

■ Would there be any difference at all if NATO did not enjoy privileges and immunities?

Soldiers from various NATO Nations march together at a ceremony in Latvia to welcome a new NATO battlegroup. The battlegroup is being led by the Canadians, but also includes soldiers from Albania, Italy, Poland, Slovenia and Spain. The group has been created as part of NATO's enhanced Forward Presence (eFP). Photo by NATO



Privileges and Immunities of International Organizations

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THE WARSAW SUMMIT Communiqué, issued by the Heads of State and Government participating in the meeting of the North Atlantic Council (NAC) in Warsaw 8-9 July 2016, describes in Section 37 eight new small headquarters (HQs), called NATO Force Integration Units (NFIUs), to be established on the territory of Allies in the eastern part of the Alliance to assist in training of Alliance forces and in the reception of reinforcements.



The views expressed in this article are those of the author and do not necessarily reflect the official policy or position of NATO or any of its agencies. The author wishes to thank **Mr David Nauta** and **Lieutenant Colonel John Moore** for offering helpful and valuable comments.

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In addition, the existing Headquarters of a Multinational Corps Northeast in Poland has been made fully operational, and the Headquarters of a Multinational Division South-east in Romania has been established to take command of the NIFUs and to provide flexible command and control options in their regions.¹ When reading about newly established units or headquarters, the topic of privileges and immunities arise. Will such entities enjoy immunity from legal process in their respective host nations? Will they enjoy tax privileges? To answer these questions, it may be helpful to recall how privileges and immunities apply to NATO and its HQs.

LET US START by discussing the United Nations (UN), whose Charter in its Article 104 provides that “[t]he Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.” Here, we are referring to the *legal personality* of the organization, which seems to be a prerequisite for the organization to act in a domestic legal system.² International organizations should have the right to conclude contracts, to possess property as well as to defend

themselves before national courts. Having legal personality also means that international organizations possess rights, duties, powers and liabilities as distinct from their members and creators on the international plane and in international law.³

According to Article 105, paragraph 1 of the UN Charter: “The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.”

The wording used—“privileges and immunities as are necessary for the fulfillment of its purposes”—indicates that the UN has functional immunity. This type of immunity is meant to protect the UN against any possible interference from a host nation, which may impact the UN’s ability to conduct its mission. In other words, immunity is required for an organization to be able to exercise a certain degree of freedom and legal security for its assets and headquarters in order to function effectively.⁴ The Convention on the Privileges and Immunities of the UN additionally provides immunity to UN officials and member states’ representatives.⁵

NATO, too, possesses juridical personality⁶ and enjoys privileges and immunities. The Agreement on the status of the North Atlantic Treaty Organization, National Representatives

and International Staff, signed in Ottawa 1951 (Ottawa Agreement) guarantees the inviolability of the premises of NATO and the protection of the archives as well as fiscal privileges, such as exemption from all direct taxes and custom duties. Furthermore, similarly to the Convention on the Privileges and Immunities of the UN, the Ottawa Agreement regulates the privileges and immunities of the Representatives of Member States and the International Staff and Experts on Mission for the Organization.

Article 5 of the Ottawa Agreement reads: “The Organization, its property and assets, wheresoever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case the Chairman of the Council Deputies, acting on behalf of the Organization, may expressly authorize the waiver of this immunity. It is however, understood that no waiver of immunity shall extend to any measure of execution or detention of property.”

In accordance with Article II of the Ottawa Agreement, “[t]he present Agreement shall not apply to any military headquarters established in pursuance of the North Atlantic Treaty nor, unless the Council decides otherwise, to any other military bodies.” As a consequence, both Supreme Headquarters—Allied Command Operations (ACO) led by Supreme Allied Commander Europe (SACEUR), and Allied Command Transformation (ACT) led by Supreme Allied Commander Transformation (SACT)⁷—as well as any other Allied HQs, are excluded from the provisions of this Agreement [Ottawa Agreement].

In order to cover international military forces and international military HQs, two agreements were adopted. These were the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, dated 19 June 1951 (NATO SOFA), which defines the status of the forces of one NATO member state while in the territory of another NATO member state⁸, and the Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty, dated 28 August 1952 (Paris Protocol), which defines the status of NATO



Commitment to Collective Defence in Eastern Europe

A young Estonian child meets members of the U.S. military police. Photo by NATO



Photo by NFIU Slovakia



NATO Force Integration Units

- // The NATO Force Integration Units have been active since 1 September 2015.
- // There are currently eight NATO Force Integration Units based in Sofia (Bulgaria), Tallinn (Estonia), Riga (Latvia), Vilnius (Lithuania), Bydgoszcz (Poland), Bucharest (Romania), Szekesfehervar (Hungary) and Bratislava (Slovakia).
- // The decision on their locations was taken by the North Atlantic Council, following invitation by the host nations and a military assessment.
- // Their primary responsibility is to facilitate the rapid deployment of NATO's Very High Readiness Joint Task Force (VJTF) and other NATO Response Force (NRF) elements to support Collective Defence in Eastern Europe, enhance responsiveness and assist in coordinating training and exercises.
- // Each NFIU is manned by around 40 national and NATO staff.

international military headquarters and of the personnel thereof within the North Atlantic Treaty area.⁹ Articles 10 and 11 of the Paris Protocol provide that “[e]ach Supreme Headquarters shall possess juridical personality; it shall have the capacity to conclude contracts and to acquire and dispose of property” (Article 10), and that “[...] a Supreme Headquarters may engage in legal proceedings as claimant or defendant” (Article 11). For this reason, SHAPE and HQ SACT do not enjoy immunity from legal process.¹⁰

The Paris Protocol nevertheless provides that “[t]he archives and other official documents of an Allied Headquarters [...] shall be inviolable, unless the Headquarters has waived this immunity” (Article 13). Another immunity that is granted to any Allied Headquarters is that “[n]o 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 (NATO SOFA)”.

Additionally, in accordance with Article 8, paragraph 2 of the Paris Protocol, the Allied Headquarters shall be immune from customs search and inspection as well as duties, incorporating by reference NATO SOFA, Article XI, paragraphs 3 and 4.¹¹

In summary, the two Supreme Headquarters enjoy only a limited degree of immunity. The privileges and immunities accorded to both Supreme Headquarters also apply to any other subordinate international military Headquarters.¹² Indeed, the Paris Protocol provides that Allied “Headquarters shall be relieved, so far as practicable, from duties and taxes, affecting expenditures by them in the interest of common defence and for their official and exclusive benefit” (Article 8). This article anticipates that separate agreements will be negotiated and concluded in order to give effect to this provision. According to some experts, however, such agreements are not required because public international law provides that international organizations are exempt from taxes in the host nation, which ensures the independent status of the international organization and respects the principle that a nation should not derive revenue from hosting an international organization.¹³

To conclude, NATO HQs enjoy nearly the same privileges and immunities as other international organizations. The privileges and immunities are functional in that they serve to protect the organization and enable it to fulfill its mission. Would there be any difference at all if NATO did not enjoy privileges and immunities? Are privileges and immunities so

indispensable that not having them would put NATO at a disadvantage by hampering its ability to fulfill its mandate?

A living example of an organization functioning without privileges and immunities¹⁴ is the Organization for Security and Co-operation in Europe (OSCE). The OSCE, which has its roots in the Conference on Security and Co-operation in Europe (CSCE), has been operating since 1975, when the Helsinki Final Act was signed. Later on, in 1994, the name was changed from the CSCE to the OSCE following the creation of several institutions, such as the OSCE Secretariat. There have been attempts over the years to address the legal personality issue¹⁵ but these have so far not led to an agreement. As a result, the OSCE is still not a fully-fledged international organization.¹⁶ But, how does this situation affect the OSCE in day-to-day life?

Sonya Brander, a former OSCE Legal Adviser, points out in an article of hers¹⁷ several examples where the legal personality and privileges and immunities of the OSCE were challenged: a bank refusing to open a bank account unless presented with proof that the OSCE is a legal entity; an OSCE official lacking immunity from legal process was subject to being called as a witness in a civil trial; etc.

There are also economic consequences





ABOVE: Joint press point with NATO Secretary General Jens Stoltenberg and the President of Lithuania, Dalia Grybauskaitė, at the Distinguished Visitor's Day of Exercise IRON WOLF 2017, 20 June 2017. In Lithuania, Germany leads forces from Belgium, Luxembourg, the Netherlands and Norway. The battlegroup will serve alongside Lithuanian troops to defend the Alliance and deter any possible aggression. Together with the three other battlegroups in Estonia, Latvia and Poland, these forces form part of the biggest reinforcement to NATO's Collective Deterrence and Defence in a generation (www.nato.int) Photo by NATO

for the OSCE. In accordance with the Chairmanship Food-for-Thought Paper on Strengthening the Legal Framework of the OSCE, dated 18 May 2012, the estimated amount lost annually by the OSCE as a direct result of its lack of uniform privileges and immunities ranges from €1.5 million to €2 million, amounting to over 1 per cent of the total OSCE budget.¹⁸

An even more serious example demonstrating the impact of the lack of privileges and immunities can be found in the Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2014. The Report states that “[t]he consequences of that lack of clarity became sharply manifest during the involvement of the OSCE in the events occurring in Ukraine. [...] By applying urgent efforts, the appropriate legal status, privileges and immunities to enable successful implementation of the mandate and the protection of the OSCE officials deployed, were concluded in record time. Nonetheless, a full 10 weeks passed before the legal arrangements were in place and in force.”¹⁹

The above mentioned examples serve as proof that for NATO, privileges and immunities are not just a slogan. In order to work efficiently, as was demonstrated in the OSCE

examples, the protection of the Alliance and its staff is crucial to the successful accomplishment of the mission or tasks at hand.

As an organization whose essential purpose is to safeguard the freedom and security of its members through political and military means,²⁰ NATO has to have a reliable and institutionalized system of privileges and immunities in place. In case of emergency, there may be insufficient time to negotiate and conclude critical ad hoc agreements. For this reason, whenever new units or HQs are established, due diligence should be taken to make the necessary legal arrangements to cover them in order to prepare and enable them to successfully accomplish their mission.

The new small HQs²¹—the NFIUs and the two additional HQs (Multinational Corps Northeast; Multinational Division Southeast)—need privileges and immunities to be able to perform their functions and tasks. NATO SOFA and the Paris Protocol apply, and further negotiations to conclude Supplementary Agreements²² should be seen as an essential tool for confirming the status granted under the Paris Protocol.²³ In conclusion, the existing legal framework in the form of NATO SOFA and the Paris Protocol, together with

concluded Supplementary Agreements, will provide adequate legal protection, including privileges and immunities, for NATO's newly established entities and help them to successfully accomplish their mission. †

END NOTES:

- 1 Warsaw Summit Communiqué, available at http://www.nato.int/cps/en/natohq/official_texts_133169.htm?selectedLocale=en
- 2 August Reinisch, *Convention on the Privileges and Immunities of the United Nations/Convention on the Privileges and Immunities of the Specialized Agencies*, UN (2009), available at http://legal.un.org/avl/pdf/ha/cpiun-cpisa/cpiun-cpisa_e.pdf
- 3 NATO Legal Deskbook (2nd edition 2010, p. 72) [hereinafter NATO Legal Deskbook].
- 4 James Crawford, *Brownlie's Principles of Public International Law* (8th ed. 2012, p. 171), Oxford University Press (2012).
- 5 August Reinisch, *Convention on the Privileges and Immunities of the United Nations/Convention on the Privileges and Immunities of the Specialized Agencies*, supra note 3.
- 6 Agreement on the status of the North Atlantic Treaty Organization, National Representatives and



In Brief

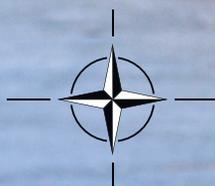
BELOW: Polish Żandarmeria Wojskowa in front of Stryker vehicles, 28 March 2017. Photo by NATO



BOOSTING NATO'S PRESENCE IN THE EAST AND SOUTHEAST

NATO FORCE INTEGRATION UNITS:
BULGARIA, ESTONIA, LATVIA, LITHUANIA,
POLAND, ROMANIA, HUNGARY, SLOVAKIA

ENHANCED FORWARD PRESENCE:
LATVIA, LITHUANIA, ESTONIA, POLAND



// Boosting NATO's presence in the east and southeast:
http://www.nato.int/cps/en/natohq/topics_136388.htm?selectedLocale=en

International Staff, done in Ottawa on 20 September 1951 [hereinafter Ottawa Agreement], states in its Article IV that the Organization, meaning the North Atlantic Treaty Organization, consisting of the Council and its subsidiary bodies, "shall possess juridical personality; it shall have the capacity to conclude contracts, to acquire and dispose of movable and immovable property and to institute legal proceedings", available at http://www.nato.int/cps/en/natohq/official_texts_17248.htm

7 NATO Legal Deskbook, supra note 4, p. 39.

8 Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, done in London on 19 June 1951 [hereinafter NATO SOFA], available at http://www.nato.int/cps/en/natohq/official_texts_17265.htm?selectedLocale=en

9 Preamble of the Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty, done in Paris on 28 August 1952 [hereinafter Paris Protocol], available at http://www.nato.int/cps/en/natohq/official_texts_17300.htm

10 NATO Legal Deskbook, supra note 4, p. 105.

11 NATO Legal Deskbook, supra note 4, p. 106.

12 Paris Protocol, supra note 10, article 1, paragraph c.

13 NATO Legal Deskbook, supra note 4, p. 104.

14 See The legal framework of the OSCE, available at <http://www.osce.org/mc/87192>

15 See <https://www.oscepa.org/documents/all-documents/helsinki-40/seminar-4-diis/2814-helsinki-40-food-for-thought-paper-the-osce-s-lack-of-an-agreed-legal-status-challenges-in-crisis-situations/file>; see also <http://www.osce.org/mc/109366?download=true> and <http://www.osce.org/mc/35520?download=true>

16 See The legal framework of the OSCE, supra note 15.

17 See Making a credible case for a legal personality for the OSCE, reproduced in OSCE Magazine, March – April 2009, available at <http://www.osce.org/secretariat/36184?download=true>

18 See <http://www.osce.org/mc/97950?download=true>

19 OSCE Ministerial Council, Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2014, MC.GAL/5/14, dated 2 December 2014, available at <http://www.osce.org/cio/128916?download=true>

20 See <http://www.nato.int/nato-welcome/index.html>

21 See http://www.nato.int/cps/en/natohq/news_127599.htm?selectedLocale=en

22 See https://www.kam.lt/en/news_1098/news_archives/news_archive_2015/news_archive_2015_-_02/minister_of_national_defence_signed_an_arrangement_regulating_legal_status_of_the_international_military_nato_headquarters_in_lithuania.html?pbck=0; see also <http://www.nineoclock.ro/defence-ministry-supplementary-agreement-to-paris-protocol-reflects-romania-s-commitment-to-strengthening-collective-defence/> and <http://www.act.nato.int/latvia-signs-supplementary-agreement-with-nato>

23 NATO Legal Deskbook, supra note 4, p. 108