup>.

## Bibliography

### Books

Bekker Peter, *The Legal Position of Intergovernmental Organizations. A Functional Necessity Analysis of their Legal Status and Immunities*, Marinus Nijhoff Publishers, 1994.

Blokker Niels and Schrijver Nico (eds.), *Immunity of International Organizations*, Brill Nijhoff, Leiden, 2015.

Fleck Dieter (ed.), *The Handbook of the Law of Visiting Forces*, Oxford University Press, Oxford, 2018.

Jenks Wilfred, *International Immunities*, Stevens, London, 1961.

Muller A.S., *International Organizations and their Host States – Aspects of their legal relationship*, Brill, 1995.

NATO Administrative Tribunal, 2013 *Annual Report of the NATO Administrative Tribunal*, 2014.

*Nato Legal Deskbook*, 2010

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<sup>53</sup> Karatzias, *supra* note 7, at 3.

<sup>54</sup> Muller, *supra* note 25.

<sup>55</sup> European Court of Human Rights ('ECtHR').

<sup>56</sup> See *Gasparini v Italy and Belgium*; and *Chapman v Belgium*.

<sup>57</sup> NATO Administrative Tribunal, 2013 *Annual Report of the NATO Administrative Tribunal*, AT(TRI) (2014)0001, 2014.

<sup>58</sup> Olson, *supra* note 10.

<sup>59</sup> The proposal is by Nico Schrijver and pertains, in particular, to the United Nations ('UN'). Niels Blokker and Nico Schrijver, 'Afterwords', in Niels Blokker and Nico Schrijver (eds.), *Immunity of International Organizations*, Brill Nijhoff, Leiden, 2015, 356.

<sup>60</sup> August Reinisch, 'To What Extent Can and Should National Courts 'Fill the Accountability Gap'?', in Niels Blokker and Nico Schrijver (eds.), *Immunity of International Organizations*, Brill Nijhoff, Leiden, 2015, 313.

### **Journals**

De Brabandere Eric, Immunity of International Organizations in Post-Conflict International Administrations, *International Organizations Law Review*, 7(1), 2010.

Hybl Zdenek, Privileges and Immunities of International Organizations, *The Three Swords Magazine*, 32/2017.

Karatzias Vasileios, The status of International Military Headquarters under the scope of International Law.

Prassé Hartov Mette, NATO Status Agreements, *NATO Legal Gazette*, Special Issue for NATO School Oberammergau, Germany, August 2016.

### **Treaties**

Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, concluded on 19 June 1951.

Agreement on the status of the North Atlantic Treaty Organization, National Representatives and International staff, concluded on 20 September 1951.

Charter of the United Nations, signed on 26 June 1945.

Convention on the Privileges and Immunities of the Specialized Agencies, adopted on 21 November 1947.

Convention on the Privileges and Immunities of the United Nations, adopted on 13 February 1946.

European Convention of Human Rights, concluded on 4 November 1950.

North Atlantic Treaty, concluded on 4 April 1949.

Protocol on the Status of International Military Headquarters Set Up Pursuant to The North Atlantic Treaty, concluded on 28 August 1952.

### **Cases**

*El Hamidi & Chlih v NATO*, Tribunal of First Instance of Brussels, R.G. no. 11/6647/A, 21 October 2012.

*Jafara v NATO*, Tribunal of First Instance of Brussels, R.G. no. 12/966/C, 26 April 2013.

*Belgian State v International Hotels Worldwide*, Brussels Court of Appeal (17th Chamber), R.G. no. 2011/AR/558, 29 June 2012.

*Gasparini v Italy and Belgium*, ECHR, no. 10750/03, 12 May 2009.

*Chapman v Belgium*, ECHR, no. 39619/06.

*Sevens v NATO*, Brussels Tribunal of First Instance, Case no. 12/1586/C, 12 March 2013.

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