The North Atlantic Treaty Organization:

An International Institutional Law Perspective

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## CHAPTER 1

INTRODUCTION

### 1. Introduction

#### 1.1 Is NATO an International Organization?

“In organizational terms, NATO is something new under the international sun. It is an alliance which involves the construction of institutional mechanisms, the development of multilateral procedures, and the elaborations of preparatory plans for the conduct of joint military action in future contingencies … it represents an impressive organization achievement … [t]his utilization of the concept of international organization for the transformation rather than supplantation of alliances may prove to be a highly significant precedent”.[[1]](#footnote-1)

The North Atlantic Treaty Organization (‘NATO’) has attracted very little attention from international institutional law writings. Although there is profuse literature on the actual application of Article 5 of the North Atlantic Treaty (‘NAT’); its Crisis Response Operations and out-of-area activities; as well as its political construction;[[2]](#footnote-2) there have only been a few partial attempts at addressing thoroughly all aspects of NATO from the perspective of international institutional law.[[3]](#footnote-3) For this reason, it appears necessary to delve into the institutional mechanisms of NATO as an international organization. The two parts of this dissertation aim to set out a series of research findings on NATO’s institutional developments that have not been unveiled yet. This introductory paragraph intends to present several facts, which will set the grounds for the research question and the research aim.

The analysis of the facts by which NATO’s conceptual origin as an alliance develops into a full functional international organization is a fascinating intellectual journey. This requires a brief review of the historical events in the aftermath of the Second World War that brought about a new international order, which has the actual network of international organizations as one of its foundational pillars. During the second half of the nineteenth century, international law evolved based on positivist tenets that ushered in a new international legal order. This positivism prompted the creation of new international associations in the twentieth century, which formed part of a collective attempt to find enduring institutions in order to ensure peace.[[4]](#footnote-4)

The North Atlantic Treaty Organization, as an institution, is conspicuously a product of the dynamics of international law, since it is an organization whose members have declared they are “resolved to unite their efforts for collective defense and for the preservation of peace and security”.[[5]](#footnote-5) Consequently, there are two gravitational centres in the study of NATO’s particular aspects under the perspective of international institutional law. On the one hand, its foundational document, the North Atlantic Treaty (‘NAT’), is no stranger to the twentieth century international law construct, crowned by the Charter of the United Nations (‘UN Charter’) at its peak. In fact, the continuous references within the NAT’s text to the purposes and principles of the UN Charter and to the Security Council suggest the NAT is, in a sense, a supplemental agreement to the UN Charter.[[6]](#footnote-6) On the other hand, NATO is an intergovernmental organization with functions and purposes relating to security and defence in order to contribute to the UN-mandated maintenance of international peace and security. These functions and purposes provide basic information on why NATO is an international organization and why it has developed a sophisticated network of institutions - the NATO bodies. Three of these bodies have their own legal position, from which the rest of the NATO bodies take theirs, either by charter or by *ad hoc* delegation of authority.

The UN Charter’s teleological preamble establishes that peoples are resolved “to save succeeding generations from the scourge of war”,[[7]](#footnote-7) which, from the very beginning, was accepted by all delegates[[8]](#footnote-8) and is closely related to the core purpose of maintaining international peace and security. Collective security or peace is an objectively determinable fact function.[[9]](#footnote-9) The concept of collective security and peace, founded on the principle of *bellum iustum*, has “become unequivocally the content of […] the Charter of the United Nations”.[[10]](#footnote-10)

The aim here, however, is not to demonstrate that the UN Charter is a fully-fledged Constitution through an empirical analysis of NATO’s legal texts and institutionalization. Nor will this dissertation take a purely instrumental approach to the UN Charter. Notwithstanding the debate and diverse approaches on this matter, it is reasonable to think that the UN Charter’s drafters seem to have given it a certain constitutional dimension.[[11]](#footnote-11) This constitution-like function[[12]](#footnote-12) is easily observable, *inter alia*, in the preamble, in Articles 1, 2 and 103, and in the articles related to the powers of the Security Council.

In this regard, Kelsen’s static and dynamic principles[[13]](#footnote-13) help to clarify the nature of the UN Charter. The dynamic principle gives a plausible explanation to the constitutional inspiration of the UN Charter. This is shown in two ways. First, as Diez de Velasco argues, a systematic interpretation of Article 1 of the UN Charter—containing the purposes and principles of the United Nations (‘UN’)—allows us to have a holistic appreciation of the aim of the text. The holistic interpretation affirms both a) the UN’s objective of maintaining international peace and security as the first and essential goal of the United Nations;[[14]](#footnote-14) and b) Article 2(4) as the keystone and “heart of the United Nations Charter”.[[15]](#footnote-15) Similarly, Orford affirms that the maintenance of international peace and security is the fundamental principle of the UN Charter and will eventually be its unifying norm.[[16]](#footnote-16)

Second, the law created by the UN Charter has become the law of other international organizations.[[17]](#footnote-17) For instance, references to the purposes and principles of the UN Charter exist in not only the constituting documents of all international organizations in the UN family, but also in the constituting documents of the European Union; the African Union; the Organization of American States; the Organization for Security and Co-operation in Europe; and the North Atlantic Treaty Organization. The UN Charter and the UN (as its institution) both appear to be part of the history, politics, and law of many international organizations, notwithstanding being born in the aftermath of the Second World War.

The NAT seems to share the two constitutional aspects of the UN Charter described above. The final communiqué of the first session (Resolution) of the North Atlantic Council made on 17 September 1949 on behalf of the ministers states:

“[t]he task of the Council is to assist the Parties in implementing the Treaty and particularly in attaining its basic objective. That objective is to assist, in accordance with the Charter, in achieving the primary purpose of the United Nations—the maintenance of international peace and security”.[[18]](#footnote-18)

It is not necessary to enter into a debate about the legal or political value of this resolution[[19]](#footnote-19) of the North Atlantic Council. The resolution still has significant international institutional law value, especially because it is the first collective decision taken by the signatories of the NAT. Since the only institution created by the NAT passed the resolution, it must be considered an ‘organic act’ and, consequently, the ‘starting point’ for the institutionalization of the NAT in conjunction with the prerogatives given in its Article 9.[[20]](#footnote-20) Moreover, this ‘organic act’ explicitly links the primary objective of the NAT with the primary purpose of the UN, being the maintenance of international peace and security. Further, in subsequent communiqués, the NAT signatories continued to confirm their commitment to the maintenance of international peace and security and the primary purpose of the UN.

Other provisions in the NAT reinforce this position. The term ‘United Nations’ is mentioned six times in relation to the UN Charter’s purposes and principles, as well as the use of force and settlement of disputes. Equally, the term ‘Security Council’ appears both in Article 5—NATO’s *raison d’être*—and in the primacy-oriented Article 7. The latter establishes a “conflict clause in favor of the UN Charter, in keeping with Art. 103 UN Charter,”[[21]](#footnote-21) which must be read in conjunction with Article 8 of the NAT. It appears reasonable to conclude that the NAT recognizes the superiority of the UN Charter, which prevails over other treaties.[[22]](#footnote-22)

The present dissertation also needs to address the reasons for (and repercussions of) the fact that the NAT does not make reference to an ‘organization’; the expression ‘North Atlantic Treaty Organization’ does not appear in any of the fourteen articles of the Treaty text. This may raise questions on the actual intention of the NAT drafters with respect to the final aim of the Treaty.

Therefore, before studying the different elements that knit together NATO’s institutional fabric, it must first be determined whether NATO is or is not an international organization in its own right. There is an epistemic necessity to confirm NATO as both an organic institution and a functional organization. Both categories are prerequisites for the subsequent analysis in the chapters to come, and they provide a robust argumentative basis by which further questions relating to NATO’s legal status and other key institutional elements can be addressed.

\*The classic term of ‘Administrative Unions’ framed the discussions of the nature of international organizations during the first part of the last century. The approach of the nature of ‘Administrative Unions’ (such as, for example, the Universal Postal Union) was a combination of functionalism and contractualism with continuous doubts as to what would happen with states. Aguilar Navarro defined those unions using a functional and normative approach: (i) they have a specific obligation stated in their constitutional[[23]](#footnote-23) instrument;[[24]](#footnote-24) (ii) they pursue international cooperation in different fields; and (iii) they operate in a cross-border cooperation manner.[[25]](#footnote-25) However, taking into account the variable origins, nature, and purposes of international organizations, these features fall short. It is instead necessary to identify some characteristics that can be applicable to all types of international organizations, i.e., that all of them have: an inter-state basis, shared common bodies, and a certain autonomy.[[26]](#footnote-26)

It must be noted that Article 2.1(i) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations defines an international organization as “an intergovernmental organization”.[[27]](#footnote-27) However, Article 2(a) of the International Law Commission’s (ILC) Draft Articles on the Responsibility of International Organizations provides a more recent definition of international organization:

““international organization” means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organization may include as members, in addition to States other entities”.[[28]](#footnote-28)

The ILC therefore recognized that other instruments governed by international law could establish an international organization.[[29]](#footnote-29) With respect to NATO, the first analysis must be done *vis-à-vis* Bederman’s “Idiom of the Organic Institution”; [[30]](#footnote-30) an expression, that finds understanding on the concept of a ‘community of interest’. NATO emphasizes and presents a community of interest to pursue international peace and security, in the aftermath of two world wars and in the face of a threatening Soviet Union. Simma confirms that international peace and security is the substance of the most prominent community interests.[[31]](#footnote-31) Indeed, in 1952, the Council under the first NATO Secretary General stated:

“[T]he North Atlantic Treaty is not merely a military alliance and that its purpose is to bring into being an *Atlantic Community*, not only for immediate defense but for enduring progress”.[[32]](#footnote-32)

In the international system, the way by which states give status to a community of interest is by creating common organs.[[33]](#footnote-33) These organs carry out international activities on behalf of the constituent states. This approach helps in the analysis of the legal character of an international organization. Thus, it becomes of secondary importance to look first for the legal personality of an organization with the intention to qualify it as international. Legal personality is subsumed by the previous existence of a formal decision, or treaty-created functional structures capable of exercising rights and obligations.

International organizations are not the sole product of the provisions of a constituent treaty, they are also, and in a cumulative manner, the creature of international functions vested in their organs, which can be connected to “the Idiom of the functional international organization,”[[34]](#footnote-34)

From the above, it can be submitted that while NATO is an intergovernmental organization with a core competence for security and defence, it has also developed “a diverse and sophisticated array of institutions and has well-established institutionalized procedures for the formulation and conduct of its actions [and] is a self-declared carrier of Euro-Atlantic values and on this basis embodies a *community identity*”.[[35]](#footnote-35) Moreover, NATO’s legal personality can indeed be identified as unique, since the constituents decided to create two legal personalities, one for the ‘Organization’ and another for the ‘Supreme Headquarters’.[[36]](#footnote-36)

As seen above, NATO’s particularity is that of having institutionalized a community of interest around the imperative need to address “the grave problems which affect the peace of the world,”[[37]](#footnote-37) This particularity has embarked the members of that community on a common enterprise. This confirms ‘Gierkian’s’ version of an international order, made not only around the state, but also around other fellowships or communities, which will stand between the state and the individual.[[38]](#footnote-38) These fellowships are understood as “individual collective entities,”[[39]](#footnote-39) In contemporary times, the UN Charter provided the soil for the institutionalization of communities of interest around the idea to promote international peace and security.[[40]](#footnote-40) This, like in many other international institutions, also materialized in the creation of NATO common organs.

NATO is a community, which has created institutions and procedures proper to an international organization[[41]](#footnote-41) for better implementing the work necessary to contribute to international peace and security. NATO holds the status of an international organization not because it has explicit conventional or treaty-given legal personalities, but because its member states gave it functional tangible common organs,[[42]](#footnote-42) which made NATO *be*. These organs permit NATO to act as a community and create its proper regime, the ‘NATO *acquis*’, which consists of NATO’s common rights and duties. The ‘NATO *acquis’* is its legal order[[43]](#footnote-43) and includes not only the requirements for admission (Membership Action Plan),[[44]](#footnote-44) but also the North Atlantic Council’s decisions and the rules of NATO bodies.[[45]](#footnote-45) The ‘NATO *acquis’* is not intended to oblige others outside of the NATO community, it applies to both the community in its daily activities and their constituents when their acts affect the competence of the common organs to carry out the functions and purposes of NATO.

In May 2010, Secretary General Rasmussen stated:

“NATO remains the institutional foundation for this *community* [North America and Europe/transatlantic security community]. By continuing NATO’s transformation, we will ensure that our Alliance remains fit for purpose and that we can look to the future with confidence”.[[46]](#footnote-46) This continuous, necessary, and crucial transformation routinely undertaken by NATO’s common organs not only maintains NATO’s dynamism as an international organization – having a life on its own[[47]](#footnote-47) – but also reflects the existence of practices, which feed ‘NATO *acquis’* and invigorate the pursuit of its functions and purposes.

This brings to light that NATO is an organic institution, but the research question would be ill answered if the above explanations are not framed in Virally’s principle of functional necessity.[[48]](#footnote-48) He argues that the activities of international organizations pursue a non-abstract “*finalité determinée*”, and that this is external to its executive organs.[[49]](#footnote-49) Actually, this definite end is clearly delineated by very specific goals, which permit states to recognize themselves within a community of interests.[[50]](#footnote-50) Virally also argues that *“[l]a fonction désigne alors un facteur assurant ou facilitant la conservation du système (ou sous-système) ou son adaptation aux changements internes et externes auxquels il est confronté*”, which explains NATO’s resilience against the contemporary complex history and its demonstrated inherent institutional dynamism. The latter appears to be the key of such endurance and the ‘Asterix’s magic potion’ that NATO member states have used to make up for the insufficiency of state institutions to maintain international peace and security.[[51]](#footnote-51)

NATO’s institutional development empirically demonstrates Virally’s functional necessity; the organization cannot be explained thoroughly without this concept. In order to substantiate this argument, before addressing any question relating to NATO’s legal status, it must first be tested whether NATO is a ‘functional’ international organization. For this purpose, an adapted version of Marchegiano’s functional considerations on the works of the Cape Spartel Lighthouse Commission can be used.[[52]](#footnote-52)

Marchegiano,[[53]](#footnote-53) before determining whether the Cape Spartel Lighthouse Commission had legal personality, considered that this can only take place if the Commission was a functional international organization. For this he laid down three criteria: a) does the Commission have a recognized international competency with powers deriving from an international convention?; b) does the Commission carry out a mandate entrusted by the constituents, which also has certain independence from the constituents?; and c) does the Commission carry out functions for an international purpose?[[54]](#footnote-54)

An honest attempt can be made to apply Marchegiano’s analysis to NATO, in order to determine whether it is a functional international organization. First, it is necessary to recall that in 1967 publicists already considered NATO a functional international organization. In this regard, Jordan stated: “NATO stands as much in the growing tradition of functional international organization as in that of military alliances”.[[55]](#footnote-55) What did he mean? Jordan referred to a transformation. Thus, while in its infancy NATO was an *ad hoc* organization,[[56]](#footnote-56) it “began to evolve […] in a more efficient, and neater organization […] an international staff or secretariat was created to deal *functionally* and not through committees”.[[57]](#footnote-57)

NATO was created through the institutional NAT’s ‘Adam’s rib’, Article 9, pursuant to which NATO’s institutional offspring comes. NATO was born from a multilateral treaty, which was supplemented by three general multilateral treaties,[[58]](#footnote-58) as well as subsequent decisions or, as Bekker puts it, the “organization’s constitutional structure”,[[59]](#footnote-59) a term which is much broader than ‘constituent instrument’”.[[60]](#footnote-60) Consequently, NATO began to have a life of its own. The beginning of NATO’s international secretariat has been described, one year after its creation, as an “area of international action [which] has steadily broadened over the past twelve months by a process of accretion rather than by plan, and sometimes against some opposition on the part of Member Governments,”[[61]](#footnote-61) With these fabrics, NATO quickly began to develop its objective competence in a series of activities or functions distinct from those of its members, carried out by the common organs, and consisting not only of planning, but also of executing those plans.[[62]](#footnote-62) The most visible purpose was to stand ready to apply Article 51 of the UN Charter on collective self-defence within the framework of the purposes and principles of the Charter.

On this question, Reuter argues that a minimum of autonomy equates, unless the constituents set something different, to vesting the institution with the capacity to perform its own actions.

“quand une organisation a reçu un minimum d’autonomie et une action assez stable et assez large pour prétendre à une action propre, il est normal de considérer, sauf stipulation contraire clairement indiquée par ses fondateurs, que ces derniers ont voulu l'habiliter à prendre part à la vie internationale”.[[63]](#footnote-63)

In 1951, NATO’s organs already held delegated functional authority, i.e., member states delegated international competence to their common organs with a certain autonomy, which became detached from the NATO members based on the principle of speciality. This also included NATO military headquarters.[[64]](#footnote-64)

This addresses the second part of Machegiano’s analysis - functional international organizations carry out a mandate entrusted by their constituents with certain autonomy and independence from the will of individual member states of the institution: the *volonté distincte*. The delegation of functional authority in NATO can be seen in the juridical explanation on the decrees for the publication of the Ottawa Agreement and the Paris Protocol:

“Si la Convention sur le statut de l'O.T.A.N. et le Protocole relatif aux Quartiers Généraux ont pour effet de restreindre, dans une certaine mesure, les droits souverains des Etats qui y sont parties, l'Accord sur le S.H.A.P.E. vise essentiellement à préciser la portée des abandons de souveraineté consentis par la France dans l'intérêt du bon fonctionnement de l'Organisation atlantique (Footnote 6: L'accord sur le S.H.A.P.E., application du Protocole sur les Quartiers Généraux, joue par rapport à la Convention sur le statut de l'O.T.A.N. un rôle comparable à celui que joue l'Accord sur le siège des Nations Unies par rapport à la Convention Générale sur les privilèges et immunités desdites Nations Unies)”.[[65]](#footnote-65)

Marchegiano’s sets out the third condition for considering the Cape Spartel Lighthouse Commission a functional international organization; namely that it “[advances] the benefit of all mankind – [by promoting a] ‘high humanitarian interest’ in ensuring ‘security of the navigation’ through the Straits of Gibraltar”.[[66]](#footnote-66) Facing the dilemma of whether to develop structures to be ready to use force in self-defence, or to leave the response to an aggression in a collapsed United Nations Security Council, the NAT drafters chose to create a new organization with a noble goal. The Treaty reaffirms the faith of the NATO members in the purposes and principles of the UN Charter and their desire to live in peace with all peoples and to contribute to the further development of peaceful and friendly international relations, as well as to settle international disputes by peaceful means without endangering international peace and security and justice.[[67]](#footnote-67) Actually, NATO’s membership under Article 10 of the NAT implemented through the Membership Action Plan requires, *inter alia*, demonstrating commitment to the rule of law and human rights.[[68]](#footnote-68)

In light of the above, solid arguments have been provided to agree that NATO is indeed a functional international organization following Marchegiano’s test, which permits to approach the research question better off.

### 1.2 Research Question

The research question of this dissertation is: how did NATO’s conceptual origin as an alliance develop into a fully functional international organization with all the features required to be considered as such? This proposal is, theoretically and practically speaking, settled. In fact, no one today contests that NATO is an international organization, but the fact that it was first created as an alliance has, in some instances, posed questions. Moreover, these questions are mainly subject to the *sui generis* construct of NATO composed of civil and military bodies, each with conventional and distinct legal positions, but with certain legal connections. This would also include the particular delegated legal positons of other bodies like agencies or subordinated Allied Headquarters in the NATO Command Structure, as well as headquarters in the NATO Force Structure, specific structures and assets at the disposal of NATO, and centres of excellence.

The aim of this dissertation is to explain these key facts. This requires detailing the key moments of NATO’s institutionalization by means of historical accounts, political decisions, and legal evidence. As Claude points out above, this proves NATO “is an alliance which involves the construction of institutional mechanisms […] this utilization of the concept of international organization for the transformation rather than supplantation of alliances may prove to be a highly significant precedent”.

To examine the research question, this dissertation is divided into two further sub-questions, which coincide with the two parts of this work. The first one will look at the organization through an institutional lens in an attempt to uncover the *sui* *generis* institutionalization of NATO. Over the course of the following pages some of NATO’s particularities and paradoxes will be unveiled around three main points centred on the concept of an institution as that of an idea of work materialized. This idea of work or enterprise, i.e. the institution, has a teleological mission personified in a juridical subject: a) the sources of the idea of NATO (Chapter 2), b) the barebones of a NATO constitution as a key for institutional success (Chapter 3), and c) NATO’s institutions and its decision-making process (Chapter 4). The second sub-question intends to analyze NATO’s full institutional building by delving into the *ratione functionis* approach, i.e., the ‘legal position’ of NATO. This is based on the understanding that the legal position of international organizations requires the criterion of functional necessity in order to remain within the limits established by their constituents in the correspondent ‘constitutional structure’. Therefore, this dissertation will attempt to address key topics affecting NATO’s legal position through an analysis of NATO’s rights and duties, i.e., its legal status (Chapter 5), its privileges and immunities (Chapter 6), and its responsibility (Chapter 7).

### 1.3 Methodology

The methodology to reach the findings in the chapters below cannot be purely juridical, since this method of analysis would be insufficient: NATO is aimed more at resolving political problems than legal questions. Furthermore, a juridical method cannot disregard the succession of ‘precedents’ and history that have very relevant juridical value as inspiration for finding the specific institution’s current problems, as “*une institution ne vit pas que dans le présent*”.[[69]](#footnote-69) Moreover, NATO, as a political organization, expresses through its rules political values, which are the result of political negotiations. Although the NATO legal framework has its origin in those negotiations, it acquires an autonomous existence once approved and thus stops being the opinions discussed during those encounters. In this way, NATO (indeed any institution) can juridically ‘survive’ any political changes in a specific social environment by carrying forward its original political values.

Therefore, an interdisciplinary method of institutional analysis, in the manner proposed by Virally and Kennedy,[[70]](#footnote-70) is more appropriate to approach the analysis of NATO as an international organization. Such methodology is commonly applied when analyzing other international organizations and focusses on the following three disciplines: history, political science, and law. This approach complies with the sociological method, which aims to extract patiently the historical and social data that form NATO’s legal framework by means of observing the organization as a social fact. The data this method retains are relating to the historical precedents to the NAT; political interest of the NAT signatories; their community of interest; the universal principles of peace enshrined in the UN Charter; the Euro Atlantic region; the post Second World Word idealism; and NATO’s legal position.

The sociological method is optimal for approaching Public International Law and, more specifically, the area of International Institutional Law, since its goal is not merely describing reality, but explaining and comparing the approach of the existing international organizations. In the present case, this will be done by scrutinizing NATO’s historical key moments, resolutions/decisions (and their making), and other legal outputs, which constitute the rules of the organizations, as well as by identifying the institution’s particularities that characterize and inspire its function.

The interdisciplinary method addresses NATO’s institutionalization in a three-step process, which is centred on the concept that “[a]n institution is an idea of a work”.[[71]](#footnote-71) This concept is understood as a teleological mission personified in a juridical subject, which “comes into being in the constituted body”.[[72]](#footnote-72) The institution itself goes through three phases: it first emerges, then grows, and finally settles.[[73]](#footnote-73) The origins of the institution—regardless of its level of organized internal bodies and external capacities – explain why it has come into being and what common understandings the constituents reached. Its growth is addressed by an institutional analysis of the juridical instrument(s) that constitutes the organization. Finally, the continuous and dynamic practice(s) of the organization helps to understand how the institution settles.[[74]](#footnote-74) However, the methodology would be incomplete without taking into account world history and NATO’s history, its political decision-making throughout its life, and the legal and case law elements that settled NATO’s legal position.

### 1.4 Outline of the Dissertation

Part I of this dissertation is divided into three chapters that explain NATO’s institutionalization. The three chapters will examine the sources of the idea responsible for creating NATO; the ‘constitution’ of NATO as its terms of reference, key for its institutional success; and NATO’s institutions along with its decision-making process. The analysis will adopt a functionalist perspective and look at NATO’s origins; an institutional analysis of the NAT; and the continuous and dynamic practice of the North Atlantic Council and its subordinate NATO bodies as well as the evolution of its decision-making techniques.

In other words, the first section of this work examines NATO’s institutional history. Lord Ismay’s *NATO*: *the First Five Years, 1949-1954* helps with understanding how the North Atlantic Treaty Organization was brought into being and what the intention of the NAT’s drafters was. Ismay explains:

“They did not attempt, at the outset, to draw up a blueprint of the international organization which should be set up, or lay down any hard and fast rules of procedure. They realized that these could only be evolved step by step in the light of practical experience”.[[75]](#footnote-75)

In light of the above, several questions emerge with respect to the institutionalization of the NAT and the organization created from it. In Part I of this dissertation, it is necessary to explore the origins of NATO’s evolution. What role does the search for peace play? What are the sources of the North Atlantic Treaty? Is the idea of a ‘community of interest’ a part of NATO’s origin? For this purpose, Chapter 2 makes brief historical references to key moments in the development of NATO from the perspective of the members and eventually their goals for assembling and institutionalizing NATO. As Virally states, “the juridical analysis cannot ignore history as ‘practice’— understood as a succession of ‘precedents’—has juridical significance of the first order”.[[76]](#footnote-76) Chapter 3 examines the idea for NATO *vis-à-vis* the NAT negotiations and its conclusion among twelve allies. What are NATO’s terms of reference? Is the NAT compatible with the UN Charter? Was the NAT aimed to create an alliance or an organization? Are there other treaties that implement NATO’s institutionalization? Is NATO a regional organization, as the NAT contains provisions relating to geographical areas? This chapter shows the growth of NATO and intends to answer the questions above, which are crucial for identifying NATO’s institutionalization bases. The last chapter of this dissertation, Chapter 4, examines how NATO and the NAT settled (and actually continues to settle) by looking at NATO’s practice, mainly related to NATO’s ‘rules of the organization’. The chapter will embark on a study of the role of the North Atlantic Council and its decision-making process, as well as certain NATO particularities and paradoxes derived from the institutional dynamism of the organization.

Part II of this dissertation will address questions relating to NATO’s ‘legal position’[[77]](#footnote-77) through Virally’s functional necessity approach.[[78]](#footnote-78) As demonstrated above, NATO’s concept of function will be an integral part of this dissertation, in order to explain contemporarily *ut supra* Marchegiano’s axiom. In an analysis of international organizations, functional necessity is a micro concept linked to the purpose of the institution. Thus, the interpretation of this purpose most likely requires support from the theory of functionalism, in order to appreciate the 360’degree socio-political singularities underlying the establishment of an international organisation. This comprehensive approach results in identifying NATO as functional, and permitting to be eventually in a better position to address the sub-question of its legal position, i.e., its rights and obligations, which are followed by organizations’ legal status, privileges and immunities and responsibility. Chapter 5 examines NATO’s legal status, i.e., its legal personality, legal capacity and its powers, as they are the “starting-point whenever we are concerned with rights and duties of an organization,”[[79]](#footnote-79) The legal status addresses the most complex matters within the legal position of an international organization, since the legal personality, the legal capacity, and the powers of an international organization enable them to interact as a subject on the national and international legal planes. The result is that this approach permits an understanding of the legal status of the different NATO bodies and distinguishes them from other NATO multinational entities and in-theatre elements. In this chapter, it can be seen that NATO has different legal statuses. Chapter 6 addresses the second major issue concerning NATO’s legal position, namely privileges and immunities. The need for NATO to count on privileges and immunities enables NATO to carry out its mission without interference. In this chapter, NATO’s privileges and immunities have been divided into ‘organizational immunities’, privileges and immunities granted to the actual international organization; and ‘international immunities’, privileges and immunities given to the organization’s staff. This chapter presents the fact that the different legal positions of NATO’s main civil and military subsidiary bodies affects the taxonomy of NATO’s privileges and immunities. Finally, Chapter 7 deals with NATO’s responsibility as the third piece of NATO’s legal position. This chapter is a corollary of NATO’s particularities on matters relating to attribution, responsibility, and liability, which comes to conclude that the responsibility tends to fall on the member states. However, an examination of the facts has shown also that there are cases where NATO members have decided to address certain situations of incidental damage incurred during certain military operations in a solidary manner.

After the release of documents by the United Kingdom and the United States related to the preparatory works of the NAT, this dissertation addresses updated information, which sheds light on several incognita since there aren’t any formal *travaux préparatoires* of the Treaty.

Finally, this dissertation is intended to present NATO as a truly international organisation. In the preceding paragraphs, we have seen that the drafters of the NATO Treaty had already anticipated the possible transformation of the Alliance into an international organisation, with all the characteristics of an international institution, because of its imperative need in the face of the existential threat posed by the USSR. In this sense, President Truman’s remark on NATO looks prophetical: “[If NATO] had existed in 1914 and 1939, supported by the nations who are represented here today.... it would have prevented the acts of aggression which led to two world wars”.[[80]](#footnote-80)

**The North Atlantic Treaty Organization:  
An International Institutional Law Perspective**

# PART I

**FROM THE UNITED NATIONS CHARTER TO A DYNAMIC INSTITUTIONALIZATION**

## CHAPTER 2

THE INSTITUTION AS AN IDEA OF WORK EMERGES: THE SOURCES OF THE IDEA OF THE NORTH ATLANTIC TREATY ORGANIZATION

### 2. The Institution as an Idea Of Work Emerges: The Sources of the Idea of The North Atlantic Treaty Organization

#### 2.1 In the Beginning: Discovering an Existing Community of Interest

In a Hobbesian world, the leader of a commonwealth, the Leviathan, would bring peace by defence: “This is the generation of that great Leviathan, or rather, to speak more reverently, of that mortal god to which we owe, under the immortal God, our peace and defence”.[[81]](#footnote-81) *Leviathan* inaugurated the search for the integration of international law, however it was not until the conception of the League of Nations that “[t]he fragments of international organization that existed before 1918 only came together as an integrated whole”.[[82]](#footnote-82)

The development of the League of Nations orchestrated the move from bilateralism to a community of interest.[[83]](#footnote-83) The League showed the evolution of “international law beyond the inter-state sphere”.[[84]](#footnote-84) Moreover, as Claude affirms, “a minimal community of interest may sooner or later be discovered or developed by the states and group of states whose relationships are […] discordant”.[[85]](#footnote-85)

The NAT and NATO can be analyzed under the same ‘community of interest’ approach, since the NAT is framed in the collective interests codified in the UN Charter. This, together with the historical and political events after the Second World War, explains the development of a settled body of international law favoring its own dynamism by developing an institutionalization of the community of interest.[[86]](#footnote-86) This institutionalization occurred through the creation of international organizations, such as NATO, with the aim of exercising and guaranteeing the collective interest at an international level.

However, as Ball notes, “the distrust of the United Nations reflected in the signature of the North Atlantic Treaty did not represent an abandonment of the world organization—at least in principle”.[[87]](#footnote-87) It is worth remembering that on 20 February 1949 the Norwegian Labour Party issued a resolution in favor of cooperation for peace and security. This resolution took place after an exchange of correspondence between the Soviet authorities and the Norwegian government. The Soviet Ambassador in Oslo stated that the negotiations for an Atlantic pact were aggressive and the pact was “being set up outside of and by-passing the United Nations”.[[88]](#footnote-88) Norway’s answer confirmed the understanding the UN Charter permitted NAT-type agreements:

“Norway will assist in every attempt to strengthen the United Nations Organization, but they have to face the fact that so far the United Nations has not succeeded in building a system granting its members the necessary security against aggression. It has become necessary for member States with common interests to make special agreements on cooperation. The United Nations Charter permits such agreements to be made.”[[89]](#footnote-89)

##### 2.1.1 War and Peace: International Law Scholars

In the ancient world, collaborations between societies and states were based on common religious or cultural identities, or a mutual interest in pursuing peaceful relations, and “the process of making foreign friends in antiquity was largely one of legal process”. [[90]](#footnote-90) Friendly Greek city-states and vassalage relationships both developed in the Near East and Rome, and “were all conceived as legal relationships … and political association[s] … which were controlled by the rule of law”.[[91]](#footnote-91) The city-states’ interactions embodied something similar to what is understood as international law today. Tenekedis, in his study of Greek city-states, affirms that *“[e]n tête des institutions interétatiques viennent les traités. Ceux que caractérise un rapport de supériorité d’un des contractants son volontiers tenus pour des ordres et réputés non obligatoires*”.[[92]](#footnote-92)

The Dorian League formed a single unified body of collective defence and “it seemed to be excellently conceived and equipped … [b]ut if they had done as they intended and had agreed on a common policy, their power would have been irresistible, militarily speaking”.[[93]](#footnote-93) However, the League, in spite of its fantastic potential and identified common interest, lacked common institutions, which would have helped to instigate the development of a common future. The Dorian League missed institutionalization.

International law only emerges if there are common general ideas and interests. The fall of the Roman Empire showed how much Roman law has influenced international law development with “very detailed rules concerning their relations with other states in time of peace and war; but these were rules of Roman law, not rules of the law of other countries, and certainly not international rules”.[[94]](#footnote-94)

It was not until the end of the medieval period, with the emergence of ‘prototype states’ in Europe, that the need for cross-border law was reborn. These ‘prototype states’ initially interacted with little coherent practice. However, this incoherence and lack of settled practice had the positive impact of creating a common custom. This custom was based on similar interests, rooted in the same moral and religious soil. The way these states conducted their international relations was ‘conquered’ by the rule of *ubi societas ibi jus*.[[95]](#footnote-95) The states also started developing the notion of a system of peace overseen by international arbitration.

Kennedy identifies the 1648 Treaty of Westphalia as the end of ‘primitive’ legal scholarship and the emergence of ‘traditional’ (between 1648 and 1900) and ‘modern’ (between 1900 and 1980) scholarship.[[96]](#footnote-96) For Kennedy, the ‘primitive’ scholars of international law were the Catholics Francisco Vitoria (1480-1546) and Francisco Suárez[[97]](#footnote-97) (1584-1617); and the Protestants Alberico Gentili (1552-1608) and Hugo Grotius (1583-1645). In comparison, Rousseau[[98]](#footnote-98) proposes Pierre Dubois (1250-1320), Emeric Crucé (1590-1648) and Maximilien de Béthune, the first Duke of Sully (1560-1641). Oppenheim[[99]](#footnote-99) adds Antoine Marini of Grenoble (-1461) to the list. Whichever list one relies on, the propositions of these primitive scholars, whenever they use ancient terminology in reference to self-defence in civil law, are “easily transposed into discussions of inter-sovereign relations. Both are governed by the same moral-legal order”.[[100]](#footnote-100) Unlike the traditional scholars, primitive scholars do not focus on institutionalizing inter-sovereign relations.

Rousseau acknowledges traditional scholars: the Frenchmen L’abbé de Saint-Pierre (1650-1743) and Jean Pierre Brunet (1781-); the Germans Gottfried Wilhelm Leibnitz (1646-1716), Immanuel Kant (1724-1804), and Johann Gottlieb Fichte (1762-1814); and the Anglo-Saxons William Penn (1644-1718), John Bellers (1748-1832), and Jeremy Bentham (1748-1832).[[101]](#footnote-101) In contrast to the primitive scholars, the traditional scholars see the international legal order as “a horizontal order among sovereign authorities” and “contractual”.[[102]](#footnote-102) All traditional scholars advocate for treaties or institutions to settle peace among those with a community of interest. L’abbé de Saint-Pierre presents “*un plan de paix en cinq articles consistant dans l’adoption para les Princes d’un traité fondamental, la « Grand Alliance », pour rendre la paix durable en Europe,*”[[103]](#footnote-103) while Brunet presents a project for a European tribunal “*pour procurer la paix dans toute l’Europe*”.[[104]](#footnote-104) The German scholars propose that law enters into politics for a *pactum pacis*. The Anglo-Saxon scholars, especially Penn, postulate institutions and recommend a European parliament. This is the result of the change of the *raison d’être* for wars after the French Revolution, from dynastic and religious wars to wars fought for national unity.[[105]](#footnote-105)

Modern scholars emphasize the community of interest differently to their predecessors. They consider that “cultural, political, administrative and judicial forces ... [blur] the boundary between international and municipal law”.[[106]](#footnote-106) This, in turn, allows for the growth and institutionalization of international law.

The growth and institutionalization of international law started modestly in the second half of the nineteenth century and culminated in the creation of the League of Nations. The League represented not “merely the restoration of peace following the rupture of war, but a second break, a break in the pattern of international integration”.[[107]](#footnote-107) Oppenheim argues that “no sooner had this League of Nations come into existence—and even some time before that date—than a number of schemes for the establishment of eternal peace made their appearance”.[[108]](#footnote-108) Oppenheim’s argument is reinforced by statistical studies made by Singer and Wallace,[[109]](#footnote-109) that show the number of international organizations grew as state leaders sought to secure peace through the institutionalization of international relations:

“[A] dramatic spurt in the creation of new IGO’s and weighted nation membership during the periods following World War II (i.e., 1945-1949, as well as later), World War I (i.e., 1920-1924 and 1925-1929), the Russo-Japanese War (i.e.,1905-1909), and to a lesser extent after the Russo-Turkish, Pacific and Central American wars (i.e., 1885-1889 and 1890-1894). These figures would suggest that quite a few statesmen did, when the costs and tragedies of war were still fresh in their memories, seek to avoid further slaughter via the establishment of new or additional intergovernmental organizations”.[[110]](#footnote-110)

##### 2.1.2 NATO and the NAT: Embodying the Community of Interest

NATO’s inception follows the same rationale as described above. It emphasizes the community of interest. The statesmen who instigated NATO’s birth came from the sad experience of two world wars and, at the beginning of the 1950s, the threat of another by the perceived aggressive attitude of the Soviet Union. In essence, NATO’s origins prompted the pursuit of international peace and security and formed the substance of the community of interest. Indeed, the “first permanent imprint … on international relations is to be seen in the emergence of international organization”.[[111]](#footnote-111) The materialization of the community of interest “occupies a permanent place on the agenda of the United Nations and other international bodies” or conferences.[[112]](#footnote-112) While NATO is the enabler of the existing community of interest (as is any other international body), it also highlights that the community of interest is made up of states *and* all human beings.

Additionally, NATO’s embodiment of the community of interest, its materialization, was seen in the controversial bombing campaign in Serbia and Kosovo. Debatably, NATO—without turning solutions for ‘hard cases’ (a humanitarian disaster was taking place) into the rule[[113]](#footnote-113)—was able to stress the purposes and principles of the UN Charter when the UN’s institutions became, in that instance, stagnant.[[114]](#footnote-114)

The idea of a North Atlantic community of interest, despite previous conflicts, was underscored in the drafting of the NAT and has continued to be underscored in NATO’s history.

“Mr. Acheson, for example, said: ‘The reality of the Treaty is the unity of belief, of spirit, of interest, of the community of nations represented here. It is the product of many centuries of common thought and of the blood of many simple and brave men ... it lies in the affirmation of moral and spiritual values which govern the kind of life they propose to lead and which they propose to defend, by all possible means, should that necessity be thrust upon them ... ’. The signers of the North Atlantic Treaty represented nations nurtured in common traditions and with common respect of the rule of law. Moreover, their community of interest had become clear through the experience of two world wars which demonstrated that an attack against one of these nations threatened the security of the whole North Atlantic area in that sooner or later the others were drawn into the conflict”.[[115]](#footnote-115)

In a trivial analysis of the NAT, a layman would conclude that its provisions are simply intended to create a classical alliance, instead of believing that the NAT is also the foundation for building an international organization. There must, of course, be no doubt that the NAT establishes an alliance as Bergsman describes: “an explicit agreement among states in the realm of national security in which the partners promise mutual assistance in the form of a substantial contribution of resources in the case of a certain contingency the arising of which is uncertain”.[[116]](#footnote-116)

The NAT, however, goes an extra mile. It institutionalizes the mutual assistance that Article 5 ‘hallows’ and has followed a path that departs from that followed by classical alliances by developing an institutional regime. First, the NAT frames its functions in the purposes and principles of the UN Charter, and ‘anchors’ them to the UN Charter’s institutions. Second, it establishes the formula of consultation—democracy applied to relations among sovereign states[[117]](#footnote-117)—as the procedure to activate Article 5. Third, Article 2 incorporates references to cooperation in order to eliminate conflict in the international economic policies of NAT signatories and to encourage economic collaboration. Fourth, Article 3 establishes the obligation of making a sustained effort over time (*see also* Article 13) to have the physical capacity and resources to resist an armed attack. Finally, Article 9 confirms that these self-imposed obligations will be carried out jointly by means of common institutions: the North Atlantic Council, and the bodies it establishes.

##### 2.1.3 Idealism in the Inception of Institutional Regimes

The establishment of an institutional regime requires a major dose of idealism during its inception, which eventually becomes the glue for a ‘divergent’ community of interest. It is not in vain that Hauriou considers that an institution is “an idea of a work or enterprise that is realised and endures juridically in a social milieu”.[[118]](#footnote-118) This concept of an institution rests comfortably in the concept of interdependence[[119]](#footnote-119) applied by international organizations’ constituents and materialized in their common institutions, which develop, in turn, “*d’intérêts identiques chez les divers États*”.[[120]](#footnote-120) Thus, this interdependence is the heart pumping blood into the circulatory system of the community of interest and its limbs: the functional institutions.

“[A]t its heart *NATO is an idea*, an idea which has taken years to flesh out into the imposing fact of its present dominance in world politics. This idea is that somehow, in a way no one can quite describe, there grew up about the Atlantic Basin a civilization, which is like no other in the world. In this civilization, the individual man and liberty are the measure of political value. Together the people on both sides of this great ocean […] makes a community in the greatest sense, bred out of traditions, religions and technology that none of the other major civilizations of the world share. It has taken centuries of internecine bloodshed to make them realize that they are one. Not until now, when desperately challenged by other counter-attacking civilization, have the men who live around the Atlantic realized that they must band themselves together to defend, each people with its lives and substance, the lives and substance of every other member. It is an alliance like no other in history, since its goals are not base on spoil or conquest, but on deterrence and defence. All the rest of the globe may be bargained over, but NATO itself was not erected for bargaining. It was erected for defence of the heartland of freedom and a heritage which only too late was realized to be *common property*”.[[121]](#footnote-121)

In the political science arena, idealists ponder that collective security and international sanctions are “necessary for a new world order characterized by the greater interdependence of peoples”.[[122]](#footnote-122) Reichard argues that in alliances formed by states, not only power and security are taken into consideration, but also a common ethos and cultural, political, administrative, and judicial values.[[123]](#footnote-123) It is this community of interest that supports a two-phase approach to the institutionalization process. This process starts with idealistic approaches, which consist of applying a juridical continuum to an idea within a group. The process continues with the materialization of the idea into a text and by practice, based on a “reasoned follow-through”.[[124]](#footnote-124)

On this note, Secretary Acheson stated that NATO was a “*community* inspired by ‘common institutions and moral and ethical belief’”.[[125]](#footnote-125) Arguably, NATO represents, together with the OECD, one of the permanent Western institutions, which has lasted long enough to bring together both sides of the Atlantic. Strausz-Hupé states that “[f]or better or worse, NATO represents the one and only concrete token of Western unity”.[[126]](#footnote-126)

The sophisticated realm of international relations points to a pragmatic plane—a certain realism—for explaining the cooperation among the constituents of an international organization in its institutions. As explained earlier, running an institutional regime instills the capacity for change in an international organization by combining idealist and realist tenets.

##### 2.1.4 Functional Necessity

At this point, it should be noted that the evolution of international organizations and the way they adapt to evolving international circumstances is founded in the principle of functional necessity.[[127]](#footnote-127) The principle of functional necessity acknowledges that international organisations are created by states to carry out a specific mission for the common interest, or *finalité intégrée*, of the partnership community. This is because each individual state in the international organization is incapable of achieving the mission alone. Consequently, the functionalist approach explains why international organizations evolve naturally over time, using their institutions to adapt the original mission and their functions, to the changing environment of international relations.

The principle of functional necessity helps to explain that the decision to endow the NAT “with institutional characteristics was designed to add the process of adaption”.[[128]](#footnote-128) The visionary words of NATO’s first Secretary General show the significance of combining the ‘idea’ with interdependence and the community of interest:

“[W]e in NATO will need, for years to come, a great deal of imagination and energy in order to develop by collective action the defensive power of our Alliance and to tighten in all fields the bounds between member states on both sides of the Atlantic Ocean”.[[129]](#footnote-129)

In light of the above, it appears that NATO’s particularity is that of having amalgamated the mutual assistance function of an alliance[[130]](#footnote-130) with its institutionalization, thereby permitting states to consult and collaborate in a continuous manner to address “the grave problems which affect the peace of the world”[[131]](#footnote-131) and, directly or indirectly, the Atlantic area. Buteux summarized the above, stating: “NATO combines the traditional functions of an alliance with the institutions, procedures, and operation of an international organization”.[[132]](#footnote-132) Equally, Jordan argues that “NATO stands as much in the growing tradition of functional international organization as in that of military alliances. In NATO the two are intertwined to an unprecedented extent”.[[133]](#footnote-133)

#### 2.2 The Pre-history of the North Atlantic Treaty Organization

##### 2.2.1 The Forerunners of an Atlantic Pact**[[134]](#footnote-134)**

America Resolution VIII of the Inter-American Conference on Problems of War and Peace led to the signing and ratification of the 1947 Treaty of Rio. The idea of supporting peace developed in Mexico City, where the American states agreed to conclude a treaty to prevent and repel threats and acts of aggression against any of the countries in America. The American states recalled that the treaty would be consistent with the purposes and principles of the UN, in particular with the keystone principle of maintaining international peace and security in order to improve the procedures for the pacific settlement of their controversies. Moreover, the Treaty of Rio made explicit reference to Articles 51 and 54 of the UN Charter, as well as implicitly referring to Articles 102 and 103.

Continuing this line of reasoning, references made to the UN Charter in the Treaty of Rio demonstrate that, since 1945, political leaders have preferred to frame agreements for mutual assistance and common defence in the language of the UN Charter. Article 6 of the Treaty of Rio presents its model of mutual assistance and common defence using the UN Charter’s lexicon:

“If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent”.[[135]](#footnote-135)

On the other side of the Atlantic, France and the United Kingdom signed a mutual assistance agreement, the 1947 Treaty of Dunkirk, “in the event of any renewal of German aggression”.[[136]](#footnote-136) The scope and purpose of the Treaty of Dunkirk was obviously insufficient and too narrow to deter Soviet expansion. However, this treaty acted as the baseline for future negotiations for both the Brussels Treaty and North Atlantic Treaty.[[137]](#footnote-137) Like the Treaty of Rio, the Treaty of Dunkirk also refers directly to articles of the UN Charter.[[138]](#footnote-138) Although the Treaty of Dunkirk created a nineteenth century-like alliance, it was not intended to establish an institutional regime, however, the statesmen negotiating the agreement still inserted references to UN law within its provisions. In doing so, they - intentionally or not - confirmed the constitutional dimension of the UN Charter.

The United Kingdom, France, and the Benelux countries concluded the Treaty of Brussels of 1948[[139]](#footnote-139) with the idea of economic recovery and mutual defence. The need for such an agreement can be seen in Bevin’s[[140]](#footnote-140) paper on British foreign policy, where he stated: “It must be recognized that the Soviet Government has formed a solid political and economic block behind a line running form the Baltic along the Oder, through Trieste to the Black Sea”.[[141]](#footnote-141) The Treaty of Brussels came to satisfy two imperative needs required for any transatlantic pact[[142]](#footnote-142) and became the prelude to the North Atlantic Treaty. On the one hand, the United Kingdom achieved its goal of showing the United States that Western countries had started taking serious steps towards building an alliance for collective self-defence.[[143]](#footnote-143) On the other hand, the United Kingdom and France gave up on the Treaty of Dunkirk model[[144]](#footnote-144) and conceded that the treaty would be also related to economic, social and cultural collaboration as the Benelux states wanted—the Benelux states being large contributors for the community of interest that sustains international organizations.

The 1948 Treaty of Brussels, similarly to the Treaty of Rio and the Treaty of Dunkirk, incorporated UN law in its provisions. However, despite reaffirming the principles of the UN Charter, it avoided including the principles of democracy.[[145]](#footnote-145) These three agreements support the constitutional dimension of the UN Charter. Political leaders demonstrated, through repeated and consistent behavior, that UN law was the generally accepted legal framework for developing mutual defence assistance and collective self-defence mechanisms.

The view that UN law is a framework for developing mutual defence and collective self-defence mechanisms appears, nevertheless, to be debatable. Some commentators have understood that treaties of self-defence, like the NAT (or the Warsaw Pact),[[146]](#footnote-146) “*[ni] se s’insère ni ne s’intègre dans la Charte … se situe en marge de celle-ci*”,[[147]](#footnote-147) qualifying them as alliances made by governments. This argument appears to present references made to the UN Charter in those mutual defence and collective self-defence mechanisms as a simple ‘smoke screen’ that can be utilized by states to return to the former alliances’ practice, and in this manner to ‘exploit’ any vacuum the UN Charter may leave in the collective security system.[[148]](#footnote-148) Virally supports this argument and added:

“[d]epuis 1949, les États les plus puissants militairement ont écarté de facto l’idée s’assurer leur sécurité de cette façon et en sont revenus au système traditionnel des alliances, moderniser par les techniques de l’organisation internationale et de l’intégration militaire[[149]](#footnote-149)

However, what is the NAT’s uniqueness? A counter-argument to Virally’s can be submitted based on Scelle’s ideas on alliances. Scelle reminds us that governments make traditional alliances. These traditional alliances lack ratification by a state’s domestic democratic institutions, that is, “*ratifié par les populations intéressées*”*.*[[150]](#footnote-150) Scelle’s construct of an alliance, that appears to inspire Virally’s opposition to NATO, is not the case for the NAT. All of the NAT’s original signatories were free democracies. This fact intrinsically incorporated the obligation for those governments to seek the NAT’s approval by their correspondent democratic parliaments, or later, as was the case for Spain, via referendum. This situation makes reference to the UN Charter in the NAT’s authentic and full of meaning, unlike the ‘smoke screen’ found in the Warsaw Pact formed of non-democratic governments in spite of reference to the UN Charter and national parliaments’ approvals.

How can it be explained that the UN Charter’s constitution-like features are nowadays so rooted in international relations? The ‘legal evolutionary theory’ submits that legal actors mold the evolution of the legal phenomenon and by participating in the evolution, they look for a clearer guidance in case of difficult decisions. This theory could explain the practice of democratic states, which base their mutual defence assistance and collective self-defence agreements on the UN Charter. As mentioned above, many of the current international organizations incorporate key parts of the UN Charter in their constitutions and, willingly or not, create certain dynamics that position UN law prominently in the implementation of international law. The understanding that UN law occupies a prominent place in the implementation of international law applies to NATO and also supports Mitrany’s ‘functional evolution’.[[151]](#footnote-151)

What directs how international organizations contribute to the maintenance of international peace and security?[[152]](#footnote-152) The daily practice of international organizations has some precedential value. Practice, however, only supplements the powers found in an international organization’s constitution. If a constitution references the UN Charter, it has to be assumed (with little room for doubt) that the maintenance of international peace and security is inextricably part of the functions of the international organization.

The threats posed to international peace and security are dynamic. They change over time. International organizations must therefore evolve with these threats. As such, the functions and purpose of an international organization need to be formulated in broad language to allow it to be flexible in responding to unforeseen circumstances; while simultaneously being balanced against the clearly defined primary function of the organization.[[153]](#footnote-153) The more an international organization’s constitution explicitly references the UN Charter’s goal of maintaining international peace and security, the more practical the organization’s goals will be. In turn, a ‘functionalist approach’ (as described above) is required in interpreting that constitution.[[154]](#footnote-154)

The NAT’s provisions were visionary. They departed from the classical concept of an alliance by ensuring the NAT was deeply rooted in the North Atlantic community of interest—“to safeguard the freedom, common heritage and civilization of their peoples”[[155]](#footnote-155)—and “on the principles of democracy, individual liberty and the rule of law”.[[156]](#footnote-156) One of the NAT’s innovations is that it recognizes that peace and security do not only come via collective defence, but also by encouraging a Kantian[[157]](#footnote-157) economic collaboration[[158]](#footnote-158) between the signatories and a humanistic view by highlighting “western attachment to the worth of the individual”.[[159]](#footnote-159) Whatever weight one gives to this argument, one must see NATO as the institutional response to an unstable, post-Second War World era. It would be incorrect, however, to believe NATO is solely associated to the Second World War: it is also associated with a future where the absence of war is achieved by developing credible deterrence with institutionalized security and defence plans with policies, structures, and procedures; as well as solid economic and social advances to ensure that the community of interest is ready to stand up to aggression.

##### 2.2.2 Shaping an Atlantic Pact

The initial break between the end of the Second World War and the perceived expansive behavior of the Soviet Union, territorially and ideologically, facilitated the growth of the idea of a pact for the Atlantic area and the materialization of the North Atlantic community of interest. When a new idea grows, it does so either by expelling an old one or building on an incipient idea that is commonly accepted. The latter was the case for NATO.

Two precedents appear to have inspired and shaped the Atlantic Pact spirit as much as the forerunners discussed in the previous section: The Geneva Protocol of 1924 and Churchill’s speech at Fulton in 1946. The former was a League of Nations document, which failed—it never became binding, as it was not ratified by Great Britain (who originally proposed it). The Protocol was intended to fill “the gaps in the Covenant of the League of Nations. Its frame desire[s] that all war in the future should be outside the pale of law … [i]t may not be necessary for all nations to follow exactly the same course. What proves satisfactory for one continent may not prove satisfactory for another”.[[160]](#footnote-160) The Protocol was to make states “consent to important limitations of their sovereignty in favor of the League of Nations”.[[161]](#footnote-161) The Geneva Protocol set political leaders’ minds toward a better and complete institutional regime, as a lesson learned from the flaws of the League of Nations system.

In 1946, Sir Winston Churchill, after having lost the general election as Prime Minister, accompanied President Truman to make a speech at Westminster College in Fulton, Missouri. The speech is known as ‘The Sinews of Peace’ or the ‘Iron Curtain’ speech. In it, Churchill reminded his audience that the United States had emerged from the Second World War as a world power, and that this meant “an awe-inspiring accountability to the future”.[[162]](#footnote-162) Moreover, Churchill set the grounds not only for the West to realize how Communism was growing against Western democracies, but suggested states begin to contemplate the possibility of forming associations against Communism in the framework of the UN Charter:

“Special associations between members of the United Nations which have no aggressive point against any other country, which harbour no design incompatible with the Charter of the United Nations, far from being harmful, are beneficial and, as I believe, indispensable … organisation”.[[163]](#footnote-163)

1946 saw Europe begin to ‘craft’ a new alliance. In December of that year, the Greek government complained to the Security Council that the violation of its northern and western borders constituted a threat to international peace and security.[[164]](#footnote-164) This event tested the UN Charter and its institutions, and confirmed that they were insufficient[[165]](#footnote-165) for the new world leaders and its allies.

Yet it was March 1947 that saw the clear emergence of the Atlantic Pact spirit, born out of the foundations of the Geneva Protocol and Sinews of Peace speech.[[166]](#footnote-166) March 1947 saw the end of American isolationism,[[167]](#footnote-167) with the formulation of the Truman Doctrine and the inauguration of the containment policy against Soviet expansion. Even though December 1946 had seen Europe begin to create a new alliance, the Truman doctrine required “a much greater degree of union among the European members”[[168]](#footnote-168) for its full implementation:

“With the Truman Doctrine, President Harry S. Truman established that the United States would provide political, military and economic assistance to all democratic nations under threat from external or internal authoritarian forces. The Truman Doctrine effectively reoriented U.S. foreign policy, away from its usual stance of withdrawal from regional conflicts not directly involving the United States, to one of possible intervention in faraway conflicts. The Truman Doctrine arose from a speech delivered by President Truman before a joint session of Congress on March 12, 1947. The immediate cause for the speech was a recent announcement by the British Government that, as of March 31, it would no longer provide military and economic assistance to the Greek Government in its civil war against the Greek Communist Party. Truman … argued that a Communist victory in the Greek Civil War would endanger the political stability of Turkey, which would undermine the political stability of the Middle East …”.[[169]](#footnote-169)

A minute sent from Mr Jebb at the United Kingdom Foreign Office[[170]](#footnote-170) to Sir Kirkpatrick and Sir Sargent[[171]](#footnote-171) explains what pushed the United States towards the idea of an Atlantic Pact. Mr Jebb divided the way the United States saw the security problem in Europe and in the world into a short-term problem and a long-term problem. The short-term problem was how to defend Western Europe from an immediate Russian attack.[[172]](#footnote-172) In this respect, there had been significant progress: the United States and Canada were developing, in conjunction with the Treaty of Brussels[[173]](#footnote-173) signatories, a program for providing troops and equipment. On the other hand, the long-term problem consisted of working out how to enter into an effective alliance with the Europeans. This could only occur following a clear demonstration from “the peoples of Europe [that they were] prepared to develop a concept of spiritual and material unity and to make this work, [that being that the case there would be] no real question as to the long-term relationship of the United States with [Europe]”:[[174]](#footnote-174) The alliance had to be formalized in the United States and include tailor-made mechanisms of wider regional security and defence similar to those formulated within the Treaty of Rio[[175]](#footnote-175) and the Treaty of Dunkirk (the latter had much more restricted mechanisms).

A series of converging actions immediately took place to unveil the West’s community of interest that would lead to the forging of a commitment, through both a bumpy road of discussions[[176]](#footnote-176) and a security-threatening backdrop.[[177]](#footnote-177) Negotiations[[178]](#footnote-178) started on 22 March 1948 between the United States, Canada, and the United Kingdom who first met in Washington to discuss the defence of Europe. Danchev recalls that “Constructive indiscipline was the order of the day, and it is evident that this freethinking atmosphere, so reminiscent of the great days of the wartime combined committee system, was both liberating and efficient. In this way a bond was formed”.[[179]](#footnote-179)

The first phase of the negotiations ended on 1 April 1948. The first meeting showed that the American negotiators were awaiting the outcome of the next presidential election. It also showed they advocated keeping the Treaty of Brussels and Atlantic security separate by envisioning an extension of the Treaty of Brussels to the Scandinavian countries, but not having the United States take part. Besides, the Americans thought that “some Atlantic system” would leave the Middle East orphaned from any collective defence system under Article 51 of the UN Charter.[[180]](#footnote-180) Consequently, the result of this first round of negotiations led to a certain frustration. However, the historical and political events, which were about to take place, invigorated the collaborative spirit of the western nations right before the start of the second phase of negotiations in July 1948.

A 1967 NATO document[[181]](#footnote-181) lists these events right after France withdrew[[182]](#footnote-182) from the integrated military structure. This document explains that the NAT was not only the response to a specific situation, but also the result of the common objectives of the community of interest formed by the western democratic states. The aim of the document, prepared during dire times for the Organization, appeared to look for cohesion among NATO members by reminding them of the non-circumstantial and material reasons for NATO’s creation. After praising the immaterial values of NATO, the document lists ten specific cumulative circumstances that led to the signature of the NAT:

1. The power vacuum created by the defeat of Nazi Germany and Japan;
2. A reduction of forces in the west while the Soviet Union retained four and half million soldiers;
3. The territorial expansion of the USSR;
4. The USSR’s use of vetoes in the Security Council;
5. The USSR’s creation of COMINFORM in response to the Marshall Plan;
6. The failure of talks on disarmament for Germany and Austria;
7. The USSR’s pressure in Persia, Turkey and Greece;
8. The Prague *coup d’état*;
9. The USSR’s blockade of West Berlin; and,
10. The USSR’s offer of a non-aggression pact to Norway.

These specific circumstances were the backdrop of the three-month gap in negotiations that occurred between April and July 1948.

In June 1948, right before the start of the second round of negotiations among the original three states and France, Belgium and the Netherlands, the United States Senate passed the ‘Vandenberg Resolution’.[[183]](#footnote-183) Senator Vandenberg was a convert from isolationism[[184]](#footnote-184) who worked closely with Secretary Acheson and his replacement Lovett to revitalize the United Nations[[185]](#footnote-185) as the actual instrument for the maintenance of the international peace and security.[[186]](#footnote-186) The Vandenberg Resolution brought to the negotiations an understanding of the United States’ perspective as to how it could contribute to peace in Europe. The resolution set the stage for the NAT by affirming the need for a progressive development of regional and other collective arrangements for individual and collective self-defence in accordance with the purposes, principles, and provisions of the UN Charter. To achieve this objective, arrangements were required for mutual aid and for the ability to exercise the right of individual or collective self-defence under Article 51 of the UN Charter if any armed attack occurred. After a series of meetings, the United States negotiators produced a report (the ‘Washington Paper’) that outlined the provisions of a future North Atlantic Pact.[[187]](#footnote-187) The Washington Paper also focused on future members and recommended that Norway, Denmark, and Italy be invited to join the Pact, subsequently leaving open the issue of “the area to which the pact would apply”.[[188]](#footnote-188)

The third round of negotiations did not start until 10 December 1948. In addition to the six powers, it also included Luxembourg, which was previously represented by Belgium. The three-month delay in the negotiations was due to the 1948 United States presidential election. In the meantime, the NAT had been developing in the minds of the signatories of the Treaty of Brussels. In simple terms, its Consultative Council made firm decisions regarding the contents of the Atlantic Pact; the states to be invited to a prospective conference; and which state would organize it.[[189]](#footnote-189) UK Foreign Secretary Bevin noted three significant elements that would be required if the third round of negotiations (otherwise known as ‘the Conference’) were to be successful:

1. The members of the Council would need to collect their capital’s attitude on the Washington Paper;
2. It was very important to guarantee “that nothing should delay the convocation of the conference and the conclusion of the treaty”[[190]](#footnote-190) because of the United States and Canada’s readiness to enter into a binding commitment for the defence of Europe; and,
3. The conclusion of a North Atlantic Treaty was an idea for which the United States had credit, since the Vandenberg Resolution was considered to be its trigger.[[191]](#footnote-191)

The discussions lasted until the Christmas Eve of 1948. The product of the negotiations was a draft of the North Atlantic Treaty and commentaries. The initial draft articles were prepared in London and were presented on the first day of the third round of the negotiations.[[192]](#footnote-192) Over the next few days, Canada proposed elements of institutionalization that would eventually be accepted. The Canadian proposal included a provision encouraging economic and social collaboration as well as establishing “[s]ome political organ … under the pact”[[193]](#footnote-193) as a vehicle for instituting consultations amongst members to address signatories’ concerns. On 19 December, the ambassadors agreed that Iceland, Norway, Denmark, Portugal, and Ireland should be invited to join the Atlantic pact.[[194]](#footnote-194) During December, there was a “large measure of agreement … in the working party of the draft text of most Articles of the Treaty”,[[195]](#footnote-195) However, the question of the area to which the pact would apply was still pending due to the need for clarifying the inclusion of Italy (supported by the United States)[[196]](#footnote-196) and the French territories in North Africa. It was argued that these were needed to be part of a North Atlantic Power. The exclusion of French North Africa based on this argument would also place Italy outside of the new pact.[[197]](#footnote-197) Another major point of discussion that remained for the fourth round of negotiations was related to assuring Greece, Turkey, and Iran of their security.[[198]](#footnote-198) The question on what powers should be granted by the new treaty, as well as the duration of the treaty, dominated the discussions of the fourth round on 10 January 1949.

In January 1949, the seven ambassadors started the final round of negotiations with the Soviet authorities interfering “to prevent the conclusion of the Treaty”[[199]](#footnote-199) and the statement issued by the prime ministers of Denmark, Norway, and Sweden on the failure to agree on a Scandinavian defence pact.[[200]](#footnote-200) In addition, “the Palestinian issue was straining relations between Britain and United States governments”.[[201]](#footnote-201) In this climate, discussions continued and sought also to address some reticence of the United States Senate about the wording of Article 5, as well as the insistence of Canada on the inclusion of Article 2.[[202]](#footnote-202) The discussions on Article 5 were very intense on 8 February 1949, and became complicated by public discussions at the United States Senate, which in turn raised concerns among the European representatives. On 18 February, in a meeting with the Senate Foreign Relations Committee, Secretary Acheson managed to restore the original elements of Article 5 that had been questioned by Senator Connally. Over the next few days, the ambassadors had the chance to discuss and agree upon the definition of the term “as it deems necessary”.[[203]](#footnote-203) Reid reminds us that “[t]he governments could, however, congratulate themselves that the pledge in the North Atlantic Treaty was, on balance, stronger than the pledge in the Rio treaty”.[[204]](#footnote-204)

The result of the negotiations was agreement upon the final text of the North Atlantic Treaty and the interpretation of its terms. The text, but not the interpretation,[[205]](#footnote-205) was published on 18 March 1949, which thwarted the Canadian attempts to convene a formal conference of foreign ministers and any discussion on the idea of NATO as an institution. On 2 April 1949, twelve Foreign Affairs ministers formally approved the Treaty. The same day, initial discussions took place relating to the initial institutional development, which were required by the text of the NAT in accordance with Article 9.[[206]](#footnote-206) However, these discussions were left for an *ad hoc* working group, which “would study the subject on the basis of the text of the North Atlantic Treaty and of the record of today’s meeting of Ministers”.[[207]](#footnote-207)

On 4 April 1949, the NAT was signed[[208]](#footnote-208) in the Departmental Auditorium of Washington at 3 o’clock in the afternoon. “The speeches … played … upon a single theme: the peaceful purposes of the treaty and the contribution which it was designed to make to the security and stability of the whole world … Mr Truman referred to the United Nations, reaffirming the determination of the United States to abide by its obligations under the Charter … [r]eferring to the North Atlantic community … [he] said that ‘to protect this area against war will be a long step toward permanent peace in the whole world’”.[[209]](#footnote-209)

The NAT negotiations were the natural initial process for the incorporation of NATO in the institutional regime. To understand why, it is convenient to use the sagacious analysis Kennedy offers in *Move to Institutions*[[210]](#footnote-210) and apply it to NATO. The dynamics of international discussions regarding confirming a community of interest around the maintenance of international peace and security require the inauguration of an institutional process. With NATO, contrary to the League of Nations and the United Nations, this process did not start with a conference[[211]](#footnote-211) but with a similar—although fragmented—instrument: a series of negotiations.[[212]](#footnote-212) The NAT negotiations became the formalization of the need of the community of interest, spread out on both sides of the Atlantic, to discuss the different approaches for the stabilization of Europe and keeping at bay the threat of aggression. Kennedy considers the Paris Peace Conference “a legal instance, a high-water mark of formalism”.[[213]](#footnote-213) The NAT negotiations followed the same pattern of formalism, and eventually ignited a one-year “movement between utopian theory and political practice”[[214]](#footnote-214) among NATO’s future members.

The NAT negotiations show a process ran by a group of states with a common interest for the adjustment of different positions within the idea of collective defence with the goal to avoid war. This took place firstly between the United Kingdom and the North American states and, secondly, between them and the European continental states in respect of the Treaty of Brussels. For a year, the NAT negotiators held incessant discussions by “a repeated process of differentiation and exclusion”[[215]](#footnote-215) of their states’ interests with the intention of achieving a common understanding on their collective interest. The common interest of the states the negotiators represented was none other than the implementation of the idea of collective defense as recognized in the UN Charter. The NAT negotiations were an iteration of different and individual states’ rhetoric about achieving a non-war situation. They were a simple, although effective, adjustment process of different views more than “an instant of legal accord”.[[216]](#footnote-216)

Finally, the result of the process was the text of the NAT, a simple document of fourteen articles written in plain English and making substantive reference to the UN Charter.[[217]](#footnote-217) Although the text provides limited attention to the institutionalization of the Alliance, it was written in an ambiguous manner,[[218]](#footnote-218) which let the decision makers take the next step in constructing NATO when necessary (the ‘idea to grow’) and, eventually, “by association with a moment of historical progress”[[219]](#footnote-219) to bring along the institutional practice as envisioned in the open-ended Article 9.[[220]](#footnote-220)

#### 2.3 Conclusion

NATO highlights the idea that treaties and common institutions bring peace among those sharing a community of interest. NATO’s origins can only be found in the realization of a community of interest at both sides of the Atlantic, glued together by the common perception of Soviet aggression. NATO’s very special particularity is that starting from recognizing the existence of a community of interest in the North Atlantic area, well rooted in the principles of the UN Charter, it goes beyond an Alliance. The NAT sets the barebones of the institutionalization of the Alliance and it does so by using the concept of an institution as an idea of work or enterprise, which when materialized with a legal basis, is capable of supporting common organs, bodies. This support will also require the application of the concept of interdependence, which in turn makes NATO constituents take collective action for running common institutions.

The forerunners of the NAT served its drafters in the formalization of a community of interest by developing a series of international obligations. These obligations served not only to provide a framework for guaranteeing collective defence, but also to create a space of economic and social collaboration and a common view of the importance of the individual. These pillars would inspire an embryonic institutional development, which would find support in NAT’s visionary provisions and which required actual events to trigger a full and complex institutionalization.

NATO’s embryonic institutionalization set by Article 9 stood dormant as long as the NAT signatories felt comfortable with the security planning routines the Alliance created. Moreover, Article 9 did not impose structures and procedures, and very few were created after the first meeting of the North Atlantic Council. However, Article 9 proved its value in 1950 during the Korean War, which ignited the development of one of the more complex international structures with several international organizations under the NATO brand with their ‘own’ and ‘distinct’ legal position. The institutionalization success of NATO is that of having been capable of incorporating the basic elements of international organizations within an alliance, without the need to replace it. The coexistence of an alliance and an international organization is an institutionalization success. An example of that success was the withdrawal of France from the Organization while it remained an active member of the Alliance.[[221]](#footnote-221)

## CHAPTER 3

THE INSTITUTION AS AN IDEA OF WORK GROWS: A BAREBONES CONSTITUTION, THE KEY FOR INSTITUTIONAL SUCCESS

### 3. The Institution as an Idea of Work Grows: A Barebones Constitution, the Key for Institutional Success

#### 3.1 Introduction

With regard to the negotiations of the NAT, it is a given that “[t]here are no transcripts of these meetings, indeed no formal record at all, save a few severely abridged memorandums”.[[222]](#footnote-222) This lack of formal *travaux préparatoires* often makes it difficult to find sources on the original interpretation of the Treaty when there is disagreement on the meaning, or there is interest on how the evolution of the NAT works for its proper implementation. Participants and NATO declassified documents, as well as contemporary academic analysis of the NAT, can help to reconstruct and unearth elements which could build ‘archeological’ NAT *travaux préparatoires*. Lord McNair recalled that *travaux préparatoires* were “all the documents, such as memoranda, minutes of conferences, and drafts of the treaty under negotiation”.[[223]](#footnote-223)

The NAT “does contain articles and passages which suggest that even in 1949 the signatories wanted something rather more solid and permanent than a transient and unstructured military alliance”.[[224]](#footnote-224) The NAT is not self-contained, as it only provides the bare bones of what must be the constitution of an international organization and an incipient institutionalization mechanism. The NAT did not address the whole scope of elements necessary for the purposes of building an institution, such as organs, secretariat, voting, privileges and immunities, legal personality, resolution of disputes, and so on. Monaco summarizes this situation:

“Uno dei fenomeni più sorprendenti nell’àmbito dell’organizzazione internazionale attuale è costituito dal fatto che un’istituzione, come quella che è presupposta dall’alleanza atlantica, diventi con tempo una delle strutture internazionali più complesse. E ciò sulla base di norme assai semplici, come quelle contenute nel Trattato del 4 aprile 1949. L’ampliamento degli obiettivi dell’alleanza, come pure della sua struttura, hanno fra l’altro dato origine a delicati problemi giuridici, come quelli derivanti della creazione di numerose basi militari in vari Paesi”.[[225]](#footnote-225)

This is a complexity that eventually would materialize between 1951 and 1952. At that time, NATO members developed explicit institutional elements, complemented through multilateral agreements. NATO member states continue supplementing the latter today with bilateral instruments.[[226]](#footnote-226) This is not rare in international institutional law. Reuter argues that:

“[d]ans la réalité les traités sont incomplets, et tous appellent des mesures d’exécution [par les Etats] … dans le cadre de leur droit interne … [m]ais l’on peut aussi concevoir une fonction d‘exécution qui conduise à de nouveaux accords entre Etats, subordonnés à un accord principal”.[[227]](#footnote-227)

In fact, the purpose and mandate of the organization must be defined “in broad language so as to allow the widest possible scope for future development under unforeseen conditions … [this] under the conviction that growth and change are the blood-stream of life”,[[228]](#footnote-228) something the NAT drafters successfully managed to leave in the text of the NAT.

The fourteen articles that make up the NAT not only inspired a budding transformative institutionalization, but also established a supplemental relationship[[229]](#footnote-229) with the UN Charter’s teleological independent system, since they were written within the framework of the Charter.[[230]](#footnote-230) In this respect, the NAT drafters partially[[231]](#footnote-231) ‘sacrificed’ the institutional process[[232]](#footnote-232) within the Treaty’s substantive and procedural provisions, which accentuated the compatibility with the UN Charter[[233]](#footnote-233) together with reaffirming “norms of democratic decision-making among equals emphasizing persuasion, compromise, and the non-use of force or coercive power”.[[234]](#footnote-234) Reid, citing his conversation with Hume Wrong on the Preamble of the NAT, recalled the latter’s words: “Put the ideology of the treaty in the preamble where it belongs (as is done in the Brussels treaty) and let the rest be put in as direct language as we can find …”.[[235]](#footnote-235) After presenting these facts, it appears necessary that the relationship between the NAT and the UN Charter requires a dedicated section as will be seen below.

Smith submits that in 1952, NATO members “had taken advantage of the leeway granted under the terms of the North Atlantic Treaty to bring into being a basic international organisation” and contrary to realist arguments that “international alliance are transient … [f]ar from unraveling or declining, NATO subsequently began to evolve into a still more significant international institution”.[[236]](#footnote-236) The establishment of the Council under Article 9 and the powers given by the NAT signatories to it for creating subsidiary bodies was providential for NATO’s institutionalization. The NAT came to constitute the terms of reference of the Council;[[237]](#footnote-237) the terms of reference themselves centering on the UN Charter.

Finally, NATO’s institutional physiognomy, i.e., a Council and subsidiary bodies, is the result of the initial discussions of the NAT and the incipient institutional nature set by the NAT text, which anticipated other bodies. These bodies would require a legal position the NAT did not provide. They required conventional features that NATO states gave them via general multilateral treaties and Council’s resolutions (now decisions). This construct and the NATO’s institutionalization process have been based also on NATO’s legal personality,[[238]](#footnote-238) which was of an objective character, i.e., it was not expressly established in the NAT, but because the organization existed.[[239]](#footnote-239) The general multilateral treaties would give NATO’s bodies their different but related legal positions, and it would come to add a layer of institutional complexity that will be analyzed in Part 2 of this dissertation.

#### 3.2 The Terms of Reference

Terms of reference in international organizations must be defined clearly, aiming to “promote a comprehensive and co-ordinated international effort to promote human welfare”.[[240]](#footnote-240) The start of the NAT lays down the terms of reference and points in the direction to follow. The NAT’s Preamble aligns the subsequent provisions to the United Nations international obligations and affirms trust in human nature. The first sentence of the Preamble refers to the purposes and principles of the UN Charter and establishes that the Treaty’s signatories are resolved to live in peace. ‘Peace’ is a recurring theme in the NAT and evidence of its purpose and scope. The ‘peace’ referred to in the Preamble is the same peace the UN Charter seeks to achieve and, consequently, the NAT’s Preamble seeks to achieve that peace through different means.

By explicitly referring to the UN Charter, the NAT incorporates the pledge of readiness to exercise the inherent right of individual and collective self-defence, but recognizes that it is not the only means to achieve peace. The Preamble then reaffirms that its signatories will implement the principles of democracy, individual liberty, and the rule of law for the purpose of attaining peace. Therefore, it can be said that the Preamble establishes the political basis of the NAT, which is built upon in Articles 1 and 2. This “distinguish[es] members of the Treaty from some of the other members of the United Nations”.[[241]](#footnote-241) The Preamble also refers to the idea of the community of interest, catalyzed during the NAT negotiations, by referring to “common heritage and civilization,” The Preamble establishes that stability is obtained through peace; and peace is obtained by states acting in accordance with the NAT and the UN Charter provisions that are incorporated within it. In this respect, the Preamble establishes an ‘aspirational momentum’ that intends to bind NAT members to their pleas into the future.

The UN Charter is not mentioned by ‘accident’ in the Preamble, or for simply mere interpretative purposes, or as an ‘excuse’. The text of Article 1[[242]](#footnote-242) confirms the initial commitments of the NAT signatories to follow what was established by the UN Charter[[243]](#footnote-243) on the settlement of international disputes. This can be seen through the repetition of paragraphs 3 and 4 of Article 2[[244]](#footnote-244) of the UN Charter.

First, Article 2, paragraph 3 of the UN Charter has its origins in Article 1 of the Hague Convention for the Pacific Settlement of International Disputes of 1899, Article 12 (1) of the Covenant of the League of Nations of 1919, and Article II of the Kellogg-Briand Pact of 1928. This supports the view that the NAT embraces the direction taken by international law and that it intends to contribute to it by means of its signatories respecting the provisions of the UN Charter and building upon international law ‘lessons learned’. At this stage it seems proper to insist on what Tomuschat argues: that Article 2, paragraph 3 “must be seen in connection with the institutional arrangements provided for by the Charter”.[[245]](#footnote-245) Article 2 of the NAT also confirms this institutionalization of peace management.

Importantly, NATO members consider the settlement of disputes among them as a treaty obligation. Should a dispute arise between members (so long as the dispute is not of a legal character requiring adjudication by a judicial tribunal; or of an economic character that is best dealt with by an economic organization), NATO takes the first-instance role of trying to resolve it. To this end, NATO members have empowered the Secretary General in 1956 — subject to the consent of the governments involved — to offer his good offices to settle disputes among themselves:

“The North Atlantic Council …

DECIDES that any such disputes which have not proved capable of settlement directly be submitted to good offices procedures within the NATO framework before member governments resort to any other international agency except for disputes of a legal character appropriate for submission to a judicial tribunal and those disputes of an economic character for which attempts at settlement might best be made initially in the appropriate specialised economic organizations;

RECOGNIZES the right and duty of member governments and of the Secretary General to bring to its attention matters which in their opinion may threaten the solidarity or effectiveness of the Alliance;

EMPOWERS the Secretary General to offer his good offices informally at any time to member governments involved in a dispute and with their consent to initiate or facilitate procedures of inquiry, mediation, conciliation, or arbitration …”. [[246]](#footnote-246)

Additionally, Beckett submits that Article 1, by using the wording of the abovementioned paragraphs 3 and 4 of Article 2 of the UN Charter, “is not confined to disputes between the parties themselves but include disputes which a party of the Treaty may have with a State not party to the Treaty”.[[247]](#footnote-247) In order to understand the magnitude of this interpretation, it is convenient to look into Tomuschat’s comments with respect to paragraph 3 and third states. Tomuschat refers to the *Nicaragua* case[[248]](#footnote-248) and argues that the peaceful settlement of disputes has become customary law and, therefore, is an obligation binding upon every State.[[249]](#footnote-249) It is interesting to note that the *Nicaragua* judgment was handed down thirty-seven years after the NAT was concluded and Beckett wrote his comments thirty-six years before the judgment. This shows that there was already a latent, but common understanding of the value of peaceful settlement of disputes, and that it was binding upon states. With this in mind, it would not be difficult to conclude that the intention of the NAT’s signatories was not to detach the Treaty from the dynamics of international law existing at the time of its conclusion, but to make the NAT part of the international regime embodied in the UN Charter. Beckett argues that Article 1, in the context of disputes, therefore “clearly goes beyond the scope of any regional arrangement”.[[250]](#footnote-250) Mayer supports this conclusion in his analysis of Article 1, arguing that *“*[l]*es Etats signataires* [of the NAT] *ne sont pas rassemblés par de motifs géographiques. Le préambule du Traité et l’article 2 proclament l’existence d’une communauté de vues dont l’essentiel est de préserver la civilisation occidentale*”.[[251]](#footnote-251)

Second, and with respect to the relationship between Article 1 of the NAT and paragraph 4 of Article 2 of the UN Charter, the wording of Article 1 refers to the undertaking made by the NAT signatories: “to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations”. Article 1 consists of one paragraph, which indicates that references made to the settlement of disputes *vis-à-vis* the UN Charter are valid also for the use of force. Randelzhofer and Dörr argue that the ability of states to resort to war existed pre-1919. The Covenant of the League of Nations “merely provided a moratorium … [it] was further prohibited to begin war within a period of three months from the arbitral award on the Council’s report”.[[252]](#footnote-252) The Geneva Protocol of 1924 and the Kellogg-Briand Pact of 1928 referenced the prohibition on the resort to war. However, the former never became binding and the latter could not develop the necessary system of sanctions. Another weakness could be said to be that these texts referred to ‘war’ and not to the ‘use of force’, which is a wider concept. Paragraph 4 of Article 2 of the UN Charter dovetails with Chapter VII. They together establish a credible system of enforcing the prohibition on the use of force.[[253]](#footnote-253) Randelzhofer and Dörr state that “those international organizations that are in a position to conduct military operations may be considered to be bound under customary international law … [t]his applies [to] NATO”.[[254]](#footnote-254) Finally, Article 2[[255]](#footnote-255) is the last part of the Terms of Reference and endorses paragraph 3 of Article 1 of the UN Charter. Chapters IX and X of the UN Charter further develop this paragraph. Paragraph 3’s origins, relating to economic collaboration, can be traced back to the Dumbarton Oaks Proposals of 21 August 1944.[[256]](#footnote-256) The introduction of Article 2 in the NAT was at the initiative of Canada, and there was major reluctance amongst other states to include the article, as it was considered too detached from the issue of defence. It was not until 4 March 1949 that the text was agreed.[[257]](#footnote-257) The ‘glue’ of institutionalization is evident in Article 2, and is another brick in the wall of NATO’s institutionalized regime. This ‘glue’, envisaged by the development of peaceful and friendly relations, endures in a juridical manner in support of the interests of the international community. Mayer provides an interesting argument to justify the final reason as to why the NAT signatories adopted Article 2:

“[Le Parties du Pacte] n’ignorent point, en effet, que, dans le monde moderne, le bien-être, le relèvement des niveaux de vie, la création d’une zone de stabilité, et de prospérité, son des objectifs qui ne peuvent être atteints que grâce à l’entr’aide, aux sacrifices mutuels, à l’abaissassent des barrières douanières, à la détermination et à la prise de toutes les mesures favorisant la libre circulation des idées, des capitaux et des hommes, seule susceptible de « renforcer », suivant les termes mêmes du Pacte, les Institutions libres et les Nations du monde que veulent les défendre”.[[258]](#footnote-258)

The Report of the Committee of Three,[[259]](#footnote-259) with respect to the interpretation of Article 2, focuses on a non-exclusive role for NATO on the issue of economic collaboration. Indeed, the report actually considers that common economic concerns of the member states “will often best be fostered by continued and increased collaboration both bilateral and through organisations other than NATO”.[[260]](#footnote-260) Finally, the Report argues that Article 4 of the NAT (regarding consultation) reinforces the need for economic collaboration when it has political and defence implications.

#### 3.3 Mutual Assistance (Means)

The capability of the signatories to resist an armed attack[[261]](#footnote-261) is crucial to successfully implementing the inherent right of self-defence under Article 51 of the UN Charter. Article 3[[262]](#footnote-262) intends to create an international obligation among the signatories to resist aggression by developing individual and collective resilience. This obligation not only entails the signatories developing the necessary capabilities for mutual assistance, but also to them developing independent national capabilities designed to resist an armed attack, i.e., national defence. The capabilities referred in this article are not only of a military nature, but relate to the use of all kinds of resources. The interpretation agreed by the signatories does not distinguish between military and non-military capabilities. The article must be understood in this manner, since Article 3 is inseparably related to the ‘Terms of Reference’. As such, Article 3 must be read in conjunction with Article 2. Therefore, the implementation of Article 3 is naturally related to both the economic collaboration and, as will be seen below, the institutionalization process. In respect of economic collaboration, the interpretation of Article 3 must, *inter alia*, take into account the level of economic recovery of the signatories.[[263]](#footnote-263) This recovery does not refer only to building up the military, but also to a general economic growth process. In accordance with the minutes of the Ambassadors’ committee of 15 March 1949, the actual interpretation of Article 3 is:

“(2) ‘Mutual aid’ under Article 3 means the contribution by each Party, consistent with its geographic location and resources and with due regard to the requirements of economic recovery, of such mutual aid as it can reasonably be expected to contribute in the form in which it can most effectively furnish it, e.g., facilities, manpower, productive capacity, or military equipment”.[[264]](#footnote-264)

Accordingly, the contribution to the organization’s military capability requires “unity of command, unified planning and uniformity of military training, procedure and, as far as possible, equipment”.[[265]](#footnote-265) The requirement for implementing mutual assistance necessitated the creation of structures and the establishment and development of an institutional regime. Analyzing Article 3, Mayer refers to this indispensable institutionalization process introduced by Article 9 of the NAT as a crucial element to achieving the goals of the NAT in general, and, in particular, those recognized by Article 3: “*[Á] propose de l’article 9 … les Parties se proposent de mettre en œuvre l’Assistance Mutuelle sous sa forme de coordination de la défense”*.[[266]](#footnote-266)

The obligations contained in Article 3 are chiefly codified today via memoranda of understanding (‘MOUs’). MOUs are written arrangements setting forth the conditions under which the NAT’s parties intend to co-operate in given areas, setting out operational arrangements under a framework international agreement. MOUs normally record international ‘commitments’, without treaty language and in a form that usually expresses their non-legally binding nature. They often set out operational arrangements under a legally binding framework international agreement. In summary, MOUs are used for the regulation of technical or detailed matters in support of the developments foreseen in Article 3.[[267]](#footnote-267)

3.4 The Principle of Consultation

Article 4[[268]](#footnote-268) explicitly mentions the key NATO principle of political consultation, which is not an end in itself and which is also implied by Articles 2, 3, and 9 of the NAT. This overarching principle for the coordination of the foreign policies of NATO members took several years to accepted as an integral part of the Alliance and provides political dimension to the Alliance.[[269]](#footnote-269) Consultation will be triggered if the territorial integrity, political independence, or security of any of the NATO members is threatened anywhere in the world. However, the understanding of ‘consultation’ has evolved over the years, to the point that, in accordance with Kirgis, “the consultative provision should be construed broadly in order to enable them [NATO members] to air their interest before the response is taken … in a manner most likely to promote cooperative efforts”.[[270]](#footnote-270)

“[T]he principle of a continuing political consultation between the Alliance partners is clearly implied, by the Preamble and Articles 2, 3, 4 and 9 of the Treaty;

the principle that NATO political consultation is not necessarily confined to the area defined in 1949 follows from the Treaty which mentions no such geographical limits to consultations: Article 6 refers to the commitments mentioned in Article 5 not to Article 4 or other relevant articles. The desirability of NATO consultation going beyond the NATO area was subsequently reaffirmed at the Ottawa meeting in 1951, by the Committee of the North Atlantic Community (Pearson Committee), of 1951, by Three Wise Men in 1956, by Mr. Spaak's Political Appraisal Report in 1958 and, finally, in the Long Term Planning Exercise of 1960/61. The early origin and constant reaffirmation [footnote 9: C9-D/4 (Final), 17th March, 1952; See also the Reports submitted by the Temporary Council Committee of 1951] in spite of occasional back-sliding, of this principle is clear”.[[271]](#footnote-271)

The wide understanding of the principle of consultation referred to in the Report of the Committee of Three[[272]](#footnote-272) mentions the 1951 Pearson Committee’s analysis:

“[T]he ‘habit of consultation’ … would greatly strengthen the solidarity of the North Atlantic Community … [s]pecial attention must be paid, as explicitly recognized in Article 4 of the Treaty … [t]here is an effective need, however, for effective consultation at any early stage on current problems … ”.[[273]](#footnote-273)

Equally, the principle of consultation could not have come into existence without a proper conduit. This conduit was NATO’s inherent dynamic institutionalization, which required new and evolving structures and procedures. Article 9 establishes the North Atlantic Council, which shows “the will of governments to consult”.[[274]](#footnote-274) It is the combination of Article 4 (the obligation/commitment) and Article 9 (the forum/platform) that creates the skeleton of NATO’s institutional ‘regime’.

Based on these foundations, the North Atlantic Council’s ninth session in Lisbon in February 1952 was the key historical event in NATO’s institutionalization that materialized the principle of consultation. During this meeting, NATO members restructured the organization and consolidated the Treaty’s vocational institutionalism:

“The Council Deputies are well aware that organizational changes alone cannot be relied upon to provide solutions for the many pressing problems confronting the North Atlantic Treaty Governments. Nor do they feel that the changes now recommended should necessarily be final. However, they do believe that the measures recommended herein represent an essential and timely step in the development of the North Atlantic Treaty Organization machinery more nearly adequate to provide effective collective action for the attainment of the objectives of the Treaty’.[[275]](#footnote-275)

The NAT’s mandatory and ‘permissive’ consultations[[276]](#footnote-276) appear to be a significant part of NATO’s biting heart, and are key to allowing the international organization to function under democratic principles. Additionally, the North Atlantic Council and its boards and committees system creates democratic *fora* where “problems can be introduced and discussion, exchanges of views, etc., can take place before the individual members nations [decide] what to do”.[[277]](#footnote-277) This interstate democracy is crowned in NATO by the decision-making methodology of the principle of unanimity, using the practice of consensus that will be analyzed in Chapter 4, addressing how the idea of NATO settled.

#### 3.5 Mutual Assistance (Armed Attack)

The following paragraphs will make brief reference to the origins and relevance of Article 5, in order to support the argument that the NAT contains dynamic institutionalization. Over the years, many commentators have agreed upon the relevance of Article 5.[[278]](#footnote-278) This could be justified simply by the time it took the negotiations to reach agreement upon the definition of an ‘armed attack’, as “arguments over the language to be used in the pledge went on over the whole 12 months of negotiations”.[[279]](#footnote-279) However, the discussions had an enormous impact on the deterrence effect of the NAT. At the beginning of the discussions, the text proposed resembled the wording of the Anglo-Polish treaty of August 1939 and the Brussels and Rio treaties, which were weak pledges. However, the final text not only resembled more closely a UN Charter formulation as Vandenberg proposed,[[280]](#footnote-280) but also a strong collective resolution.[[281]](#footnote-281)

It should be noted that the obligation established by Article 5 upon member states to assist a NATO member who has been attacked can be filled individually or collectively. Moreover, members can decide the nature of the assistance they provide and whether the use of force is justified. “Each party is the judge of the *casus foederis* and also the judge of whether armed force is required or whether other action will suffice”.[[282]](#footnote-282) Therefore, many different types of conduct can be used to repel armed attacks, so long as they have the character of self-defence.

Since the NAT refers explicitly to the UN Charter, Article 51 of the UN Charter must be considered to better understand the scope of Article 5. First, an armed attack triggers self-defence measures per Article 51. Article 51 is *not* triggered by *any* threat or use of force (Article 2(4) of the UN Charter), i.e., “not every use of force is necessarily to be considered an armed attack”.[[283]](#footnote-283) Analyzing Article 5 is difficult, because there is no legal notion of ‘armed attack’ and judgments of the International Court of Justice have fallen short in their attempts to define what one is. Randelzhofer and Nolte argue that United Nations General Assembly Resolution 3314[[284]](#footnote-284) on the definition of aggression is the only reference document that sheds light upon this question, as certain acts of aggression may “be taken to characterize ‘armed attacks’ within the meaning of Art. 51… The ICJ has, for example, referred to the case of Art. 3(g) of the Definition of Aggression as being one possible form of ‘armed attack’ [*Nicaragua* case]”.[[285]](#footnote-285)

Second, paragraph 2 of Article 5 “follows Article 51 of the Charter in requiring the measures taken under it to be reported to the Security Council immediately and provides that they shall be terminated when the Security Council takes enforcement action”.[[286]](#footnote-286) This is a fundamental point with respect to the qualification of Article 51; many forget that the right that this article codifies can be exercised until the Security Council has taken measures necessary to maintain international peace and security. Article 5 also obliges States to report to the Security Council after the armed attack has taken place. This is because the Security Council has primary responsibility for the maintenance of international peace and security. The reporting requirement binds the NAT to the provisions of the UN Charter. On a more procedural level, the reporting requirement has important evidential ramifications. It assists states in demonstrating that their measures in response to the armed attack are permitted under the inherent right of self-defence.[[287]](#footnote-287)

The significance of Article 5 was highlighted, more than ever in NATO’s history, after the 11 September 2001 attacks on American soil. At the time, the NATO Secretary General reinforced the link between Article 5 and the community of interest in both sides of the Atlantic:

“[A]fter September 11th, we know that no member of the Alliance is invulnerable. And the response of NATO governments demonstrates that these commitments on which the Alliance has been based for 52 years remain tangible, real and reciprocal. NATO’s historic decision to invoke Article 5 of the Washington Treaty underscored categorically the fundamental link between two continents and among 19 nations”.[[288]](#footnote-288)

The paragraph above also shows that NATO members are ready to consider applying Article 5 to non-conventional attacks. This adaptability is the result of NATO’s dynamic institutionalization, which integrates NATO’s collective defence, exercised under Article 5, into the institutional network created by the NAT.

“[NATO’s] collective defense has become a more integrated part of the continuum of institutional cooperation and consultation activities … [and] Article 5 can no longer be viewed as a Cold War provision … [but] [c]ollective defense is as relevant in the present age as the community of values and institutions mentioned in Article 2, the consultation obligations specified in Article 4, and the increased membership potential discussed in Article 10”. [[289]](#footnote-289)

Finally, the 11 September 2001 attacks show the evolving shape of conflict. Article 5 needs to be understood as agile and adaptable, as a part and enabler of the transformative institutionalization of NATO. Article 5 was tailor-made for large-scale armed attacks of a conventional military nature, but today there are many modes of the use of armed force, i.e., “[c]onventional and irregular forces, combatants and noncombatants, and even the physical/kinetic and virtual dimension of conflict are blurring”.[[290]](#footnote-290) In this regard, Hoffman rightly believes that the complex challenge of hybrid wars[[291]](#footnote-291) requires “institutional adaptation”.[[292]](#footnote-292) NATO has manifested its institutional dynamism in the different ‘strategic concepts’ approved since the 1990s.[[293]](#footnote-293) Even if Article 5 is a provision of last resort, nothing prevents it from being invoked if the basic conditions are satisfied and international peace and security are at stake, no matter whether the ‘armed attack’ comes in its classical forms of aggression and occupation or whether it comes in forms of hybrid warfare.[[294]](#footnote-294) The events and Russia’s *modus operandi* of 2014 in Crimea have proven that the Article 5 ‘solution’ against the threat NATO members envisioned once in the late 1940s is still valid and that the essence of that threat remains in existence. However, this threat is manifested in a different and mutating manner and it also uses non-kinetic elements exhaustively, which are difficult to anticipate and much more complicated to identify as lethal for the Alliance.

It is necessary to bear in mind that mutating and difficult to anticipate threats may be lethal for a community of interest—like that formed by the NATO states. The existence of those threats ‘supports’ NATO’s dynamic institutionalization; however, for this dynamic to be efficient and effective NATO institutions are required to be adaptable enablers. The momentum behind the continual institutionalization of NATO still remains and is visible in the North Atlantic Council decision-making process and outcomes relating to actual world events and situations. Examples of this include the decisions taken at the 2014 Wales Summit on the assurance to adapt NATO’s institutions to the consequences of the Russian occupation of the Crimean Peninsula and annexation of East Ukraine, as well as those from the Warsaw and Brussels summits in 2016 and 2018 respectively on presence and deterrence on the Eastern flank of the Alliance.[[295]](#footnote-295)

In order to complete the analysis of Article 5, it is necessary to see its geographical scope of application as defined in Article 6.[[296]](#footnote-296) This article defines the territory protected by Article 5 through collective self-defence. As Reid states, “the words, ‘North Atlantic area north of the Tropic of Cancer’ … mean the general area of the North Atlantic Ocean north of that line, including adjacent sea and air spaces between the territories covered by that Article”.[[297]](#footnote-297) However, even though Article 6 may appear to restrict the NAT’s territorial applicability, Goodhart argues that Article 5 applies to armed attacks that start outside the territory of a NATO member and as a result, an armed attack occurs against that member.[[298]](#footnote-298)

The clear relationship between the Article 5 obligation and the UN Charter also applies for Article 6. As Helmut Schmidt explained during NATO’s 50th anniversary:

“Any extension of the substantive and geographical scope of the North Atlantic Alliance will have to ensure that such changes are accurately defined. Any broadening of the tasks of the Alliance, and of the duties of the allies, would have to recognise the precedence of the UN Charter, and especially Article 51, which gives the Security Council the final right of decision even in cases where the allies are exercising their right of self-defence”.[[299]](#footnote-299)

Applying a *ratione locis* analysis to Article 6, considered in relation to the UN Charter as mentioned above, enables us to draw two observations concerning NATO’s ‘regionality’ and NATO’s out-of-area activities. The first has been ‘haunting’ NATO since its inception and the second started taking place intensively in the 1990s. The first question is whether NATO is a regional organization for the purposes of Chapter VIII of the UN Charter. This will be discussed below (…).

Secondly, one must also enquire as to how out-of-area operations are justified. It is easy to argue that these operations may be in support of the maintenance of international peace and security, or driven by the requirement for assurance of the security of NATO members. For the latter, the 1991 [NATO] Strategic Concept came ‘too early’ in a new turning point of the history of the world and, consequently, fell short of advancing that NATO would need to look beyond Articles 5 and 6 in line with Goodhart. The reason is that the collapse of the Soviet Union and the war in Yugoslavia showed a world not envisioned at the time of the Strategic Concept and made its goals quickly obsolete. The 1991 Strategic Concept made a timid reference to NATO’s role beyond Articles 5 and 6,[[300]](#footnote-300) which only allowed NATO to enter the new out-of-area approach through reactive actions instead of proactive. These reactive actions could not find any legal basis in the NAT other than Article 4.[[301]](#footnote-301) Once more, a key element of the evolving institutionalization of NATO helped in one of the most significant historical turning points of the organization. Nonetheless, it was not until the 1999 Strategic Concept that the out-of-area operations were formally institutionalized.[[302]](#footnote-302) However, this strategic concept did not define a new geographical area for NATO operations. It was unnecessary to restrict NATO members to a specific *locus* in order to exercise their collective defence. It was more logical, and in line with the features of an intergovernmental organization, to leave the Article 4 consultation process as the mechanism to decide where the out-of-area operations were to take place, based on the type of the threat and its magnitude.[[303]](#footnote-303) This approach is consistent with NATO’s function of providing security and defence to its members, and NATO’s dynamic institutionalism ‘fuelled’ by Articles 4 and 9.

In this respect, and as a concluding remark, one cannot forget that NATO was the product of the Cold War. As the Cold War came to an end, NATO should, arguably, have also been dissolved, like the Warsaw Pact. However, NATO’s transformation into an institutional regime may have resulted in its survival. The evolution of international institutional law, the aftermath of the Second World War, and the institutionalization enablers and processes enshrined in the NAT predisposed NATO to institutionalization. In any case, one should not consider NATO to be a kind of *deus ex machina*, as its institutional evolution was more of a circumstantial result (helped by visionary enabling provisions) than a premeditated plan. This is not to say that the changing environment has diminished NATO’s resolve and resilience in exercising the inherent right of self-defence. Member states, including those that joined NATO in recent years, appear to continue valuing the original idea behind NATO and the NAT’s institutionalization enablers for defending their individual and collective interests. As the NAT frames the institutionalization of collective behaviors, it must be considered an instrument that incorporates an embryonic and inextricably flexible institutional regime. This regime permits NATO’s role to be adapted in light of its surrounding circumstances.

As explained above, it needs to be noted that the establishment of institutional regimes can only succeed where a community of interest exists and where these regimes can work in an interdependent environment. Decades ago, western nations were conscious of the existence of an Atlantic community of interest. However, it was not until after two world wars and an actual unequivocal threat on their common western identity that procedures were needed to safeguard the community of interest. This idea was enacted through the establishment of working institutions within a legal framework. However, while the inspiring idea of NATO has remained throughout the institution’s history, it does not guarantee the survival of a function-oriented institutionalized regime. The materialization of the idea was also affected by reality. Since 1949, the evolution of international relations has shaped NATO by subjecting it to a reality check inspired by the principle of functional necessity. This has characterized the organization as a transformative institution.

In the early 1990s, international events provided a reality backdrop for endowing NATO’s original idea with new stamina. The 1991 and 1999 strategic concepts were the institutional response to show that the community of interest, around which NATO came to light, still existed. In the 1990s, and from an institutional standpoint, NATO confirmed that its structures and procedures were the glue for a functioning international organization. NATO’s dynamic institutionalization was spearheaded by Articles 4 and 9, but the other articles, especially Article 5, fleshed it out. This approach was confirmed by the 2010 Strategic Concept adopted at the Lisbon Summit, which consolidated NATO’s activities in the realm of the maintenance of international peace and security, and confirmed that the security of NATO’s members would also apply beyond the territory set out in Articles 5 and 6.

“5. NATO remains the unique and essential transatlantic forum for consultations on all matters that affect the territorial integrity, political independence and security of its members, as set out in Article 4 of the Washington Treaty. Any security issue of interest to any Ally can be brought to the NATO table, to share information, exchange views and, where appropriate, forge common approaches ... 31. Cooperation between NATO and the United Nations continues to make a substantial contribution to security in operations around the world ... ”.[[304]](#footnote-304)

#### 3.6 Other International Engagements.[[305]](#footnote-305) The Conflict Clause

Article 7[[306]](#footnote-306) was incorporated by the United States “as an alternative to an expulsion clause”,[[307]](#footnote-307) on which they gave no further explanations. This article is aligned with Article 103[[308]](#footnote-308) of the UN Charter. While Article 7 “recognises the supremacy of the Charter in case of any conceivable divergence … and also the primary responsibility of the Security Council for peace whenever the Security Council is in fact able to take action,”[[309]](#footnote-309) it cannot be fully understood in the absence of Article 8.[[310]](#footnote-310) Article 7 is reinforced through the interpretation of Article 8 made by the Ambassadors,[[311]](#footnote-311) that is, no preexisting or future international agreement shall interfere in the implementation of the obligations established by the NAT. Articles 7 and 8 form NATO’s conflict clause, that in turn strengthens the principle of systemic integration, as well as the presumption of compatibility with the UN Charter.[[312]](#footnote-312)

The position of these articles at the end of the treaty suggests that all preceding articles may be affected by the obligations contained in the conflict clause. Reichard affirms that NATO has primacy over past, present, and future international agreements between NATO members and also between them individually and third parties. He argues that the conflict clause is autonomous and that it “goes beyond the obligations contained in the NAT”.[[313]](#footnote-313) While this primacy has been contended outside the realm of collective self-defence,[[314]](#footnote-314) it needs to be seen from an international institutional law perspective. In this case, one must understand the primacy of the clause as affecting other realms relating to perceived derogations from the NAT made by NATO *accords de siège* in the development of the NAT and the general multilateral treaties. Specifically, these ‘derogations’ are the supplementary agreements (the bilateral agreements between NATO bodies with international legal personality[[315]](#footnote-315) and NATO members) to the general multilateral treaties, i.e., 1951 Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff (Ottawa Agreement); and the 1952 Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Paris Protocol). [[316]](#footnote-316) This broad view permits NATO to conduct functions that could be seen as unrelated to its primary function without impediment.

This broad view mainly relates to derogations to NATO members’ legislations created by privileges and immunities required by NATO bodies regarding minimum protection of their assets, headquarters, and international staff, as well as member representatives.[[317]](#footnote-317) These functional immunities and privileges are sometimes seen as unrelated to the main function of NATO, but, under functional necessity,[[318]](#footnote-318) they are a prerequisite for the effective operation of NATO bodies. This principle is present in the Ottawa Agreement, Paris Protocol, and their supplementary agreements, as well as in a series of function-enabler immunities and privileges.

By virtue of Articles 7 and 8, the NAT takes priority over international agreements that could interfere with the carrying out of its obligations. Regardless of whether the UN Charter is viewed under a constitutionalist or instrumentalist approach, Articles 7 and 8 of the NAT have to be seen as a way for strengthening the role of Article 103 of the UN Charter as “a rule to interpretation of international law in line with the Charter”.[[319]](#footnote-319)

#### 3.7 The Core of a Dynamic Institutionalization

3.7.1 The North Atlantic Council

“Although, the ‘O’ in NATO was not expressly mentioned in the North Atlantic Treaty, it is evident, after reading Article 9, that among the intentions of the drafters was that of giving options to the constituents in order to turn an ‘alliance’ into an ‘organization’ when and as appropriate. This intention is explicit since September 1948 with explicit references to an “adequate *machinery* for implementing its terms”, the “[r]esolution to combine their efforts in a *North Atlantic Organization* designed effectively to accomplish these aims in accordance with the purposes and principles of the Charter”, and the “[p]rovision for establishment of *agencies* necessary for the effective implementation of the Treaty” [[320]](#footnote-320)

The interpretation of Article 9 made by the Ambassadors in 1949 is that NAC powers on the interpretation of the Treaty is of a broad character and “it is not intended to exclude the performance at appropriate levels in the organisation of such planning for the implementation of Articles 3 and 5 or other functions as the parties may agree to be necessary”.[[321]](#footnote-321)

Contrary to Reichard, who argues that this article “is the only institutional provision in the NAT”,[[322]](#footnote-322) Article 9 is actually the tip of NATO’s institutionalization arrow and is reinforced by institutional enablers (as seen in the analysis of previous articles, especially Articles 2, 3, 4 and 5).

It is important to note that Article 9 and the articles analyzed above, as well as their continuing identification with the concept of transformative institutionalization, usher in the materialization and ‘corporeal’ manifestation of the dynamic institutional regime desired (modestly at the beginning) by NATO’s founders. This desire is consistent with the post-Second World War trend of creating international organizations to cover States’ insufficiencies in certain areas of major significance for the purpose of maintaining international peace and security, as well as other fields of international cooperation such as international trade.

Additionally, Article 9 comes to demonstrate, as history has confirmed, that the signatories’ original intention was to sign a treaty to inaugurate an entente that would be more than a classical alliance, i.e., an international organization. The creation of an international organization would not happen quickly. Instead, it would evolve steadily, rooted in experience gained step-by-step from the original functions shaped by evolving international circumstances. The evolution of NATO was possible due to the configuration of the NAT as a pledge, its simple language and structure, which permitted an open interpretation of its provisions (as seen above), and the fact that Article 9 refers directly to subsidiary bodies. This allowed the spark of institutionalization to creep from the NAT into practice, and feed the momentum of institutionalization.[[323]](#footnote-323) This momentum continues to grow through NATO institutional dynamics, which continue receiving the ‘divine breath’ from every NAT decision whether made in ordinary ambassadorial sessions, ministerial sessions, summits, or daily activities ran by NATO bodies. Thus, NATO’s momentum of institutionalization is a never-ending process and represents the very heart of NATO’s character as an international organization.

Mayer considers that Article 9 permits the implementation of NATO’s functions and that its absence would render the NAT static,[[324]](#footnote-324) contrary to the momentum created after the NAT’s signature, which powered NATO’s institutional regime. Ismay[[325]](#footnote-325) considers that Article 9 leads the organizational clauses followed by Articles 10, 12, and 13 relating, respectively, to the membership, duration, and review of the Treaty. Yet Ismay, following a British tradition, labels NATO’s transformative institutionalization as creating NATO’s ‘machinery’.[[326]](#footnote-326) This machinery is necessary not only for deterrence, but also in order to develop the means and procedures for mutual assistance, to settle international disputes, and to promote economic collaboration, as well as to continue pushing NATO’s evolution forward throughout its transformative institutionalization.

How then is NATO’s institutional momentum generated and sustained over time?[[327]](#footnote-327) First, the formulation of Article 9 is simple, and for this reason operational, which permits the generation of institutional momentum, in three principal ways. On the one hand, it enables the implementation of the NAT’s Preamble in conjunction with Articles 1 to 13, on the other hand, it codifies an embryonic institution open to further dynamization, as seen in the 1954 reorganization, the following strategic concepts, and the subsequent NATO Command Structure reorganizations. In addition, it establishes an endless bridge between the ‘momentary outburst of passion’ at the time of signature of the NAT, and every subsequent institutional decision for its implementation over the years and within an endless changing international environment.

Second, the sustainment of institutional momentum over time continues through the fact that the decision-making process was transferred from the members’ capitals to NATO’s own institutions, headed by the North Atlantic Council. Both the generation and sustainability of NATO’s institutional momentum evidence a significant legal and political commitment among the NATO members.

Article 9 also reflects the democratic spirit of NATO, as all of its members are represented in the North Atlantic Council and the subsidiary bodies. This democracy among the NATO members manifests itself in practice through the decision-making process. Finally, the particularities of the term ‘subsidiary bodies’ are addressed below.

##### 3.7.2 Subsidiary Bodies

Today’s NATO uses the terms ‘subsidiary bodies’ and ‘NATO bodies’ indistinctly. Article 1 of the Ottawa Agreement establishes that “‘subsidiary bodies’ means any organ, committee, or service established by the Council or under its authority, except those to which, in accordance with Article II, this Agreement does not apply”. The Council created the SHAPE during its sixth session, which was held in Brussels on 18-19 December 1950, and the international staff was created by the Deputies (the NAC) by document D-D (51 )30 on 29 January 1951.

These historical events and a literal reading of Article II of the Ottawa Agreement without reference to the *travaux préparatoires* or other events, bring confusion to the applicability of the term ‘subsidiary bodies’. For this reason, practice has come to solve the question by denominating ‘NATO bodies’ to all NAC subordinate organs. Nevertheless, and in spite of having resolved the question with the term ‘NATO bodies’, the nature of international institutional law requires a detailed approach to the question. This is necessary in order to dissipate general misunderstandings originating from a limited and superficial reading of available materials. In support of the need to take the term ‘subsidiary bodies’ in a flexible manner the following is submitted:

1. Reid argues that Article 9 of the NAT “is a *broad rather than specific definition of functions* and is not intended to exclude the performance at appropriate levels in the organization of such planning for the implementation of Articles 3 and 5 or other functions as the Parties may agree to be necessary”.[[328]](#footnote-328)
2. The commentaries to the draft Articles on the Responsibility of International Organizations (‘ARIO’) of the International Law Commission (‘ILC’) submit that there are a variety of views on what is an organ of the organization. The ILC considers the term ‘organ’ is governed by the ‘rules of the organization’. In order to illustrate its arguments on the term ‘organ’ the ILC states: “[a]n example of a very economical list is provided by NATO. Article 9 of the North Atlantic Treaty establishes a single organ, the Council, which is given the competence to create “*subsidiary bodies as may be necessary*”.”. [[329]](#footnote-329) The ILC takes a broad approach of the term in the particular case of Article 9 of the NAT.
3. Article II of the Ottawa Agreement restricts the applicability of its provisions to the international military headquarters: “The 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” (emphasis added). However, two facts prove that the NAC has decided otherwise and for that reason the term ‘subsidiary body’ has been used, and is used, broadly to include military headquarters established pursuant to the NAT, i.e., to Allied Headquarters:
   1. the *travaux préparatoires* directed by the Deputies, which was the NAC permanent representatives at the time, extend the Ottawa Agreement to Allied Headquarters when the 1951 NATO SOFA provisions are not sufficient.[[330]](#footnote-330)
   2. the NAC had already created ‘subsidiary bodies’ in their variant of ‘subsidiary military bodies’ subordinate to the Defence Committee: the Military Committee, the Standing Group, a sub-committee of the Military Committee, the five strategic regional groups (the Northern European Regional Planning Group, Western European Regional Planning Group, Southern European-Western Mediterranean Regional Planning Group, Canadian-United States Regional Planning Group and the North Atlantic Ocean Regional Planning Group), and the Military Production and Supply Board (*see* documents C1-D-1/2,C2-D-1/5).[[331]](#footnote-331)
   3. the functions and responsibilities of a group of ‘subsidiary military bodies’, the Regional Planning Groups, passed in 1951 to the Supreme Headquarters (three to SHAPE and one to SACLANT, the fifth, US-Canada, remained), which “serve *as a basis for the subordinate commands* [headquarters] which would each be under a Commander-in-Chief”.[[332]](#footnote-332) Interestingly, the memorandum on the works for the phasing out of the North Atlantic Ocean Regional Planning Group (‘NAORPG’) refers to that transfer: “[a.] the functions and responsibilities of the NAORPG be transferred to the Supreme Allied Commander Atlantic and the Standing Group as indicated in this report as soon as those agencies are able to take them over, and [b.] on completion of the transfers referred to in a. Above, the Standing Group initiate the necessary action to dissolve the NAORPG”.

This comes to demonstrate that the term ‘subsidiary bodies’ can be legitimately used for the denomination of the Supreme Headquarters and their subordinate headquarters since they are ‘subsidiary military bodies’. The conclusion is that the use of the term ‘subsidiary body’ is flexible and covers all common organs created under the authority of the NAC.

As submitted above, the practice in NATO is to use the term ‘NATO body’ instead of ‘subsidiary body’. This has come to solve the issue on this front, but it has created confusion with entities that are not part of the civil side or the military NATO Command Structure, i.e., headquarters and multinational organizations of the NATO Force Structure, specific structures, other assets at the disposal of NATO, centres of excellence, as well as the field headquarters in theater of operations in which NATO may have a presence.

The term ‘NATO body’ becomes that of ‘NATO Military Body’ when applied to organizations of the NATO Force Structure, specific structures and other assets at the disposal of NATO [including centres of excellence], excluding in-theatre headquarters, which are ruled by dedicated mission-specific status of forces or mission agreements. The activation of the former is made per NAC decision based on both Article 14 of the Paris Protocol and the NAC document C-M(69)22. Due to this document, they receive the denomination of ‘NATO Military Body’ and are given the status of international military headquarters. However, it is to be noted that this status does not imply that they fully enjoy the legal position set out in the Paris Protocol. From the Paris Protocol legal position (legal status – legal personality, legal capacity, and powers – privileges and immunities and responsibility), these headquarters, organizations, and centres only receive the Protocol privileges and immunities. They do not receive the legal status from the Paris Protocol. Their legal personality is not given by any of the NATO treaties, nor it is delegated by any of the two Supreme Headquarters. However, they have objective legal personality, i.e., it is not subjective since it does not come from Article 10 of the Protocol. Their legal capacity and powers are established by their concept of creation and the memorandum of understanding on their administration, financing, manning, and governance. The same is true for their responsibility, since these headquarters, organizations, and centres are of a multinational (not international) nature; moreover, they are not financed by NATO common funding, but by a separate multinational budget financed by their participating states. The possibility of being called ‘NATO Military Body’ does not make them ‘subsidiary bodies’.

With respect to in-theatre headquarters, a detailed analysis based on their applicable legal framework removes any temptation to call or consider them ‘NATO bodies’. The NATO governing treaties - NAT, NATO SOFA, Ottawa Agreement, and Paris Protocol (as well as their supplementary agreements) apply, totally or partially, to ‘NATO bodies’, while UN Security Council resolutions, mission-specific status of forces or mission agreements, and military technical agreements (Bosnia, Kosovo), or specific bilateral agreements (Afghanistan, Iraq) apply to in-theatre headquarters.

#### 3.8 Organizational Clauses

The organizational clauses constitute the remainder of the Articles of the NAT. These articles do not contribute substantively to NATO’s institutional regime, but do so indirectly by complementing the NAT’s vocation to constitute an international organization. Article 10[[333]](#footnote-333) incorporates an institutionalization element, i.e. a voting procedure. Articles 11, 12, and 13[[334]](#footnote-334) cover the ratification, review, and duration of the “Atlantic Pact”. Originally, the NAT negotiators did not fully develop these latter articles until the very end of the negotiations; the United States proposed this series of improvements to be incorporated within Article 10 itself,[[335]](#footnote-335) but the final text separated each of the areas into distinct Articles as follows.

Firstly, Article 10 sets the mode by which a European state could be invited to contribute to the security of the North Atlantic area and accede to the Treaty: namely, unanimous voting. Despite becoming, by practice, NATO’s daily decision-making process for almost thirty years, the maturation of NATO’s institutional interactions subsequently led to the eventual adoption of the practice of consensus.[[336]](#footnote-336) This ‘institutional maturation’[[337]](#footnote-337) took place through continuous reform and the settlement of structures and procedures.

Article 10 permits NATO members to invite and admit other European states to join the organization. This invitation is conditional on candidates embracing the community of interest, i.e., those capable of practicing and promoting the principles of the NAT. In doing so, the new NATO members would be able to contribute to NATO’s institutional momentum. In fact, the “Study on NATO Enlargement”[[338]](#footnote-338) states that the contribution by new members to the stability and security of the entire Euro-Atlantic area will be achieved through the “architecture of European security” composed, *inter alia*, by “transatlantic institutions (NATO)”.[[339]](#footnote-339) Equally, the same study put great emphasis on NATO’s institutional enablers by “[f]ostering in new members of the Alliance the patterns and habits of cooperation, consultation and consensus”.[[340]](#footnote-340)

Candidates for membership must be European states, but they do not need to have a coastline on the Atlantic Ocean,[[341]](#footnote-341) and no regional framework is in effect established by the NAT.[[342]](#footnote-342) This is confirmed by the fact that Italy - not a member of the United Nations at the time - is an original NATO member, and that Turkey and Greece acceded soon after the signature of the NAT in 1952. NATO enlargement has continued over the years and has contributed to its institutional momentum. In this way, the ‘machinery’ is self-testing, as it has to work at full throttle to verify the accession criteria against the aspiring principles of the community of interest, which are both codified in the NAT and extant in the institutional practices developed over the years. On this note, Mayer affirms that each accession requires NATO members to take on new active and passive responsibilities, which is “*l’équivalent d’un nouveau traité avec un nouveau allié, et que, comme tel, l’accord donné para la France à ce qu’il soit invité à adhérer doit, comme le traité lui-même, être soumis au Parlement”*.[[343]](#footnote-343)

Today, prospective candidates follow the Membership Action Plan,[[344]](#footnote-344) which intends to advise, assist, and provide practical support in a tailor-made manner. Participation in the Plan gives no guarantee for future membership; however, recent empirical studies demonstrate that even if the prospective candidate understands that the possibility of joining NATO is remote, it will still participate in the Plan for institutional reasons. What are these reasons? Potential current candidates may have a democratic deficit in their recent past, and they see in NATO an incentive for the development of a set of credible institutions, as well as legislation, in order to capitalize on their efforts in the international sphere. NATO, like other international organizations, has provided incentives that influence domestic legal reform policies. The Plan requires prospective members to attain a certain level of development in four areas: a) Political and Economic, b) Defence/Military, c) Resource, d) Security, and e) Legal. The Plan sets out NATO’s expectations, which are none other than complying with the NATO *acquis*.[[345]](#footnote-345) The immediate conclusion that can be reached on the eventual requirement of incorporating the NATO *acquis* within candidates’ administrations is that NATO is actually proposing they “import [its] institutions in order to reduce the costs and speed up institutional reforms”.[[346]](#footnote-346)

Turning next to ratification, with the wording of Article 11 the signatories gave themselves a ‘parliamentary insurance provision’. The United States representatives insisted on incorporating the wording: “[ratification] in accordance with their respective constitutional processes”. This was for purely domestic reasons, as they were of the opinion that the “Treaty might be subject to criticism if it were not expressly stated that nothing would be done which could in any way conflict with the power of the Congress [and the Senate]”.[[347]](#footnote-347) Consequently, the other parties interpreted the article as offering no political doubt that the governments must consult their parliaments for ratification. [[348]](#footnote-348)

Finally, Articles 12 and 13 cover the review, duration, and denunciation of the treaty and, according to Mayer,[[349]](#footnote-349) Article 109 of the UN Charter inspires them.[[350]](#footnote-350) One must understand that any comprehensive review of the NAT is required to take place within the framework of the highest NATO institution, the North Atlantic Council. Witschel has stated in respect of Article 109 of the UN Charter, that it is “merely historical interest”.[[351]](#footnote-351) Similar statements could be made with reference to Articles 12 and 13 of the NAT.

Mayer argues that there are two situations where such a review would be required. First, any change in the general security situation in the Atlantic area; and second, any new development in respect of regional or universal arrangements relating to the maintenance of international peace and security. These arrangements would be in the realm of the UN Charter. The statesmen who drafted the text appear to understand it in this manner, for they wanted to maintain the hope that the existing difficulties of the United Nations’ institutions would fade away over the years. [[352]](#footnote-352) The materialization of this hope would have made NATO unnecessary after a certain time. However, hope and a realistic understanding of the international developments at the time are masterfullly combined in Articles 12 and 13, as inspired by the European negotiators’ requirement[[353]](#footnote-353) to ensure the long-term support of the United States as a guarantee for solid military and economic recovery. These two articles and the 20-year treaty obligation provided assurance for European NATO members that support would come from the other side of the Atlantic.

This approach evidently had a positive impact for NATO’s dynamic institutionalization. From the outset, these guaranties diminished any time-related uncertainty. As is known, the establishment of structures for procedures is a time-consuming process. Time is necessary to settle agreements relating to collective endeavors in a community of interest. Article 13 came to guarantee that NATO would have an opportunity for proceduralization of the NAT-established common obligations. This links Article 13 and Article 9, as such institutional machinery had to be started by the North Atlantic Council, which was empowered to create the apparatus necessary for implementing the Treaty. This leads to the conclusion that Articles 12 and 13 became evident contributions for settling NATO’s integrative institutionalism. Indeed, through military integration, NATO succeeded in having a “well-developed institutional structure”[[354]](#footnote-354) during the Cold War. The historical events of 1966, when France withdrew from the integrated military structure, provide empirical evidence that the institutional development level of NATO was high after seventeen years of existence.[[355]](#footnote-355) Furthermore, these events proved the existence of NATO’s transformative institutionalism, which led the organization to adapt its legal and institutional frameworks naturally instead of falling into the useless ebb and flow of the perpetual tide of changing alliances. NATO’s statesmen were determined to maintain the materialization of their community of interest no matter what internal or external events took place. The idea evolved well and settled steadily but firmly.

“Although some have questioned the continuing military viability of NATO after the French “withdrawal”; none of the governments concerned seriously considered its dissolution; on the contrary, intensive activity has centered on seeking solutions of the many multilateral issues with the NATO organs and of the bilateral issues …”.[[356]](#footnote-356)

Finally, Article 14[[357]](#footnote-357) is the last organizational article and provides that both the English and French texts of the NAT are equally authentic. The Treaty is silent on the question as to what the official languages of NATO are, and the institutionalization inclination of the Treaty text has once again been tested in this respect. On 17 September 1949 the North Atlantic Council, established by Article 9, issued its first session final communiqué establishing *inter alia* the official languages of NATO: “Languages: English and French shall be the official languages for the entire North Atlantic Treaty Organization”.[[358]](#footnote-358) On the one hand, the text was unequivocally inspirational for those who were put in charge of implementing the Treaty obligations. On the other hand, it can be noted that they applied a functionalist reading to the text by focusing on developing its four corners, for the institutionalization of this new international ‘creature’ within the existing international regime led by the United Nations.

#### 3.9 Two Paradoxes of the Integrative Relation of the NAT and UN Charter

3.9.1 [title]

It is not insignificant that the provisions of the NAT mention the UN Charter and its institutions several times. This intentional wording appears to confirm that the UN Charter has created a reference international legal system – or ‘UN Law’ – which states recognize as prevailing over other treaties in their cross-border relations, and that its principles are unquestionable codes to be applied in international relations. The references to the UN Charter and its institutions imply that the NAT text is an integrative solution for implementing the Charter’s ‘unifying norm’, i.e., the maintenance of international peace and security. However, to ascertain this, the NAT’s compatibility with the UN Charter first needs to be demonstrated, and then it must be unequivocally shown how NATO is integrated in the UN framework.

The UN Charter consolidates a two-sided approach of constitutional vocation and inspiration. Firstly, its vocation is to promote and work towards the maintenance of international peace and security, which, as demonstrated above, is the fundamental principle of the Charter and its ‘unifying norm’. Secondly, it inspires constitutional documents of many of the existing international organizations, which make direct reference to both the purposes and principles of the Charter and other key provisions. These approaches turn the Charter unambiguously into an operational international legal system. Under this premise, the NAT is arguably a reflection of both approaches – it aspires to contribute to the maintenance of international peace and security, and at the same time the Charter’s principles and institutions are indeed reflected in the NAT - therefore, the NAT drafters clearly sought compatibility with the existing Charter. Following Mayer’s pattern, [[359]](#footnote-359) the arguments of various critics raised in relation to the compatibility between the NAT and the Charter can be addressed, and counter-arguments can be submitted.

Indeed, the categorization of NATO as a regional organization under Chapter VIII of the Charter has been raised in reputable legal and political writings. This begs the question of how relevant this categorization may be to the integrative nature of the NAT with respect to the Charter’s noble goals. Regarding the ‘regional’ classification, the Charter does not define the requisites an organization needs to satisfy in order to be considered a “regional arrangement or agency”.[[360]](#footnote-360) Additionally, some commentators have questioned the intention of the San Francisco Conference to keep collective self-defence organizations outside the scope of Charter VIII.[[361]](#footnote-361) Consequently, this question begs analysis under two separate headings, i.e., what NATO says about the applicability of Chapter VIII of the Charter to its construct and activities, and also how NATO and its members interpret the NAT in practical terms and with respect to the UN Charter. During the NAT negotiations, the notions that the Treaty did not need to be placed under the umbrella of Chapter VIII and that “a regional pact based purely on Article 52 of the Charter [was] unlikely to be satisfactory in practice” were continually reinforced.[[362]](#footnote-362) In this regard, Gazzini argues that NATO has rarely sent periodical reports of its military activities to the Security Council - as prescribed by Article 54 with respect to regional organizations, regardless of whether it is executing United Nations Security Council resolutions or not.[[363]](#footnote-363)

##### 3.9.2 Is the NAT Compatible with the Charter?

That the NAT is “outside of and by-passing the United Nations”[[364]](#footnote-364) is an argument repeated by the Soviet authorities in a series of letters to western governments during the negotiations of the NAT. Instead, they characterized the ‘Atlantic union’ as representing a group of Powers intending to be “counterposed to the United Nations Organization”.[[365]](#footnote-365)

“The Soviet Government cannot agree with the statement of the Norwegian Government that an Atlantic union is being created in accordance with the aims of the Charter of the United Nations. It is known that the initiators of that union are resorting to such arguments, but one cannot refute the fact that in reality the Atlantic union is being created outside and in circumvention of the United Nations and serves the interests of the aggressive policy of certain great powers”.[[366]](#footnote-366)

However, such criticisms arose not only from within the Soviet ranks, but also from members of the United States Senate and the French National Assembly. For the Soviet Union, the NAT was just a weapon of aggression[[367]](#footnote-367) against its new expansive policy.[[368]](#footnote-368) United States Senator Taft, on the other hand, opposed the NAT based on the idea that it was against former policies of his country and that other nations, rather than the legitimate representatives of the American people, would be in a position to decide the foreign policy of the United States.[[369]](#footnote-369) Other prominent Americans, such as Secretary Wallace, believed that a permanently militarized Europe would increase poverty and would require the United States to “spend … without limit in dollars or time”. [[370]](#footnote-370) Finally, the French legislative objection centred on the idea that the Soviet Union should not be cornered, as this would bring about another World War.[[371]](#footnote-371)

Drawing from this brief account of the arguments raised that the Treaty is against the interests of the Charter, Mayer’s approach can be applied to analyze such positions in more detail:

1. An Instrument of Aggression.

The Soviet ambassador was not the only one to raise the argument that NAT was an instrument of aggression; Taft opined that military assistance to European nations would promote war and that “the arms plan [was] wholly contrary to the spirit of the obligations [the United States] assumed in the United Nations Charter.”[[372]](#footnote-372) Henry Wallace, Secretary of Agriculture, argued that “[t]he pact is not an instrument of defense but a military alliance designed for aggression. It bypasses the United Nations and violates its Charter in a most flagrant manner”.[[373]](#footnote-373) Wallace based his criticism on the commitment the United States had taken with the NAT *vis-à-vis*  the European nations and that a militarized Europe would never be able to recover. In France, on the other hand, Mayer cites Marcel Chachin who considered that the Treaty “*l’on veut a nouveau encercler la Russie, on n’y parviendra pas plus qu’en 1918*”.[[374]](#footnote-374) This argument ignored the fact that the Soviet Union had signed numerous pacts on mutual assistance or defence treaties with many other countries, which were never considered pacts of aggression. Indeed, their nature could arguably have warranted their characterization as instruments of aggression as they aimed at counterbalancing a repetition of German aggression, and because they all were of a bilateral nature, contrary to the NAT’s multilateralism. Moreover, the Soviet Union did not oppose the conclusion of the Treaty of Rio, which was of a similar nature to the NAT.[[375]](#footnote-375) These features and events, aligned with the late 1940s Soviet expansionism, weigh against the characterization of the NAT as an instrument of aggression and support its labeling as a collective defence agreement.[[376]](#footnote-376)

1. The Treaty Creates a Small United Nations.[[377]](#footnote-377)

In 1949, the Charter of the United Nations and its institutions were not sufficiently reliable to safeguard the maintenance of international peace and security all over the world. Nonetheless, Taft argued that if the intention with the NAT had been to create a small United Nations, the Treaty would have incorporated a series of improvements to the Charter, as proposed in Resolution No. 239 of the United States Senate.[[378]](#footnote-378) It is true that one of the reasons for concluding the NAT was the continuous Soviet obstruction exercised at the Security Council. This obstruction frustrated “the hopes and the assumptions upon which the UN was set up to organize world peace”.[[379]](#footnote-379) Claude argues, however, that the NAT signatories in their need “for collective defense against the threat of Soviet aggression was not to reverse the San Francisco decision against relying upon collective security for this kind of job, but to create an extra-United Nations system - the North Atlantic Treaty Organization”[[380]](#footnote-380) as opposed to a competitor or replacement.

In line with Claude’s view, Reid further rejects any proposition that NATO was created to replace the United Nations. He argues that the statesmen who negotiated the NAT were very careful to avoid drafting the provisions in a manner that “might appear to be a competitor to the United Nations”.[[381]](#footnote-381) Moreover, it can further be submitted, as by Mayer, that Chapter VII and Article 45 of the Charter are drafted very weakly to ensure proper collective defence and it is for that reason that Article 51 was drafted and, then, must be applied. Based on this, and citing a member of the French parliament, Pierre Cot, Mayer argues that the Charter allows the possibility for conclusion of a pact of collective defence among a limited number of signatories. “*Notre collègue reconnaît donc, qu’en droit, le pacte Atlantique respecte la Charte*”.[[382]](#footnote-382)

1. The NAT is “the triumph of the jungle law”.[[383]](#footnote-383)

Although The Wall Street Journal coined this expression, Henry Wallace used it to argue that the NAT “flagrantly violates the plain provisions of the Charter itself”.[[384]](#footnote-384) He based this declaration on his assessment of two factors; first, that the drafting statesmen intentionally avoided referring to NATO as a regional organization – using the argument that enforcement measures have to be reported to the Security Council. Second that the Charter’s reference to the inherent right of self-defence was to create an alliance not controlled by the United Nations institutions.

However, it is conventional and customary law that when interpreting a treaty it is necessary to consider the intention of the parties.[[385]](#footnote-385) As discussed above, there are no preparatory works *per se* of the NAT, and it is only recently that certain documents have been declassified. In accordance with the documents kept by the United Kingdom Foreign Affairs,[[386]](#footnote-386) the drafters of the NAT made continuous reference to staying within the realm of the UN Charter. In March 1948, UK Foreign Secretary Bevin was ready to support the American view that the NAT had to be brought “in harmony with the Charter”.[[387]](#footnote-387) This continued to be the intention of the drafters during the negotiations.[[388]](#footnote-388) Reid recalls that there was both a collective effort and struggle not to lose the American partners, which led to the decision to seek to draft the NAT in such a manner that it would both reinforce the United Nations as well as avoid substitution of its institutions.[[389]](#footnote-389)

There was accordingly no evidence that there was any intention that the NAT would depart from the framework established by the UN Charter. Moreover, a literal reading of the NAT indicates that the Charter and its institutions would be the way to interpret and implement the NAT. Finally, NATO’s decision-making institution *par excellence*, the North Atlantic Council, has continuously made reference over the years to the Charter and its noble principles and purposes contained in its Article 1. The first instance is the final communiqué of the first meeting of the North Atlantic Council back in 1949, the latest examples include the 2010 Lisbon Strategic Concept.[[390]](#footnote-390)

This may serve as *ut sit finis litium* to the question.

In accordance with the above, the compatibility of the NAT with the UN Charter is granted. However, this requires additional analysis as to the remaining question of regional arrangements. The main reason for this analysis is that it appears that the framework for regional cooperation is the text of Chapter VIII of the UN Charter. At a first glance, both the area delimited by Article 6 of the NAT, as well as the fact NAT signatories form visually ‘a region’ when pinpointed on a world map seem to support that view. Foreseeably, this may lead to the understanding that NATO is a regional organization; however, ‘regionality’ under the Charter cannot be interpreted frivolously, for such an interpretation may create misperceptions key for the implementation of the functions and purposes of the organization.

Henrikson argues that although the United Nations was intended to be the ‘international organization’ and link global-regional actions, the Charter gave three concessions to the idea of regionalism. First, Article 33(1) whereby parties to any dispute endangering international peace and security shall first seek a solution by resort to regional agencies or arrangements by direct negotiation, third-party mediation, arbitration, or by some other means. Chapter VIII states that nothing in the Charter is to preclude regional arrangements or agencies from dealing with the maintenance of international peace and security, without derogating the role of the Security Council to investigate. Second, the Charter recognizes the right of the Security Council to investigate actions taken under ‘regional arrangements’. Third, Article 51 located at the end of Chapter VII of “the inherent right of individual or collective self-defence” is not time-bound, and is exercisable regionally, or in any other way. Article 51 has usually been understood to allow for treaties of mutual assistance, which can be framed as ‘regional arrangements’ as referred to in Article 52 at the beginning of Chapter VIII. Article 53(1) gives the Security Council the role of using regional arrangements or agencies for enforcement action under its authority. The Security Council must authorize enforcement taken under regional arrangements or agencies. “However, despite this requirement of Security Council authorization, regional groupings constituted as alliances, such as NATO, using Article 51 could not be so constrained”.[[391]](#footnote-391) This begs the question whether NATO is a regional organization under Chapter VIII, and if not, whether this erodes its compatibility with the Charter.

##### 3.9.2 Is NATO a Regional Organization?

##### One of the United States delegates at the San Francisco Conference, Senator Vandenberg, pointed out that a community of interests could exist between nations that aren't located in the same geographical area, and that the UN Charter should approve the establishment of such communities, which may not be strictly 'regional arrangements,' as provided under Article 53 of Chapter VIII of the UN Charter. The inability to distinguish between associations of nations linked by a common set of interests, on the one hand, and regional associations determined primarily by geographical factors, on the other, has led to miscommunications in the past, and is still causing some confusion. The distinction is that, according to the Charter, self-defense measures, whether individual or collective, do not require the prior approval of the Security Council, whereas, on the other hand, enforcement actions by regional agencies (as contemplated under Article 53 of Chapter VIII) do require this approval. The NAT safeguards against an eventuality beyond the control of the Security Council, but it does not undermine its authority. The primary responsibility of the Security Council for the maintenance of international peace and security is recognized in Article 7', and it states in Article 5 that any measures taken by the NATO countries as a result of an armed attack on them 'shall be terminated when the Security Council has taken the necessary steps to restore and maintain international peace and security. [[392]](#footnote-392)

Therefore, the preliminary question concerns what a regional organization actually is, and the answer lies in Chapter VIII of the UN Charter. On the one hand, this chapter requires that regional arrangements or agencies be consistent with the purposes and principles of the United Nations. Article 52 of the Charter refers to such regional arrangements or agencies as being intended to deal with matters relating to the maintenance of international peace and security. This article continues by establishing that states party to those arrangements or agencies will settle local disputes by pacific settlement before addressing them to the Security Council. On the other hand, Article 53 sets out that the Security Council will use these arrangements or agencies for ‘enforcement action’ and always under its authorization. However, the Charter does not define the prerequisites an organization needs to establish in order to be categorized as a “regional arrangement or agency”. Nevertheless, U.S. Secretary of State John Foster Dulles made it plain that “NATO has not been organized as a regional association”.[[393]](#footnote-393)

In this regard, and in order to shed light on regional organizations arranged under the Charter, it is necessary to examine writings addressing in depth the relevant articles. Simma’s well-regarded and seminal commentaries highlight a curious evolution in the interpretation of Chapter VIII, which comes to demonstrate the contradictory interpretations that exist. In this regard, Hummer and Schweitzer, in Simma’s second edition,[[394]](#footnote-394) argue in favor of an open interpretation of the Chapter VIII regional arrangements or agencies, which would permit a case-by-case identification of the ‘regionality’ of international organizations under scrutiny. This would in turn allow the exclusion of Article 51 international institutions from a regional arrangement within the meaning of the Charter.[[395]](#footnote-395) However, Walter in Simma’s third edition[[396]](#footnote-396) - which replaces completely Hummer and Schweitzer in his second - takes a one-hundred-and-eighty-degree turn and considers that systems of collective self-defence under Article 51 and regional collective security under Article 52 are the same and, therefore, both regional arrangements. Moreover, Walter argues, based on the principle of subsidiarity and a regionalist approach, that there are no regional organizations other than those under the United Nations. He states that both the actual geographical neighboring[[397]](#footnote-397) and mechanisms of disputes settlement are no longer required for a regional organization. He also maintains that collective self-defence organizations have taken over collective security activities on behalf of the United Nations institutions.[[398]](#footnote-398) Whilst one could disagree with Walter based on a desperate search for standardization, as perceived in the Charter, his approach is clearly empirical, and as such his argument comes to reflect a reality of the practical way states interact with each other.

Chapter VIII is silent on the inherent right of individual and collective self-defence. It is Article 51, and thus Chapter VII, that defines collective self-defence. These chapters are separate and not subordinate to each other. On the other hand, the right of self-defence is *ex ante* to Security Council enforcement measures. These simple elements place organizations constituted under the right of self-defence on a different plane than that of regional arrangements or agencies. Whilst it is also true that some of their states or sub-divisions group for self-defence purposes, and eventually admit the role of the Security Council’s prior approval before any enforcement action,[[399]](#footnote-399) this should nonetheless not be seen as affirming that all interstate groupings around the right of self-defence are regional organizations per Chapter VIII.

“The early examples of regionally based, though not formally “regional” mutual defense pacts were the Inter-American Treaty of Reciprocal Assistance completed at Rio de Janeiro in 1947, the Brussels Pact of 1948 centered on Western Europe, and, as noted, the North Atlantic (Washington) Treaty of 1949 which was transatlantic as well as Western European in strategic scope. All of these agreements for common defense refer to Article 51, and thus can be said to avoid the constraints on "regional arrangements or agencies" of Chapter VIII, and perhaps even the more general limitations imposed by the Charter on the resort to force by U.N. members viewing their own and their allies' vital interests”.[[400]](#footnote-400)

Hummer and Schweitzer recall debates relating to the “legal classification of the NATO Defense Alliance as a regional agency”[[401]](#footnote-401) to conclude, referring to several United Nations documents,[[402]](#footnote-402) that NATO could not be a regional organization per Article 52 of the Charter. They reason on the basis that measures of a regional nature cannot be applied to local disputes in situations where there is an absence of “a common culture, language, history, geographical proximity, etc”.[[403]](#footnote-403) Moreover, they observe that the NAT faces outwards in the case of an armed attack, whereas regional arrangements or agencies are directed inwards for the resolution of local disputes.[[404]](#footnote-404)

Notwithstanding the above, Walter applies a functional analysis for the interpretation of Chapter VIII.[[405]](#footnote-405) He argues that NATO military activities in the Balkans were neither of a self-defence nature, as there was not an armed attack against any of the NATO states, nor classifiable as part of the collective security pattern, for Yugoslavia was not a NATO member. Walter considers that the construct founded on Chapter VIII arguments: a) is not applicable to collective self-defence under Article 51 - the absence of reporting obligations;[[406]](#footnote-406) and b) is a Cold War argument not applicable today. Under Walter’s *ad hoc* functional approach analysis, an organization may perform different tasks in different strategic situations,[[407]](#footnote-407) permitting him to argue that the legal classification of an organization must follow analysis of its actions. Walter’s arguments are very appealing, but it seems that he has taken a partial approach in his functional analysis of Chapter VIII.

The functional necessity approach[[408]](#footnote-408) acknowledges that international organizations are created by states to carry out a specific mission both for the common interest, or *finalité intégrée*, of the partnership-community, and through cross-border cooperation, where the state action is suboptimal. Walter approaches functionalism by focusing on the purpose of Chapter VIII for determining the ‘regionality’ of an organization. He argues that the regional character is a bond among its members, and that this bond creates the expectation that the desire to be part of the group will make the members contribute to the maintenance of international peace and security.[[409]](#footnote-409) However, the functional approach does not concern a ‘bond’ among members, where this ‘bond’ is understood as the maintenance of international peace and security; the functional approach is about the purposes for which the organization was created. Therefore, regionalism can be considered the means to achieve the noble goal of peace, but it cannot become the actual purpose. Associations of states, under Chapter VIII or not, must not seek to establish their own status with the excuse of the Charter, but rather the purpose of it, i.e., to live together in peace with one another as good neighbors; to unite efforts to maintain international peace and security; to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used; and to employ international institutions for the promotion of the economic and social advancement of all peoples.[[410]](#footnote-410)

The juridical method understands function in international organizations not simply as a permitted activity that creates expectations, as Walter suggests, but an activity that comes with duties and rights.[[411]](#footnote-411) NATO has created a bond among its members and it is true that it is for the maintenance of international peace and security. Nonetheless, the NAT has also created obligations and rights in most of its articles, not mere expectations. These are not only in relation to the United Nations, but mainly with respect to NATO states themselves. Obligations are easily identifiable in the following NATO articles: mutual aid (Article 3); consultation (Article 4); assisting in implementing self-defence rights (Article 5); the Charter prevails (Articles 7 and 8); and dynamic institutionalization (Article 9). On the other hand, the NAT also establishes rights for its signatories. These rights come from a common understanding that the other NATO members and NATO institutions will undertake collective self-defence actions in case of an armed attack (Article 5). Other rights are, *inter alia*, to enjoy economic collaboration (Article 2), to receive aid (Article 3), and to be heard in equal footing *vis-à-vis* its counterparts (Article 4). Walter may see the classification of NATO as a regional organization based on partial functionalist views as a *nouvelle decoverture* in public international law. However, such a partisan approach would actually negate the functionalism proper that inspires international organizations, and would eventually deny the inherent evolution that permits them to survive in accordance with the needs of their constituents and the evolving circumstances of international relations.

The approach taken above, to answer the question of NATO’s categorization, applied two headings, i.e., what NATO says about the applicability of Chapter VIII of the Charter to its activities, and also how NATO and its members interpret the NAT in practice [with respect to the UN Charter]. It should be noted, firstly, that the NAT makes no specific reference to Chapter VIII thus not explicitly classifying NATO as a Chapter VIII regional organization.[[412]](#footnote-412) As a result, it could be put forward that the NAT is established only by reference to Article 51 of the Charter. Yet NATO is not only the result of Soviet abuse of the veto on the Security Council, as this would have made the Organization a simple, classical and *ad hoc* nineteenth century military alliance; Claude clarifies that NATO is more than an Alliance, and highlights its deep institutionalization.

“In organizational terms, NATO is something new under the international sun. It is an alliance which involves the construction of institutional mechanisms, the development of multilateral procedures, and the elaborations of preparatory plans for the conduct of joint military action in future contingencies … it represents and impressive organization achievement … [t]his utilization of the concept of international organization for the transformation rather than supplantation of alliances may prove to be a highly significant precedent”. [[413]](#footnote-413)

With respect to the first parameter and as discussed above, the drafters of the NAT quickly reached the conclusion that the NAT would have to exist outside Chapter VIII of the Charter.

“All the representatives, including the French, agreed in the end to omit any specific reference in the Preamble, or in any of the Articles of the Pact, to Chapter 8 of the Charter ... It was finally agreed, after further discussion in Washington, that the parties to the Pact, in their public statements, should stress the relationship of the Pact to Article 51 but should avoid saying that it was connected with Chapter 8 or other Articles of the United Nations Charter. This understanding was embodied in the agreed minutes of interpretation”.[[414]](#footnote-414)

It is of very useful to examine what NATO has said officially about its ‘regionality’. In a five-page report dating from 1956,[[415]](#footnote-415) NATO developed the juridical, political, and due process reasoning, which suggests that NATO is not a ‘regional arrangement or agency’. Article 52 of the UN Charter requires there be machinery for settlement of local disputes, which was not intended by the NAT’s drafters. Moreover, NATO members have “repeatedly emphasised … that a simple declaration that they therefore consider it a “regional arrangement or agency” would not be in itself sufficient to turn it into such”.[[416]](#footnote-416)

There remain, however, arguments envisaging that any treaty concluded by members of the United Nations for collective self-defence aimed at a restricted area may be considered a regional arrangement.[[417]](#footnote-417) These arguments stress that Article 51 waives any requirement for a Security Council authorization, as established by Article 53. Such arguments misinterpret, however, the rules on treaty interpretation. Articles 31 and 32 of the Vienna Convention of the Law of the Treaties clearly establish that interpretation should be in line with the terms of the treaty in the context, and in the light of its object and purpose. In this regard, there is no doubt as to the NAT’s purpose; neither, as seen above, in the statesmen’s declarations nor the first communiqué of the North Atlantic Council. Practice is also relevant for treaty interpretation. NATO has answered the call of United Nations Security Council resolutions, which have considered it a regional organization under Chapter VIII of the Charter. The correspondence of the Secretary General of the United Nations with the Security Council could be viewed as reinforcing this idea.[[418]](#footnote-418) Nevertheless, this does not constitute a consistent understanding of the Security Council or an officially accepted practice by the United Nations and its institutions, since there are examples, like in Resolution 1244, where NATO is qualified as an international organization.[[419]](#footnote-419) In support of this argument, it is necessary to refer to Resolution 2167, where the Security Council, recalling both Chapter VIII of the Charter of the United Nations and Resolution 2033, addressed the question of cooperation with regional and sub-regional organizations in matters relating to the maintenance of peace and security. In this resolution, the Council cites by name the regional organizations considered as such, and NATO is not included.[[420]](#footnote-420)

In a 1956 report, NATO studied the possible implications for itself if it were to operate as a regional organization under Chapter VIII.[[421]](#footnote-421) The report considers that any understanding of NATO as a regional organization would require an amendment to the NAT, or the negotiation of an additional protocol. This is due to the lack of rules or procedures in the Charter for applying Chapter VIII, which would require the formal creation of institutions in NATO’s constitution.[[422]](#footnote-422) As a contrast, such machinery is easily identifiable in Chapter V of the Charter of the Organization of American States.

NATO confirms, in the aforementioned report, that the organization was constructed within the framework of the UN Charter, and with the intention to cover situations where the Security Council could be unable to react to an aggression. For this reason the foundations of NATO are to be found in the Preamble and Chapters I and VII (particularly, but not limited to Articles 42 and 43 - availability of armed forces, 48 -Security Council mandate carried out by states or agencies, 49 – mutual assistance, and 51- inherent right of self-defence) and not in Chapter VIII.[[423]](#footnote-423) This is reinforced by the text of Articles 5 and 7 of the NAT, which “establish the formal obligation of the members of the Alliance to automatically take action under certain circumstances and to stress the full consistency of such actions with the provisions of the Charter”.[[424]](#footnote-424) NATO addresses its ‘regionality’ in Articles 53 and 54 of the Charter. With respect to Article 53, NATO affirms that the Charter unequivocally distinguishes between measures taken under Article 51 and 53.[[425]](#footnote-425) Therefore, the fact that the NAT’s drafters did not mention Chapter VIII at all should be one of the key elements to interpreting the Treaty. On the other hand, NATO itself also considers in the report that Article 54 is out of the scope of the Organization, simply because it would not make sense for an organization based on Article 51 to inform the Security Council of military [contingency] planning and defence arrangements.

In 1956, NATO concluded that Article 4 of the NAT established consultations at the North Atlantic Council as a key element to address security questions. This would permit NATO members “to put into practical effects any of the measures for the pacific settlement of disputes as are set forth in Article 33 and other Articles of Chapter VII of the United Nations Charter”.[[426]](#footnote-426) For this purpose, a decision of the North Atlantic Council would be sufficient “whether designed to establish as a general ruling or referring to specific cases”.[[427]](#footnote-427) Finally, NATO considers that transforming the organization into a regional one would weaken its juridical foundation under Article 51 of the Charter and dismiss the institutions and institutionalization developed within NATO.

The second parameter relates to the practices of NATO members. A look at NATO’s activities over the years shows that its institutions and constituents have consistently maintained the practice of referring to Article 51 of the Charter and, in this manner, NATO does not comply with Articles 53 and 54 – respectively addressing control by the Security Council and the obligation to keep it informed.[[428]](#footnote-428) This favors the premise that NATO is not a regional organization. NATO members have always rejected the notion that Chapter VIII rules the organization and have maintained that they are not subject to the authorization of the Security Council. In this regard, Yost argues: “it was not entirely surprising that they were prepared to use force in the 1999 Kosovo conflict in the absence of an explicit UN Security Council mandate to do so”.[[429]](#footnote-429) The intention of this dissertation is not to discuss the legality or illegality of NATO’s 1999 bombing campaign,[[430]](#footnote-430) nor does the above argument intend to submit that NATO bombed Kosovo in order to reaffirm its non-regional status. The argument is nevertheless useful as it permits the identification of a consistent practice to preclude arguments linking NATO to Chapter VIII, and local dispute settlement approaches. This helps to reaffirm NATO as an international organization, as in the Kosovo situation the United Nations Security Council Resolution 1244 considers NATO as such.[[431]](#footnote-431) Moreover, further operations and missions in Pakistan, Afghanistan, and Libya, all different in nature, and indeed not related to Article 51, are clearly not the object of local dispute settlement as established in Articles 52, 53, and 54 of the Charter. These are examples which advocate for considering NATO as unaffiliated with regional arrangements or agencies approaches.

In 2004, during meeting of the UN Security Council devoted to cooperation between the UN and regional organizations in stabilization processes, Robert Simmons, former NATO Deputy Assistant Secretary General for political affairs, confirmed that the organization does not consider itself to be under Charter VIII and that it has transitioned to be a “security manager in a broad sense … first in Europe and now beyond”.[[432]](#footnote-432) This moves NATO into Leurdijk’s ‘autonomy model’, which employs the Kosovo bombing campaign as a way to demonstrate that NATO “is not willing to subordinate itself to the UN under all conditions”[[433]](#footnote-433) and eventually to obligations under Chapter VIII. Fontanelli’s idea, based on ‘inter-system disobedience’,[[434]](#footnote-434) enables the reasoning that if NATO had been considered a regional organization during the Kosovo crisis, the paralysis of the Security Council would have prevented any NATO action. Moreover, Chapter VIII would have imposed upon NATO an intolerable obligation - to count on a mandatory Security Council resolution for use of force in cases of flagrant humanitarian disaster. Consequently, the fact that NATO did not consider itself a regional organization permitted a rare, unique, and unprecedented use of force. This must be posited as an ‘inter-system disobedience’[[435]](#footnote-435) with respect to prohibition of the use of force under Article 2(4) of the Charter. In turn, this approach supports the notion that deliberate non-compliance with United Nations law is, in certain and very specific situations, appropriate, although those actions will never create a precedent that can be relied upon for future events. It would be negligent nonetheless to fail to admit that this creates a high potential of instrumentalization by non-law abiding states, or at least perceptions as such. This would take place where states are inclined to apply ‘inter-system disobedience’ for their own interests, misaligned with the common interest and noble cause of the maintenance of international peace and security.[[436]](#footnote-436)

To conclude, in a scenario where there are no proper criteria for defining a regional organization under Chapter VIII of the Charter, the analysis of the nature of an association of states must be undertaken based on what the organization formed by them says about itself, and if any of its practices demonstrate full compliance with Chapter VIII. As seen above, NATO does consider itself an international organization based on Article 51 of the Charter, and with security and defence functions derived from the forum created under Articles 3 and 4 of the NAT.

NATO’s practice since 1949 demonstrates that NATO does not follow, intend to follow, nor create mechanisms under Chapter VIII ‘obligations’ - neither in its political nor military activities. This leads to the conclusion that Chapter VIII was not the inspiration for the creation and institutionalization of the Alliance. This, however, doesn’t exclude the future possibility that NATO might decide, by a NAC decision and prompted by specific circumstances, to contribute to an operation based on a Chapter VIII regional arrangement.

#### 3.10 Conclusion

The lack of *travaux préparatoires* of the NAT necessitates a piecemeal archeological reconstruction of the negotiation process through the documents and testimonies produced therein. The subsequent study of such negotiations demonstrates that the fourteen NAT articles created an embryonic institutionalization, as well as a complementary relationship to the UN Charter, i.e., the NAT forms part of the Charter’s intended legal framework and, as such, is compatible with its principles, purposes, and institutions.

The ‘Terms of Reference’ of the Alliance are supported by the Preamble and Articles 1 and 2 of the NAT. The Preamble focuses on the pledge of readiness to exercise self-defence for achieving peace and Articles 1 and 2 reinforce that pledge. The idea of making an alliance with a broad vision of wellbeing is codified in Article 2, which comes to incorporate the economic development as part of creating peaceful and friendly relations. Article 3 inaugurates a very relevant feature of the NAT, ‘Mutual Assistance’, and it focusses on the means of supporting the ‘Terms of Reference’. This takes place since the UN principles of self-defence and the economic recovery give a fundamental base to maintain and develop capacities to resist an armed attack. Article 4 consecrates the ‘Principle of Consultation’ and the sense of solidarity among allies. This serves the coordination of the foreign policies of NATO members on matters affecting their territorial integrity, political independence, or security. This principle evolved to the point of including the possibility of discussing areas beyond NATO’s geographical limits in its political consultation. It is submitted that these principles strengthen NATO’s democratic principles.

The ‘Mutual Assistance’ principle continues with Article 5, which allows member states to decide the nature of the assistance to provide to another NATO member who has suffered an attack. This permits many different types of support to repel armed attacks. It is after September 11th that NATO members considered applying Article 5 to non-conventional attacks. While Article 5 was drafted with the intent to react to large-scale armed attacks of a conventional military nature, the conventional conflict shares today the battle ground with grey zone and hybrid warfare. Article 5 needs the geographical scope of its application, with which Article 6 helps. However, even though Article 6 may appear to restrict the NAT’s territorial application, publicists and politicians have argued the contrary. They have submitted that NATO can act in situations in which a war starts outside the geographical area defined by Article 6 when an armed attack occurs against a member, however, this only can take place as long as the precedence of the UN Charter, and especially Article 51, is recognized.

Article 7 and Article 8 go hand in hand. While the former recognizes the supremacy of the UN Charter, the latter includes an autonomous conflict clause with other treaties that can be incompatible with the NAT. Thus, the NAT is, conventionally speaking, above any past, present or future international agreements NATO members may conclude among themselves or with third parties. Articles 7 and 8 must be seen also as complementary to Article 103 of the UN Charter. It is necessary to note that Articles 5 and 7 of the NAT recognize the ultimate authority of the Security Council in this domain.

NATO’s institutionalization is led by Article 9, which permits the operability of other NAT institutional enablers, such as Articles 2, 3, 4, and 5. The key future of Article 9 is that it contains the embryo for NATO’s dynamic and transformative institutionalization. This takes place with the reference made to subsidiary bodies, which created a momentum that continues until today and that permitted the Alliance to become an Organization. This Organization became the machinery that has permitted a continuous adaptation and development of means and procedures for creating deterrence and mutual assistance, to settle international disputes, and to promote economic collaboration.

Articles 10, 11, 12, and 13 relating, respectively, to the membership, accession, duration, and review of the Treaty, constitute the organizational clauses and complement the NAT’s vocation to constitute an international organization. Article 10 set the procedure to accede to the NAT, i.e., unanimous voting. This article permits NATO members states to invite other European states to join the organization. Today Article 10 is operationalized via the Membership Action Plan, however, entering into this process is no guarantee for future membership. Article 11 gives the signatories a ‘parliamentary insurance provision’ by incorporating that the ratification of the NAT must be done in accordance with their respective constitutional processes. Finally, Articles 12 and 13 cover the review, duration, and denunciation of the treaty, and Article 14 provides that both the English and French texts of the NAT are equally authentic. Although the NAT does not refer to an organization, it was ‘prophetically’ drafted to develop an organization made of several bodies, as many as the NATO member states could need based on security threats imposed upon NATO’s community of interest. Also, NATO aimed to create a mechanism within the existing international regime led by the United Nations.

The fact that the NAT uses the UN Charter as its legal framework confirms the Treaty constituents’ firm resolution to exercise the inherent right of individual and collective self-defence with the sole aim of contributing to the maintenance of international peace and security. Smith best summarizes the compatibility of the NAT and the Charter: “[the] treaty operates inside the Charter but outside the veto, and is not intended to replace the United Nations peace machinery, but rather to function only when that machinery does not function”.[[437]](#footnote-437) This must be understood as a sign of distinction of NAT signatories with respect to non-NATO states members of the United Nations. The attitude and steadfastness of NATO states gives resilience to a collective aspirational momentum towards peace, materialized in the Charter of the United Nations.

In the paragraphs *ut supra* it is evident that the drafters of the NAT did not have the intention to depart from the framework established by the UN Charter and that this and its institutions were envisioned as the only manner to interpret and implement the NAT. The continuous reference made by the North Atlantic Council to the principles, purposes, and institutions of the Charter confirms the above, together with the ‘traditional’ reference to the Charter in all North Atlantic Council communiqués and key documents forming part of the ‘rules of the organization’. However, it is crucial to underline that the fact NATO is not a regional organization per Chapter VIII does not take the Organization away from the Charter. Indeed, Chapter VIII does not necessitate the ‘regionalization’ of states’ activities aimed at implementing the UN Charter. There are other manners and ways to do so, permitting a full implementation of the United Nations legal system by groups of states, as the case in point of NATO demonstrates.

In accordance with the above, the compatibility of the NAT with the Charter of the United Nations is evident, and this is most probably the reason why the United Nations–NATO relationship in the area of the maintenance of international peace of security has been so longstanding. This conclusion supports the argument that the NAT has not negatively affected the obligations established under the Charter; to the contrary, it has served to provide creative United Nations-based means to operationalize the necessary activities, which flesh out the set of noble principles and purposes, advocated for by the Charter.

The fact that the relationship remains *sui generis* has created a new way for cooperation between the UN and NATO. This favors a coherent international security structure and a spectrum of possibilities where the Charter’s ‘jewel’, i.e., the maintenance of international peace and security, continues to function under invigorated and functional United Nations’ institutions.

## CHAPTER 4

THE INSTITUTION AS AN IDEA OF WORK SETTLES: INSTITUTIONS AND DECISION-MAKING PROCESS

### 4. The Institution as an Idea of Work Settles: Institutions and Decision-Making Process

#### 4.1 Introduction

The Articles of the NAT do not bring together all of the necessary institutional pieces required for the daily functioning of the international organization. For example, Article 9 of the NAT constitutes the legal basis for NATO’s decision-making authorities and processes, but it does not fully develop the North Atlantic Council as an institution. It was clear from the beginning that Article 9 would require further developments to create functional institutions and, in this respect, the first session of this incipient institution[[438]](#footnote-438) established relevant institutional structures and procedures.

The actual generator and facilitator of the institutional parts of the NAT can be analyzed by following Kennedy’s temporal logic pattern;[[439]](#footnote-439) a pattern that starts when the signatories become members whose interactions enter a cycle of continuous transformation that instigates evolving structural procedures. These interactions have a heavy negotiation component, which inform Kennedy’s pattern and, in the case of NATO, implement Article 9. This article is the actual generator of the institutional elements of the NAT. As demonstrated above, the NAT provisions are transformative and have institutional potential, but need to be combined with certain empowerments, and the establishment of the decision-making procedures. Articulated international institutions are not created by simple collective decisions and therefore such actions do not make an international organization. For this reason, it is imperative to develop the necessary institutional enablers. In the present case, the NAT provisions contain elements that turn the majority of them into institution makers. They facilitate the obligatory institutional dialogue, the result of which is the inauguration of a functional institutional forum. The outcome of this forum was the establishment of “a fully-fledged consultative and behavioral regime amongst the NATO membership”.[[440]](#footnote-440)

NATO’s institutional embodiment for implementing the inherent right of collective self-defence is the North Atlantic Council in conjunction with its ‘specialized’ subordinate bodies. The Council is the NATO’s plenary and although NATO might not appear to be a ‘full articulate international institution’,[[441]](#footnote-441) the Council still deploys full functional structures and procedures - organizing and converging ‘divergent’ interests into the collective one. This takes place with resolutions/decisions and policy emanating from the members’ interactions, as a result of the negotiations at the Council and subordinate bodies. The institutionalization of said convergence of interests transforms and invigorates the momentum created by the NAT.

Yet decisions in NATO reflect the expression of the “collective will of the sovereign member states, arrived at by common consent and supported”.[[442]](#footnote-442) From a legal standpoint, the nature of NATO’s decisions vary according to whether they are internal or external decisions, i.e., if the [administrative] acts of the North Atlantic Council are intended to affect the organization only, or to affect external actors in the international arena. However, decisions taken in the context of any international organization have a certain legal effect. NATO states implement the Council’s decisions because they reflect the collective will, the violation of which would amount to contravention of the NAT and therefore constitute a breach of their obligations.[[443]](#footnote-443) This can be explained since NATO maintains that each member state “retains full responsibility for its decisions, and [for this reason it] is expected to take those measures necessary to ensure that it has the domestic legal and other authority required to implement the decisions which the Council, with its participation and support, has adopted”.[[444]](#footnote-444) On the other hand, some internal decisions are solely implemented by NATO’s institutions - in the majority of cases by NATO’s institutions with military functions - and not the constituents. In any case, as Blokker argues: members of an international organization “are intensively involved in the decision-making and more in general in the overall [of its] functioning”.[[445]](#footnote-445)

What is the value of a NATO decision? In general, such a decision cannot be analyzed only in the context of NATO’s decision-making process; the architects of the initiatives must also be identified.[[446]](#footnote-446) In NATO, these initiatives come not only from member states, as the main instigators, but also from those leading NATO’s common organs, such as the Secretary General, the Director General of the International Military Staff, and the Supreme Commanders. In this way, NATO’s institutions play a major role in incorporating items and proposals into the agenda of the North Atlantic Council and its subordinate boards and committees. NATO’s institutional power to put forward initiatives can be seen in the terms of reference to its institutions. Whilst most of these documents remain classified, those issued at the beginning of the organization’s works, such as the terms of reference for the Supreme Allied Commander Europe (SACEUR), have now been declassified. This document permits the SACEUR:

“Making recommendations, as necessary to the Standing Group and to nations on infrastructure, training standards, adequacy of forces, priorities for the organization of forces, construction of facilities for training, housing and supporting forces, and such other military matters as will affect his ability to discharge his war and peacetime missions”.[[447]](#footnote-447)

Another example is the North Atlantic Council Resolution of December 1956, which gave authority to the Secretary General “to offer his good offices informally at any time to member governments involved in a dispute and with their consent to initiate or facilitate procedure of inquiry, mediation, conciliation, or arbitration”.[[448]](#footnote-448)

NATO’s decision-making process starts in a series of meetings of subordinate boards and committees before reaching the final decision-maker, the North Atlantic Council. The Council holds the legal basis for any decision at NATO. Decision-making is of the utmost significance for international organizations as it is the process that collects “all mutual consultations, fact-finding, studies and debates”[[449]](#footnote-449) within their institutions, and leads to an outcome with legal internal or external effects. In this respect, the Council counts on an extensive system of boards and committees covering everything from political, to technical, and operational issues.

The NAC is the principal political decision-making body within NATO and it is the only organ established by the NAT, which in turn and under Article 9 was authorized to set up subsidiary bodies as may be necessary for the purposes of implementing the Treaty. The Council was very successful in establishing a network of committees, so as to facilitate NATO’s work. The principal NATO committees are the Nuclear Planning Group (NPG) and the Military Committee (MC). The Defence Planning Committee (DPC), was disbanded in June 2010 and the NAC took over its functions.

In addition to the NAC, the NPG, and the MC, there are also a number of other committees that report directly to the NAC. Some of these are supported by working groups, especially in areas such as defence procurement. In June 2010, NATO launched a reform process focused on the review of NATO Command Structure and NATO Agencies, and NATO Committees. As such, committees reporting to the NAC now include the following: Deputies Committee; Political Committee; Partnerships and Cooperative Security Committee; Defence Policy and Planning Committee; Committee on Proliferation; C3 Board; Operations Policy Committee; High Level Task Force on Conventional Arms Control; Verification Coordinating Committee; Conference of National Armaments Directors; Committee for Standardization; Logistics Committee; Resource Policy and Planning Board; Air and Missile Defence Committee; NATO Air Traffic Management Committee; Civil Emergency Planning Committee; Committee on Public Diplomacy; Council Operations and Exercises Committee; Security Committee; Civilian Intelligence Committee; and the Archives Committee. Additionally, there are institutions of cooperation, partnership, and dialogue that underpin relations between NATO and other countries: the Euro-Atlantic Partnership Council; the NATO-Russia Council; the NATO-Ukraine Commission; and the NATO-Georgia Commission.[[450]](#footnote-450)

There are other structures not cited above, comprising boards and subordinate committees, such as the Resources Plans and Policy Board and its two committees (for budget and for investment (infrastructures)). Besides this, and in a *sui generis* manner, the Organization’s defence side, i.e. the integrated military structure or NATO Command Structure, would form part of this committee system. The NATO structure works hierarchically, although nations can still have an influence on military advice provided by the Supreme Commanders with their assigned seconded personnel when providing military advice for the planning and conduction of NATO activities. This is a characteristic exclusive to NATO and it takes place by the allocation of posts to NATO’s Peace Establishment. The number of flag officers and full colonels in the command groups and directorates therefore also indicates the areas of interest of certain NATO states. The NATO Command Structure, led by the Supreme Headquarters, as executive common organs of the Organization, must be considered the element that implements NATO’s collective decisions. Due to their peculiar leading role with respect to NATO’s initiatives, these common organs are in turn major contributors to NATO’s decision-making process.

NATO’s system of boards and committees organization is what Eriksen calls the “the committee system of the NATO council”,[[451]](#footnote-451) something that can also be found at the EU and its ‘comitology’. This NATO’s system triggers an internal reaction chain of corporate will and feeds the community of interest. This serves to demonstrate the way NATO has found the [functional] “balance between dependence and independence”[[452]](#footnote-452) with respect to its constituents.

Regarding this balance, it is necessary to remark that it does reflect the dual position of member states in institutional decision-making. This could be explained by Scelle’s theory of *dédoublement fonctionnel* in international law. The theory is inspired by a view of an international community made of a Pleiades of legal orders, which interact with one another.[[453]](#footnote-453)

In NATO, this *dédoublement fonctionnel* can be found in the Deputies Permanent Representatives Committee (DPRC), created in 2010 in the framework of the NATO Committee Review, as a successor to the Senior Political Committee. The DPRC deals with cross-cutting issues ranging from strategic and political oversight of areas, and also with those issues on which no consensus can be achieved in other boards or committees. The DPRC is part of NATO’s decision-making process and reports directly to the North Atlantic Council, but it is distinct from each NATO member delegation and protects national interests. However, the DPRC is chaired by the correspondent [depending on the topic] Assistant Secretary General of the relevant NATO International Secretariat division, and is supported by NATO’s Political Affairs and Security Policy Division, with overall coordinating responsibility for its activities. This fact shows that the DPRC endeavours to achieve the objective given to NATO, entrusted in the North Atlantic Council by its constituents in 1949:[[454]](#footnote-454)

“The task of the Council is to assist the Parties in implementing the Treaty and particularly in attaining its basic objective. That objective is to assist, in accordance with the Charter, in achieving the primary purpose of the United Nations, i.e., the maintenance of international peace and security”,[[455]](#footnote-455) which brings out the dual role of NATO states when acting within NATO’s institutions.

This chapter does not seek to analyze each and every NATO committee as they are numerous, vary in their characteristics and, most importantly, are subject to continuous adjustments due to the adaption of structures and procedures a transformative and dynamic organization such as NATO requires. The goal is simply to describe NATO’s main structures and procedures, as well as to explain their institutional value in the decision-making process. In addition, to complement the analysis of NATO’s decision-making process, the question of unanimity and consensus in NATO can be addressed with respect to the organization’s institutional maturity, which presents a remarkable paradox.

#### 4.2 Five Institutional Transformations

The hallmark of NATO’s institutional dynamism is ‘organizational change’ in order to maintain the institutional momentum of its conceptual framework, which results in having very adaptable institutions. Such a characteristic is driven by both the need to count on institutions ready to provide answers to a changing international environment, and by the ‘obsession’ to continuously apply a policy of economies of scale looking for an effective and efficient use of scarce and competitive resources within and among NATO members. With this purpose, and since 1952,[[456]](#footnote-456) NATO has undergone several major transformations.[[457]](#footnote-457)

The first of those transformations took place in 1991 after the 1990 London Declaration on a Transformed North Atlantic Alliance,[[458]](#footnote-458) as a response to the end of the Cold War, and it created institutional momentum for the rest of the decade. NATO states would create the North Atlantic Cooperation Council, which became the Euro-Atlantic Partnership Council in 1997. This platform would permit Central European, Eastern European, and Central Asian states to discuss security and defence matters. The 1991 Rome Summit contributed to the major transformation of NATO envisioned in 1990 with a new Strategic Concept,[[459]](#footnote-459) and the Rome Declaration on Peace and Cooperation.[[460]](#footnote-460) These declarations started the ball rolling on a long transformation which was fuelled by several key initiatives:

1. The 1994 Brussels Summit & the establishment of the Partnership for Peace (PfP). [[461]](#footnote-461)
2. The Paris 1997 conclusion of the Founding Act on Mutual Relations, Cooperation and Security between the Russian Federation and the North Atlantic Treaty Organization.
3. The 1997 Madrid Summit, [[462]](#footnote-462) which:
   1. agreed to invite the Czech Republic, Hungary, and Poland to accede to the NAT;
   2. hosted the first meeting of the Euro-Atlantic Partnership Council (EAPC); and
   3. updated the 1991 Strategic Concept with a new defence posture; thus reforming the NATO military command structure.

And finally,

1. The 1999 Washington Summit[[463]](#footnote-463), which:
   1. Was the first time the Czech Republic, Hungary, and Poland participated at a summit meeting; and
   2. The NATO Heads of State and Government approved a new Strategic Concept in line with the new international environment in the Euro-Atlantic region:

“The driving force of the 1999 Strategic Concept was NATO’s operation in Kosovo. In accordance, the document is based on a regional approach, focusing on responsibility for the security of the Euro-Atlantic region and potential sources of instability its neighbourhood. In other words, NATO’s “out of area” activities in essence were restricted to the Euro-Atlantic region”. [[464]](#footnote-464)

The 1999 Washington Summit, which coincided with 50th anniversy, thus marked the culmination of this post-Cold War transformation.

The second major institutional momentum of transformation took place in 2002, in the aftermath of the 11 September attacks. In May 2002, the NATO-Russia Council replaced the NATO-Russia Permanent Joint Council. This initiative was followed by the 2002 Prague Summit[[465]](#footnote-465) where NATO invited Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, and Slovenia to begin accession talks and approved the “Military Concept for Defense against Terrorism”,[[466]](#footnote-466) as well as support in Afghanistan. The 2002 Istanbul Summit, apart from the expansion of NATO’s operation in Afghanistan, led to the provision of support to the Iraqi Interim Government with the training of its security forces, and the launching of the Istanbul Cooperation Initiative. The actual transformative initiative was to change NATO’s defence-planning and force-generation processes, which would serve to strengthen contributions to the fight against terrorism.[[467]](#footnote-467) Finally, the 2005, 2006, and 2008 summits modestly maintained the institutional momentum by strengthening the partnership between NATO and the European Union (2006); creating the Comprehensive Political Guidance “for NATO’s continuing transformation”;[[468]](#footnote-468) and inviting Albania and Croatia to start the accession process, respectively.[[469]](#footnote-469)

The third transformation started with the 2009 Strasbourg/Kehl Summit against the backdrop of the NAT’s 60th anniversary, during which NATO’s Heads of State and Government gave directions to evaluate and provide strategic direction for Alliance activities, i.e., a new Strategic Concept, which would be approved during the 2010 Lisbon Summit. This new initiative would bear in mind the “adherence to basic principles and shared values, as well as [to] the need for ongoing transformation.”[[470]](#footnote-470) Moreover, France’s decision to once again fully participate in all of NATO’s institutions, after the 1966 withdrawal from the integrated military structure,[[471]](#footnote-471) brought a new impulse to the Organization. It is necessary to note that the creation of the military structure must be considered both a major component and instigator of NATO’s institutionalization. In Lisbon, the new Strategic concept added a new dimension to NATO’s institutionalization by agreeing, *inter alia*, a policy and an action plan to incorporate what would later be considered an operational domain, namely, cyber defence. This and other initiatives, aimed at securing NATO’s position as a global actor, required a major reform of NATO’s military command structure, as well as its agencies.[[472]](#footnote-472) As Zapolskis observes, the 2010 Strategic Concept

“is highly influenced by the lessons learned from NATO’s operation in Afghanistan: the Alliance is committed to strengthen various aspects of crisis management (including stabilization and reconstruction tasks), ensure broader involvement of partners into the operational decision making process, etc. The global spectrum of NATO’s activities is also reflected in the assessment of strategic environment, which includes various ecological, climate change, resource factors, etc. In addition, the new Strategic Concept apparently is aimed at strengthening NATO as a global political forum”.[[473]](#footnote-473)

The changing international environment triggered further transformations. Russia’s annexation of Crimea and occupation of Eastern Ukraine in 2014, as well as the rise of Daesh / ISIL (Islamic State of Iraq and the Levant) and similar non-state actors continued to fuel NATO’s institutional momentum. During the 2014 Wales Summit the Readiness Action Plan was adopted, including a Very High Readiness Joint Task Force[[474]](#footnote-474) in order to deter Russia from any venture into NATO’s Eastern flank. The 2016 Warsaw Summit[[475]](#footnote-475) redirected NATO’s institutions to focus on two pillars: strengthening NATO’s deterrence and defence, and projecting stability beyond NATO’s borders, together with major cooperation with the European Union through the signing of the Joint Declaration with the Presidents of the European Council and the European Commission:

“The European External Action Service and the NATO International Staff, together with Commission services as appropriate, will develop concrete options for implementation, including appropriate staff coordination mechanisms …”[[476]](#footnote-476)

The 2018 Brussels Summit launched the fourth major transformation. It came to reinforce the above and confirmed NATO will continue to pursue a 360-degree approach to security: collective defence, crisis management, and cooperative security. This as a response of the current security environment: “We face a dangerous, unpredictable, and fluid security environment, with enduring challenges and threats from all strategic directions; from state and non-state actors; from military forces; and from terrorist, cyber, and hybrid attacks”.[[477]](#footnote-477)

The fifth transformation took place in June 2022 with a new Strategic Concept to include a NATO more focused on its values, and invokes NATO’s main purpose of ensuring Allies’ collective defence. This was reinforced by the Russian invasion of Ukraine in February 2022.[[478]](#footnote-478) The Strategic Concept includes the Peoples Republic of China (PRC) and qualifies PRC’s ambitions as a challenge for NATO’s interests, security, and values; since the PRC uses a broad range of political, economic, and military tools - using them in malicious hybrid operations. The Strategic Concept also states that the PRC “strives to subvert the rules-based international order [and that together with Russia, they are] mutually reinforcing attempts to undercut the rules-based international order” [[479]](#footnote-479) against NATO’s values and interests.

It can be submitted that NATO’s organization around a board and committee system strengthens the relative autonomy of NATO from its constituents. This system is also the manifestation of a transformative institutionalization, which conforms to a simple conceptual framework for making NATO institutions function; however, the institutional momentum has other sources. NATO’s institutional momentum continues to be propelled by NATO’s summits, declarations, and strategic concepts. Bland considers NATO’s conceptual frame is composed of three ideas:

1. NATO’s fundamental objective is the preservation of a way of life, i.e., a community of interest;
2. NATO’s defensive nature, which complements the primary United Nations’ purpose, the maintenance of international peace and security; and
3. NATO states are equal and the Organization’s institutions are the guarantors of that equality.

He argues that these ideas inspired a regime that actually creates the legal framework for NATO’s structure. This structure would “perform cooperative functions for the nations and the alliance” that result in a “consensus strategy”.[[480]](#footnote-480) In this respect, Bland considers NATO’s strategy, as a regime made of principles, norms, and rules, which is structured by three interacting elements - decision makers, institutions, and a decision making-process.[[481]](#footnote-481) Like in other international organizations the institutionalized system of boards and committees is a key characteristic of NATO’s decision-making process and a necessary forum for rule-led dialogue. This system has particular and functional procedures that aim to achieve a successful institutionalized multilateral diplomacy, complemented by an institutional momentum made of regular NATO summits, declarations, and strategic concepts.

The following analysis will concentrate on the North Atlantic Council, NATO’s decision-making body par excellence to which all the other elements of the committee system report. The boards and committees follow the same interactions as the Council. The source of that conduct is the terms of reference of the North Atlantic Council, which have inspired all subordinate bodies. This confirms unequivocally the Council’s hegemony in NATO’s committee system.

#### 4.3 NATO’s Decision-Making Process. Some Particularities

##### 4.3.1 Introduction

The decision-making in international organizations may have different ‘meanings’, i.e., it may refer to the ordinary functioning of the organization and to binding resolutions of the designated body or organ, or by the member states gathered in a summit. Traditionally, international organizations adopted unanimity as their decision-making method, this was as a result of sacrosanct sovereignty. The most common voting rule prior to the Second World War was unanimity. Unanimity represented the true embodiment of principles established by the Congress of Vienna, since the legal equality of states, as well as their primary actors for decision-making in the international system was, then, guaranteed. Moreover, unanimity further emphasized the principle of non-interference – which was supposed to help avoid unacceptable decisions by a potential minority. However, unanimity was discredited largely since it brought difficulties in decision-making as revealed by the (dis)functioning of the League of Nations, which could not resolve the conflicts for which it was created.

The deviation from sovereign equality in international organizations was predicated on distinguishing between ‘equality before the law’ and ‘equality of participation and responsibilities’.[[482]](#footnote-482) Bretton Woods confirmed that the Congress of Vienna and League of Nations were systems of control for the major powers based on their large participation and major responsibilities therein. However, the protests of the small nations demonstrates that they considered themselves to be at a direct disadvantage. These protestations made the UN change voting formulas in the General Assembly and the Economic and Social Council (ECOSOC), which resulted in a substantially increased participation of the smaller states. The IMF and World Bank took this issue even more seriously and adopted a different system by incorporating consensus decision-making in their decision-making processes.

Unanimity compromised the spirit of cooperation favouring those with major participation and responsibilities, so consensus started gaining traction as an efficient method to take decisions without a formal vote whilst still respecting small nations.[[483]](#footnote-483) It is rare to find the consensus decision-making process in any of the foundational treaties of international organizations with the exception of the World Trade Organization (WTO). The Marrakesh Agreement Establishing the WTO, states in Article IX, paragraph 1 that consensus should be the preferable and primary means of arriving at a decision.

At the very beginning of NATO’s history, the organization could not escape from the reality and dominance of the unanimity method, which quickly became the norm, despite not actually being required by the NAT for making decisions except in Article 10 for the admission of new members. However, during the 1970s, unanimity did not fit well with the evolution of decision-making processes happening in other international organizations, and NATO gradually adopted decision-making by consensus, which, while it respects sovereignty, does not disregard the interests of the majority of member states. It should be highlighted that today, NATO decision-making by consensus differs from unanimity voting in that it does not give a veto to each NATO member. Even so, neither the NAT nor the three general multilateral treaties codify NATO’s decision-making process.

NATO’s principal decision-making institution is the NAC, which consists of representatives of all member states. The first NATO Secretary General, Lord Ismay, said that “[a]t the summit of the organization is the North Atlantic Council. This is in effect an international cabinet for NATO affairs”.[[484]](#footnote-484)

There are three different types of NAC meetings: normal sessions, restricted sessions (confidential business), and informal sessions (without formal decisions, just for exchanging preliminary views). Apart from weekly meetings attended by ambassadors, i.e. heads of their respective permanent representations, the Council also meets twice a year at the level of foreign ministers or defence ministers and in the form of summits at the level of Heads of State and Government. Ismay states[[485]](#footnote-485) that the Council had no written rules of procedure, but that since 1949 discussions were in both French and English, and decisions were taken unanimously.[[486]](#footnote-486)

Seventy years later, these rules of procedure continue to be absent, but procedural practice is well established and consolidated. It is noted, that the principle of unanimity not only presented NATO as a purely intergovernmental organization, but also showed that the Council is not an ‘almighty’ supranational body.[[487]](#footnote-487) Maybe this is the reason why NATO does not expect episodes like that of Brexit in the EU as “[t]he *sine qua non* of the alliance is the unconditional sovereignty of member states”.[[488]](#footnote-488) In principle, unanimity entices states that do not want to be outvoted and in turn favors the implementation of decisions, as general support exists from their inception.[[489]](#footnote-489) However, NATO moved from unanimity to consensus because this protected the equal right of all NATO members to express their views at the Council.

By means of the principle of decision-making via consensus, NATO members have a full opportunity to be involved at every stage of the decision-making process, and the committee system is the conduit of that involvement. This also permits the nations the ‘non-participation in the vote’, i.e., “not wishing to vote either “yes” or “no”, states are passive and completely dissociate themselves from the vote. It is also different from “absence,” because the member in question is present during the vote”.[[490]](#footnote-490)

This applies at every level of the organization, as all member states may participate on an equal basis in all committees and other subordinate bodies within NATO.[[491]](#footnote-491) NATO’s institutions are the conduit that permits a fluid decision-making process, resulting in the institutionalization of NATO’s multilateral diplomacy. This multilateral diplomacy brings specific dynamics to NATO’s unique cross-border relationship; this could be described by saying that participating states play two roles: a) that of debtor, and b) that of creditor. This dynamic enables states to interchange those two roles during their intercourse based on unilateral or community interests, or simply by internal and external circumstances. In certain situations, NATO members act as receiving states, holding an enormous political and logistical burden that also affects their ordinary domestic national life. On other occasions, NATO members are sending states, expecting to receive a level of logistical support similar to what they would expect in turn. Despite this, public opinion in NATO states evidently varies depending on their role as creditor or debtor.

##### 4.3.2 Particularities of NATO’s Decision-Making Process

Notwithstanding the above, the NAC’s functioning has certain particularities. The Council’s administrative acts are called ‘decisions’, although until the mid-1960s they were named ‘resolutions’.[[492]](#footnote-492) Why such a change? After comparing documents issued during the 1950s and 1960s, two conclusions can be drawn in this respect. First, North Atlantic Council decisional acts were labelled as resolutions, in order to differentiate them from those of the subordinate bodies, called decisions.[[493]](#footnote-493) Since NATO was born somehow as a reaction to a situation where the United Nations Security Council was non-functional, due to the Soviet Union’s abuse of its veto power, NATO members could have had the intention to coat their administrative acts in ways similar to those of the Security Council.[[494]](#footnote-494)

Secondly, after the Reykjavik Summit, held 24-25 June 1968,[[495]](#footnote-495) NATO stopped using the term ‘resolution’. Since then, no documents refer to Council acts as resolutions. The change can first be observed in the NATO Handbook of 1969,[[496]](#footnote-496) which already avoided using the term ‘resolution’ when referring to the political and administrative acts the North Atlantic Council took in the exercise of its powers conferred by the NAT. Indeed, since the 1970s, the term ‘resolution’ has been absent from NATO terminology. There are no clear findings, which explain the reason for this change. However, a plausible explanation, following the chronology of events, can be found in France’s approach to NAC’s resolutions of a binding nature. The ‘bindingness’ of, at the time, NAC resolutions were disparaged by the event of nuclear weapons control in NATO, which followed the *de facto* application of the McNamara doctrine with no NAC authoritative decision-making on the matter.

As discussed in previous chapters, NATO’s common political and administrative acts are always preceded by discussion and consultation. This is required by the treaty obligation laid down in Article 4 of the NAT, and is intended to promote political cooperation, cohesion, and interdependence. The NAT did not establish a voting decision-making process for the daily operations, and since the Treaty was silent on any rule of procedure for the decision-taking acts of the North Atlantic Council, NAT signatories adopted the principle of unanimity. This was the formula established by Article 10 of the NAT for the admission of new NATO members, and not as the ordinary means for NATO’s decision-making process. Yet, something similar to the evolution seen above from ‘resolution’ to ‘decision’ occurs with the terms ‘unanimity’ and ‘consensus’. At the beginning of NATO’s history, the decision-making process was based solely on the unanimity principle, and it was not until the end of the 1970s that the term lost prominence to, and was eventually replaced by, consensus practice, except for the admission of new members. What happened?

The evolution is not easy to follow since the analysis uses data based on NATO publications and institutional practice. Therefore, the reason for change appears to be closer to institutional dynamics provoked by political events rather than by political decisions. Although it was not until the late 1970s that the evolution of NATO’s decision-making process catalyzed into the practice of consensus, in 1959 Secretary General Spaak already identified the unanimity rule as foiling inter-state cooperation:

“I myself believe that international organizations, whether they are universal, Atlantic, or Europa, will not really function well until the day when the strict rule of unanimity will have been abandoned. But one must certainly recognize that, in saying this, I or people who share this feeling are far ahead of their time”.[[497]](#footnote-497)

Why did this change happen in the 1970s and not before? What happened in NATO at that time? The answer appears to be in the effects created by the Harmel Report, which spread throughout the 1970s and into the 1980s:

“the Harmel initiative reflected the influence of the smaller members of the Alliance upon the larger powers, particularly upon the superpower, the United States. NATO's acceptance of the message in that report blunted centrifugal pressures that might have led to the Alliance's dissolution. It also set NATO on a course that ultimately led to the end of the Cold War”.[[498]](#footnote-498)

NATO texts used the terms ‘unanimity’ or ‘unanimous’ until 1976, but the 1976 NATO Facts and Figures avoids mentioning the term when referring to the works of the North Atlantic Council. The evolution continues, and the 1978 NATO Handbook[[499]](#footnote-499) did not make reference to the term ‘unanimity’ nor the term ‘consensus’, but rather ‘common consent’. This might have been symptomatic of NATO’s institutional maturity as well as of a by-practice revelation that unanimity would not benefit NATO’s inherent institutional dynamics. In any case, NATO’s consensus always preserves its intergovernmental nature where the common decision is formed at the NAC.

This evolution ran necessarily in parallel to that of NATO’s institutions. In this state of affairs, the term ‘consensus’ appears in the 1981 NATO Facts and Figures referring to it as the tool used not only by the North Atlantic Council, but also by its subordinate committees.

“The other items which come to the Council for discussion and decision cover all aspects of the Organisation’s activities, and are based on documents prepared by the Council's subordinate committees. These documents contain recommendations which are then adopted unchanged or modified by the Council itself to reconcile divergent views and arrive at a consensus”.[[500]](#footnote-500)

What is the explanation for such a terminological evolution? Does it have any institutional meaning? In accordance with the paragraphs above, the brief explanation for such evolution appears to be in the domain of institutional dynamics driven by both the evolution of decision-making in other international organizations, and NATO’s political and institutional self-conscience requiring a more inclusive decision-making process to keep the Alliance’s coherence. In fact, the meaning could be explained by considering that this evolution is correlative to the institutional maturity of an international organization, as well as the realization that unanimity limits international cooperation. This evolution likely relates also to NATO’s inherent intergovernmentalism, which provides NATO members with an opportunity to interfere in NATO institutions’ autonomy and eventually affect matters relating to international responsibility.

#### 4.4 NATO’s Institutional Maturity

This Section will analyze how NATO’s institutional maturation has influenced the evolution of NATO’s decision-making procedures, from unanimity to decision-making by consensus.

International publicists appear to agree that in the plenary of an institution, unanimity represents the agreement of all members of that institution,[[501]](#footnote-501) i.e., it would be a “positive consent”.[[502]](#footnote-502) The ‘rule of unanimity’[[503]](#footnote-503) is the consequence of “*la defense de la souveraineté*”,[[504]](#footnote-504) which betters explains why states chose this rule in the 19th century during the inception process of modern international organizations. At that time, the development of the machinery of international institutions was in an early stage, and practice on collective decision-making had yet to be developed. In principle, the rule of unanimity was ideal for permitting small states to overcome their natural reluctance to engage in ‘joint ventures’ with big states, although it also made them vulnerable. States could “be held hostage of one bad actor”,[[505]](#footnote-505) which would detract autonomy from international institutional constructs and eventually would not favor full cooperation among sovereign states. The unanimity rule became then discredited, as it “slow[ed] the momentum of institutional life and permit[tted] backsliding towards anarchy,”.[[506]](#footnote-506)

In this state of affairs, it can be argued that unanimity pretentiously justifies equality among states, but it is actually a burden for international institutions “[b]y reducing international cooperation to the lowest common denominator of sovereign accord”.[[507]](#footnote-507) “Unanimity emasculates the institutions and sabotages sovereign cooperation”[[508]](#footnote-508) as it also reduces international institutions’ autonomy. The result is that “unanimity was unworkable in practice”[[509]](#footnote-509) and permitted member states to negatively influence international organizations’ operations. In the same vein, Bederman cites the 1940 volume of Cromwell Riches, *Majority Rule in International Organization*, who argues that the League of Nations “utterly failed because of its strict application of a unanimity rule”.[[510]](#footnote-510)

An example of the unworkability of the unanimity rule occurred in the 1960s at NATO. The NAC adopted in 1957 the so-called Dulles doctrine of massive, immediate atomic retaliation in compliance with NATO’s basic aim to avoid war by persuading a potential aggressor that an attack against any NATO member would not pay. For its implementation, the nuclear force of the United States was integrated within NATO. This arrangement did not last very long, as in 1962 the United States withdrew its NATO nuclear commitments as soon as it learned that the Soviet Union was able to reach American territory with its nuclear missiles. The intention was to replace the Dulles doctrine by one aimed at lessening the risk of a nuclear holocaust (McNamara doctrine). “Since unanimity was required in the Council, France was able to prevent the Council from rescinding its 1957 decision and formally adopting the new strategy”.[[511]](#footnote-511) It was not until 1967, a year after French withdrawal, that the NAC changed it. The unanimity rule provoked a clear lack of cooperation. Moreover, the situation evolved to the point that between 1962 and 1967 the NATO Supreme Commander Allied Powers Europe (SACEUR) applied the McNamara doctrine *de facto* without any legitimation by the NAC. This situation undermined NATO institutions and sabotaged the cooperation of member states. In this vein, Beer maintains that:

“[t]he general weakness of NATO institutions went together with a lack of NATO authority in specific situations. Thus NATO political consultation did not lead to authoritative decision-making on issues of primary importance to the participants – issues such as Algeria and Tunisia, Cyprus, Berlin, the Congo, Cuba, arms control, or Vietnam. Occasional exceptions - like Malta - together with the co-ordination of some minor issues were only dim candles”.[[512]](#footnote-512)

An interesting example, and taking into account that “positive consent”[[513]](#footnote-513) is a requirement for reaching agreement when the decision making mechanism is unanimity, is the *Application of the Interim Accord of 13 September 1995 case* in the former Yugoslav Republic of Macedonia v. Greece, known as the ‘FYROM case’.[[514]](#footnote-514) The analysis of this case intends to illustrate both that unanimity in NATO now remains only for the admission of new members – per Article 10 of the NAT, and that the nature of NATO’s unanimity and consensus is neither understood nor distinguished by relevant third parties outside NATO.

The case started when Former Yugoslav Republic of Macedonia (‘FYROM’) brought an application against Greece before the International Court of Justice for opposing its NATO membership. Greece’s reason ‘to oppose’ at the NAC was the use of the FYROM constitutional name – the Republic of Macedonia. Paragraph 111 of the Court’s judgment refers to Greece’s “duty” [to exercise judgment as to membership decisions that frees the Respondent from its obligation not to object to the Applicant’s admission to an organization] under a prior treaty, i.e., Articles [8 and] 10 of the NAT. The Court analyzed whether the NAT would take precedence over obligations in the Interim Accord signed between Greece and the Former Yugoslav Republic of Macedonia, and the NAT imposes a duty on Greece to object to admissions to NATO. Greece argued that it has duties [international obligations] under the NAT “with which it cannot comply without being in breach of its obligation not to object to the Applicant’s admission to NATO” [both Articles 8 and 10]. The Court considered that Greece presented:

“a general ‘right’ to take a position on membership decisions into a ‘duty’ by asserting a ‘duty’ to exercise judgment as to membership decisions that frees the Respondent [Greece] from its obligation not to object to the Applicant’s [the former Yugoslav Republic of Macedonia] admission to an organization ... *the Court concludes that the Respondent [Greece] has not demonstrated that a requirement under the North Atlantic Treaty compelled it to object to the admission of the Applicant to NATO*”. (emphasis added).

Although the Court focused on Greece’s conduct at the NATO Bucharest Summit (paragraphs 42, 50 and 67), the Court later (paragraphs 110 and 111) creates a dangerous precedent. The Court disregarded Greece’s NATO obligations (paragraph 111) with no legal argument other than giving the Interim Accord a superior value than the NAT, contrary to its Article 8.[[515]](#footnote-515)

The Court neither referred to Article 8 of the Treaty, nor analyzed the actual nature of unanimity. In fact, it replaced unanimity for consensus, without making the necessary differentiation between both decision-making principles, and definitely skipped the unanimity principles established in Article 10 of the NAT. In doing so and even if the decision of the Court was almost unanimous, it overlooked bluntly both Articles 8 and 10 of the NAT and validated the argument of the FYROM; thus mixing unanimity and consensus, and treating them as synonyms in the judgment, see *infra*. This stripped the principle of unanimity of its inherent ‘positive consent’.

“68 … In the Applicant’s view, the act of objecting is not limited to casting a negative vote. Rather, it could include any act or omission designed to oppose or to prevent a *consensus* *decision* at an international organization (where such *consensus is necessary for the Applicant to secure membership*) or to inform other members of an international organization or institution that the *Respondent will not permit such a consensus decision* to be reached. In particular, the Applicant notes that NATO members are admitted *on the basis of unanimity* of NATO member states, in accordance with Article 10 of the North Atlantic Treaty”. (emphasis added)

The Court appears to align itself with FYROM’s argument, which intentionally forgets Greece’s international obligation *per* *ex ante* treaty in accordance with Article 8 of the NAT and confuses unanimity with consensus, disregarding Article 10, which expressly codifies unanimity as the decision-making rule for admitting new members. In the judgment, the Court disregards both the well-recorded evolution in the decision-making mechanisms of international organizations, i.e., from unanimity, through majority vote, to consensus, and NATO’s history in this regard. It is necessary to remember that consensus does not impose any obligation on NATO states, indeed the practice of this decision-making technique is such that NATO uses it extensively in its modality of ‘silence procedure’ for the daily activities of its institutions. Admitting a new member in any international organization is most likely a change of balance of influences, if not powers. This is why unanimity was made the rule for this decision in NATO and not consensus. Unanimity would impose on each Ally the obligation to explain why or why not a candidate is admitted.

The NAT remains silent on the decision-making method other than, as already explained, in matters relating to admitting a new member per Article 10. Unanimity was also used for more than twenty years to make daily decisions. However, at the end of the 1970s consensus [referred to as silence procedure] was adopted. Changing their decision-making process was NATO members’ discretional prerogative, as they have no treaty obligation with respect to institutional daily dealings. NATO changed from unanimity to consensus due to the internal developments highlighted in the Harmel Report, inspired both by NATO’s internal ideas from mid-1950s[[516]](#footnote-516) and as a result of an institutional maturity trend in most post-Second World War international organizations.

The need for NATO international cooperation and strengthened institutions made NATO members gradually adopt in 1970s[[517]](#footnote-517) a new practice in their decision-making process; consensus replaced the politically obsolete unanimity. Consensus was adopted to bring a reasonable stability – balance, to NATO’s decision-making process. Since then, and more significantly, NATO’s institutional maturity permitted states establishing a new and functional manner to implement NATO’s decision-making.

Certainly, the NAT imposed on its signatories only one decision-making process, i.e. unanimity, and this only for the admission of new states. Since unanimity imposes a ‘positive consent’, it turns the ‘right’ of expression of national interests into a ‘duty’ towards the other members. This ‘duty’ means that to reach unanimity all must agree, and no one can remain silent. Abstention cannot happen if there is to be a unanimous decision. In the ‘unanimity world’ there is only place for ‘speaking up’, i.e., the ‘duty’ to manifest individual interests to the other allies. Therefore, and by treaty obligation, Greece could not remain silent, because the circumstances – inviting a new NATO candidate - imposed unanimity *per* Article 10 of the Treaty. As such, Greece had a ‘duty’ *vis-à-vis* the other NATO members to vote against the motion. Moreover, Greece could have renounced to the NAT’s obligations in Articles 8 and 10. However, nothing indicates this event took place, to the contrary, Article 22 of the Interim Accord of 13 September 1995 reinforces the current analyses: “This Interim Accord … [does] not infringe on the rights and duties resulting from bilateral and multilateral agreements already in force that the Parties have concluded with other States or international organizations”.

Consequently, Greece received an unfavorable judgment for having honoured its obligation, which was its ‘right’ and its ‘duty’ per a preceding treaty. France behaved in a similar manner in the late 1950s. France applied unanimity in its *plenitude*, i.e., as a ‘right’ and as a ‘duty’ in the context of NATO’s nuclear power (McNamara doctrine) - when unanimity ruled NATO institutions’ daily operations,[[518]](#footnote-518) and consensus was not yet the decision-making process.

The analysis of the Court should have taken into account the conduct and not the result. Moreover, the Court could have taken into account that before the NATO Bucharest Summit, Greece made statements not favorable for the admission. Indeed, these statements were Greek’s ‘duty’ imposed by not only Articles 8 and 10 of the NAT, which neither permitted disregarding previous international obligations nor applying the silence procedure,[[519]](#footnote-519) but also by Article 11.1 of the Interim Accord. On the latter, the condition was to honour the UNSCR 817 (1993). Most likely, the reason why Greece never disputed the authenticity of those statements (see paragraph 73 of the judgement) it is that it gave priority to the decision-making procedure established in 1949 that remains unchanged for the admission of new members to NATO, i.e., unanimity, which requires an actively stated vote in favor of a measure. Moreover, and because Greece also honoured Article 8 of the NAT, since there is no evidence that Greece waived it in favor of the Interim Accord. The Court appears to have disregarded these fundamental elements of fact in the final judgement and brought in confusion on what unanimity and consensus is and means in NATO.

In order to illustrate the above, and show how differently Greece acted under consensus, it is worth submitting the 1999 NATO Kosovo campaign decision-making events. During the Kosovo crisis, it was clear to all NATO members that Greece was at odds with a proposal to run a NATO bombing campaign against Serbia. Consensus, in NATO, does not require allies to vote in favor, but rather to present explicit objections, i.e., break the silences produce. Greece chose not to break silence. [[520]](#footnote-520) Greece being in disagreement did not need to say why it was not in favor of the campaign, knowing its allies wanted to do it. In the unanimity context, Greece would have been forced to make a statement of its disagreement.

Moreover, if NATO may look a *rara avis* for conserving unanimity for admitting new members and not having reinterpreted Article 10 over the years, it is good to look at the EU. The EU seeks unanimity on key issues, like when new members are invited to become part of the Union. With the background of the above case, the following paragraphs will explain in detail NATO’s decision-making process by consensus.

##### 4.4.1 Consensus by Silence Procedure

By using Monaco’s definition of consensus, i.e., “*le consensus signifie l’absence de toute objection exprimée par un représentant et présentée par lui comme constituant un obstacle à l’adoption de la décision en question*”,[[521]](#footnote-521) a better start for understanding NATO’s consensus can be obtained. In NATO, consensus is reached by the NAC through a process in which no member presents an objection, and it represents the willingness of NATO members to avoid formal voting to adopt decisions, and consequently to negotiate until all NATO members feel comfortable in their own way with the final outcome. [[522]](#footnote-522)

In NATO, the agreement reached consists simply in not breaking silence, i.e., absence of objections,[[523]](#footnote-523) and it is known as the ‘silence procedure’. This procedure is used in the daily functioning of the organization and has become practical within NATO as it permits member states in opposition to a specific action to avoid confronting other NATO members at the NAC table. The silence procedure functions through the idea that “by not sending a letter to the Secretary General within a specified time period, a government can avoid the step of stating its explicit objection to a policy if it believes other allies are set on a course of action”.[[524]](#footnote-524)

It appears evident that the silence procedure is an incentive for NATO members to contribute easily to the collective will. There is also a reputational element, since an ally breaking silence does so at risk of bearing a stigma. Moreover, another effect is that as the break silence deadline approaches and silence is kept, a potential objector State would start assuming the collective institutional agreement and avoid national isolation by breaking silence.

“The constant consultative process as well as the “Silence Procedure” offers the potential for member countries to relinquish a degree of autonomy to the collective will of the organization. The repeat-contact between Permanent Representatives undoubtedly creates an environment that discourages recognizable isolation from the collective aspirations of the institution. Although most likely unintended, these subtle facets of the international institution serve to soften the rigidity of ‘consensus-only’ decision-making. The resulting flexible-consensus provides the opportunity for greater institutional democratization through an enhanced focus on the will of the collective”.[[525]](#footnote-525)

A benefit of the silence procedure is that NATO members do “not [need] to take positions publicly, which can again serve to insulate them from their domestic critics”. [[526]](#footnote-526) In this respect, the procedure was key during the Kosovo bombing campaign and masterfully used by Secretary General Solana “so that members could remain silent as NATO moved forward”.[[527]](#footnote-527) It should be pointed out that Kosovo challenged the NAC capacity to maintain consensus during military actions. This was demonstrated during the three phases of the targeting process. Each phase was an escalation over the previous, and each required NAC approval. During Phase I, targets were indisputably military targets, while in Phase II targets were infrastructure. However, Phase III targets were, *inter alia*, law enforcement facilities involved in ethnic cleansing, mostly located in city-centres, which was controversial among NATO members.[[528]](#footnote-528)

In February 2003, consensus practice failed to start defence planning for Turkey, as France, Belgium, and Germany objected to providing military assistance. The procedure has proven to be more successful when only one government intends to break silence. Nevertheless, in this case the United States removed the question from the NAC and left it for the Defense Planning Committee (DPC) to approve Ankara’s request for assistance under Article IV. This raised the question as to whether the other NATO members attempted to weaken the principle of consensus. It appears not, as NATO had taken decisions on military operations at the DPC in the past, since France was not part of the DPC due to its withdrawal in 1966. It was only from 1992, when France wished to participate in the arms embargo in the Adriatic Sea, that the rest of the allies transferred the decision-making authority for operations to the NAC. This set the precedent for subsequent NATO-led operations.[[529]](#footnote-529)

What does consensus offer to the decision-making process? In NATO, the silence procedure preserves the practice of consensus and elevates it to the collective desire to maintain political solidarity during difficult situations, which is the natural and functional environment of NATO. Consequently, the meaning of consensus among NATO sovereign states, where each independently takes the decision to cooperate in the NATO institution, is an expression of international solidarity and cooperation, and a confirmation that the unanimity principle is not of use for NATO’s daily functioning.[[530]](#footnote-530)

It is interesting to note Monaco’s appraisal of the two stages of the use of consensus, as it helps to understand that NATO’s change from the principle of unanimity to the practice of consensus was triggered by the NATO members’ desire to bring the organization to another institutional stage. Monaco argued that consensus is used in two different phases of the decision-making process, i.e., the phase that refers to the actual conditions and procedures to adopt a collective decision and the decision proper. [[531]](#footnote-531) In the first case, the NAC would use consensus to facilitate NATO members’ cooperation: “Consensus decision-making means that there is no voting at NATO. Consultations take place until a decision that is acceptable to all is reached”.[[532]](#footnote-532) In the second case, it would refer to the actual NAC decision, i.e., the NAC has reached consensus on a specific matter: “A decision reached by consensus is an agreement reached by common consent, a decision that is accepted by each member country”.[[533]](#footnote-533)

Finally, it must be explained why consensus has become the decision-making process in NATO. A *prima facie* explanation would be that smaller NATO members wanted to exercise more influence.[[534]](#footnote-534) This would be something similar to what happened with developing countries in the International Monetary Fund (IMF) and their strong opposition to taking decisions weighted in favor of the few rich IMF members.[[535]](#footnote-535) Schermers and Blokker argue that consensus was a solution that “reconcile[d] the apparently irreconcilable”,[[536]](#footnote-536) as it is able to look after the interests of the majority of the member states of an international organization. Translating this into NATO terms, it could be submitted that NATO’s existential crisis in the 1970s, where smaller members where not on the same ‘wave length’ as the larger powers, and particularly the United States, led the organization out of the dire straits of dissolution that threatened it[[537]](#footnote-537) by adopting the consensus practice as its general decision-making tool. The providential silence decision-making process permitted the NAC, in its first meeting, to adopt the principle of unanimity in its terms of reference[[538]](#footnote-538) and in the late 1970s, without annulling its own resolution, to implement consensus by practice. Yet, it is necessary to consider whether this change also found support in the fact that in the late 1970s NATO had already counted on a solid construction of institutional mechanisms through the committee system explained above.

In order to answer this question, reference must be made to the consensus disadvantages pointed out by Schemers and Blokker – no recorded vote, private character of negotiations, time-consuming negotiations, and mild content of decision - that Kennedy[[539]](#footnote-539) filters under an institutional analysis. This permits Kennedy to argue that adopting consensus by international organizations is its forward ‘movement’ that results in:

“institutional maturation through reform … [i]n consensus … the institution seems to speak as a whole … [and] suggests a pure speech situation which translates membership directly into organization behavior … The move from unanimity … to consensus tracks a maturation of the plenary. Unanimity suggest an immature plenary, constantly recapitulating the moment of [the] establishment [of the organization]. Consensus suggests a mature organizational voice finally released from its members”.[[540]](#footnote-540)

In NATO, consensus came to confirm the impetus of the momentum that the NAT establishes in its Preamble. The establishment of consensus by silence procedure for the functioning of the organization came to confirm more than twenty years of NATO’s institution building and its continuous collective will to balance individual members’ influence in the organization’s institutions. In this manner, NATO was able to demonstrate the maturity of its institutions committed to the pleas of the NAT constituents– international obligations - in an endless ‘David Kennedy’s aspirational momentum’. However, the fulfillment of NATO’s functions established by the NAT and the ‘rules of the organization’ also beg the question of the institutional decision-making consequences, addressed in Part II of this dissertation.

#### 4.5 Conclusion

NATO achieves institutional dynamism through continuous transformation triggered by regular summits, declarations, and strategic concepts. This dynamism requires the relentless adaption of its institutions in order to react to a rapidly changing international environment, which was facilitated by the ‘barebones’ nature of the NAT. These changes have also driven the Organization to use new terms, which have adapted NATO practices. The terminology change bespeaks NATO’s inherent institutional dynamics and maturity, which, in turn, complement NATO’s institutional momentum. A good example was the adoption of consensus as a decision-making tool, which increased the institutional democratization of NATO.

The NAC and its subordinate bodies shape NATO’s institutional *corpus* in order to implement the right codified in Article 5 of the NAT. This institutional embodiment looked to create harmony among Allies and the common organs for the benefit of NATO’s citizens. The NATO members individually retain full responsibility for its decisions because NATO members are involved in NATO processes at all levels by means of NATO’s board and committee system, which invigorates the momentum created by the NAT.

One of the decision-making particularities of NATO is the transition of NAC decisional acts from resolutions to decisions. It could have been due to NATO’s original intentions to ‘replace’ the United Nations Security Council when this was non-functional, due to the Soviet Union’s abuse of its veto power, and then NATO tried to emulate the Security Council’s decisional acts. However, NATO moved away from this naming and adopted the term ‘decision’ in 1968.

Another example is the switch from unanimity to consensus. The change in 1957 from Dulles doctrine, on atomic retaliation with a United States nuclear force integrated within NATO, to the McNamara doctrine, non-integrated United States nuclear force, tested unanimity. The unanimity rule highlighted an obvious lack of cooperation among Allies. This situation also undermined NATO institutions. Unanimity was a well-accepted decision-making practice among international organizations and NATO practiced it actively in spite of not being codified in the NAT other than for admitting new members. However, during the 1970s, as a result these bitter experiences, NATO gradually replaced unanimity with consensus, which was also in line with a new trend among international organizations. Consensus became the NAC’s primary process for making decisions on relations with the Partners, the NATO budget, NATO military activities, and even the invocation of Article V. Consensus in NATO works by silence procedure, where an Ally can choose not to pose an objection, while unanimity would require an actively stated vote in favor of a decision.

The case of FYROM’s application to become a NATO member and the opposition of Greece serves to illustrate how consensus and unanimity work in NATO. Some of the ICJ’s misunderstandings on how these two decision-making principles work lead them to condemn Greece’s behaviour. Greece, by treaty obligation, could not use the consensus by silence procedure to admit FYROM, i.e., it could not remain silent, as the admission of new NATO members requires unanimity per Article 10 of the Treaty. Therefore, Greece had a ‘duty’ *vis-à-vis* the other NATO members, due to the nature of the unanimity, to expressly say why it was not in agreement with the admission of FYROM. Moreover, Greece never waived, neither implicitly nor explicitly, the obligation of Article 8 of the NAT, which gives precedence to the NAT with respect to other future treaties. On the contrary, Greece agreed to Article 22 of the Interim Accord, which stated that its provisions will not infringe on the rights and duties resulting from bilateral and multilateral agreements already in force for the Parties.

Finally, in NATO, consensus means not presenting an objection, i.e., keeping silence, which represents the willingness of Allies to avoid formal voting in order to adopt decisions. This procedure permits Allies to avoid confronting other members at the NAC. The transition from unanimity to consensus shows NATO’s institutional maturity, its dynamism, and ‘Kennedy’s temporal logic pattern’, i.e., the interactions among Allies and with NATO’s institutions create a cycle of continuous transformation that inspires the continuous evolution of the Alliance.

## PART I: CONCLUSIONS

## Conclusions to Part I

Part I of this dissertation attempted to uncover the unique, indeed perhaps even *sui generis*, institutionalization of NATO. NATO counts on particular, although probably not exclusive, particularities, which are worth investigating for understanding its institutionalization process and spirit. In a chronological manner, this dissertation develops the NATO historical and legal precedents and desires that inspired the NAT drafters under the noble goal of protecting their community of interest, which was also based on the UN Charter’s sacrosanct maintenance of international peace and security. The collective experience of the Western European states during two world wars combined with the Soviet Union’s aggressive posture in Eastern Europe triggered the need to create an Alliance that the NAT codified in fourteen articles. These fourteen NAT articles were written in a very simple manner, but they reflected the idea of work of the Allies. The Allies gave to those fourteen articles a profound meaning and prospective, which turned to provide to the initiative a transformative institutionalization, to the point that they inspired the transformation of an alliance into an international organization. All this took place by taking the UN Charter as the reference on the use of self-defence. In addition, this dissertation addresses several fundamental institutional anecdotes very relevant to NATO’s decision-making process and the interpretation of the NAT. In sum, Part I of the dissertation examines only the processes by which NATO became a sophisticated international institution. The brevity of the NAT most likely facilitated NATO's flexibility, its potential to adapt itself to the changing security environment in which it must perform its functions.

The second chapter highlighted the idea that NATO’s origins can be found only in the realization of a community of interest at both sides of the Atlantic, which is anchored in the UN Charter. The NAT sets the barebones of the institutionalization of the Alliance. The forerunner treaties of the NAT served to formalize said community of interest by developing a series of international obligations in order to guarantee the maintenance of international peace and security. NATO’s embryonic institutionalization was codified in Article 9 of the NAT, which during the Korean War, proved to be instrumental NATO’s dynamic development of its complex international structures. The institutionalization success of NATO lay in its ability to incorporate the basic elements of international organizations within an alliance.

The third chapter makes an archeological reconstruction of the negotiation process through the documents and testimonies produced therein. The ‘Terms of Reference’ are made of the Preamble and Articles 1 and 2, which pledge the Allies’ readiness to exercise self-defence for achieving peace and work on the economic development as part of creating peaceful and friendly relations. Article 3 and 5 are crucial for understanding NATO’s ‘Mutual Assistance’ and they focus on maintaining and developing capacities to resist an armed attack. The ‘Principle of Consultation’ is codified in Article 4 and serves for the coordination of NATO members on matters affecting their territorial integrity, political independence, or security. Article 6 delineates the geographical scope of the application of the ‘Mutual Assistance’, with particular focus on Article 5. Nevertheless, Article 6 publicists and politicians have argued that NATO can act in situations in which a war starts outside its geographical area, but this only can take place as long as the precedence of the UN Charter, and especially Article 51, is recognized. Article 7 and Article 8 recognize, respectively, the supremacy of the UN Charter, and an autonomous conflict clause with respect to the incompatibility of other treaties. Article 9 enables NATO’s institutionalization through the authority received by the NAC from the NAT signatories with respect to creating subsidiary bodies. This fact gave the Organization a nature of continuous adaptation. The last five Articles, 10, 11, 12, 13, and 14, addressed the membership, accession, duration, review of the Treaty, and its language respectively. The Treaty is under the coverage of the UN Charter, but outside the Security Council permanent members’ veto. Also in the third chapter, it has been underlined that NATO is not a regional organization per Chapter VIII. The compatibility of the NAT with the UN Charter is obvious and the NAT has served to provide a creative Charter-based mechanism to operationalize the United Nations’ necessary activities, avoid the noble principles of the Charter being blocked by the veto, and make available assets for the United Nation’s crisis response activities for the maintenance of international peace and security.

Finally, the fourth chapter shows that since NATO members retain full individual responsibility for its decisions, the decision-making process must be adapted for this idiosyncrasy, which thus explains NATO’s several particularities on this matter. One of those is the transition in 1968 from NAC resolutions (Council Resolutions) to decisions (Council Decisions). This took place most likely to avoid any resemblance with the Security Council resolutions and show NATO’s subordination to the UN Charter. Another one is that of the change in decision-making from unanimity to consensus, something that not only followed the trend of other international organizations, but also the internal developments of NATO, where unanimity provoked lack of cooperation among Allies. However, it was not until the end of 1970s that the change took place after some uncertainty, and finally settled on consensus under the silence procedure. The case of FYROM’s application to become a NATO member and the opposition of Greece served to illustrate, *a sensu contrario*, how unanimity and consensus coexist in NATO, but for different purposes: the former for the admission of new members, and the latter for daily activities of the Organization.

In sum, Part I of the dissertation examines in a chronological manner only the processes by which NATO became a fully-fledged international organization. However, Part II of the dissertation will accordingly address characteristics of NATO’s institutionalization, i.e., questions relating to a full institutional building, such as NATO’s legal status (legal personality, legal capacity, powers), privileges and immunities, and responsibility. This triggered a journey into NATO’s history in the 1950s when NATO members, due to Soviet Union expansionism, developed explicit institutional elements backed up by comprehensive multilateral agreements, and supplemented by bilateral ones. On this note, it must not be forgotten that NATO’s institutions originally started without those instruments. Their creation was possible thanks to Article 9, the ‘queen-bee’. Specific international circumstances made Article 9 bloom by sharing its royal jelly with the ‘worker-bees’, i.e., the other articles of the Treaty, which developed an institutional creative interaction. These, in turn, became the feed for producing the necessary propolis[[541]](#footnote-541) for “the construction of institutional mechanisms, the development of multilateral procedures, and the elaboration of preparatory plans for the conduct of joint military action in future contingencies”.[[542]](#footnote-542) All of this eventually required the proper building of an institution, which came by developing the necessary legal position of NATO, a question that the next part will develop in-depth.

**The North Atlantic Treaty Organization:   
An International Institutional Law Perspective**

# PART II

**INSTITUTIONAL BUILDING AND NATO’S LEGAL POSITION**

**INTRODUCTION**

## Introduction

Part I of this dissertation made a functionalist analysis of NATO’s institutionalization under the concept of idea of work,[[543]](#footnote-543) i.e., a teleological mission personified in juridical subjects. This is done in chronological manner, which analyzes NATO’s idea of work implemented in three phases - the idea of work evolves, grows, and settles:[[544]](#footnote-544) a) the origins of the institution, b) the institutional analysis of the North Atlantic Treaty, and c) the continuous and dynamic practice of the North Atlantic Council and its subsidiary bodies.

Part II continues the *ratione functionis* approach, in order to address key specific questions relating to NATO’s full institutional building, i.e., the ‘legal position’[[545]](#footnote-545) of NATO.[[546]](#footnote-546) This is based on the understanding that the legal position of international organizations requires the criterion of functional necessity in order to remain within the limits established by their constituents in the correspondent ‘constitutional structure’.[[547]](#footnote-547) The analysis of the legal position corresponds to that of NATO’s rights and duties, i.e., its legal status,[[548]](#footnote-548) its privileges and immunities, and its responsibility. The International Law Commission and Bekker’s methodology based on a functional ‘legal position’ of international organizations offers a very suitable structure for analyzing that of NATO.

Yet, the key institutional characteristics relating to a full institutional building, such as NATO’s legal position, are of fundamental significance to understand NATO’s complex structure, civilian and military, NATO Command Structure, and NATO Force Structure, other MOU organizations, agencies, etc.

In order to approach these key institutional characteristics, the fifth chapter will examine NATO’s legal status and its subdivisions: legal personality, legal capacity, and its powers. The taxonomy of the legal status of NATO provides a privileged view on the key legal aspects of NATO's complex structures. This is especially useful for academics or practitioners who intend to answer the question of the legal personality, legal capacity and powers of the different arrangements of the allies relating to the availability of forces, headquarters, and units beyond the NATO Command Structure, or entities established in support of out-of-area operations or field headquarters.

The second major issue concerning NATO’s legal position is the question of privileges and immunities, analyzed in the sixth chapter. Privileges and immunities are established to grant functional independence to international organizations with respect to their constituents and to grant the principle of equality of states. The need to count on functioning international organizations is a requirement in a peace-based international system promoting cross-border intensive, multi-disciplinary, and multi-functional cooperation. NATO privileges and immunities allow the independent functioning of its bodies.

The fact that NATO’s main civil and military subsidiary bodies, i.e., the ‘Organization’ and the ‘Supreme Headquarters’, have different legal positions affects the way NATO’s privileges and immunities are to be viewed. In spite of different legal positions, and because NATO bodies all pursue the same functions and purposes, there is no divergence among them, on the contrary, there is in fact complementarity. The question of the relationship between EU law and NATO privileges and immunities is addressed in depth, as well as the existence of conventional immunity from jurisdiction for international military headquarters.

Finally, the seventh chapter intends to explain NATO’s particularities on responsibility, which requires the analysis of certain particularities addressed by NATO to the ILC in 2011, in addition to NATO’s practice on this matter developed over the years. Both particularities indicate that the general rule in NATO is that the responsibility of the NATO bodies’ activities must be sought among the member states individually. However, there are cases relating to collateral damage and disasters arising out of pipelines, which introduce ‘episodes’ of solidary responsibility under the NATO umbrella. The way allies approach this question illustrates the fact that NATO states are involved in both the control of the organization and the application of the ‘due diligence’ concept.

## CHAPTER 5

NATO’S LEGAL STATUS

### 5. NATO’s Legal Status

The legal status of international organizations is of most significance with respect to their independent functioning. Functional international organizations need to be able to interact within the national and international orders. For this reason, those legal orders must consider them subjects of law, i.e., persons. What sort of persons are international organizations?

States, as entities, are not physical persons, but still need to interact in different legal orders. It is necessary to consider them as persons through a juridical fiction. This will result in seeing states as composite persons, i.e., as moral persons: *“Entia moralia, quae ad analogiam substantiarum concipiuntur, dicuntur persona morales*”.[[549]](#footnote-549) In this vein, reference can be made to Von Gierke’s efforts to espouse the theory of the state (*Staatsslehre*) and the theory of corporation (*Genossenschaftslehre*),[[550]](#footnote-550) which argue that biological persons and political bodies are two types of persons before the law.

Accepting that this argument explains states as persons based on the corporate idea, the same rationale can then be extended to international institutions. International organizations would be considered *sui generis* corporations, i.e., compound moral persons, since they are also political bodies, although instead of being made of people, they are made of states. It is of note that this argument finds understanding in NATO’s terminology – already obsolete in today’s NATO’s lingo; thus, in certain NATO documents the organization is defined as “a *corporate* and juridical body”.[[551]](#footnote-551) This could well include the idea that NATO is made of states and also of different bodies, i.e., the civil and military bodies.

In any case, this rationale based on the corporate concept[[552]](#footnote-552) helps to demonstrate that international organizations possess rights and obligations, as well as a certain international personality and the capacity to act in the international arena and in domestic legal orders. The above rationale cannot, however, be used to argue that an international organization is the same as a state and that it has the same legal personality, rights, and duties.[[553]](#footnote-553) For this reason, a functional approach must be taken in the subsequent analysis. Moreover, this helps to explain the foundation of the legal status of these institutions in an autonomous manner with no reference to states.

The following sections will analyze the particularities of NATO’s legal status[[554]](#footnote-554) from the juridical personality perspective, including its legal capacity and its powers. In this analysis, a distinction must be made between NATO’s legal status in the international and in the domestic legal orders. In addition, international organizations (including NATO) have their own specific legal order, which is “peculiar to them and which include[s] not only their organs, but also the rules of the organization”.[[555]](#footnote-555) For this reason, the analysis of the legal status of international organizations in general, and NATO in particular, must take into account that they operate within the following frameworks: “(a) the national law of States; (b) general international law; (c) the law of the organization”.[[556]](#footnote-556)

#### 5.1 Legal Personality

5.1.1 Approaches to the legal personality of international organizations

The justification of the existence of international legal personality of international organizations faces the reality that Yasseen describes as: “no uniformity among international organizations, and that they differed greatly in their rights, their obligations and their functions; it might be said that they differed greatly in their international juridical personality”.[[557]](#footnote-557) Besides, it is necessary to note that the notion of legal personality has “*un caractère purement formel*”[[558]](#footnote-558) and it is just a mere “situation”,[[559]](#footnote-559) which permits an international organization “only to *be capable* of bearing rights and duties”,[[560]](#footnote-560) without defining them.

For this reason, scholars of the law of international organizations have developed three different approaches. Of the two main theories considering that an international organization holds international legal personality, one argues that this part of the legal status is given by member states explicitly in the constituent document, known as ‘subjective legal personality’. The other main theory argues, following Seyersted, that international organizations possess ‘objective legal personality’.[[561]](#footnote-561) The latter theory requires that these institutions have different organs, which makes them “legally and *ipso facto* general subjects of international law”.[[562]](#footnote-562) This is a situation that Dupuy and Kerbrat describe as *“[i]l existe en droit international général une présomption de personnalité internationale au bénéfice des organisations intergouvernementales*”.[[563]](#footnote-563)

A third theory has more recently gained traction after having applied the principles of the *Reparation* *case*.[[564]](#footnote-564) The abstraction of those principles, applied to the manifested reality of the existence of international organizations on the legal plane, suggests that their legal personality does not emerge “from the explicit or implicit “intent” of IO creators but from the operation of general customary international law; that is, the personhood of IOs results from their mere existence.[[565]](#footnote-565)

The question is not how international organizations and their legal personality have been established, either explicitly or implicitly *vis-à-vis* their constitution, “but that they exist”,[[566]](#footnote-566) which confirms R.J. Dupuy’s reference to the existentialist philosophical theories: “*l’existence précède l’essence*”.[[567]](#footnote-567) Moreover, the *Reparation case* also suggests that the establishment of an international organization requires the test of functional necessity, which assists the recognition of its legal personality through identification of its rights and duties.[[568]](#footnote-568) It can be concluded that by using existentialist and functionalist arguments, it can be determined ‘how much’ legal personality an international organization necessitates carrying out the functions and purposes vested in its organs by its ‘constitutional structure’.

Before analyzing NATO’s legal personality, actually personalities, it is necessary to address some of NATO’s particularities. These appear crucial in order to understand how NATO’s legal personalities came to exist, how they look, and how they operate.

##### 5.1.2 Particularities of NATO’s Legal Personality

The first particularity of NATO relates to historical events that made its members develop a fully-fledged institutional building, by using the leeway granted by Article 9 of the NAT. This article authorizes the Council to consider matters concerning the implementation of the Treaty, as well as to set up bodies. Based on these authorities, the NAT signatories created civil and military structures, i.e., ‘subsidiary bodies’.[[569]](#footnote-569) In turn, the NAT signatories gave these civil and military bodies a ‘legal position’ through general multilateral treaties.[[570]](#footnote-570) As discussed in chapter 1, the Treaty did not use the acronym ‘NATO’ or the word ‘Organization’ in any of its provisions. The NAC started using the term ‘North Atlantic Treaty Organization’ at its first session: “The Council is the principal body in the *North Atlantic Treaty Organization*” (emphasis added).[[571]](#footnote-571) This indicates that the NAT needed to be supplemented in order to sustain the subsidiary bodies with proper legal positions.

The outbreak of the war in Korea in June 1950 is considered the trigger for the hasty creation of NATO’s political and military bodies.[[572]](#footnote-572) The concerns of Soviet expansion made the NAT signatories turn the Council into a standing body. For this purpose the fourth session of the Council “decided to establish, by the appointment of Deputies, mechanism to permit the Council fully to discharge its role as the principal and directing body of the North Atlantic Treaty”.[[573]](#footnote-573) The Council Deputies established in its second session “a permanent international working staff”,[[574]](#footnote-574) and the NATO civilian structure started running. Since “[i]t was also necessary to define the juridical status of the Organization”,[[575]](#footnote-575) NATO members led by the United Kingdom drafted and concluded on 20 September 1951 the Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff (‘Ottawa Agreement’). The provisions of this agreement “drew largely upon the provisions in already existing agreements concerning the status of international organizations: the United Nations, its Specialized Agencies, the Organization for European Economic Cooperation (‘OEEC’), and the Council of Europe”.[[576]](#footnote-576)

At the same time, the NAT constituents also commonly understood the need to create an integrated military force as part of the NATO institutions to deter aggression and to ensure the defence of Western Europe. It is of note that the Council agreed to provide the headquarters of the integrated military force [Allied Headquarters] and its personnel with a status analogous to that given to its civilian structure.[[577]](#footnote-577) Moreover, this analogy was not a legal fiction; the Council made the integrated force an integral part of NATO, i.e.:

“organized under [it and] subject to political and strategic guidance by the appropriate agencies [of NATO and] … under a Supreme Commander who will have sufficient *delegated authority* to ensure that national units allocated to his command are organized and trained … in time of peace as well as in the event of war. The Supreme Commander will be *supported by an international staff* representing all nations contributing to the force”.[[578]](#footnote-578)

The United States led the effort to draft an agreement on the status of NATO forces,[[579]](#footnote-579) which covered all aspects of a visiting force from a NATO nation in the territory of another NATO nation. For this purpose, the NATO nations concluded on 19 June 1951 the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (‘NATO SOFA’).[[580]](#footnote-580)

However, as soon as the establishment of the Supreme Headquarters Allied Powers Europe (‘SHAPE’) was approved, the question of the applicability of the NATO SOFA was raised. On 7 May 1951, France, tasked by the Working Group charged by the Council of Deputies with the examination of the status of the Armed Forces, began to study the applicability of the NATO SOFA to Allied Headquarters and “to make proposals to it which might form the subject of a Protocol to be attached to the Agreement on the Status of the Armed Forces”.[[581]](#footnote-581) The issue under scrutiny was that members were assigned by their nations to an Allied Headquarters and when acting in their official capacity they do it “as members of an integrated Headquarters, SHAPE replaced their sending State with regard to the rights and obligations which the Agreement of 19 June 1951 [NATO SOFA] gives to or imposes upon such State”.[[582]](#footnote-582) The result of this process was the signature, on 28 August 1952, of the Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (‘Paris Protocol’). The Paris Protocol accomplished two missions: first, it integrated the NATO SOFA provisions and adapted them to the functional needs of international military headquarters, and, second, it created “a special status for such headquarters which is analogous to that created for the Council and its subsidiary civilian bodies … and falls provisions for the grant to Supreme Headquarters of juridical personality and other legal capacities”.[[583]](#footnote-583) This made the Paris Protocol a hybrid treaty, which required making reference to the NATO SOFA and the Ottawa Agreement for its completeness.[[584]](#footnote-584)

The above shows that NATO, In a very short period of time, took advantage of the embryonic institutionalization contained in Article 9 of the NAT to develop into a fully-fledged international organization ‘fit for purpose’, i.e., for the functions and purposes established by its constituents. NATO was then “born in two distinct stages, which helps explain some of its ambiguity of character and purpose”. [[585]](#footnote-585) This allows NATO to adapt to a changing international arena in accordance with the interests of its members. In accordance with the above, it can be argued, once more, that NATO is a functional international organization and, as such, many of its features can be explained under a functionalist approach. The concept of function is a key enabler in the study of NATO’s legal status, and more particularly its legal personality.

The second particularity refers to the fact that in NATO there are “several treaties dealing with privileges and immunities, including those of the organization itself, those of their State’s missions to NATO, those of NATO’s military headquarters and those of Member States’ military forces”.[[586]](#footnote-586) To understand this unusual setup necessitates examination of the *travaux préparatoires* of those multilateral agreements, where the intention of the parties can be found, as well as how they envisioned the ‘legal position’ of the bodies to which those treaties would be applicable. It must be noted that the three NAT follow-on general multilateral treaties, i.e., the NATO SOFA, Ottawa Agreement, and Paris Protocol were all negotiated almost simultaneously. The United States was charged with [preparing] [leading the negotiations of] the NATO SOFA, the United Kingdom with the Ottawa Agreement, and France with the Paris Protocol. The negotiations took place “on two levels: (a) by a Working Group, assisted by a Financial Subcommittee and a Juridical Subcommittee; and (b) by the council Deputies, who were succeeded, after the reorganization of NATO in 1952, by the Council itself”.[[587]](#footnote-587) All NATO members participated at both negotiation levels.

The memorandum presented by the United Kingdom deputy on 1 March 1951 with the draft articles of the Ottawa Agreement gives, in a purist subjective manner, juridical personality to the Council, as well as the capacity to conclude contracts, to acquire and dispose movable and immovable property, and to institute legal proceedings. The same memorandum stated that the Secretary General would act on behalf of the Council.[[588]](#footnote-588) Moreover, the draft also vests the Council with treaty-making powers.[[589]](#footnote-589) However, a month and a half later a draft presented on 16 April 1951 reads in its Article 3: “The Organisation shall possess juridical personality; it shall have the capacity … The Council shall act on behalf of the Organisation …”.[[590]](#footnote-590) What was the reason to change it?

Analyzing the March and April text, together with the aforementioned historical events *vis-à-vis*  the increasing threat of the Soviet Union, indicates that the draft of 16 April is the first occasion NATO members were able to manifest ‘formally’ that their ‘creature’ was more than a traditional military alliance.[[591]](#footnote-591) The incorporation of ‘Organization’ in the 16 April draft ushers in, and justifies, the ‘international organization’ style of the rest of the Articles of the Ottawa Agreement – which are all very similar, as stated above, to those of the United Nations and its Specialized Agencies or the Council of Europe agreements - simultaneously confirming NATO as an international organization.

It is important to note that the last sentence referring to the Council representing the Organization disappears in the final version of the Ottawa Agreement, meaning that therefore another body apart from the Council could also represent the Organization.[[592]](#footnote-592) How could another body represent the Organization without legal personality? The decision was already made: the Supreme Headquarters, SHAPE. A year after SHAPE’s establishment, and during the Working Group on Status works on 17-18 January 1952, “[t]he SHAPE representative observed that the Supreme Headquarters was gradually losing the characteristics of a purely military and operational Headquarters”.[[593]](#footnote-593) On this note, it is important to recall that the Council decided to create an integrated force, which would be part of NATO and under a Supreme Commander with *sufficient delegated authority* in times of peace, as well as in the event of war.[[594]](#footnote-594)

The creation of specific bodies in order to fulfil NATO’s functions necessitated that the Supreme Headquarters have a dedicated and codified legal position and, thus, be able to represent and execute NATO’s military activities. This task not only required the conclusion of an agreement in order to give legal status to the Supreme Headquarters, but also to make clear that they were excluded from the Ottawa Agreement. For this purpose, Article II of the Ottawa Agreement laid down that its provisions shall not apply to any military headquarters unless the Council decides otherwise. Article II led the way for a stand-alone status agreement – though analogous to that of the ‘Organization’ - for international military headquarters. The result was the conclusion of the Paris Protocol, which, *inter alia*, granted juridical personality and other legal capacities to Supreme Headquarters.[[595]](#footnote-595) The need to bestow legal personality upon the Supreme Headquarters was never questioned during the negotiations of the Paris Protocol, in fact, the chairman of the Working Group “said that the he would like to see a wording adopted along the lines of the provisions of the Agreement on the Status of NATO Civilian Staff [Ottawa Agreement], to the effect that the Supreme Headquarters should possess juridical personality”.[[596]](#footnote-596)

It must be recalled that between January and March 1952 several discussions took place among the nations with respect to the legal personality of the Supreme Headquarters. The initial draft of the article relating to the legal personality and capacity of the Supreme Headquarters had an addition at the beginning, which reads: “So far as necessary for the fulfilment of its functions”.[[597]](#footnote-597) This wording ‘tainted’ both the legal personality and capacity of Supreme Headquarters and while it appeared to be of a functionalist nature, the phrase actually limited the possibility for the Supreme Headquarters, as a NATO subsidiary military body, to contribute to the general functions and purposes of NATO.[[598]](#footnote-598) The phrase was deleted following a proposal by the Netherlands. It was indeed a superfluous addition, which actually acted as a *chapeau* qualifying both legal personality and capacity. This addition did not add anything new, since international organizations, as subjects of international law, are different from states although at the same level as states, and their interactions in international and domestic planes will always depend on the functions and purposes for which they were created.

In light of the above, it now appears evident that two legal personalities coexist within NATO, one for the civil bodies and another for the military bodies; a fact that leads to the third particularity. This confirms Olson’s submission: “Legal personality has been established both for the Organization as a whole (with the exception of the military headquarters) and for each of the two ‘supreme’ NATO headquarters”.[[599]](#footnote-599)

As seen above, the civil and military subsidiary bodies, represented by the ‘Organization’ and the ‘Supreme Headquarters’, have their own legal positions. They are different subjects of international law and, eventually, international organizations within another international organization,[[600]](#footnote-600) which is not unique in the casuistry of international organizations. A parallel can be made with the legal position of the World Bank Group, which is made of five international organizations: International Bank for Reconstruction and Development (‘IBRD’), the International Development Association (‘IDA’), the International Finance Corporation (‘IFC’), the Multilateral Investment Guarantee Agency (‘MIGA’), and the International Centre for Settlement of Investment Disputes (‘ICSID’). In 1999, the World Bank legal advisor explained the tasks of his legal office, among them: “Developing legal methods and instruments for a better coordinated approach among the World Bank Group institutions, paying due regard to their separate legal personalities and the need to avoid conflicts”.[[601]](#footnote-601)

The fact that NATO has two different international legal personalities requires it, as in the World Bank Group, to count on certain behaviors to deconflict them. In this regard, it is worth recalling the obsolete 2010 NATO Legal Deskbook,[[602]](#footnote-602) which represents the effort of the legal advisors of the major NATO bodies to codify a practice, and resulted in conflict avoidance between the two different legal positions and their many practitioners. The Office of the Legal Affairs of the NATO International Staff concludes Status of Forces Agreements (‘SOFA’),[[603]](#footnote-603) Transit Agreements (‘TA’),[[604]](#footnote-604) agreements relative to the status of NATO Agencies or their interactions with NATO bodies or third parties, as well as security agreements[[605]](#footnote-605) with non-NATO nations and entities, and Participation and Financial agreements[[606]](#footnote-606) for participating in NATO-led operations.

It is necessary to note that NATO, contrary to the World Bank Group, does not have a single legal advisor, but several senior ones. On this note, the International Staff legal advisor has stated:

“I am not the Legal Advisor for the whole of NATO, and have no hierarchical relationship with the other 100 or so legal professionals throughout the Organization. Most of these are on the military side … This office does not handle ALL the legal work for the organisation, just the IS [International Secretariat] part of it. I can’t tell any other legal office or officer what their policy is or should be”.[[607]](#footnote-607)

On the other hand, the Supreme Headquarters have a continuing requirement to conclude formal international agreements – supplementary agreements [treaties],[[608]](#footnote-608) exchange of letters, and *inter alia*, administrative arrangements,[[609]](#footnote-609) mostly in form of memorandum of understanding and with status of forces clauses - with various bodies, including states and other international organizations and non-governmental organizations. “In accordance with the Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty (Paris Protocol), only the two Supreme Headquarters [SHAPE and HQ SACT] are given juridical personality; and thus the authority to enter into legally binding agreements”.[[610]](#footnote-610)

Within NATO, the coordination of its two legal personalities [that for the Organization and that of the Supreme Headquarters] has taken place naturally since 1952. The Supreme Headquarters, in an effort to harmonize their powers, issued the Bi-Strategic Command Directive 15-3, and although this directive requires an update, it sets the principles for implementing the treaty-making power conferred by the Paris Protocol to the Supreme Headquarters:

“The Bi-SC Directive 15-3 establishes procedures and responsibilities for the drafting, preparation, negotiation, conclusion and communication of written international agreements to which HQ SACT, SHAPE or any other constituent element within Allied Command Operations (ACO) and/or Allied Command Transformation (ACT), is a party. It also provides commonly accepted definitions for agreements and arrangements entered into by the two Supreme Headquarters or their Subordinate Headquarters as well as it identifies the relevant entity having the authority to enter into a specific type of agreement”.[[611]](#footnote-611)

In order to doctrinally frame this third particularity of NATO’s legal personality, it is necessary to refer to “the issue of the (in)divisibility of international legal personality”,[[612]](#footnote-612) which does not appear to have been resolved by scholars. However, NATO’s practice, as explained above, advances a piece of evidence to contribute to scholarly discussion, by presenting in a functional manner the capacities and powers of NATO bodies which hold international legal personality. This practice not only brings clarity to how NATO implements its different legal positions, but also contributes to the demonstration of Reuter’s conclusion of the legal position of subsidiary bodies and maybe to a future codification of the question of agreements of international organizations:

“[T]here is nothing surprising in this: the freedom to establish organs and to confer upon them varying degrees of decentralization is an important feature of the constitutional law of each organization. The question of subsidiary organs, seen in this light, does not lend itself to codification applicable to all international organizations – not even to codification confined to the special topic of the agreements of international organizations”. [[613]](#footnote-613)

So: the NATO answer is: legal personality may be divisible?

Finally, the fourth particularity concerns which legal personality applies during the operations in which NATO participates. Other than the current Resolute Support mission for training and advice in Afghanistan and the mission in Iraq, operations to which NATO is contributing are all UN-mandated.[[614]](#footnote-614)

Peace Support Operations are established by United Nations Security Council Resolutions (UNSCR) as a subsidiary organ of the United Nations, which “implies a degree of independence vis-à-vis the parent body. The measure of independence … depends … on the nature of the functions conferred on it”.[[615]](#footnote-615) In order to illustrate this question, it is worth taking the NATO Headquarters Sarajevo as an example.[[616]](#footnote-616) This headquarters is not a NATO ‘subsidiary body’, it is the successor of the originally UN-established UNPROFOR and only the Security Council has the power to terminate its mandate by means of a resolution. Therefore, this headquarters does not fall under any of the NATO’s general multilateral treaties, and subsequently its legal personality cannot be drawn from any of those instruments. The extended or limited legal position of NATO Headquarters Sarajevo must be found in the legal framework of its specific operation, which in this case is governed by the 1995 Dayton Accords.[[617]](#footnote-617)

First, on the legal personality, it is submitted that the institutions of Peace Support Operations[[618]](#footnote-618) created explicitly or implicitly by the UNSCR share the UN legal personality.[[619]](#footnote-619) However, the mere fact of existing is a reason to have objective legal personality.[[620]](#footnote-620) It is clear that the Dayton Accords are not a self-contained treaty, and therefore the institutions created for its implementation may lack explicit provisions on certain institutional aspects, such as those of legal personality, legal capacity, and competence, i.e., its legal status as part of their legal position. This, however, is the nature of Peace Support Operations, and also a source of analytical difficulty. But continuing to examine the subsidiary organs with a functional approach can shed light on this complex matter. The legal status of NATO Headquarters Sarajevo is implied in the functions and purposes of the Dayton Accords, as described in their provisions (*e.g*. the capacity to contract in para. 16 Appendix B Annex 1A, as such it would be meaningless to deny NATO Headquarters Sarajevo of legal personality, legal capacity, or powers).

Second, legal capacity refers to what an institution is potentially entitled to do. In this manner, the Peace Support Operations institutions can exercise legal capacities within the domestic law of the receiving states.[[621]](#footnote-621) It can be submitted that NATO Headquarters Sarajevo holds a legal capacity that gives it the ability to exercises rights and obligations, and is therefore capable of interacting in both the domestic and international[[622]](#footnote-622) legal spheres.

Third, on subsidiary organs, Zwanenburg submits an analogical argument under the definition of ‘subsidiary organ’ provided by the United Nations:[[623]](#footnote-623) a) IFOR, and its legal successor SFOR, and eventually EUFOR and NATO Headquarters Sarajevo are a subsidiary organ of NATO; and b) KFOR also meets the requirements of a NATO subsidiary organ. He posits, without hermeneutics on the term ‘subsidiary organ’, that IFOR and KFOR are “established by the NAC, a principal organ of the organization, and [they are] under the authority and control of that principal organ”.[[624]](#footnote-624) This statement is incorrect and misleading; it has no legal basis in the NATO context. Indeed, applying the United Nations internal legal order to NATO organs is not definitively a correct legal technique, since this could only occur with NATO’s explicit consent. “*Les organes subsidiaires sont fondés sur une manifestation de volonté propre à l’organisation*”,[[625]](#footnote-625) which must be in accordance with the international organization’s legal order. The practice of the United Nations shows that its peacekeeping operations are a subsidiary organ of the organization and not of the states or organizations contributing to it. Finally, peace support operations renew their obligations, competences, and functions annually with the yearly-approved United Nations Security Council resolution. So that, only the United Nations, and therefore neither the EU nor NATO, has the power to terminate the peace support operations in former Yugoslavia.

Fourth, the international nature of NATO Headquarters Sarajevo and its mission-specific agreement, to which Bosnia Herzegovina, Croatia, and the Federal Republic of Yugoslavia [today Serbia] are party, show that the institutions of the Dayton Accords are given unequivocal competences to interact within the territories of those states. It is to be noted that the competence of subsidiary organs is at the heart of the legal status. In the case of peace support operations in the former Yugoslavia, the competence is to exercise the *function* of stationing in areas of civil war, restoring internal security, and assisting in establishing the rule of law, as well as protecting ethnic minorities, or providing protection for the delivery of humanitarian assistance, including the use of force. All of the above have the *purpose* of contributing to the maintenance of international peace and security. As Paulus argues, peacekeeping forces established by UNSCR “are authorized to exercise operational powers within the affected States”.[[626]](#footnote-626)

The institutions of the Dayton Accords hold an independent legal status (legal personality, legal capacity, and competences), which serves to exercise their functional immunities as established explicitly in the Dayton Accords provisions.[[627]](#footnote-627) Moreover, and since the immunities may be understood as an attribute of legal personality, this comes to confirm both the existence of Dayton Accords’ institutions, and those institutions’ functional legal personality arising out of the Dayton Accords’ functions and purposes. At the same time, the Dayton Accords are the result of the application of Chapter VII of the UN Charter, the ultimate legal reason for the activities of the international community in former Yugoslavia. Jaenicke presents a list of categories of United Nations subsidiary organs, which includes UN–mandated peacekeeping operations such as UNPROFOR. Since the United Nations made subsequentially the IFOR, SFOR and currently EUFOR and NATO Headquarters Sarajevo the legal successors of UNPROFOR, it could be argued that by implementing a United Nations mandate, they could be considered a subsidiary organs of that organization.

In conclusion, the Dayton Accords provide a certain autonomy to peace support operations institutions in former Yugoslavia and do not require any of the NATO [or EU] governing treaties to be implemented. Moreover, when the Dayton Accords require other treaties for their implementation, the text is *expressis verbis*.[[628]](#footnote-628) The text of the Dayton Accords does not refer to any of the NATO governing treaties, which establish the legal personality of NATO bodies, so the legal positions of those bodies is not applicable. The same applies to KFOR and its Military Technical Agreement concluded between the International Security Force (KFOR) and the government of the Republic of Yugoslavia, on 9 June 1999 in accordance with the UNSCR 1244.

##### 5.1.3 Under International Law

All necessary features for an international organization missing in the NAT where covered by the general multilateral NATO treaties,[[629]](#footnote-629) and complemented by bilateral supplementary agreements concluded with NATO and non-NATO members, as well as by other types of international agreements, such as exchange of letters, memoranda of understanding, and technical agreements.[[630]](#footnote-630)

No matter which of the international legal personality theories explained above is applied, NATO fulfills the criteria for being an international legal person. On the one hand, taking into account the provisions of the Ottawa Agreement and the Paris Protocol, NATO has subjective legal personalities. Article IV and Article 10 respectively establish, *expressis verbis*, that the Organization and each of the two Supreme Headquarters shall have juridical personality. Yet Article XXV and Article 16 of the Ottawa Agreement and the Paris Protocol respectively lay down powers of the Organization and the Supreme Headquarters to conclude bilateral supplementary agreements, i.e., give limited treaty-making power. The latter has even gone beyond those limits, based on the rules of the organization and NATO practice.

Additionally, Seyersted’s ‘objective legal personality’ also finds empirical confirmation within NATO. As explained above, NATO is an organic institution: it has organs different from the NATO members – the North Atlantic Council and its civil and military bodies - which are associated permanently;[[631]](#footnote-631) it is distinct from its member states, and it has a life of its own with its own legal order and interaction within international law; and, finally, its decisions are taken collectively,[[632]](#footnote-632) by its common organs,[[633]](#footnote-633) which provide the necessary legal capacity to carry out its missions, i.e., to be functional in accordance with its purposes. An example is the implementation of Article 3 of the NAT – mutual assistance - by means of NATO bodies concluding a series of international agreements in the form of memoranda of understanding with NATO and non-NATO members. These are written arrangements setting forth the conditions under which the NAT parties intend to cooperate in certain areas, in support of developing the individual and collective capacity of NATO members to resist an armed attack.[[634]](#footnote-634)

With respect to the third theory it can be argued that NATO ‘exists’ and operates on the international and domestic legal planes, which demonstrates that it is capable to, *inter alia*, conclude agreements with member and non-member states;[[635]](#footnote-635) hold international and multilateral military headquarters and civilian agencies within and outside NATO members’ territories;[[636]](#footnote-636) contract goods and services for its activities within and outside NATO members’ territories;[[637]](#footnote-637) and hire individuals from NATO members and non-NATO members for its operations.[[638]](#footnote-638) NATO carries out all of these activities for the implementation of its functions and purposes anywhere in the world through its organs applying its ‘constitutional structure’. Consequently, NATO holds legal personality, from a functional standpoint and for the purpose of complying with NATO’s specific functions originally established in the NAT and continuously updated with the Council’s decisions and policy, as well as policy and practices of the civil and military bodies, which altogether forms the NATO *acquis*.

The applicability of this third theory to NATO forms the basics of NATO’s legal personality particularities. In order to further illustrate this, it is of most interest for the current analysis to recall the creation of SHAPE. The Council in its sixth session appointed General Eisenhower as the Supreme Commander and tasked him to create a subsidiary military body: “He will assume his command and establish his headquarters in Europe early in the New Year”.[[639]](#footnote-639) On 2 April 1951, General Eisenhower executed this mandate and, after intensive works for a period of three months, signed the activation of SHAPE.[[640]](#footnote-640) It was General Eisenhower who represented the Council. It is to note that the Council only decided in February 1952, during its ninth session – Lisbon reorganization - to appoint a Secretary General,[[641]](#footnote-641) and that the appointment of Lord Ismay would not take place until 13 March 1952.[[642]](#footnote-642) This brings empirical evidence of NATO’s *volonté distincte*, its actual existence as an organic and functional international organization with international legal personality, which permitted it, even working with barebones institutional instruments, to act as a legal person implementing the decisions of its common organs. The Council’s decision was later supported with the Paris Protocol, which also demonstrates empirically Reuter’s arguments on subsidiary bodies:

“Dans beaucoup de cas d’autre part l’acte juridique émanant de l’organisation est jumelé avec un accord intergouvernemental ; l’organisme crée ainsi dans son propre sein un organe subsidiaire, mais c’est un accord entre Etats qui institue de nouvelles obligations et enrichit l’organisme subsidiaire d’une série de compétences et the fonctions nouvelles … l’organisation joue un rôle en tant que personne juridique, puisque c’est une de ses délibérations qui crée un organe subsidiaire, mais c’est la volonté des Etats en tant que telle qui assume de nouvelles obligations, ce qui permet de développer les compétences de l’organisation tout en respectant leur fondement … les organes subsidiaires sont fondés sur une manifestation de volonté propre à l’organisation”.[[643]](#footnote-643)

In 2011, NATO provided comments to the International Law Commission during the preparation of the draft Articles on the Responsibility of International Organizations (‘ARIO’) and stated: “NATO is an international organization within the meaning of draft article 2(a) of the draft articles, and as such a subject of international law. It possesses international legal personality as well as treaty-making power.”[[644]](#footnote-644) With this statement, NATO confirms both that it ‘exists’, that it is a subject of international law, and that its legal personality is not only manifested explicitly and implicitly, but also functionally, as it is required for fulfilling NATO’s functions and purposes on the international plane, and in this regard that it has the capacity to conclude treaties. This functional necessity perspective instigated by the *Reparation* case creates a general principle at an international level. This general principle presents NATO’s legal personality, given *expressis verbis* by the Ottawa Agreement and the Paris Protocol, as providing legal capacity in order to conclude contracts and to acquire and dispose of property and institute legal proceedings. These are rights, which operate on the international plane[[645]](#footnote-645) and in the domestic arena, and which permit NATO to carry out its functions and purposes as wished by its constituents.

Finally, it is to be noted that the lack of full understanding of some publicists,[[646]](#footnote-646) for the particular institutionalization of NATO and its decision-making mechanisms, has made them deny NATO’s international legal personality from its inception and, more prominently and relatively recently, when the International Court of Justice (‘ICJ’) and the European Court of Human Rights (‘ECtHR’) examined NATO’s international responsibility as a consequence of United Nations-mandated Kosovo operations.[[647]](#footnote-647) Additionally, and although the question of responsibility will be addressed briefly *infra*, it can be advanced that there are genuine particularities in the way NATO’s legal personality is exercised.

##### 5.1.4 Under Domestic Law

From a juridical standpoint, international organizations operate not only in the international plane or their own legal order, but also within the legal order of states. Legal personality under internal law is a requisite, which allows international organizations operate within the legal order of member states. This is indispensable for the daily functioning of international organizations, as they unavoidably need to be able to “enter into innumerable transactions governed by the municipal law of different countries which are incidental to their dally operations”,[[648]](#footnote-648) as already established by Article 104 of the UN Charter.

Arguably Verhoeven submits that since legal personality is relative,[[649]](#footnote-649) it is normal that an organization may not be recognized in domestic law even if it clearly has international legal personality, or *a contrario*, may not be recognized in the internal law of a state and lack international legal personality.

“Il peut même se comprendre que l’organisation dont l’existence ne repose internationalement que sur des engagements politiques trouve exceptionnellement une consécration juridique du fait de la personnalité autonome qui lui est accordée dans l’ordre interne de États intéressés”. [[650]](#footnote-650)

Like international legal personality, domestic legal personality is sometimes granted by the ‘constitutional structure’ of the organization, which is the case of NATO, or by the legislation of the state where operations may take place. On the latter, the ILC argues that it is “the primary matter that affects the recognition of legal personality under internal law or under unwritten international rules and thus came within the sphere of private international law”.[[651]](#footnote-651) Since “personality alone is not (and cannot be) decisive, it does provide an indication of what the drafters may have had in mind”, in fact in the domestic law it is “an essential attribute of the possessor of privileges and immunities”.[[652]](#footnote-652)

Acting in the legal order of a member state does not make an international organization a simple subject of that legal order. An international organization cannot be a simple subject of its host state’s internal order. This is because that state cannot disregard its international obligations with respect to the correspondent international organization, i.e., the hosting state must comply with the derogations made to its internal order made by the ‘constitutional structure’ of the organization of which it is a member and ensure that the organization can act independently from it. Dupuy and Kerbrat argue that this situation poses two practical legal problems:[[653]](#footnote-653) a) the applicability of the ‘*principe de l’autonomie de la volonté*’ where the parties to a contract can choose the applicable law; b) the jurisdiction and applicable law, whereby after having exhausted several means such as mediation, the parties may choose arbitration,[[654]](#footnote-654) and a specific law.[[655]](#footnote-655) Although in any case, it is unavoidable that certain cases end up in municipal courts.[[656]](#footnote-656)

It appears imperative that international organizations count on a functional legal personality in both the international and domestic planes; other options are not acceptable from a functional necessity standpoint. The reason is that if the mere existence of the organization is not considered as the basis for its recognition as an actor within the legal order of a member state that would equate to stripping the organization of the necessary means to fulfill its functions and purposes in accordance with the collective desire of its constituents. Verhoeven submits that in international practice, states do not question that an international organization of which they are members and that has international legal personality is a subject of law.[[657]](#footnote-657)

In fact, a recent legislative initiative in Spain demonstrates how states are keen to codify in favor of recognizing international organizations as subjects of law within their legal order. Spain has recently issued a new law on privileges and immunities of foreign states, international organizations based in Spain, and international meetings and conferences held in Spain. Article 35 of that law extends, for purely functional reasons – “*respecto a toda actuación vinculada al cumplimiento de sus functiones*”,[[658]](#footnote-658) to provide immunities to international organizations based in Spain without an applicable international agreement. However, those immunities are not absolute since they do not apply in private law proceedings or labour law grievances if there are no alternatives dispute resolution mechanisms in place. Finally, the immunity is not applicable in case of traffic accidents. By denying immunity in certain cases, the law reaffirms that international organizations will be capable, indeed obliged, to act within the Spanish legal order. With this law, Spain unilaterally extends the recognition of legal personality and capacity to international organizations based on its territory even if lacking a proper international agreement. In the preamble of this law, Spain argues the reason for this legislative initiative is, *inter alia*, based on obligations derived from customary international law and lacunae in the international immunities regime. However, the preamble also admits “there is still considerable doubt as to the customary or non-customary nature of many aspects of immunities, in both substantive and procedural matters”.[[659]](#footnote-659)

Before analyzing NATO’s domestic legal personality, it is worth citing the case of the NATO Parliamentary Assembly[[660]](#footnote-660), which, as described by Verhoeven, is an organization ‘embedded’ *de facto* in NATO[[661]](#footnote-661) since 1954, but it is not part of NATO.[[662]](#footnote-662) This fact triggered the Belgian legislative to confer on the Assembly a “*régime qui s’inspire de la Convention d’|Ottawa du 20 septembre 1951 sur le statut de l’OTAN*”.[[663]](#footnote-663) Article 1 of the ‘regime’ [established by Belgian law] vests the Assembly with both legal personality and capacity. It is interesting to note that the law was updated by a new ‘*proposition de loi*’ in 2001, which recalled the motifs argued in 1974: “*visait à institutionnaliser un organisme officieux … Le gouvernement est favorable à l’attribution de la personnalité juridique, laquelle facilitera le fonctionnement de l’Assemblée. Il s’agi là d’une obligation morale, et non formelle*”.[[664]](#footnote-664)

Bekker recalls Schermers’ argument that legal personality in the legal orders of member and non-member states has been granted either: a) because the state recognizes the international and domestic legal personality of an international organization based on public international law, or b) because the organization has been established applying the rules of private international law legal personality acquired abroad.[[665]](#footnote-665) The case of Spain clearly falls in the first ground. However, the case of the NATO Parliamentary Assembly does not fit easily into either of the above ‘boxes’. In fact, Belgium created a new ground, or exception, i.e. when a group of states create *de facto* the organization and budget its operations, the state where the organization finds *siége* [which is one of the member states] automatically develops a moral obligation to provide functional domestic legal personality and capacity.

NATO’s domestic legal personality existed since the moment the institution, specifically the Council, started working on behalf of the member states. On 18 November 1949, in Washington the second session of the Council approved the establishment of two new subsidiary bodies, the Defence Financial and Economic Committee, and a Military Production and Supply Board. Both bodies had powers not only to plan the financial and economic aspects of resources, but also “to recommend financial arrangements for executing military defence plans”.[[666]](#footnote-666) In this planning context, member states and NATO organs prepared themselves for a myriad of exchanges of all types of resources. This required, in turn, the interaction of those organs in the different domestic legal orders of the NAT constituents. It is of note that the NATO incipient institutions, formed by the Council and its civil and military bodies, counted on their own budgets.[[667]](#footnote-667) Those budgets were partially spent on operational and maintenance activities on the territory where they were [temporarily] located.[[668]](#footnote-668) This demonstrates that, long before the Ottawa Agreement and the Paris Protocol entered into force, NATO existed and had functional domestic legal personality in order to carry out its functions.

Codification of NATO bodies’ domestic legal personalities took place later in Article IV of the Ottawa Agreement and Articles 10 and 11 of the Paris Protocol respectively. As argued by Bekker, there is a close link between the notion of capacity and that of personality under domestic law.[[669]](#footnote-669) Actually, the domestic legal personality of an international organization is difficult to understand without assessing it through the capacity of the activity of the institution. This is what happened during the negotiations of Article IV of the Ottawa Agreement. The delegations reached a common understanding on the applicable law to NATO, confirming that their respective domestic laws would recognize NATO, which can only be understood as a concurrent assertion of the domestic legal personalities of NATO bodies under public international law.[[670]](#footnote-670)

While the above arguments are also valid for SHAPE, Articles 10 and 11 of the Paris Protocol incorporate something new, i.e., references to the possibility of the receiving state to act on behalf of Allied Headquarters in concluding contracts, acquiring, or disposing property or engaging in legal proceedings. This further proves that NATO’s constituents accepted that [its bodies] Allied Headquarters would interact in their municipal legal orders, which necessarily confirms NATO’s domestic legal personality under international law. On the other hand, the polemic[[671]](#footnote-671) Article II of the NATO SOFA, incorporated by reference in Article 3.2 of the Paris Protocol, and which laid down the respect of the receiving state law by Allied Headquarters, is another way to confirm that NATO members, when acting as receiving states, recognize *ante* both NATO’s domestic legal personality and capacity.

#### 5.2 Legal Capacity

The legal personality refers to “what the entity *is*”,[[672]](#footnote-672) and the legal capacity permits recognition of an international organization as a subject of international law. However, this taxonomic unit, the legal capacity, requires analysis in order to identify the “operational or dynamic aspect” [[673]](#footnote-673) of the legal status, i.e., “what the entity is potentially entitled to *do*”.[[674]](#footnote-674)

The legal capacity of each international organization varies, and this depends on the functions of the entity under analysis. Indeed, being capable of doing is not equal to being competent to do it. While international organizations will have international and domestic capacities, the competence to do this or that will entirely depend on the internal legal order of the organization.

Each organization has a different regime or ‘constitutional structure’, which may include its subsidiary bodies.[[675]](#footnote-675) Therefore the legal capacity of international organizations is to be identified under the principle of functional necessity, and determined by their ‘constitutional structure’. The needs of international organizations, while distinct from those of states, can indeed be similar, as both require the ability to operate in the international and domestic arenas. Thus, international organizations may have the capacity to conclude international agreements, while in the domestic arena be capable of acquiring and disposing of property.

##### 5.2.1 Under International Law

International organizations, as subjects of international law, necessarily need to be able to act on the public international law plane. The interaction with other subjects of international law – states, international organizations, non-governmental organizations, or multinational corporations, even physical persons - leads them to develop different capacities *vis-à-vis* topics related to their functioning in such an arena. These topics can cover as many different fields as the specific international organization requires for carrying out the mission given by its constituency, in the form of ‘competence’. These fields, based on that competence, may include, but are not limited to, bringing claims, concluding treaties, and establishing diplomatic relations.[[676]](#footnote-676) In the case of NATO, this may be extended to being able to execute through its bodies the United Nations mandates relating to support operations for maintaining international peace and security.

Not all of these capacities must be exercised by an international organization for it to be considered as having international legal capacity. For example, international claims brought by the United Nations may be of a different nature to those which may take place in the context of NATO. In NATO, it is not authorized to request opinions from the International Court of Justice, as instead the Council covers the role of providing opinions. NATO constituents consider “the terms of the relevant agreements, in the final analysis it normally falls to the North Atlantic Council to attempt itself to settle differences between member countries”.[[677]](#footnote-677) However, nothing impedes the constituents (not NATO’s institutions), in the NATO context, “from submitting voluntarily to a procedure for its pacific settlement along the lines of those adopted by the American States, or from accepting a procedure recommended to them by the North Atlantic Council”.[[678]](#footnote-678) Whilst nothing in NATO’s history indicates that the organization, as such, has brought international claims, this does not diminish its international legal capacity.

NATO concludes treaties and other international agreements[[679]](#footnote-679) with NATO and non-NATO members, as well as with other international organizations. Both the Organization, represented by the Secretary General assisted by the International Secretariat, and the Supreme Headquarters represented by the Supreme Commanders, separately exercise the three distinct international legal capacities established in Article XXV of the Ottawa Agreement for the Organization and Article 16 of the Paris Protocol[[680]](#footnote-680) for the Supreme Headquarters. These two articles enable these NATO bodies to conclude supplementary agreements with NATO states *vis-à-vis* the adaptation of those general multilateral treaties. On the question of agreements with non-NATO states and with other international organizations, the ‘rules of the organization’ must be referred to, which complement NATO’s ‘constitutional structure’ and have predominantly been made by NAC decisions during summits and within NATO’s strategic concepts.[[681]](#footnote-681)

On the question of NATO’s diplomatic relations, the Organization has established them in a particular manner aligned with custom. The need to sustain NATO’s partnership policy has required, since the early 1990s, both the reception of diplomatic missions (already granted for the allies)[[682]](#footnote-682) and national military representatives at the NATO HQ and the Supreme Headquarters (SHAPE and HQ SACT), (passive legation)[[683]](#footnote-683) and the establishment of Contact Point Embassies (active legation).[[684]](#footnote-684) The latter are not diplomatic missions in the pure sense of the expression. Their explicit goal is to “support the Alliance’s partnership and public diplomacy activities”.[[685]](#footnote-685) A particular exception can be considered with respect to the NATO Military Liaison Office in Belgrade, which was established with personnel from NATO states, and locally hired civilians, to support the Serbia NATO Defence Reform Group since December 2006, in order to reform Serbia’s armed forces and build a modern and democratically controlled defence structure.[[686]](#footnote-686) Another *sui generis* diplomatic mission is the NATO liaison office in Djibouti established to enhance anti-piracy cooperation, through an agreement concluded on 22 April 2015.[[687]](#footnote-687)

“International organizations may also maintain permanent missions to other international organizations”.[[688]](#footnote-688) In NATO, the complexity of security and defence challenges also required the establishment of diplomatic relations with international organizations. In this manner, NATO’s first diplomatic mission with an international organization was established with the United Nations.[[689]](#footnote-689)

In the case of the European Union, their diplomatic relations can be seen from how NATO supports the Union and how both international organizations ‘double-hat’ posts.[[690]](#footnote-690)

“NATO supported the EU on strategic, operational and tactical planning. An EU-Operation Headquarters (OHQ) was set-up at NATO’s Supreme Headquarters Allied Powers Europe (SHAPE) in Mons, Belgium, to assist the Operation Commander (who is SHAPE’s Deputy Supreme Allied Commander Europe (DSACEUR)]. In addition, an ‘EU Command Element’ (EUCE) was established at AFSOUTH in Naples, Italy (which is the NATO Joint Force command for Balkan operations). The Chief of Staff of AFSOUTH also became Chief of Staff of the new EU Command Element, assisted by an EU Director for Operations”.[[691]](#footnote-691)

On 8 May 2014, the African Union concluded an agreement with NATO to formalize the status of the NATO liaison office to the African Union Headquarters in Addis Ababa.

“The completion of this technical agreement will facilitate greater cooperation between the two organizations in areas of mutual interest such as: strategic air and sea lift, interoperability of multinational forces, individual training, exercise planning, and lessons learned from operations. How to share experiences in implementing United Nations initiatives such as Women, Peace and Security, and Children and Armed Conflict, will also be examined.”[[692]](#footnote-692)

The above illustrates an element of the dynamic aspects of NATO’s legal status. NATO’s international legal capacity (based on NATO’s internal rules regarding the Alliance’s partnership and public diplomacy activities) establishes *représentations paradiplomatiques*[[693]](#footnote-693) all over the world. This is simply the result of the implementation of NATO’s functions through its internal legal order.

A specific characteristic of NATO’s international legal capacity is its ability to execute United Nations Security Council mandates relating to support operations for maintaining international peace and security. This appears to be a characteristic that is not shared with regional organizations, such as those in Africa and America, due to several reasons relating to the capacity of those organizations.[[694]](#footnote-694) NATO has been recognized consistently by the Security Council as an international organization, having.[[695]](#footnote-695) developed an institutionalized decision-making process,[[696]](#footnote-696) internal mechanisms for financing operations,[[697]](#footnote-697) and a complex command and control system.[[698]](#footnote-698) It has the material and legal capacity to carry out operations for maintaining international peace and security. Any doubt in this regard is immediately clarified when the principle of functional necessity is taken into account. The NAT is consecrated to its constituents’ efforts for collective defence and for the preservation of the international peace and security as set forth in the UN Charter. This requires NATO be able to count on their international capacity for carrying out these activities. This takes place regardless of the type of legal personality or personalities NATO bodies have since the operability of an international organization’s legal status is mandatorily dependent upon the exercise of a legal capacity in the international (and domestic] planes.[[699]](#footnote-699)

##### 5.2.2 Under Domestic Law

The daily functioning of an international organization unavoidably requires it to be able to operate on the territory of member states, both for the organization’s activities related to the headquarters site, and those activities undertaken outside the organization’s host state.[[700]](#footnote-700) The fulfillment of the organization’s ‘real life’ support obliges it to conclude contracts, acquire and dispose of property, engage in legal proceedings, hold bank accounts and foreign currency, enjoy privileges, immunities and fiscal entitlements, drive vehicles, and hold and display copyright crest and emblems. In addition, an organization needs to be able to use software and issue publications, enter and leave the territories of member states, hire local personnel, acquire good and services, run education centres, and, in the particular case of NATO, carry weapons and uniforms, plate vehicles, and patrol its headquarters. All of these activities are exercised by the domestic legal capacity of international organizations in so far as is necessary to carry out their mission.

During the second reading of the Ottawa Agreement draft, the NATO Working Group on Status discussed the question of domestic legal personality. This discussion took place after the Portuguese representative observed that this should not conflict with national law in the individual countries and for this reason proposed to incorporate new wording. The arguments were due to certain Portuguese constitutional provisions, which would make NATO be seen as a public law entity or as a perpetual association for public purposes, which, in turn, would lead to restrictions when acquiring immovable property.[[701]](#footnote-701) However, the other representatives rejected the proposed wording, pointing out that the only manner for NATO to acquire or dispose immovable property was under the national law of the receiving state – *lex res sitae* – affirming there “could be no special private law for NATO.”[[702]](#footnote-702) Interestingly, with this common understanding, NATO members came to confirm that their respective domestic laws would recognize NATO, which can only be understood as an assertion of NATO’s domestic legal personality and capacity under public international law.

In March 1952, France proposed the addition of the sentence “so far as necessary for the fulfilment of its task”[[703]](#footnote-703) *vis-à-vis* the legal capacity of the Supreme Headquarters. The Chairman of the Working Group considered that those words must be omitted “[i]n view of need for giving Supreme Headquarters the capacity to conclude contracts …”.[[704]](#footnote-704) The sentence proposed by France also limited NATO as a functional international organization. Indeed, the United States representative stated: “Supreme Headquarters could not be limited by the receiving State in the exercise of functions which it considered necessary”.[[705]](#footnote-705) The reason is none other than that the functions and purpose of an international organization are determined by its constituents and its organs, and not by the states where that organization or its subsidiary bodies are based. Indeed, NATO must maintain its independence from any individual influence from a member state, most particularly the one hosting its bodies. This also applies to influence from groups of states.

Related to this ‘independence’, the polemic Article II of the NATO SOFA always surfaces ( “… respect the law of the receiving State, …”),[[706]](#footnote-706) which was incorporated by reference in Article 3.2 of the Paris Protocol, and laid down the respect of the receiving state law by Allied Headquarters. This formulation not only confirms that NATO members, when acting as receiving states, recognize in advance both NATO’s domestic legal personality and capacity, but also incorporates the discussion of the extent of the expression ‘respect the law’. This question is of major importance with respect to NATO bodies’ independence *vis-à-vis* its hosting states. While areas relating to criminal and disciplinary jurisdiction are clearly delineated in Article VII of the NATO SOFA, as well as non-contractual claims in its Article VIII, the extent of the expression ‘respect the law’ begs clarification, which eventually is different from ‘obey the law’. The question is how much sovereignty the hosting state can yield with respect to the legal and actual control it has over allied individuals, materials, and activities in its territory. The functional necessity concept ‘comes to the rescue’ on this question. The international obligations are the parameters that inform the domestic applicable law, which can be relevant without interfering in NATO’s independence. Thus, “an exorbitant application of the receiving State law … would make the NATO SOFA provisions, de facto, null and void”.[[707]](#footnote-707) Actually, Kunz argues that ‘[t]he new development consists only in that the basic treaty imposes such obligation (“legal capacity of international organizations under private municipal law”] for each Member State”.[[708]](#footnote-708)

This domestic legal capacity is also applicable with respect to non-NATO member states. SHAPE, for instance, can contract goods and services for its activities outside NATO members’ territories,[[709]](#footnote-709) which necessarily implies that such capacity exists. This becomes easier within the domestic legal order of non-NATO states signatories of the 1997 Further Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces, which incorporates by reference all of the provisions of the Paris Protocol. Along these lines, it is of note that SHAPE concludes host nation support arrangements with potential host states.[[710]](#footnote-710) Since NATO’s host nation support concept “is dependent on cooperation and coordination between NATO and national authorities, [and] the establishment of HNS arrangements based upon the best use of available host-nation resources”,[[711]](#footnote-711) the domestic legal capacity recognition is implicit.

While the existence of legal personality and capacity within NATO tell us that the organization ‘exists’ and ‘is entitled to do’ respectively, there remains a need to examine which rights and duties it has, i.e., what it is ‘empowered to do’. This new feature of the ‘legal status’ of NATO requires a study of its powers, i.e. its competence.

#### 5.3 Competence

The question of powers[[712]](#footnote-712) is an essential element of a comprehensive understanding of the legal status of international organizations, since it is necessary to know what a specific international institution is empowered to do in order to actualize its functional capacities. This concept may be perceived as being in confrontation with the powers of the constituents. The proper and progressive view of approaching this matter is to accept that “the *very nature* of the concept [is] to be contested and to raise questions as to its nature”.[[713]](#footnote-713) For this reason mainly, the issue of the competence of international organizations must be explained under the functional necessity approach.

The reason why the attribution of competence requires a functional approach is simple. The rights and duties of international organizations, i.e. their powers, must be those necessary to fulfill the functions and purposes for which they were created by their constituents. In the law of international organizations, ‘powers’ are unique, as they are “an instrumental tool, available within a given sphere of competence”.[[714]](#footnote-714) These powers are not comparable to those of the states, as the competence of international organizations must always be demonstrated and founded on special legal bases. This is not the same as saying that only rules of international law apply to determine the powers of a given international organization, as “*des « règles propres » à l’organisation*”[[715]](#footnote-715) are also applicable.

International organizations must have powers sufficiently general to allow for some adaptability, as “it will normally be wise to be guided by the conviction that growth and change are the blood stream of life”.[[716]](#footnote-716) In NATO, “transformation in the broad sense of the term is a permanent feature of the Organization”,[[717]](#footnote-717) which has meant the organization, “since its inception … regularly reviewed its tasks and objectives in view of the evolution of the strategic environment”.[[718]](#footnote-718)

It is necessary to note that competence, in international institutional law, is *sui generis* by nature. Each international organization’s powers are different from each other, for their objectives are different and vary in accordance with the specific functions given to them by the states. These functions may evolve over the lifespan of each organization and be reflected in “any subsequent agreements, relevant rules, practice and functional necessity considerations relating to the organization concerned and reflecting the individual character peculiar to it”.[[719]](#footnote-719) For this reason, the NATO *acquis*, already described above, must be the torch to follow in order to identify NATO’s powers.

The above rationale explains why the competence of an international organization is not a ‘snap-shot’ aimed at defending unmovable constitutional postulates. In fact, the legal powers of international organizations need to be seen under a broader viewpoint of public international law, and the internal legal order of each individual international organization operating in an evolving and transforming milieu. On the one hand, these powers are continuously in evolution, in general, and in particular in each international organization. On the other hand, powers based on a legal methodology offer the guarantee of a proper and controlled dynamism in the necessary evolution of powers in international organizations. In any case, these facts do not clarify the origin of the powers for international organizations. The classical study of conferral of powers to international organizations stays with two doctrines: attributed powers and implied powers.

The doctrine of attributed powers[[720]](#footnote-720) argues “that international organizations, and their organs, can only do those things for which they are empowered”.[[721]](#footnote-721) The doctrine of implied powers states that powers follow from “the functions and objectives of the organization concerned”.[[722]](#footnote-722) It is of note that the doctrine of implied powers has evolved in three ICJ Advisory Opinions, which have established a test to identify where they come from:[[723]](#footnote-723) a) being essential to the performance of constitutionally laid down duties (*Reparation*);[[724]](#footnote-724) b) the necessary intendment out of the constituent instrument (*Effect of Awards*);[[725]](#footnote-725) and c) by the appropriateness for the fulfillment of constitutionally authorized purposes of the organization (*Certain Expenses*).[[726]](#footnote-726)

##### 5.3.1 What Powers Have Been Conferred on NATO?

During the drafting of the North Atlantic Treaty, the Ambassadors’ Committee reached an agreement on the meaning of certain phrases and articles of the NAT text. The commentary number 6 of the agreed interpretations of the Treaty stated the following:

“(6) The Council, as Article 9 specifically states, is established ‘to consider matters concerning the implementation of the Treaty’ and is *empowered* ‘to set up such subsidiary bodies as may be necessary’. This is a *broad* rather than specific definition of functions and is not intended to exclude the performance at appropriate levels in the organization of such planning for the implementation of Articles 3 and 5 or other functions as the Parties may agree to be necessary”. [[727]](#footnote-727)

In the above, the NAT drafters recalled that the empowerment given to the Council is broad rather than specific;[[728]](#footnote-728) it can be submitted that it is framed within the functional needs approach. Moreover, it can be presumed that the empowerment includes activities relating to the implementation of articles 3 and 5 of the NAT, the key articles for collective defence. This interpretation crowns NATO’s legal status and confirms the constituents’ vision of the organization’s requirement to evolve – “*or other functions as the Parties may agree to be necessary*”. [[729]](#footnote-729)

There are two interesting examples commented by Merle, which illustrate in practice the NAT drafters’ intent that powers should exist in NATO, which was perceived as such at the beginning of NATO’s institutionalization. Firstly, the North Atlantic Council Resolution adopted for the implementation of Section IV of the Final Act of the London Conference on 22 October 1952, confirmed “that the powers exercised by the Supreme Allied Commander, Europe, in peace-time extend not only to the organisation into an effective integrated force of the forces placed under him but also to their training”.[[730]](#footnote-730) Secondly, the North Atlantic Resolution of December 1956 gave authority to the Secretary General “to offer his good offices informally at any time to member governments involved in a dispute and with their consent to initiate or facilitate procedure of inquiry, mediation, conciliation, or arbitration”.[[731]](#footnote-731) Merle argues the North Atlantic Council has issued resolutions which have reinforced NATO powers.

“[D]écisions qui impliquent un renforcement des pouvoirs de l’Organisation, c’est-à-dire une restriction à l’une des compétences fondamentales des Etats ; celle qui concerne l’organisation d’un des principaux services publics, l’armée. Or cette mesure est adoptée par l’organe principal de l’institution, sans que les États intéresses puissent faire jouer à son encontre le contrôle que représente la ratification”.[[732]](#footnote-732)

These two examples and their analyses permit a deeper examination of the actual ‘NATO powers’. If the North Atlantic Council, an organ established by the NAT, established broad powers, and, therefore, the doctrine of attributed powers is not applicable, this contractualist view would deprive NATO and any other international organization from ‘growing hormones’ and render the institution obsolete over the years, choked by a lack of ‘evolution oxygen’. NATO has developed several complex institutions with well-established procedures in order to conduct collective acts in accordance with its functions and purposes. For this reason the principle of speciality provides an unsatisfactory explanation not only for acts performed by the North Atlantic Council, but also for those carried out by NATO bodies with legal personality, such as the Supreme Headquarters, which, *inter alia*, conclude treaties and other agreements with non-NATO states.[[733]](#footnote-733) Therefore, it is necessary to abandon this approach in the search for the explanation of NATO’s powers.

The other option would be to claim that NATO powers also fall under the implied powers doctrine. However, it might be thought that if this doctrine were applicable to NATO, it would be in a ‘Hackworthnian’[[734]](#footnote-734) version. Under this logic, NATO would have had developed powers, which are not freely implied, but limited to [or inspired in] implementing those powers expressly granted.[[735]](#footnote-735) Nonetheless, Hackworth’s approach of the implied powers doctrine best explains how the powers originally given exclusively by the NAT have developed into new ones based on the rules of the organization. Actually, on powers, this takes NATO to the side of the implied powers concept. Following the ILC’s concept of rules of the organization, these would include, among others, all of the decisions taken by the North Atlantic Council over the years. The same concept must apply in order to understand Shaw’s implied powers test on constitutional references to:[[736]](#footnote-736) a) the duties, b) the intendment, and c) the authorized purposes of the organization. This test on constitutional references requires a broader understanding than the original and foundational instrument of the organization, i.e., the rules of the organization; and this is the case of NATO. In any case, NATO functions based on the implied powers concept.

##### 5.3.2 NATO Implied Powers

If the competence of an international organization is the extent of its empowerment, NATO’s institutionalization and the evolution of the organization provide illustrative examples of NATO’s implied powers. The first example is the establishment of the NATO’s military structure.

“The military structure may therefore be portrayed as a complex of subsidiary organs and arrangements established by international agreement and resolution adopted by the Council in the exercise of its authority under the Treaty, and representing a unanimously accepted “subsequent practice” reflecting the shared, reasonable expectation of all the parties”.[[737]](#footnote-737)

Stein and Carreau describe the acts with legal effects of the North Atlantic Council and its bodies and place them in four categories, which clearly describe NATO’s general competence:

“(1) “Internal” decisions relating to administration and allocation of work, which derive their “binding” character from the implied or inherent power of the Organization to order its internal affairs.

(2) Decisions prescribing rules of conduct for the member states. This category would comprise a limited number of decisions, such as portions of the resolution of October 22, 1954, defining the authority of SACEUR … [footnote 129: “the Council decided that all disputes among the member states not settled directly by the parties … [the Council] granted the Secretary General certain powers in this connection.].

(3) Guidelines on the nature of recommendation setting forth direction for common postures and policies.

(4) Agreements within the Council and agreements between the Council (or subsidiary organ) and the individual member governments”. [[738]](#footnote-738)

On the other hand, NATO’s Strategic Concept would be a prominent example to show what tasks have been given to the organization, taking into account its purposes and functions. For NATO, the Strategic Concept materializes the implied powers doctrine as described above.

“NATO’s Strategic Concept is an official document that outlines *NATO’s enduring purpose and nature* and its fundamental security tasks. It also identifies the central features of the new security environment, specifies the elements of the Alliance’s approach to security and provides guidelines for the adaptation of its military forces”.[[739]](#footnote-739)

Within the period between NATO’s creation in 1949 until the end of the Cold War, NATO developed and applied four strategic concepts, which were supported by a series of supplemental documents aimed at implementing a set of measures for the military. On the other hand, after the Cold War period, NATO issued three strategic concepts also complemented by implementing policies developed by the Military Committee. It is not possible to approach NATO’s nature or its empowerment without factoring in its transformative nature based on an equally transformative international environment.

However, it was in the aftermath of the terrorist attacks of 11 September 2001 that NATO began to take a comprehensive approach *vis-à-vis* its tasks. NATO’s powers proved obsolete after these attacks, which required an internal ‘revolution’ of its approaches and thinking. Consequently, NATO incorporated into its security and defence thinking a number of questions relating to resources and energy, the spread of weapons of mass destruction, and financial networks; it also developed a policy on cyber-defence, and incorporated strategic assets on intelligence and special forces. Moreover, NATO projected its activities beyond the Euro-Atlantic area, admitted new members, and additionally decided to extend its partnerships beyond the Euro-Atlantic area and the Mediterranean basin – including the Gulf, to partner with countries in the Pacific and in the Caribbean Sea,[[740]](#footnote-740) and international organizations such as the United Nations, the European Union, and the African Union. This deepening of partnerships developed new political relationships, which in turn provided NATO “with stronger operational capabilities to respond to an increasingly global and more challenging world”.[[741]](#footnote-741)

The 2010 Strategic Concept empowers NATO with three essential core tasks: a) collective defence – based on Article 5 of the NAT, b) crisis management – by maintaining a set of standing political and military capabilities, and c) cooperative security – by partnership and cooperation. In this manner, NATO’s constituents enhanced the organization’s purposes and functions with the intention of furnishing NATO with powers to confront future security challenges and help with defining future political and military developments. [[742]](#footnote-742)

Some may question what the legal nature of NATO’s strategic concepts, and instead characterize them as just a political approach. No matter the classification of NATO’s strategic concepts, there is no doubt that they create three legal effects: [[743]](#footnote-743) a) promoting NATO’s inherent institutional dynamics – ‘treaty on wheels’; [[744]](#footnote-744) b) re-orientating NATO’s functions and purposes; and c) creating problems in interpreting internal law, while international law is not much affected. The re-orientation of functions and purposes requires tools to make them effective; these tools are new powers for NATO. On the other hand, the reinterpretation of internal law takes place because there is a transmission of sovereign rights. In this regard, Ruffert and Walter argue with respect to the interpretation of Article 24.2 – transfer of sovereign rights to systems of collective security - of the German constitution (*Grundgesetz für die Bundesrepublik Deutschland*):

“it is to be welcomed that an opinion is more and more advancing according to which NATO is vested with the quality of such a system of collective military security, that its former character as a defense alliance is replaced by this new idea and that, consequently, Article 24 para 2 *Grundgesetz* may also be applied to NATO”. [[745]](#footnote-745)

Reichard argues that NAT articles have been reinterpreted by the strategic concepts and “given new meaning by the parties, to adapt the Alliance to this new role [crisis management outside the territories of its members]”.[[746]](#footnote-746) The German Federal Constitutional Court in 2001 established: “The new NATO Strategic Concept of 1999 is neither a treaty created formally nor a treaty created impliedly”.[[747]](#footnote-747)

However, while the Court denies treaty status to the strategic concepts, it still considers that the new roles established by them “constitute[s] only a further development of the NATO Treaty”.[[748]](#footnote-748) Moreover, the Court naturally explains this phenomenon by characterizing it as “commitments under international law”. [[749]](#footnote-749) The Court does not question whether strategic concepts are “a *further* *development* of a treaty through the act of a competent organ or through other acts that are legally relevant under international law”;[[750]](#footnote-750) it actually confirms that NATO holds powers by confirming NATO’s actual integration with the *Grundgesetz*. A profound reading of the Court’s ruling permits the argument that these powers appear as a result of a functionalist approach, i.e., “(1) a binding concretization of the content of the Treaty by the competent NATO organs; or (2) an authentic interpretation of the NATO Treaty by the parties to the Treaty”.[[751]](#footnote-751)

This confirms that NATO’s implied powers were originally broad and aimed to implement the original powers expressly granted. The case of the NATO’s strategic concepts illustrates NATO’s powers particularities well.

##### 5.3.3 Three Characteristics of NATO Powers

NATO’s powers are also inspired by the naturally evolving purposes and functions of the organization. This is due to the dynamics of the international arena, which ‘force’ the adaptation of the parameters by which NATO bodies interact with other actors, including NATO constituents. In this regard, three of NATO’s genuine characteristics illustrate the way NATO legislates.

The first characteristic requires reference to Rosene’s analysis of the United Nations treaty practice; from which the nature of the treaty-making power in international organizations can be extrapolated, i.e., it is implied and it “is in fact much more employed than the specific treaty-making power”.[[752]](#footnote-752)

“Furthermore its [treaty-making power] exercise is not limited only to the organs designated by the charter as “principal organs”, but every organ, by virtue of its being representation of the Organization. Is, under the general principles of law governing the representation of juridical persons, [the Organization] entitled to make use of the implied treaty-making power if necessary”. [[753]](#footnote-753)

This analysis comes hand-in-glove with NATO’s treaty-making power. There are specific references in the Ottawa Agreement and the Paris Protocol with respect to the conclusion of supplementary agreements with NATO states. However, the practice of NATO common organs has filled the gap of more specific provisions in the NAT[[754]](#footnote-754) and in the general multilateral treaties. Indeed, NATO concludes treaties and other international agreements[[755]](#footnote-755) with NATO and non-NATO members, as well as with international organizations, including international tribunals,[[756]](#footnote-756) and the International Committee of the Red Cross.[[757]](#footnote-757) Both the Organization, represented by the Secretary General, and the bodies with legal personality, i.e., the Supreme Headquarters represented by the Supreme Commanders, exercise this practice.

It can be concluded that the functional need inspires that practice, which, in turn, develops NATO powers by the evolution of its internal legal order and the development of the law of international organizations.[[758]](#footnote-758) However, this is not unique for NATO as “*l’organisation internationale [est] extravertie par nature et par nécessité*”.[[759]](#footnote-759) The development of treaty-making powers in international organizations by practice takes place due to “*le recours à l’accord est spontané; le droit international est, par essence, un droit relationnel; dès lors que des entités nouvelles apparaissent, elles vont recourir aux techniques relationnelles classiques, c’est-à-dire aux traités*”.[[760]](#footnote-760)

The second characteristic concerns the question of who is the owner of the powers exercised by NATO, and in particular whether these powers can operate exclusively and against those of its constituents, or whether they can be exercised at the same time and in parallel. This question does not challenge the implied powers doctrine applied to NATO, it actually helps to illustrate the complex nature of powers of international organizations. In the context of NATO, powers appear to be exercised in a ‘non-zero-sum game’ fashion, which would explain why, while NATO organs exercise their powers, a member may exercise the same powers individually. A good example that shows this characteristic is the coexistence of NATO’s powers to conclude status of forces agreements (SOFAs) with the same countries that individual NATO states also conclude their own bilateral SOFAs. NATO concludes those agreements when NATO-led forces require a certain legal position.

“In negotiations involving NATO Forces or facilities, operational issues are raised, but questions about status, claims, privileges and immunity are significant and inevitably and financial issues remain the most contentious.

The legal role in these negotiations usually is to establish the framework and conditions for NATO’s presence via SOFAs and other understandings such as transit agreements”.[[761]](#footnote-761)

On the other hand, individual nations encourage the conclusion of bilateral SOFAs for their own forces.

“The contexts in which SOFA issues arise have evolved. The first context led to the NATO SOFA and similarly comprehensive agreements with other allies, developed after WWII as U.S. overseas military presence transitioned from wartime combat and occupation to long term peacetime stationing of U.S. forces in fully sovereign nations with which the United States had strong alliance or other security commitments”.[[762]](#footnote-762)

The above demonstrates that NATO states vest their common organs with powers to conclude treaties, but without renouncing their own competence to conclude the same type of agreements with the same nations when they consider their interests may be better protected in a bilateral relation than in a multilateral one. In Afghanistan, NATO relied on a SOFA from 30 September 2014, which “define[d] the terms and conditions under which NATO forces [would] be deployed in Afghanistan as part of Resolute Support, as well as the activities that they [were] set to carry out under this agreement”. [[763]](#footnote-763) On the other hand, the United States concluded, the same day, the Bilateral Security Agreement (BSA).[[764]](#footnote-764)

This powers ‘philosophy’ in NATO can be found in Article 3 of the NAT. This article establishes that NATO members will act ‘separately and jointly’ to better achieve the objectives of the NAT.

Interestingly, it appears that in certain operational circumstances, when NATO’s legal order and international law ‘work’ together, it is much better for NATO states to act under the agreements or policies developed collectively. This was manifested in the *Serdar Case*. NATO-led forces in Afghanistan formed the International Security Assistance Force (ISAF), which established detention policies and procedures in the Standard Operating Procedures 362 (ISAF SOP 362) in accordance with the authority to detain under the applicable UNSCRs. The SOP authorized detention for only 96 hours before transfer to Afghan authorities. On the other hand, the United Kingdom issued its own policy, the Standard Operating Instruction J3-9 (UK SOI J3-9). The UK SOI J3-9 differed from ISAF SOP 362 in that British forces could detain beyond 96 hours.[[765]](#footnote-765) Judge Leggatt stated that “[t]here can be no doubt that the policy under which HM armed forces were operating at the time of SM’s detention went beyond that authorised by ISAF under ISAF SOP 362. As the authority under the UNSCR was granted to ISAF”,[[766]](#footnote-766) Judge Leggatt found the British forces guilty of breaching national and international human rights obligations.[[767]](#footnote-767) For the United Kingdom, the use of the NATO’s ‘non-zero-sum game’ powers have proven disadvantageous to the point of breaching its international human rights obligations.

A preliminary conclusion would be that NATO states, working under procedures issued under NATO powers, are less tempted to individually ‘misinterpret’ international obligations. The above shows that NATO states are better off in terms of compliance with conventional individual obligations when working under collectively agreed operational rules and proceedings. It appears that adherence to or use of them under a collective understanding increases legitimacy with regards to compliance with international obligations.

The third characteristic refers to NATO’s rule-making and how its “line between internal and external law-making blurs”. [[768]](#footnote-768) NATO counts, as do most existing international organizations, on regulatory and operational powers.[[769]](#footnote-769)

“As was well known, international organizations … had to act within a specific legal framework …(a) the national law of States; (b) general international law; (c) the law of the organization …The concept of an "internal law" of international organizations … was necessary to distinguish between the law applicable to the organization and the law applicable by the organization. It was the latter which would constitute the "internal law" of the organization”.[[770]](#footnote-770)

NATO’s regulatory powers refer to internal and external rules, which respectively form the legal order (internal law) of the organization and apply beyond “the mere functioning of the organization itself”.[[771]](#footnote-771) On the other hand, NATO’s operational powers apply to general or particular directives for its daily functioning.

Powers for developing internal rules are generally recognized[[772]](#footnote-772) and are intrinsic to the fact of being an international organization. Internal rules contribute to the creation of a separate system of law for NATO, which is hierarchical. At the top stands the NAT and the other foundational treaties, running all the way down to directives and other minor regulations. External rules must also be considered part of the legal order of NATO, although, in general, they are intended to cover peripheral activities of the organization with other actors of the international arena.

However, while this distinction between internal and external rules fits for Cartesian minds, it does not fit reality and in fact becomes circular. Alvarez argues that “[t]he internal/external distinction addresses a purported distinction between actions dealing with certain subjects … and matters that do not deal with the rights and duties of members qua membership”.[[773]](#footnote-773) He proposes to de-emphasize the distinction and “recognize that many if not most decisions made by IOs have both internal and external normative impacts”.[[774]](#footnote-774)

Indeed, it appears that NATO’s internal rules have had external normative impact in the case of matters relating to host nation policy. NATO has issued the Allied Joint Publication ‘Allied Joint Doctrine for Host Nation’ (AJP 4.5) with the purpose of providing Host Nation Support guidance for “planning NATO military activities, where Allied Forces are planned to be located on, operating in or transiting through the territory of a Host Nation”.[[775]](#footnote-775) This document is at the second level in NATO’s doctrine hierarchy on logistics contained in the NATO Military Committee’s documents: MC 319/2, Principle and Policies for Logistics, MC 334/2 NATO Principles and Policies for Host-Nation Support, and the generic host nation support guidance contained in AJP-4 Allied Joint Doctrine for Logistics. However, it had a major impact externally, to the point that the ‘EU Concept for Logistic Support for EU-led Military Operations’ took into “account relevant NATO logistic documents to the extent possible”.[[776]](#footnote-776) NATO’s internal law documents on host nation support are “relevant for the EU HNS Guidelines”.[[777]](#footnote-777)

Interestingly, since NATO has proven to be a security provider, its ways and manners have gained ascendance among other international actors providing support to international peace and security. Therefore, the policy invites third parties, who are intended to participate in NATO-led operations and exercises,[[778]](#footnote-778) to implement its structures and procedures. This explains why the European Union has incorporated them into its own internal law. This is an example of how a definition of NATO’s internal and external rules is elusive and does not reflect reality.

Another example of NATO’s rule-making characteristic is that of the implementation of the United Nations Security Council Resolution 1325[[779]](#footnote-779) on Women and Peace and Security. The resolution urges United Nations members to increase their voluntary financial, technical, and logistical support for gender-sensitive training efforts. It is not addressed to international organizations. Nevertheless, the North Atlantic Council implemented a first diversity action plan in 2012,[[780]](#footnote-780) and, consequently, its Supreme Headquarters issued the Bi-SC Directive 40-1 as part of NATO’s comprehensive approach for operational effectiveness. The directive’s aim ensures that Resolution 1325 and related resolutions are integrated in NATO’s military organizations and forces within NATO Command Structure, NATO Force Structure, assets at the disposal of NATO, and within NATO-led operations.

The Directive demonstrates the initiative of NATO’s common organs to turn a United Nations external rule into NATO internal rules and operational ones. It is of note not only that NATO, as an international organization, has implemented Resolution 1325, but also that it has incorporated it into its operations. This could be interpreted as an effort to demonstrate that NATO continues to be inspired by the United Nations’ purposes and principles.

One may cast no doubt on a ‘certain’ obligation to implement United Nations Security Council resolutions – actually, all NATO states are parties to the Charter. However, NATO’s practice in rule-making splits hairs when implementing the 2008 Montreux Document on Private Military and Security Companies. This document is soft law based on the principle that “[c]ontracting States retain their obligations under international law”.[[781]](#footnote-781) Drawing the idea from Guzman, the Montreux Document would be the first form of soft-law-making, i.e., “a kind of support for hard law rules. It fills in gaps, clarifies meaning, and nudges the content of hard law rules”.[[782]](#footnote-782) The document is the product of a joint initiative by Government of Switzerland and the International Committee of the Red Cross and although “addressed to States, the good practices may be of value for other entities such as international organizations, NGOs and companies that contract PMSCs, as well as for PMSCs themselves”.[[783]](#footnote-783)

Since 2007 NATO has already relied on the NAC’s approved Policy on contractor Support to Operations, C-M (2007) 0004, which did not directly address the question of private security companies, but indirectly covered the issue of the carrying of arms and their subsequent use, which could bring the risk of the contractors losing their civilian status.[[784]](#footnote-784) However, it wasn’t until 2011 that the Supreme Headquarters Allied Powers Europe passed Allied Command Operations Directive 060-101 concerning contracting with Private Security Companies. Even so, the Directive does not directly impose obligations on private security companies, it only confirms a contractual relationship, which prescribes obligations for delivering services. The directive has a special “focus on all precautionary steps that an ACO contracting officer has to take into account when entering into contracts with PSCs after previous approval of the North Atlantic Council (NAC)”.[[785]](#footnote-785) ACO contracting officers must check that private security companies comply with the highest international standards of their profession as prescribed in the Montreux Document and other related mechanisms.[[786]](#footnote-786) Another curiosity of NATO’s characteristic on rule-making in this particular case is that the Directive preceded the 2013 letter of support from NATO’s Secretary General.[[787]](#footnote-787) This might illustrate Economides’ argument:

“Mais, dans d’autres cas [when the mandatory character of decisions taken by international organizations does not result from their constitution] le caractère obligatoire se dégage, par voie interprétative de l’économie générale du traité, en liaison avec la pratique correspondante de l’organisation. Par exemple, l’OTAN, dont le traité ne faut aucune mention des actes de l’organisation, prend néanmoins des décisions obligatoires en ce qui concerne notamment le secteur de l’élaboration et de l’application des plans de défense coordonnés”.[[788]](#footnote-788)

The behavior of NATO’s regulatory and operational powers comply with the conceptualization by Dupuy and Kerbrat of *compétences normatives et compétences opératoires:“[i]l serait hasardeux de vouloir dresser un catalogue ou une typologie exhaustive des compétences diverses dont peuvent être dotées les organisations internationales”*.[[789]](#footnote-789) The characteristic of NATO’s powers on rule-making show the *sui generis* nature of international organizations’ competences as Dupuy and Kerbrat indicate. It also demonstrates the necessary versatility international organizations require in order to comply with their functions and purposes. Klabbers somehow denies NATO that versatility when he argues that “NATO may have overstepped the limits of its own legal order: after all, as traditionally understood, NATO was not supposed to act in areas outside the territories of its member states”.[[790]](#footnote-790) The sometimes blurred distinction between internal and external rules helps to explain how the circumstances international organizations face are prompters for the common organs to make law - “even if the resulting law has moved in ways that she did not always anticipate”.[[791]](#footnote-791)

#### 5.4 Conclusion

The legal status addresses the most complex matters within the legal position of an international organization, since the legal personality, the legal capacity and the powers of an international organization enable them to interact as a subject on the national and international planes. NATO is a corporate and juridical body made of states, which established, and continue establishing, different civil and military subsidiary bodies in order to fulfill its ultimate mission, which is that of contributing to the maintenance of international peace and security. NATO bodies, as subjects of law, interact within the international and domestic legal orders, as well as within NATO’s internal legal order.

NATO’s particularities add a ‘pinch’ of difficulty. In NATO, no matter which theory is applied on how an international organization holds legal personality, NATO fulfils all the criteria to be considered as having international legal personality. NATO has both subjective and objective international and domestic legal personalities, which eventually give treaty-making power and recognition to conclude contracts, acquire and dispose of property, or engage in legal proceedings.

In the case of NATO, and in order to understand the specificities of its legal personality, actually personalities, it is necessary to address certain particularities: a) NATO’s institutional history; b) the lack of international features in the provisions of the NAT and the further development of the three [interacting] general multilateral treaties – in the case of SHAPE, well after the Supreme Headquarters was created as in international organization; c) there are three leading legal personalities operating within NATO [given by the Ottawa Agreement and the Paris Protocol], this situation makes three distinct international organizations, within NATO, and with their own legal positions based on the three [interacting] general multilateral treaties; and d) the understanding of the limited nature of the term NATO ‘subsidiary bodies’.

NATO’s legal capacity is identified under the principle of functional necessity. NATO’s needs require the legal capacity to operate in the international and domestic arenas. On the one hand, NATO has the capacity to conclude international agreements, while in the domestic arena it is capable of acquiring and disposing of property. The interaction with other subjects of international law may require bringing claims, concluding treaties, and establishing diplomatic relations, although NATO bodies do not bring claims before a third party since the NAC is the only body to resolve any dispute between allies. On the other hand, the daily functioning of NATO necessitates operating on the territory of the member states. The fulfillment of the organization’s ‘real life’ demands the conclusion of contracts, acquisition and disposal of property, participation in legal proceedings, driving vehicles, issuing publications, carrying weapons, etc. NATO’s domestic legal capacity enables these activities, which are imperative for the fulfillment of the functions and purposes set up by the rules of the organization.

NATO holds expressly granted and implied powers, which are all limited to implementing the functions and principles of the organization as established by the governing treaties and rules of the organization. However, there are three interesting characteristics: a) NATO powers can be extrapolated as in the case of the treaty-making power and the extension to subjects and situations not foreseen in 1949; b) NATO has ‘non-zero-sum game’ powers. This is a fact illustrated by Article 3 of the NAT, which permits member states to conclude agreements on subject matters that may be also assigned to NATO bodies; and c) while NATO’s rule-making powers are focused on its internal order, in some cases, as with Host Nation Support policy, they may become unintentionally external.

The taxonomy of the legal status of NATO gives granularity not only to its activities, but also to the role of member states and NATO bodies, and their interaction. The complexity of NATO activities and its institutionalization require the level of detail to properly exploit all the possibilities of the organization when faced with new situations such as the creation of the NATO Force Structure and other multinational assets, out-of-area operations or, most recently, hybrid threats.

## CHAPTER 6

PRIVILEGES AND IMMUNITIES

### 6. Privileges and Immunities

6.1 Introduction

With respect to NATO’s legal position, the above analysis has addressed its legal status. Next, the second major issue concerning NATO’s legal position is the question of certain rights in the form of privileges and immunities. Bederman argues that in antiquity “[t]here was the fundamental issue of protecting the privileges and immunities of envoys from infringement by the host nation”.[[792]](#footnote-792) Greeks, “[b]y the fourth century BCE … preferred, when making claims to immunities and privileges, to premise their arguments on expediency.”[[793]](#footnote-793) This practicality has not only stayed over the years, but also required a great deal of sophistication when contemporary international organizations appeared in the international arena. It was around the mid nineteenth century when this field began timidly to be studied, and case-law and conventional and customary-based practice caught the attention of academics and practitioners.[[794]](#footnote-794) Kunz submits that from 1920, and with respect to privileges and immunities of international organizations, this question was greatly extended by means of conventions and that after 1939 privileges and immunities became widely acceptable for international organizations[[795]](#footnote-795) due to their increase in number.

Privileges and immunities were established based on the need to grant functional independence to international organizations, to ensure that the host state cannot exercise any influence or control over the institution,[[796]](#footnote-796) and to safeguard “[t]he principle of equality of states”.[[797]](#footnote-797)

“Le bon fonctionnement de toute organisation international n’est assuré que si, par des privilèges et immunités, celle-ci est mise à l’abri d’ingérences non autorisées des Etats membres … ne peut guère concevoir l’existence d’une organisation sans ces immunités … ”[[798]](#footnote-798)

The above is framed by the needs arising out of the functions and purposes of each specific institution.[[799]](#footnote-799) Furthermore, the ILC has established that the granting of these privileges and immunities is based on the need of international organizations to exercise their functions with complete freedom and independence.[[800]](#footnote-800)

“The question of privileges and immunities … was founded in the case of international organization on functional necessity and was thus limited in scope by the purposes of the organization concerned”.[[801]](#footnote-801)

The four general pillars of privileges and immunities, which allow international organizations to implement their functions and purposes, as developed by their respective constitutions and the rules of the organizations (organizational immunities), are: a) the immunities from jurisdiction and execution; b) inviolability of premises and official archives; c) freedom of communication; and d) freedom to hold bank accounts, currency, and transfer funds, as well as fiscal entitlements.[[802]](#footnote-802) These basic privileges and immunities are complemented with those granted to their personnel (international immunities): a) immunity in respect of official acts; b) immunity from national service obligations; c) immunity from immigration restrictions and registration of aliens; d) diplomatic privileges and immunities of executives and other senior officials; e) repatriation facilities in times of international crisis; f) exemption from taxation on salaries, and emoluments; and g) exemption from customs duties.[[803]](#footnote-803)

Privileges and immunities for states and international organizations continue to trigger questions and debate.[[804]](#footnote-804) The settlement of these has proven difficult in two respects: first, there is no general convention in force for international organization regulating them in spite of the not-yet-in-force Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character; and second, the expression ‘privileges and immunities’ now “overlap[s] so much that it is impracticable to distinguish between them”.[[805]](#footnote-805) On the latter, the distinction between privileges and immunities appeared important in the past. Åke Hammarskjöld and Kunz considered honour, courtesy, and protocol as elements relating to the term ‘privileges’, while the independent functioning of the organization related to the term ‘immunities’.[[806]](#footnote-806) However, in the particular case of international organizations this distinction does not appear practical. It is the doctrine of functional necessity which clarifies why international organizations require privileges and immunities and draws its contours. In this way, each international organization is entitled to a specific range of privileges and immunities based on the needs defined by its functions and purposes as vested in them by their constituents.[[807]](#footnote-807)

Questions related to privileges and immunities not only require specific analysis per institution due to the uniqueness of each international organization, but also because of the imperative need to take into account the conventional and customary rules applicable to it. The need to count on functioning international organizations is obvious in a peace system based on inter-state cooperation and peaceful resolution of disputes within the framework of international institutions. However, as obvious as this may look, there is certain resistance towards privileges and immunities.

In 1983, Szasz predicted a catastrophic future where the functional immunities of international organizations will diminish.[[808]](#footnote-808) This fatalistic prediction had some prophetic value since the *de facto* absolute immunity of international organizations is starting to come under challenge, although “[o]f the 28 cases surveyed, IO immunity was set aside in only six cases. Immunity remains a strong bar to employment claims, although the ECtHR has made the availability of a robust internal justice system an important variable in such cases”. [[809]](#footnote-809)

Kunz considers that functional necessity is the basis for granting privileges and immunities and “seems now almost universally recognized”,[[810]](#footnote-810) while Klabbers questions this submission based on case law. Klabbers argues that the functional need, as a reason to justify privileges and immunities, is unpredictable and potentially not a norm.[[811]](#footnote-811) Moreover, he claims that “it focuses exclusively on the relations between organisations and their member states and is structurally incapable of catering to the position of those other than member states”.[[812]](#footnote-812) While Klabbers’ conclusion is not without value, experts, and specialized courts appear to have recently developed tests and criteria in order to balance properly the immunity *ratione functionis* of international organizations.[[813]](#footnote-813)

In the sections below, NATO’s international and organizational immunities will be addressed from an institutional international law standpoint. As explained above, it is necessary to understand that NATO’s civil and military subsidiary bodies, i.e., the ‘Organization’ and the ‘Supreme Headquarters’, have different legal positions. Wouters and Naert address this question by noting that in the case of NATO several treaties deal with privileges and immunities - including those of the Organization itself, states’ representatives, international military headquarters, and headquarters provided by members to NATO.[[814]](#footnote-814)

Undoubtedly, these peculiarities affect the conceptualization and analysis of NATO’s privileges and immunities, although this is not equivalent to stating that privileges and immunities of NATO bodies have no relationship, to the contrary they form a complex and interesting network supported by the interrelation of the three general multilateral treaties and their *travaux préparatoires*. The reasons for this are: those treaties have several common points deriving from their origin and negotiations; the practice of the law of international organizations; the necessary collective work of NATO’s common organs required to jointly pursue the NAT’s functions and purposes; and the need for common organs to operate with a similar functional independence fueled by ‘Hackworthnian’[[815]](#footnote-815) implied powers, i.e., implied powers limited and controlled by the rules of the organization.

The sections below illustrate in detail the NATO’s privileges and immunities by addressing their rationale, legal bases and particularities,[[816]](#footnote-816) and related case law.

#### 6.2 Rationale for Vesting NATO with Privileges and Immunities

6.2.1 [General] [Introduction]

As submitted above, the functions and purposes of an international organization identify its needs, which, in turn, inform the privileges and immunities to which it is entitled. NATO’s functions and purposes, established in the preamble of the North Atlantic Treaty, partially coincide with those of the United Nations.[[817]](#footnote-817) This includes the search for peace, safeguarding freedom, the common heritage and civilization of their peoples, and the foundational principles of democracy, individual liberty, and the rule of law. NATO additionally seeks to promote stability and well-being in the North Atlantic area. The Alliance is not only ready to apply the inherent right of collective defence, but also to preserve peace and security. NATO states undertake to settle any international dispute by peaceful means and to refrain from the threat or use of force inconsistent with the purposes of the United Nations.

Therefore, and in accordance with the above, the Treaty also establishes the general needs in articles 2 and 3, which refer to strengthening the Parties’ free institutions, eliminating economic conflicts, and maintaining continuous and effective self-help and mutual aid to develop individual and collective capacities to resist armed attack. Finally, another NATO need is set by Article 4 and relates to the capacity of the Alliance to “consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened”.

The above needs are confirmed and made operational in the NATO SOFA, the Ottawa Agreement, and the Paris Protocol, i.e., the general multilateral agreements of NATO. The Ottawa Agreement in its preamble ascertains “that for the exercise of their [signatories] functions and the fulfilment of their purposes it is *necessary* that the North Atlantic Treaty Organization, its international staff and the representatives of Member States attending meetings thereof should have the status set out hereunder … ”.[[818]](#footnote-818) The Paris Protocol makes the same clear by referring in its title to the Treaty: ‘Protocol on the Status of International Military Headquarters set up *pursuant to the North Atlantic Treaty*’.[[819]](#footnote-819) These needs are clearly based on functional necessity, which “interacts with, and is closely related to, a whole range of *basic considerations*, which together militate in favor of granting those immunities necessary to an organization’s [NATO’s] functions and purposes”.[[820]](#footnote-820)

Olson points out that there are three elements that add complexity to NATO’s immunities regime:

“1) the existence of separate but co-equal legal regimes for the military and civilian sides of the NATO house; 2) the fact that the seats or subordinate offices of various NATO bodies are found on the territories of a majority of NATO Allies as well as a number of non-Allied states, and operate under a wide range of local legal and political contexts; and 3) the absence of a single hierarchy below the Council, whether for the Organization as a whole or separately on the civilian or military sides”.[[821]](#footnote-821)

On the absence of a NATO hierarchy below the Council, reference must be made to the conscious intention of the member states of making the Council the common organ of reference, making all other organs, NATO bodies, subordinate to it. The fact that there is no hierarchy below the Council – other than subordinate headquarters to the Supreme Headquarters, is not an impediment for ‘collaboration’ among the civil and military bodies. This is ‘forced’ by the need to contribute to the functions and purposes of NATO as established by the governing treaties and NAC decisions.

“At the first session of the Council, in Washington on 17 September 1949, it was decided that the Foreign Ministers of the NATO countries would comprise the “normal” membership of the Council, and that any subsidiary bodies which were set up would be subordinate to the Council”.[[822]](#footnote-822)

NATO bodies require privileges and immunities, *inter alia*, in order to: a) grant NATO bodies’ independence and impartiality; b) ensure the sovereign equality of allies; and c) avoid financial advantage from NATO activities. These points and others are developed below.

##### 6.2.2 Principle of Independence of the NATO Bodies

The term ‘independence’ refers to independence *vis-à-vis* others, *ne impediatur officia*. Compliance with this relevant feature is assessed on the basis of the existence of sufficient safeguards against the risk of external pressures and interferences, as well as statutory criteria.

Jenks presents the foundation of the organizational immunities, which are of general acceptance and were contained in the International Labor Organization Memorandum.[[823]](#footnote-823) These principles are: a) the protection of international organizations from “control or interference by any one government in the performance of functions”;[[824]](#footnote-824) b) the protection of international funds from national financial advantages and financial charges; and c) the provision of “facilities for the conduct of its official business customarily extended to each other by its individual member States”. [[825]](#footnote-825) Jenks argues that:

“The thinking underlying these propositions is essentially institutional in character. It is not concerned with the status, dignity or privileges of individuals, but with the elements of functional independence necessary to free international institutions from national control and to enable them to discharge their responsibilities impartially on behalf of all their members”.[[826]](#footnote-826)

This confirms that the *raison d’être* of organizational immunities is that of facilitating the operationalization of the common interest without the control or interference of any one of the member states of an international organization. The aim is to grant the functional independence of the common organs to implement the collective decisions of the constituents. NATO’s International Staff, International Military Staff, and Supreme Headquarters, as well as civilian agencies[[827]](#footnote-827) require said functional independence. The role of the International Staff, headed by the Secretary General, is that of providing unbiased advice, guidance, and administrative support to the member states’ delegations at the NATO Headquarters. The International Staff also helps to implement decisions taken at NATO boards and committees, which eventually results in NATO’s consensus-building and decision-making.[[828]](#footnote-828)

The International Military Staff is “the essential link between the political decision-making bodies of the Alliance and NATO’s Strategic Commanders (the Supreme Allied Commander Europe – SACEUR – and the Supreme Allied Commander Transformation – SACT) and their staffs”.[[829]](#footnote-829) Its main role is that of providing strategic military advice and staff support for the Military Committee, which in turn provides consensus-based advice on all military aspects of policy, operations, and transformation within the Alliance to the North Atlantic Council.

The two Supreme Headquarters, which together form the NATO Command Structure, provide the command and control needed to address threats and, if deterrence fails, respond to an armed attack against the ‘NATO territory’. The essential role of the Supreme Headquarters and all of their subordinate units is preserving cohesion and solidarity within NATO. The NATO Command Structure has the common organs that require major independence, since they do not support the member states’ civil and military delegations like the International Staff and the International Military Staff. They are the materialization of NATO’s institutionalization, since, in their daily activities, they provide a continuum on the promotion of the principle of equitable sharing of the roles, risks, and responsibilities among NATO member states, as well as the benefits of collective defence. Supreme Headquarters’ institutions also maintain and strengthen the vital transatlantic link.[[830]](#footnote-830)

The three main categories of NATO common organs are NATO HQ/International Staff and the two Supreme Headquarters,[[831]](#footnote-831) which act independently from the member states; each and every one of these organs performs their specific and differentiated international tasks. This confirms that they have their own and distinct legal position, which includes, aside from legal personality, legal capacity and powers, the privileges and immunities. This independence protects international organizations from unilateral interference from member states.[[832]](#footnote-832) Bekker rightly argues that privileges and immunities are necessary to counter the danger of prejudice, as well as divergent judgments by national courts.[[833]](#footnote-833) On this note, Lalive also adds an element that NATO is always likely to suffer.

“[E]n période de tension internationale, à un moment où l’organisation souffre, à tort ou à raison, d’un certain discrédit auprès de l’opinion publique et où elle peut avoir à exercer une activité, à prendre des décisions qui seraient impopulaires dans le pays d’accueil, on discerne les inconvénients de lui appliquer le droit commun et de la soumettre à un contrôle juridictionnel exercé para des juges ou jurés qui, eux, ne seraient pas toujours a l’abri de pressions gouvernementales ou privées”.[[834]](#footnote-834)

NATO’s functions and purposes are related to the maintenance of international peace and security, which entails actual engagement in the field and also the possibility of causing fatal casualties. Therefore, NATO’s operations run the risk of not being popular in public opinion and subject to unfavorable criticism, especially in areas relating to crisis management, e.g. activities in the Balkans and the Middle East and North Africa (MENA).

The threat over the independence of international organizations comes from governments as much as from courts. Lalive submits that there is also a psychological effect for national courts ordinarily busy with private law cases, which make them very unfamiliar with the particularities of international organizations.[[835]](#footnote-835) Also, in organizations like NATO, which have offices in almost all NATO states and various and complex legal positions, the risk of diversity and incoherence in judgments on the activities of the different common organs of the Organization is a reality.

The diversity of judgments is a fact in Italy, Belgium, and the Netherlands. The *Corte di Cassazione* in the case of *Branno v. Ministry of War*[[836]](#footnote-836) discussed a contract concluded between a company and NATO headquarters[[837]](#footnote-837) in Naples for the provision of canteen services. The Court considered that provision of canteen services was a *iure gestionis* activity, which was not protected by immunity. The court, however, forgot to take into account that canteens are an integral part of international military headquarters, either by means of being an operational facility or integrated into moral and welfare activities. In Belgium, “[o]utside the context of labour disputes, Belgian courts and tribunals have been less ready to discard international organization immunity, and instead have confirmed the generally absolute character of international organization immunity”.[[838]](#footnote-838) In the District Court of Limburg in Maastricht,[[839]](#footnote-839) a case, against SHAPE and its subordinate headquarters in Brunssum by a former fuel supplier for the International Security Assistance Force (ISAF) in Afghanistan related to a multi-million claim, was presented as commercial. The Court however confirmed that the activities related to the implementation of United Nations Security Council resolutions in the context of ISAF for the maintenance of international peace and security are of a public nature.[[840]](#footnote-840) This fact was confirmed by the Supreme Court of the Netherlands.[[841]](#footnote-841)

Additionally, the threat may come from baseless actions brought to court by “*des illuminés, des maniaques ou des fous, ou simplement des esprits chicaniers ou profiteers*”, [[842]](#footnote-842) or by individuals controlled by third states or entities. In February 2015, in the aftermath of the occupation of Crimea and invasion of the eastern part of Ukraine, General Breedlove, the Supreme Allied Commander Europe (SACEUR, the head of SHAPE) made a series of statements[[843]](#footnote-843)on CNN alleging that forces backing up the operations in Ukraine were Russian. At the beginning of 2016 a Bulgarian passport holder of Russian origin and resident in Munich filed a criminal action against this NATO Commander for insult and defamation against the Russian Federation.[[844]](#footnote-844) The judge of Munich issued an order to the United States European Command (EUCOM) in Stuttgart asking for the provision of personal data in order to contact General Breedlove on the action brought by the Bulgarian citizen. EUCOM informed the judge that the SACEUR resided in Belgium as he was the SHAPE Commander. The judge issued a petition, via diplomatic channels, and the office of legal affairs of the Allied Command Operations/SHAPE contacted *Le Comité Interministériel pour la Politique de Siège* (CIPS),[[845]](#footnote-845) the Belgian institution in charge of international organizations. The legal office invoked Article 8 (on personal privileges and immunities - immunity of jurisdiction for words spoken) of the SHAPE and the Kingdom of Belgium Agreement, dated 12 May 1967.[[846]](#footnote-846) The court of Munich accepted the immunity and the case was closed.

##### 6.2.3 Principle of Impartiality of the NATO Bodies

The principle of impartiality complements that of independence. Impartiality indicates the absence of prejudice or bias.

“A member State will only then be prepared to implement the decisions taken by an organization which go against this State’s interests, if it can depend on the fact that the organization genuinely acts in the common interest of all its member States and not in the sole interest of one particular member State or influential bloc of member States within the organization”.[[847]](#footnote-847)

NATO’s test for the existence of impartiality must be determined on the basis of subjective and objective criteria. Human beings operate NATO bodies; therefore impartiality “concern[s] with a psychological element on the side of the member States”.[[848]](#footnote-848) On this note, it seems useful to refer to the NATO Code of Conduct in order to identify NATO’s impartiality. On the subjective criteria, the staff of NATO bodies must remain impartial by “promoting the highest levels of trust and confidence in our integrity, impartiality, loyalty, accountability, and professionalism”.[[849]](#footnote-849) On the objective criteria, the same code of conduct [contains] [mentions] abundant criteria: “Keep an international outlook and base our recommendations and decisions on what is best for the Alliance as a whole, rather than the views or interests of our own, or any particular nation or nations ... ”.[[850]](#footnote-850)

These stringent work conditions serve the purpose of the common interest. They also rule out, or at least minimize, dissenting constituents. This is managed through the implementation of the NAC’s decisions via activities of the NATO bodies executed by the International Staff/International Military Staff and, mainly, by the Supreme Headquarters’ staff.

The privileges and immunities, originating from the different legal positions of NATO, enable the good and bias-free functioning of NATO bodies. They are a major contribution for safeguarding the impartiality of the international organization.

##### 6.2.4 Principle of Sovereign Equality of Allies

The principle of sovereign equality has always been present in the Alliance and has served to promote cooperation among NATO members. This equality is not only reflected in the institutional rules, such as the establishment of the North Atlantic Council, the vote system of unanimity first and consensus later in the committee system, and the treatment of the international employees.[[851]](#footnote-851) In NATO, part of that equality resides in sharing the burden of being ready for their collective defence, which requires a balanced interdependence. In this regard, NATO’s Secretary General pointed out in 1962 some key elements of President Kennedy’s 4th of July speech:

“I feel exactly the same about the President's other dissertation that the effort for Independence should lead naturally to an ever increasing degree of interdependence. But here again let us bear in mind one cardinal point: That is the conceptions of partnership and equality imply duties as well as rights. If we demand more equality in, for instance, nuclear matters, we probably must also assume heavier responsibilities in, for instance, the build-up of the conventional forces of the Alliance”.[[852]](#footnote-852)

This principle has been also highlighted by France, which refers to the need that NATO members truly believe they all share the burden:

“[H]owever, when planning interdependence, account will also have to be taken of certain political factors. All countries will make a greater effort and will do so with greater willingness if they are conscious that the work shared in common is based in principle and in fact on moral equality. Regard for the maintenance of a reasonable balance between the parties to the alliance as regards their rights and duties is essential”.[[853]](#footnote-853)

NATO member states insist strongly on the full application of the principle of sovereign equality. This was the case for France, which agreed to provide a tax exemption regime to SHAPE under the proviso that other hosting states of Allied Headquarters did the same.[[854]](#footnote-854)

“SHAPE has already reached an agreement with the French Government on behalf of itself and other Allied Headquarters located in France which allows these Headquarters exemption from business turn-over taxes. […] However the French Government agreed to the continuation of this special exemption *only on the condition that other governments give International Military Headquarters situated in other host countries similar tax exemptions*”.[[855]](#footnote-855)

In addition, the principle of sovereign equality is supported by the series of bilateral treaties between Supreme Headquarters and receiving states, which host Allied Headquarters. These treaties refine the privileges and immunities laid down in the NATO SOFA and the Paris Protocol, and incorporate those from (or are inspired by) the Ottawa Agreement, which the two former miss. A case in point is that of the privileges and immunities enjoyed by certain representatives under Article XIII of the Ottawa Agreement and the request by the United States to designate in the draft of the Paris Protocol similar privileges and immunities to senior international military officers and civilian equivalents.[[856]](#footnote-856) This request was reiterated by SACLANT[[857]](#footnote-857) and finally the decision by the North Atlantic Council was that the question would be left to national arrangements, i.e., the bilateral agreements (supplementary agreements) defined in Article 16.2 of the Paris Protocol. This has been the case since 1953. In this regard Bekker, referring to the United Nations, argues that a psychology of equality benefits both the organization and the member states individually. An example of this benefit is the bilateral agreements, which permit “the organization [to] claim certain immunities that are of a wider scale than those laid down in existing general multilateral agreements”[[858]](#footnote-858) and in turn “the individual States are accorded a position in the negotiating process that is not less favorable that that accorded … to any other State”.[[859]](#footnote-859)

##### 6.2.5 Undue Financial Advantage

The establishment of financial entitlements for international organizations and their personnel intends to keep these institutions and their agents independent from the members. Privileges and immunities are mechanisms which play a fundamental role in ensuring that independence and sovereign equality,[[860]](#footnote-860) and most particularly the establishment of mechanisms for avoidance of financial advantage by hosting states.[[861]](#footnote-861) These mechanisms consist of vesting international organizations and their personnel with financial entitlements in the realm of customs and direct taxes.

The financial privileges and immunities must be related to the activities of the institution and these have to be identified as needs of the organization, which are framed within the institution’s functions and purposes. This approach shows the noble cause of the organization, which falls under this principle of avoiding undue fiscal advantage. It is the collective interest of common security and defence which inspires the waiver of sovereign power to tax physical and moral persons in the territory of state. “The cardinal principle is that member States should not hinder in any way the working of the organization or take any measures the effect of which might be to increase the organization’s burdens, financial or otherwise”.[[862]](#footnote-862)

Conscious of the above, France issued a series of specific administrative arrangements in order to exempt SHAPE from taxes. It is to be noted that SHAPE was the first common organ established by the NAC. In 1950,[[863]](#footnote-863) the French delegation already memorialized the establishment of the legal status of SHAPE. France stated that for the provisional financing of SHAPE, it would extend the conditions set forth in the Franco-American agreement and that “[t]he French delegation is perfectly conscious of the fact that SHAPE in its character of an *international organisation* is different from the Franco-American organisation. Faced with the necessity of taking provisional measures at this time it appears that it would be best to propose a system which has already been proven”. [[864]](#footnote-864) France was not obliged to act by the provisions of a treaty, but in recognition of NAC resolutions (fifth session – New York, 15-18 September 1950 – creation of an integrated military force under SHAPE). This, since the specific treaty for Allied Headquarters (international military headquarters), the Paris Protocol, concluded on 28 August 1952, was not in force until 1954. France justified its behavior on the basis of functional necessity, i.e., “[t]o facilitate the functions of SHAPE”. [[865]](#footnote-865) Since 1 November 1952, SHAPE enjoyed tax exemptions of the France-SHAPE agreement (supplementary agreement) out of courtesy of France, as the agreement was not yet signed.[[866]](#footnote-866) Before that time, Annex C (activities) and annex D (by equivalence of personnel with that of the Embassy) of the Franco-American agreement covered tax exemptions. Interestingly this agreement, renewed several times, makes continuous reference to the UN Charter and the NAT.[[867]](#footnote-867) Based on this particularity, it is submitted that, even during provisional situations such as the one described for SHAPE in France, the NATO Allied Headquarters were always under the legal framework created by the principles and purposes of the Charter and the NAT.

France conditioned its position to the principle of ‘reciprocity’, i.e., the other hosting states must provide to the Allied Headquarters in their territory at leastthe same level of fiscal privileges and immunities.[[868]](#footnote-868) France’s position also reinforced the principle of equality by avoiding any fiscal advantage to any member state hosting an Allied Headquarters. Martha argues, referring to the United Nations Legal Counsel on a question of direct tax, that to hold a direct tax on the organization “would mean that it would not only enable enrichment of one member State at the expense of all others (even as a power not exercised but the only held in reserve) it would also give the taxing authority a measure of indirect control over the working of the organization”.[[869]](#footnote-869)

In 1953 the Council stated in a memorandum[[870]](#footnote-870) that France had decided to make a provisional application – in accordance with Article 11.6 of the Paris Protocol - of the provisions of the draft France-SHAPE Agreement since 1 November 1952. The Council also recalled in that document the need for relief of duties and taxes in the interests of common defence.

“(a) to impress upon member Governments the importance, form the point of view of international budgets, of not imposing any taxes or duties on expenditures made in the interest of common defense and, consequently, to recommend member Governments to grant to international military Headquarters exemption from taxes and duties to the widest possible extent. This principle should apply both to expenditures in the country where the Headquarters in question is located and to expenditures by such Headquarters in other member countries”. [[871]](#footnote-871)

The NAC was in line with the needs established by NATO’s functions and purposes, i.e. the common defence for the maintenance of international peace and security. The common defence, *inter alia*, is operationalized through fiscal privileges and immunities, which in turn have a direct impact on the materialization of the general principle of independence and that of equality. On the latter, and in the same memorandum,[[872]](#footnote-872) the Council emphasizes the need to ensure bilateral agreements on tax relief on expenditures for common defence, which should provide a comprehensive and homogenous NATO-wide tax exemption system.

“ […] various sovereign States contribute to the funds of international organizations and that fund is meant to be used for furthering common international purposes. Therefore, it would be inequitable if the host State obtains some financial gain at the international expenses by levying such taxes”.[[873]](#footnote-873)

NATO constituents were cognisant at the inception of the institutionalization of the Alliance that privileges and immunities were enablers for the needs of NATO, which are framed by the NAT’s purposes and deeply rooted in the UN Charter.

##### 6.2.6 Other Justifications

When the Allies created the common organs they look at the existing precedents, i.e., the other international organizations they had already created and which were the result of the United Nations’ principles. Moreover, since the NAT was aimed at reaffirming their faith in the purposes and principles of the UN Charter, the treaties for the Organization and the Supreme Headquarters looked at the Charter and its conventions in order to identify privileges and immunities. This is the case for the Ottawa Agreement, which “largely follows the lines of the International Convention on Privileges and Immunities for the Specialized Agencies of the United Nations”.[[874]](#footnote-874)

The 1969 Council of Europe Report highlights that, on purely practical grounds, “the precedent had played too important a part until now” [[875]](#footnote-875) for according privileges and immunities to new international organizations similar to those already existing in others, but “only when dealing with organisations which were comparable”.[[876]](#footnote-876) It is clear that the “precedent and equality of status with other international organizations are the dominant principles”.[[877]](#footnote-877)

Privileges and immunities contribute *de facto* to the recognition of an international organization’s authorities. An example to illustrate this statement would be that found in Article 3.2 of the Paris Protocol and its reference to Article VII.10 of the NATO SOFA. Paragraph 10 relates to the right to police any camps, establishments, or other premises as the result of an agreement with the receiving State. This right is the authority, while framed in agreements, to have an operational military police, which may take all appropriate measures to ensure the maintenance of order and security on such premises.

Lalive argues that ‘hatchling’ international organizations need major levels of protection[[878]](#footnote-878) and they need to have, even if provisionally, privileges and immunities, which permit them to grow and develop in accordance with the mission assigned by their constituents. This was the case for SHAPE, which started operations on 18 December 1950,[[879]](#footnote-879) but whose privileges and immunities where only properly in place once the Paris Protocol came into force in France on 10 April 1954. SHAPE officially came into being on 2 April 1951, well before the NATO SOFA, the Ottawa Agreement, and the Paris Protocol were concluded. SHAPE became the first international organization within NATO. At this time there was no treaty ruling its activities; yet SHAPE maintained its own international budget;[[880]](#footnote-880) had its own [interim] facilities at the Hotel Astoria;[[881]](#footnote-881) and, since 10 January 1951, employed an international staff.[[882]](#footnote-882) SHAPE, as explained above, enjoyed privileges and immunities from the Franco-American agreement.[[883]](#footnote-883) This fact goes to demonstrate that Lalive's argumentation is real and was exemplified in the case of SHAPE. SHAPE’s provisional status, but status after all, eventually enabled NATO in its first years (led by General Eisenhower) to develop individual and collective defence capabilities in application of Article 3 of the NAT.

All the elements and justifications above demonstrate the need for functional privileges and immunities, which helps to contribute to and enable the independence, equality, and fiscal principles. In turn, their interaction permits an international organization to be functional and fulfill the purposes for which its was created and the mandates given by its constituents.

Reference should be made to Articles 7 and 8 of the NAT in order to give NATO’s privileges and immunities a broad context within the system created by the ‘International Organization’ [United Nations]. Article 7 “recognises the supremacy of the Charter [of the United Nations] in case of any conceivable divergence”.[[884]](#footnote-884) Article 8 sets out that no preexisting or future international agreement shall interfere in the implementation of the NAT’s obligations. Both articles establish the primacy and the non-conflictual concepts, which permit NATO to implement its functions and purposes without impediment. This is operationalized through certain privileges and immunities as described in the NATO SOFA, the Ottawa Agreement, and the Paris Protocol, as well as their supplementary agreements (mainly to the Ottawa Agreement and the Paris Protocol), other agreements, and customary law. On this note, NATO requires functional immunities and privileges in order to fulfill the obligations emanating from the UN Charter, which are an integral part of the NAT. Under a pure interpretation of international law,[[885]](#footnote-885) it can be submitted that by virtue of Articles 7 and 8, the NAT takes priority over international agreements that could impede the fulfillment of its needs as developed by its functions and purposes, which include key obligations under the UN Charter. Consequently, Articles 7 and 8 of the NAT reinforce Article 103 of the Charter.

Otherwise, how would it be possible to fulfill the purposes and principles of the UN Charter, and most specially the keystone and core obligation of the maintenance of international peace and security,[[886]](#footnote-886) if NATO [and other international organizations] do not count on privileges and immunities comparable to those of the United Nations?

The reference made by the NAT to the UN Charter’s major and noble purpose[[887]](#footnote-887) creates the ‘requirement’ that NATO count on substantive privileges and immunities in order to be capable of contributing to the fulfilment of the UN Charter obligations. The conclusion is that the NATO bodies’ privileges and immunities must be very similar to those of the United Nations, otherwise NATO’s functions and purposes would have been just an unfulfilled pledge. This point will be developed below in the first particularity of the sources of NATO’s privileges and immunities.

#### 6.3 Sources of NATO’s Privileges and Immunities

Klabbers submits in an earlier edition of *An Introduction* that “the law relating to privileges and immunities of organizations is a labyrinth of treaties and other legal instruments”.[[888]](#footnote-888) NATO honours Klabbers’ statement to great lengths. As explained above, in NATO there are several treaties, which deal with the different legal positions for both the civil and military sides of the organization.[[889]](#footnote-889) The NAT was not only aimed at creating an alliance; [[890]](#footnote-890) actually, the drafters left the door open for its institutionalization in Article 9, i.e., the possibility to create an organization via subsidiary bodies. While there are no *travaux préparatoires* for the NAT, there are *travaux* for the general multilateral treaties covering NATO’s subsidiary bodies.

“It was this development [the creation of several subsidiary bodies] of the North Atlantic Treaty Organization which created the necessity for some form of multilateral agreement to define the status of NATO personnel, both civilian and military, in the countries where they were present for the performance of their official duties. It was also necessary to define the juridical status of the Organization itself vis-a-vis the national law of the various countries in which the Council or its subsidiary bodies were present and operating. The result was the three principal NATO agreements on status”. [[891]](#footnote-891)

These general multilateral agreements are the ones already cited above, i.e., the NATO SOFA, the Ottawa Agreement, and the Paris Protocol. These treaties are supplemented by bilateral treaties, which taken together, put flesh and bones to NATO’s legal position, which includes its privileges and immunities. The supplementary agreements give particular effect including extensions to the privileges and immunities already granted by the Ottawa Agreement and the Paris Protocol. There are other documents not covered in this chapter including exchanges of letters, specific memoranda of understanding, hosting states’ domestic laws,[[892]](#footnote-892) as well as case-law and customary law,[[893]](#footnote-893) which complete the sources of NATO’s privileges and immunities.

The negotiations of the NATO SOFA, Ottawa Agreement and Paris Protocol were conducted almost simultaneously. The negotiations took place “on two levels: (a) by a Working Group, assisted by a Financial Subcommittee and a Juridical Subcommittee; and (b) by the Council Deputies, who were succeeded, after the reorganization of NATO in 1952, by the Council itself”.[[894]](#footnote-894) All NATO members participated at both levels for each set of negotiations. The United States led the negotiations of the NATO SOFA, the United Kingdom those of the Ottawa Agreement, and France led the development of the Paris Protocol. Only two of these agreements deal directly with NATO’s common organs, i.e., the Ottawa Agreement and the Paris Protocol. Interestingly, the Paris Protocol is a ‘semi-autonomous’ treaty since both the NATO SOFA[[895]](#footnote-895) and the Ottawa Agreement are required for its interpretation and implementation.[[896]](#footnote-896) This is a particularity of NATO’s legal bases, which influences NATO bodies’ privileges and immunities as will be discussed below.

#### 6.4 Particularities of NATO’s Privileges and Immunities

The study of NATO’s privileges and immunities requires the analysis of a series of particularities, which shed light on the understanding of the inception and intention of the general multilateral treaties (NATO SOFA, Ottawa Agreement and Paris Protocol) and the reason for the existence of the bilateral agreements (supplementary agreements).

##### 6.4.1 Origins: Privileges and Immunities with No Agreement.

SHAPE, the first NATO subsidiary[[897]](#footnote-897) body, was born from no agreement, which has repercussions for the original privileges and immunities to which a NATO body was entitled. This is because the ‘SHAPE treaty’, i.e. the Paris Protocol, was not in force at the time SHAPE started as an international military headquarters. It is necessary to look into the historical facts to contextualize SHAPE’s privileges and immunities.

SHAPE was first located in France and later in Belgium. It is a subject of international law with its own legal position. SHAPE began functioning in December 1950 on the basis of neither a general multilateral agreement nor a bilateral one, since both were the object of on-going negotiations among NATO members and France respectively.

Article 2 of the ARIO defines ‘international organization’ as an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. This article only serves for the purposes of the ARIO and is not intended as a definition for all purposes,[[898]](#footnote-898) but it is a good reference for the purposes of this section. Although almost all international organizations are established by treaty, this is not a prerequisite as Seyersted argues,[[899]](#footnote-899) And as mentioned in the ARIO (“[…] or other instrument governed by international law”). Note the example of the Pan American Institute of Geography and History (PAIGH), and the Organization of the Petroleum Exporting Countries (OPEC), international organizations that have been so established through instruments other than treaties.[[900]](#footnote-900)

The North Atlantic Council, by resolution, established a nucleus of SHAPE by appointing Supreme Commander General Eisenhower on 19 December 1950 and tasking him to establish his headquarters in Europe in 1951.[[901]](#footnote-901) [[902]](#footnote-902) General Eisenhower was the Council’s representative prior to the appointment of a Secretary General for NATO.[[903]](#footnote-903) SHAPE was activated on 2 April 1951,[[904]](#footnote-904) well before the NATO SOFA, Ottawa Agreement, and the Paris Protocol were concluded, or even a bilateral agreement was signed with France. SHAPE became the first international organization within the NATO family, and as described above, SHAPE administered its own budget,[[905]](#footnote-905) had its own [interim] facilities at the Hotel Astoria in Paris,[[906]](#footnote-906) privileges and immunities per the Franco-American agreement, and, from 10 January 1951, an international staff.[[907]](#footnote-907) It appears from the facts that the Council had the implied power to create an international organization.[[908]](#footnote-908) As seen above, SHAPE, before the Paris Protocol entered into force, enjoyed the privileges and immunities of the Franco-American agreement until 1 November 1952, when the bilateral agreement between SHAPE and France, as a supplementary agreement per Article 16 of the Paris Protocol, was applied in a provisional manner.

The Franco-American agreement makes continuous reference to the UN Charter and the North Atlantic Treaty.[[909]](#footnote-909) In addition, this confirms that the Treaty’s designers were determined that the Charter be the only and actual source leading the activities of NATO bodies. Moreover, the Franco-American agreement makes reference to Article 9 of the NAT, which is indicative that NATO’s institutions (e.g. SHAPE) were also the object of the Franco-American agreements.

“The furnish of any such assistance … shall be consistent with the Charter of the United Nations and with the obligations under Article 3 of the North Atlantic Treaty. Such assistance shall be so designed as to promote an integrated defense of the North Atlantic area and to facilitate the development of, or be in accordance with, defense plans under Article 9 of the North Atlantic Treaty approved by each Government”.[[910]](#footnote-910)

It can be concluded that SHAPE, in the same way as the Nordic Council, the Pan American Institute of Geography and History, and the Organization of the Petroleum Exporting Countries, presents another example of an organization originally created not by treaty but through a decision (a resolution of the North Atlantic Council, later confirmed by a treaty).

##### 6.4.2 The NATO SOFA as a Source of Privileges and Immunities for NATO’s Institutions

The NATO SOFA refers to the forces of one Party sent to serve in the territory of another Party, and defines the status of those forces while in the territory of the other. It regulates the complexities of the relationship between visiting forces and the receiving state and provides for a series of privileges and immunities in order to make visiting forces functional.

The particularity of the NATO SOFA consists of the fact that it was intended to serve as a general multilateral treaty for [the privileges and immunities of] visiting forces from other NATO members, not for NATO subsidiary bodies. Nevertheless, its provisions have been incorporated by reference in the Paris Protocol, which is the general multilateral treaty for Allied Headquarters and defines its privileges and immunities. During the negotiations, the drafters of the Paris Protocol already identified the difficulties of adapting the status of visiting forces to international military headquarters.

“The French Delegation is able to state on this point that the French Government and SHAPE agree to apply in principle the Agreement on the Status to be established for the armed forces of the North Atlantic countries. Nevertheless*, the automatic application to the case of SHAPE of this Agreement on the Status would encounter a number of difficulties due to the fact that SHAPE is an integrated Headquarters forming a separate entity*, the members of which are not responsible to the same national authority. In these circumstances, it will be necessary, without altering in any way the general sense of the Agreement on the Status [of Forces] to lay down the special provisions called for in the case of SHAPE by means of a special agreement between the French Government and the Supreme Commander. It is pointed out, as an example that the provisions appearing in Article VII of the draft Agreement give rise to difficulties in the case of SHAPE, which are often particularly difficult to solve”.[[911]](#footnote-911)

However, a bilateral agreement was surely not sufficient and the need for a general multilateral treaty was identified very early on.

“The Chairman said that in his opinion the question of the application of this Convention to SHAPE could be settled by a multilateral Agreement in the form of a protocol attached to this Convention, specifying which Articles would be applied to SHAPE and containing additional provisions appropriate only to SHAPE”.[[912]](#footnote-912)

The result of the negotiations was a draft Protocol presented to the Council Deputies in December 1951 by the Working Group leading Nation, France.

##### 6.4.3 United Nations Inspired Privileges and Immunities for NATO’s Institutions

Part I of this dissertation analyzed the NAT’s forerunners as part of the evolution of the idea of NATO. In the same manner, the drafters of the three general multilateral treaties on privileges and immunities followed the United Nations family model.[[913]](#footnote-913) This subsection discusses the precedents used in the draft of the Ottawa Agreement.[[914]](#footnote-914)

These precedents were the provisions and the practice of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, and the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947. In addition the NATO members also took into account the Convention for European Economic Cooperation of 16 April 1948 (Supplementary Protocol No. 1 to the Convention for European Economic Cooperation on the Legal Capacity, Privileges and Immunities of the Organisation) and the Statute of the Council of Europe, of 5 May 1949.[[915]](#footnote-915)

“There seemed a general consensus of opinion in the Group that the practice in other international organizations, particularly the United Nations and OEEC, should be followed”.[[916]](#footnote-916)

The *travaux* on the provisions of the Ottawa Agreement are full of references that show how closely its privileges and immunities resemble those of the 1946 and 1947 United Nations conventions and that of the OEEC.[[917]](#footnote-917) [[918]](#footnote-918) [[919]](#footnote-919) [[920]](#footnote-920) [[921]](#footnote-921)

The above is just a manifestation of the following fact: The United Nations Conventions have been the source for NATO’s privileges and immunities as much as they have been for other international organizations. Indeed, “the United Nations held first place by reason of the importance of its functions, its universality and the magnitude of its work”.[[922]](#footnote-922) Díaz González submitted, “with the creation of the United Nations, a vital stimulus had been given to the new subject of international law called an international organization. Since then, new international organizations had proliferated with varying success”.[[923]](#footnote-923) The first conclusion is that “the privileges and immunities which have been granted to the United Nations may therefore be used as a maximum standard in determining whether a given organizations has a similar need for protection”.[[924]](#footnote-924) The second conclusion is that the Ottawa Agreement’s privileges and immunities can easily be considered as being an adapted subset of those of the United Nations.[[925]](#footnote-925)

Finally, and following the rationale of the United Kingdom,[[926]](#footnote-926) the privileges and immunities of an international organization are directly and intrinsically related to the nature of its functions. NATO, like the United Nations, can be called upon by the international community at short notice to assist in conflict or disaster relief situations anytime and anywhere, which will likely be subject to disparagement due to its political nature.[[927]](#footnote-927) This is the reason why NATO’s privileges and immunities require a broad understanding, which makes them similar to those of the United Nations. There is another element to this approach, which is that the drafters[[928]](#footnote-928) of NATO’s general multilateral treaties also drafted those of the United Nations, and the OEEC (and Council of Europe).[[929]](#footnote-929) They drafted these agreements in the historical context of the, at the time, applicable conventional and customary public international law, and for that reason, they could not deviate much when taking the joint venture of designing NATO’s privileges and immunities, especially taking into account that NATO was designed to contribute to international peace and security in the framework of the UN Charter.

##### 6.3.4 The Peculiar Hybrid Nature of the Paris Protocol

The history of the negotiations of the three general multilateral agreements shows that they are interconnected in their own manner. In fact, it is the Paris Protocol that appears to be in debt to the NATO SOFA provisions, as well as to those of the Ottawa Agreement.

In simple terms, the Paris Protocol accomplished two missions: first, it integrated the NATO SOFA provisions and adapted them to the functional needs of international military headquarters, and, second, it created “a special status for such headquarters which is analogous to that created for the Council and its subsidiary civilian bodies … [and] grant[s] to Supreme Headquarters of juridical personality and other legal capacities”.[[930]](#footnote-930)

In a more sophisticated manner, it can be argued that the NATO SOFA and the Ottawa Agreement, with respect to the Paris Protocol, could be considered *lex generalis* for Allied Headquarters and the latter would be *lex specialis* for those headquarters. However, in this case the principle *lex posterior derogat legi priori* does not apply fully, since the Paris Protocol gains its completeness[[931]](#footnote-931) when it addresses questions that are silent (or simply implicit) in its text, but imperative for the fulfillment of the mission of the international institutions. This takes place by incorporating the provisions of the NATO SOFA, referred to expressly in the Paris Protocol, and those of the Ottawa Agreement, referred to expressly in the *travaux*. Another way to explain it in a simpler manner would be to consider the NATO SOFA and Ottawa Agreement provisions as default rules for the Allied Headquarters.

“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”.[[932]](#footnote-932)

Also, it is to be noted that Article 31.1 of the Vienna Convention of the Law of the Treaties reaffirms the need to interpret treaties in their context and in the light of their objects and purpose.

From the *travaux préparatoires* the conclusion is that the Paris Protocol was a reaction to the existence of SHAPE and the mandate given to General Eisenhower to institutionally strengthen the Alliance with an integrated military structure. That integration could no longer be comprised of the different national contingents, but formed through cohesive and internationalized entities. It is curious to note that, although SHAPE existed prior to the international staff, NATO states gave priority, in terms of treaties, to the development of the political side by addressing first the legal framework for the Status of Forces Agreement (NATO SOFA), and the Status of the North Atlantic Treaty Organization, National Representatives and International Staff (Ottawa Agreement). It is submitted that the explanation for this is that the intention of NATO constituents was to create a political organization based on defence and deterrence, but surely on the possibility of intra-dialogue and hopefully dialogue with the Soviet Union. In addition, the priority given to the NATO SOFA can be explained by the number of allied troops deployed,[[933]](#footnote-933) mainly American, in continental Europe, to show deterrence. These troops urgently required a status after the war ended.

The fact that international military headquarters would share NATO’s civil and military natures made the drafters approach the Paris Protocol with a ‘recycling-mind’, which eventually resulted in a general multilateral treaty that for certain questions had to refer to both the NATO SOFA and the Ottawa Agreement. It is true that this incorporation by reference of other treaties adds a layer of complexity to the understanding of NATO’s institutionalization, but it brings together NATO’s civil and military natures and harmonizes them under democratic principles in order to fulfill the organization’s functions and purposes, which dwell in both the civil and military.

The Paris Protocol provisions explicitly take all of the background and rationale of those of the NATO SOFA and the Ottawa Agreement. Consequently, any implementation of the Paris Protocol and its supplementary agreements would be of a hybrid character, since some questions arising out of the activities of the Allied Headquarters may need to refer to the treaties mentioned above, i.e., the NATO SOFA and the Ottawa Agreement. One may wonder where this leaves the restriction of Article 2 of the Ottawa Agreement which states that its provisions shall not apply to any military headquarters or bodies unless the Council decides otherwise. A whole list can be made of examples of topics not explicitly mentioned by the Paris Protocol, yet covered in the Ottawa Agreement, which are applied daily to Allied Headquarters. This could not have happened with the explicit or implicit approval of the Council, nor without a basis in the *travaux* or practice of the organization. As already noted above, the Council agreed to provide the integrated military force headquarters and its personnel with a status analogous to that given to its civilian structure.[[934]](#footnote-934)

Examples of such topics not explicitly mentioned are the possibility to invoke the unequivocal conventional immunity from legal process (Article V);[[935]](#footnote-935) to refer to civilian personnel directly employed by Allied Headquarters as ‘international staff’ (in Part IV);[[936]](#footnote-936) the mandatory use of the Administrative Tribunal for resolving disputes with the international staff and appropriate modes of settlement from disputes of a private character (Article XXIV); or to incorporate specific privileges and immunities for senior international officials (Article XVIII).[[937]](#footnote-937) This appears to be the understanding of Michaels’ too:

“Initially, the status of the international military headquarters of the North Atlantic Alliance was governed by the provisions of a protocol signed at Paris on August 28, 1952, and *attached* to the Ottawa Agreement”.[[938]](#footnote-938)

The explanation of the Paris Protocol’s hybridity can also be addressed under the perspective of its supplementary agreements and under the analysis of the application of the customary international law.

##### 6.4.5 The Value of Supplementary Agreements

Like other international organizations, NATO’s multilateral general agreements, the Ottawa Agreement and the Paris Protocol,[[939]](#footnote-939) permit their supplementation by means of bilateral agreements. Article 25 of the Ottawa Agreement and Article 16 of the Paris Protocol contain the conventional authorities for NATO common organs to conclude supplementary agreements with member states. In this vein, it is of major significance to note that, among the NATO common organs, only the Supreme Headquarters have the conventional authority to conclude supplementary agreements with non-NATO states part of the Partnership for Peace.[[940]](#footnote-940)

These supplementary agreements give to the state hosting a NATO entity the necessary privileges and immunities described in the multilateral general treaties, including a wider scope and diversity.[[941]](#footnote-941) Supplementary agreements are also useful for both the international organization and the host state in order to regulate matters unforeseen at the time of the conclusion of the general multilateral agreements.[[942]](#footnote-942) On other occasions, these supplementary agreements could serve the sending nations’ needs.[[943]](#footnote-943) In 1969, however, the Council of Europe reached the conclusion that bilateral agreements, with respect to general multilateral agreements, are only an adaptation of the terms of the former, and the privileges and immunities cannot be extended except for special reasons and when the other states approve.[[944]](#footnote-944) However, as presented in the next subsection, the practice in NATO is that supplementary agreements may extend the privileges and immunities established by the Ottawa Agreement and Paris Protocol.

NATO follows Ernest Satow’s Guide parameters; a good example is that of the privileges and immunities for high-ranking officials, which cannot be found in the Paris Protocol. In this case, the drafters recognized the capacity of supplementary agreements.[[945]](#footnote-945) NATO Supplementary Agreements follow the public international law norms for international organizations.[[946]](#footnote-946) The Supreme Headquarters count with a Supplementary Agreement template which “*elaborate[s] on the immunity* enjoyed by an Allied Headquarters, and reaffirm[s] the inviolability of its premises, archives, documents, and the functional immunities to be afforded to flag and general officers”.[[947]](#footnote-947)

In conclusion, headquarters agreements of international organizations may grant more rights that the applicable multilateral agreement(s).[[948]](#footnote-948) This is also the case for supplementary agreements to NATO’s multilateral agreements.[[949]](#footnote-949) This takes place as long as the latter remain either silent, or the *travaux* provide indices that the privileges and immunities granted cover the needs of the organization to fully comply with the mandate of the constituents and to contribute to the international system of peace.

##### 6.4.6 NATO Treaties Identify Customary Law Privileges and Immunities

While international organizations are not states, their practice is relevant in areas where they have been conferred powers (such as the scope of privileges and immunities) for identifying the existence of customary international law.[[950]](#footnote-950) The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 is part of general international law, and as such the members of the United Nations, regardless of the form or forum in which they interact, must act consistently with the principles of the Convention.[[951]](#footnote-951) The record of the negotiations of the NATO treaties indicate that NATO states lived up to those responsibilities with respect to privileges and immunities.

“The draft follows generally the form of agreement which, beginning with the General Convention on Privileges and Immunities of the United Nations in 1946, has been adopted, with more or less minor variations, to define the privileges and immunities of practically all important international organizations. Certain departures have however been made from the precedents in order to meet the peculiar requirements of NATO”. [[952]](#footnote-952)As Olson has observed, “[t]hese immunities are essentially identical to those afforded the UN in the 1946 UN General Convention”.[[953]](#footnote-953)This supports the view of several publicists,[[954]](#footnote-954) that the successive incorporation of similar privileges and immunities [of the United Nations], or their mere reference in the distinct *travaux* of other international organizations, constitute a general practice and their acceptance as law.

“Il sera possible de démontre l’existence d’une coutume ou en tout cas d’un commencement de coutume, à l’aide des éléments suivants: la caractère uniforme des dispositions relatives au statut et immunités des organisations internationales; *la répétition dans un sens unilinéaire, laquelle se manifeste par une pratique concordante des Etats* … C’est en vain qu’on pourrait objecter qu’il s’agit là d’une simple tolérance e qu’une coutume ne saurait se former si rapidement.”[[955]](#footnote-955)

“Puisqu’on ne peut guère concevoir l’existence d’une organisation sans ces immunités, on peut considérer que ces codifications sont dèclaratoires d’un droit coutumier que, les cas échéant, les Etats membres on respecté même avant l’adoption de l’accord”.[[956]](#footnote-956)

During the *travaux* *préparatoires* of the NATO multilateral general agreements, the nations referred several times to the customary practice, common legal practice, and practice of international organizations. There must be no doubt that the drafters referred to customary international law since this “remains an important source of public international law. In the international legal system, such unwritten law, deriving from p*ractice accepted as law*, can be an effective means to regulate their behaviour and it is indeed often invoked by States and others”.[[957]](#footnote-957)

Throughout the *travaux préparatoires* of the NATO multilateral general agreements, the drafters used customary practice to address their discussion on the jurisdictional matters relating to visiting forces.[[958]](#footnote-958) In addition, the question of non-contractual claims of Article VIII of the NATO SOFA also raised the need to consider the customary practice.[[959]](#footnote-959) The area of privileges and immunities for representatives attracted much attention, and was the object of multiple references to the customary practice. However, while custom was well accepted, at a certain point the drafters agreed that it was better to avoid the wording “international practice”[[960]](#footnote-960) since nobody could define it accurately. This is not far from reality as the ILC considers that the identification of customary international law is not always susceptible to exact formulation.[[961]](#footnote-961)

Several examples illustrate that customary law was applied by NATO states during the drafting of the general multilateral treaties. In the field of freedom of conversion of currency, France accepted a practice[[962]](#footnote-962) that became habit among NATO states, and it was later codified in the respective bilateral supplementary agreements. This is a normal practice in international organizations, as the ILC identifies exemption from currency control as general and normal functionalities of an international organization.[[963]](#footnote-963) On the question of establishing canteens, the United States was not ready to discontinue the practice in which its forces could establish canteens and commissaries for the benefit of the forces and those accompanying them in order to buy tax-free imported goods.[[964]](#footnote-964)

However, the drafters of the NATO treaties on privileges and immunities also had the temptation to disregard customary law. This was the case of the Netherlands and other states with respect to the taxation of international civilian staff in both international military headquarters and other international organizations of which NATO states are members. The result was that this discontinuance of the practice never took place in either NATO or other extant international organizations.

“Several members of the Working Group have declared that the regulations concerning the fiscal status of the International Headquarters and their personnel, as set forth in Articles 7 and 8 of the draft Protocol, cannot satisfy our Governments. The main objection of those Governments is to the clause of Article 7 exempting from taxation the salaries of civilian personnel paid directly by the Headquarters. Although this exemption is *in accordance with the practice followed during recent years in respect of the personnel of international organizations* — see, for example, Article 19 of the Convention on the Status of NATO, signed at Ottawa — these Governments, for the reasons explained below, consider that *this policy should be discontinued* … This creation is in conflict with the principles of reasonable and equitable taxation and is, therefore, contrary to the spirit of justice. So as not to delay the signing of the Protocol in question, the Representatives of these Governments have accepted the proposed Articles 7 and 8, subject, however, to the Working Group’s recommending to the NATO Council that, when this Protocol is discussed, it should *set up a committee of fiscal experts to seek a satisfactory formula for application, not only to NATO, but also to the other international organizations of which the NATO countries are members*”.[[965]](#footnote-965)

The above paragraphs demonstrate customary international law in practice, and how states do not hesitate to claim it during their negotiations and in search of the common interest, no matter whether it is general or particular customary international law. It is in the pursuit of the ‘common interest’ element,[[966]](#footnote-966) and keeping the ‘common interest’ alive, that practice receives the psychological element, the *opinio juris sive necessitatis*. Moreover, the series of supplementary agreements to the Ottawa Agreement, and mainly to the Paris Protocol (due to the numerous international military headquarters spread across Euro-Atlantic and North America areas) demonstrate that the negotiators needed, and still need, to grant certain privileges and immunities. Even if not specified by a conventional basis, customary law grants them. It is necessary to be general rather than limited for the fulfilment of NATO’s functions and purposes[[967]](#footnote-967) NATO’s long-standing practice in providing privileges and immunities for both its civilian and military sides shows that there are no extra-legal motives, such as comity, political expediency, or convenience.[[968]](#footnote-968)

NATO, like many others international organizations, can make a very credible case for demonstrating that it counts on the spectrum of long-standing functional privileges and immunities recognized under customary international law.[[969]](#footnote-969) This is in contrast to the conclusion reached by Wood in 2014, who denies its existence. He submits that “[w]hile one still comes across assertions, by writers, governments or courts, that international organizations enjoy immunity under customary international law, the authorities relied upon are largely unconvincing”. [[970]](#footnote-970) However, Wood, in 2018 and in his capacity of ILC Special Rapporteur, admits that customary law for international organizations can be identified by practice and *opinio iuris*. He submits that the forms of evidence referred to states may well apply, *mutatis mutandis*, to international organizations.[[971]](#footnote-971)

Nevertheless, customary law should not be overestimated, as it may remain uncertain in many cases. This is said in spite of NATO’s favorable treatment on this matter. The current network of privileges and immunities in NATO shows that customary law, even if considered ‘local’,[[972]](#footnote-972) has covered gaps and controlled the determination of those privileges and immunities in order to *ne impediatur officia*, the latter based on the needs defined by its functions and purposes.

##### 6.3.7 The Question of ‘Paragraph 26’

In order to complement the above sub-section on the Paris Protocol hybridity the question of ‘paragraph 26’[[973]](#footnote-973) must be addressed to understand why the Paris Protocol had to reference NATO SOFA and Ottawa Agreement provisions in order to be fully and legally complete. Paragraph 26 is part of NATO document D-D (52) 2, which was issued by the NAC deputies - the highest permanent representative authority of NATO at the time. The deputies held the decision-making power, since the NAC, in its first three years, did not have ambassadors as permanent representatives. ‘Paragraph 26’ shows the desire of the constituents to give both the NATO SOFA and Ottawa agreements a wider scope in order to provide the Paris Protocol with full institutional cover. Therefore, all institutional features that cannot be found in the Paris Protocol must be sought in the NATO SOFA, and if not in the NATO SOFA does not have them( due to its scope being primarily on visiting forces and not institutions), then they shall be found in the Ottawa Agreement.

“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”.[[974]](#footnote-974)

The Paris Protocol was concluded pursuant to the North Atlantic Treaty and not the NATO SOFA or Ottawa Agreement, which puts it at the same hierarchical level as them. It can be submitted that NATO document D-D(52)2, mandated by the North Atlantic Council, in its Deputies Council form, is sufficient evidence that the Paris Protocol counts on no fewer privileges and immunities than those of the NATO SOFA and the Ottawa Agreement, for forces and personnel/entities respectively. This is regardless of whether the privileges and immunities are explicitly referred to in the Paris Protocol or not.

In any case, paragraph 26 of NATO document D-D(52)2 of 3 January 1952 on the ‘Protocol on the Status of Allied Headquarters’ confirms that all NATO bodies count on the same privileges and immunities and that the Paris Protocol is only complete, from a conventional standpoint, when reference is made to both the NATO SOFA and the Ottawa Agreement. In February 2018, the Kaiserslautern Labour Court in the *Klag case* confirmed the recognition of the conventional immunity from jurisdiction of the Supreme Headquarters per the *travaux préparatoires*.[[975]](#footnote-975)

Moreover, while ‘paragraph 26’ provides the Paris Protocol with the necessary and full conventional privileges and immunities, it still presents a curious customary international law challenge, which is worth analysis. The ILC refers to the importance of customary international law even if a treaty is in force.[[976]](#footnote-976) Without questioning the legal bindingness of resolutions, decisions, and other acts adopted by international organizations, they may provide evidence for the existence and content of customary international law and reflect its existence.[[977]](#footnote-977) The above serves to introduce the argument relating to the forms of evidence of acceptance of NATO’s privileges and immunities as law. *Opinio juris* may take many forms and evidence of that may be multilateral drafting, which would show consent of customary law. It is submitted that this is also the case for certain privileges and immunities not explicitly set out in the Paris Protocol.

The ILC argues that “the reference to “treaty provisions” and to “conduct in connection with resolutions””[[978]](#footnote-978) may create a rule of customary international law. If this superstructure is transferred to NATO, the following can be observed: a) first, on treaty provisions, the Paris Protocol has the possibility to make reference not only to the NATO SOFA, but also to the Ottawa Agreement on questions not covered by the Protocol provisions, as expressly set up by the NATO document D-D(52)2; and, second, the conduct of NATO constituents has been manifested in NATO Document D-D(52)2, i.e., a decision of the NAC which establishes that the Protocol, which concerns NATO international military headquarters, can apply the provisions of the NATO SOFA and the Ottawa Agreement; the latter for areas not covered by the NATO SOFA and the Paris Protocol.

On the treaty provisions, the Paris Protocol for its completeness refers to the articles from the Ottawa Agreement relating to conventional immunity from legal process (Article V);[[979]](#footnote-979) to civilian personnel directly employed by Allied Headquarters as ‘international staff’ (in Part IV); to the mandatory use of the Administrative Tribunal for resolving disputes with the international staff and appropriate modes of settlement from disputes of a private character (Article XXIV); or to incorporate specific privileges and immunities for senior international officials (Article XVIII).

Any doubt cast on the arguments displayed above would beg the question as to how NATO, which requires the coordinated and unfettered full use of its civil and military entities, can fulfill its functions and purposes if all those entities do not share, in one way or another, the same immunities? How could the military side of NATO, the one more exposed to risks due to both its vast geographical distribution and the nature of military operations, have fewer privileges and immunities than the secretariat? Clearly, and based on the numerous discussions during the negotiations of the three multilateral general agreements and the supplementary agreements, the intention of NATO states, as shown by paragraph 26, was not to deprive the military side from fully fledged, functional, and essential privileges and immunities.

#### 6.5 NATO’s International and Organizational Immunities

After reviewing the rationale and sources of NATO’s privileges and immunities, it is necessary to address what those privileges and immunities are. At the introduction of this chapter a convenient distinction was made between international immunities and organizational immunities. The former refers to that of the international staff or agents, and the latter to the immunities of the international organization as a legal person. No matter which category is referred to, both are based on the functional necessity concept and mandatorily the independence of the international institution is the element that inspires and requires both categories.[[980]](#footnote-980) As Bowett wrote:

“The distinction between the immunities of the organisation as such and those of the personnel attached to it is, in one sense, an unreal one, for the principle which emerges from the many agreements is that the personnel enjoy privileges and immunities, not for their personal benefit, but for the purposes of exercising their functions in relation to the organisation”.[[981]](#footnote-981)

The above presents the justifications for international organizations to be able to count on reliable privileges and immunities. The fulfillment of the mission of an international organization, formulated in general terms by its functions and purposes, establishes that functional necessity inspires the scope of the applicable privileges and immunities.[[982]](#footnote-982) The justification for granting privileges and immunities to international organizations is that of promoting the achievement of common benefits by facilitating cooperation. This noble cause requires that the law of the constituents do not apply to the international organizations’ collective activities.[[983]](#footnote-983) The endeavors taken on this matter by El-Erian and Díaz González almost 50 years ago at the ILC, and more recently by Gaja, confirm:

“[T]he need to safeguard the independence of the organizations to the extent necessary for the unhindered performance of their functions and the achievement of their objectives — the *ne impediatur officia* principle — and the principle of equality among the member states of the organizations, which prohibits any member state from deriving unwarranted fiscal advantages from the funds placed at the disposal of the organizations. Being unable to enjoy the protection conferred by territorial sovereignty, as states could, international organizations had as their sole protection the immunities granted to them”.[[984]](#footnote-984)

Jenks argues that the regular clarification of the privileges and immunities of international organizations, “at a time when immunities generally have been unpopular has been due to the recognition by governments, after mature consideration, that international immunities also correspond to certain basic functional needs”.[[985]](#footnote-985) In any case, the functional test is neither free nor general nor automatic, since it needs to take into account that “the functional requirements of international organisations need to be considered on their own merits”,[[986]](#footnote-986) i.e., the *raison d’être* of the international institution as established by the ‘rules of the organization’, and developed in subsequent practice.

##### 6.4.1 International Immunities

The Holy Scriptures already codified the relevance of envoys and international agents. For example, in The Holy Bible, 1 Chronicles 19:1-9 shows how wars can be waged for the mistreatment of ambassadors. However, the development from state agents’ immunities to international ones did not take place until the 19th century and the successive Rhine River commissions. Their practice also transferred to the Danube Commission, which created international staff, international courts, and proper institutional international regulations. However, the international civil servant as understood today came from the international instructions created by the 1899 Hague Conventions (*inter alia*, the Commercial Bureau of the American Republics; the International Commission for the Cape Spartel Light; the International Office of the General Postal Union; and the International Bureaus of the International Union for the Publication of Customs Tariffs).[[987]](#footnote-987) The League of Nations and the United Nations were milestones for the international functionary, since the former inspired the latter, and this in turn inspired the family of the United Nations and other international organizations such as NATO. In any case, the understanding of the international civil servant as an “impartial third party is a revolutionary event”.[[988]](#footnote-988)

International civil servant or international staff is a term that serves to define the staff members and officials of international organizations. While there is variety in the nature of this staff, there are many more similarities than differences among international organizations. However, it is also true that the specific nature and mission of international organizations, the hosting state, and the nationality of staff members, *inter alia*, govern the discussions on international civil servants’ privileges and immunities. A new discipline has emerged within public international law, the ‘Law of the International Civil Service’, which has attracted many publicists and writings.[[989]](#footnote-989) In order to illustrate that the topics of concern today were not unusual even one hundred years ago, it is useful to refer to what De Visscher, as rapporteur of the *Institut de Droit International* argued:

“M. CH. DE VISSCHER expose tout d'abord que le fondement dé ces immunités doit être recherché dans la nécessité de sauvegarder l'indépendance des agents de la S. D. N. vis-à-vis du gouvernement local. Ce fondement est le même que celui qui est à la base des immunités diplomatiques accordées aux chefs de missions à l'étranger; mais à d'autres égards il y a une différence radicale entre les immunités des agents de la S. D. N, et celles dont jouissent les agents diplomatiques: ceux-ci relèvent de leurs gouvernements; exercent des fonctions d'intérêt national; les agents de la S. D. N. au contraire, nommés par la Société, ne relèvent que d'elle. Ils ont des fonctions de caractère international, c.-à-d. exercées non dans l'intérêt d'un État, mais dans celui de tous les États. Deux conséquences dérivent de cette différence. Tout d'abord, tous les membres de la société doivent à ces agents la même protection et les mêmes égards. La pratique des États, en ce qui concerne les agents diplomatiques est loin d'être unanime; pour les agents de la S. D. N. il ne devrait subsister aucune divergence. Les immunités diplomatiques devraient donc faire l'objet d'un règlement uniforme commun aux États membres de la Société.

Cette conception n'a pas rencontré une opinion unanime au sein de la sous-commission où certains membres ont soutenu que les immunités des agents de la S. D. N. dans un pays devraient être celles reconnues dans ce pays aux agents diplomatiques qui s'y trouvent accrédités. Une seconde conséquence résultant du fait que les agents de la S. D. N. exercent leurs fonctions dans un intérêt international est qu'ils doivent dans l'exercice de ces fonctions être indépendants de l'État dont ils sont sujets et bénéficier dans leur propre pays des immunités. Quant à l'étendue de ces immunités, M. DE VISSCHER croit devoir s'en référer au droit international coutumier. Si des États se décidaient à établir un règlement général, cette question devrait être abordée”. [[990]](#footnote-990)

Privileges and immunities for international civil servants normally come from express agreements, generally in the form of treaties, although they also exist in the absence of express provisions,[[991]](#footnote-991) when the instruments are incomplete. This is in order to guarantee the necessary functional independence that international organizations require. In NATO, this phenomenon can be seen in the privileges and immunities provided to high officials of Allied Headquarters, and where the Paris Protocol is silent. However, its supplementary agreements (bilateral), by taking the immunity principle from the Ottawa Agreement,[[992]](#footnote-992) and within its limits, grant the necessary privileges and immunities for those officials.

What is the objective pursued by granting privileges and immunities for international civil servants? The objective is their independence with respect to the state of which they are nationals, the hosting state, or any member or non-member [only for NATO partners signatories of the PfP SOFA and Further Additional Protocol] participating directly or indirectly in the international organization they serve. The final objective of privileges and immunities for international civil servants is to make the organization functional for the common interest of the constituents,[[993]](#footnote-993) which entails that international civil servants are not entitled to renounce them without the international institution’s consent.[[994]](#footnote-994) “[P]ersonal immunities protect functions and not activities outside the scope of, and wholly inconsistent with, those functions”.[[995]](#footnote-995) Moreover, these privileges and immunities are directly related to the duties assigned to the individual. This begs the question of whether these privileges and immunities are a subjective right. In the *Humblet v Belgium* case[[996]](#footnote-996) the Court of Justice of the European Communities established that the Protocol creates a subjective right for the benefit of the official of the institutions of the Community. [[997]](#footnote-997) This does not appear to be the case in NATO. [[998]](#footnote-998)

“Immunities and privileges (viii) The personnel designated in paragraph A(i) above shall enjoy the privileges and immunities to which they are entitled according to the provisions of Articles 17 to 23 of the Agreement on the status of the North Atlantic Treaty Organization, national representatives and international staff and of Articles 2 to 8 of the Protocol on the status of international military headquarters (Annex 1). *These privileges and immunities are accorded in the interests of the Organization and not for personal benefit* … Whenever these privileges and immunities are called in question, the personnel concerned shall report the matter immediately through channels to the Secretary General or Supreme Allied Commander, who will decide *whether or not the immunities shall be waived*”.[[999]](#footnote-999)

The general international immunities accorded to the international civil servants will normally cover the following:

“1. Immunity from suit and the service of legal process with respect to all activities performed under color of office in the absence of waiver by the organizations. 2. Immunity from search and seizure of any property owned by the organizations which is in the possession of an employee. 3. Immunity from national taxation. 4. Immunity from immigration restrictions and alien registration. 5. Immunity from national service”.[[1000]](#footnote-1000)

In NATO, as in the United Nations, the list of international immunities for the representatives and their staff is different from those of international staff and experts, although they have similarities.[[1001]](#footnote-1001) Those similarities also apply to the privileges and immunities of the visiting forces and the Allied Headquarters. For the latter, some of those immunities can be found in the supplementary agreements or by reference to the NATO SOFA or the Ottawa Agreement.

The NATO SOFA intends to provide status to national military units deployed in the territory of another member of the Alliance. The importance of the NATO SOFA with respect to international immunities is that the Paris Protocol makes explicit reference to its provisions in order to grant those immunities to its military and civilian staffs.

“[T]he first to be drafted and signed was the Status of Forces Agreement. Since the United States maintained the largest contingent of troops in other NATO countries, it was perhaps natural that the first draft of this Agreement was submitted by the United States Deputy … The Status of Forces Agreement deals with the problems arising from the stationing of the armed forces of one NATO country in the territory of another. The Preamble makes it clear that the Agreement merely defines the status of these forces when they are sent to another NATO country; it does not of itself create the right to send them in the absence of a special agreement to that effect”. [[1002]](#footnote-1002)

The institutional value of the NATO SOFA appears only when the Paris Protocol, dedicated to Allied Headquarters, refers to its provisions. Serge Lazareff[[1003]](#footnote-1003) put forward the best-referenced and most authoritative description of the NATO SOFA and its practice.

The text of the NATO SOFA covers not only the members of the force and the civilian component, but also their dependents. A brief description of the most relevant questions would start with the issue of jurisdiction and its exclusive and concurrent character. Article VII dispatches jurisdictional responsibilities between the sending state and the receiving state. The NATO SOFA also provides exception from alien control, as well as passport and visa regulations and immigration inspection on entering or leaving the territory of the receiving state. However, members of the civilian component and dependents shall be so described in their passports (Article III). The members of the force and the civilian component are tax-exempt on their salaries and emoluments, but not from other gainful activities they may engage in in the receiving state. As with the above, they are also exempt from taxes on movable property (Article X). Members of the force and the civilian component’s personal goods and effects, and their furniture and private owned cars are entitled to duty free import-export (Article XI). Members of the force or the civilian component are not subject to any proceedings for the enforcement of any judgment given against them by the receiving state judicial authorities in a matter arising from the performance of their official duties (Article VIII, 5.g.).

The Ottawa Agreement sets up the legal position of the Organization, the National Representatives (Part III) and International Staff and Experts on Missions for the Organization (Part IV).

“The Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff concerns NATO civilian personnel and in the course of the negotiations is not infrequently referred to as the “Civilian Status Agreement” … [T]he United Kingdom Deputy … initiated action toward such an agreement. His draft drew largely upon the provisions in already existing agreements concerning the status of international organizations: the United Nations, its Specialized Agencies, the Organization for European Economic Cooperation (OEEC), and the Council of Europe”.[[1004]](#footnote-1004)

Michaels argues that the NATO SOFA privileges and immunities “and those accorded the Alliance’s international staff [he refers to the Ottawa Agreement] reveals some striking similarities”.[[1005]](#footnote-1005) Those similarities relate to immunity of legal process for official acts, duty free import and export, as well as facilities for currency exchange, even if the NATO SOFA is silent and the Ottawa Agreement is explicit. The same is true for repatriation facilities for dependents from the members of the force and the civilian component in times of international crisis, as accorded to diplomatic personnel of comparable rank (Articles XIII and XVIII). However, there are differences regarding the concept of family, which is more restrictive in the NATO SOFA (spouse and children), although made up for in practice and by supplementary agreements, which extend the concept of dependent (financial or health/age) for members of the force and the civilian component. As with the latter, Supreme Commanders and other high ranking officials are provided the diplomatic status accorded to diplomatic personnel of comparable rank, which is also true for the Secretary General and other permanent officials of a similar rank (Article XX). Tax exemption applies per Article XIII.

Although many of the privileges and immunities established in articles XVIII, XX, and XXI do not apply to nationals of the hosting state, some of them do in order to grant the independence of NATO. These are mentioned expressly in the Ottawa agreement in order to cover nationals performing the official functions of the organization:

“a. immunity from legal process in respect of words spoken or written or acts done by him in the performance of his official functions for the Organization; b. inviolability for all papers and documents relating to the work on which he is engaged for the Organization; c. facilities in respect of currency or exchange restrictions so far as necessary for the effective exercise of his functions”. (Article XXIII)[[1006]](#footnote-1006)

This quotation raises the question of the immunities of nationals of a state in which they are operating under an international mandate, as addressed in the *Mazilu* case and *Cumaraswamy* case[[1007]](#footnote-1007) respectively or, with respect to taxes as explained by Kunz.[[1008]](#footnote-1008)

The Paris Protocol[[1009]](#footnote-1009)must be read in context. The understanding of NATO’s history, *travaux préparatoires*, and the nature of Allied Headquarters are essential in order to avoid reaching precipitated conclusions from the Protocol’s text. As addressed in previous chapters, the Allied Headquarters are firstly international organizations; Supreme Headquarters hold legal personality and this can be delegated to subordinate Allied Headquarters. Second, the drafters of the general multilateral treaties conceived the Paris Protocol as a hybrid between the NATO SOFA and the Ottawa Agreement. The provisions of the Paris Protocol refer to these treaties explicitly; this is in order to reach a full implementation of NATO’s functions and purposes, and explains why the title of the Paris Protocol explicitly refers to the status of International Military Headquarters set up pursuant to the North Atlantic Treaty. Third, the Allied Headquarters are NATO institutions that are present all over NATO’s territory, where they perform numerous activities, most of which require the use of military materiel, and, therefore, are liable to entail numerous incidents. For these reasons, Allied Headquarters needa level of privileges and immunities at least equal to those vested in the NATO member states’ visiting forces and the NATO HQ’s representations and international staff. The above provides a plausible reasoning for the series of particularities explained in previous sub-sections.[[1010]](#footnote-1010)

“In dealing particularly with its international staff, the hybrid nature of the Paris Protocol becomes very evident as the nexus between purpose and functions and corresponding privileges and immunities is not articulated as expressly in the case of NATO status agreements [NATO SOFA and Ottawa Agreement] since the status agreements do not have a provision similar to that found in Art. 105 of the United Nations Charter or in the Ottawa Agreement”.[[1011]](#footnote-1011)

Turning to the most relevant non-fiscal privileges and immunities, Article 4.a of the Paris Protocol refers to Article VII of the NATO SOFA on matters related to criminal jurisdiction. The sending and the receiving states have, depending on the circumstances laid down in said Article VII, exclusive or concurrent criminal jurisdiction. As explained above, immunities for flag and general officers (and equivalent civilian personnel) are not within the Paris Protocol provisions, but addressed in the supplementary agreements emulating those provided in the Ottawa Agreement.

“The compromise has been implemented in all Supplementary Agreements but for one. Additionally, the diplomatic immunities originally accorded by France to General Eisenhower in his personal capacity and his function as SACEUR are continued in the SHAPE-Belgium Agreement and are extended to the Chairman of the Military Committee, with the exemption that if the Chairman is a Belgian citizen, the immunities will be limited”.[[1012]](#footnote-1012)

Pursuant to Articles 2 and 4 of the Paris Protocol and by reference to Article III of the NATO SOFA, the military staff of Allied Headquarters is exempt from visa and immigration control. The only requirement is to present a travel order and a valid identification card (Article 4.c). By contrast, the civilian staff and all dependents are required to hold passports and comply with visa requirements, although receiving states are expected to facilitate their entrance and stay.

Article IV of the NATO SOFA addresses the issue of recognition of driving licenses. Supplementary Agreements establish the extension of that recognition to both dependents and to contractors, as well as their dependents.

With respect to fiscal privileges and immunities, it is to be noted that all staff members, military and civilian, perform international functions on behalf of all NATO states. Article 7 of the Paris Protocol addresses military and civilian staffs, assigned by a sending state, and exempts them from the receiving state’s tax on moveable property, as well as from taxes relating to their salaries and other emoluments. On the international staff, Article 7.2 addresses tax exemptions on the salaries and emoluments paid to them by the Allied Headquarters. Since the Paris Protocol is explicit on this matter and has been ratified by all NATO members, with the exception of Canada, it does not appear necessary that international staff are obliged to report to the nation from which they originate. Throughout the *travaux*, and more particularly during the discussions of this point, many references were made to the Ottawa Agreement, resulting in the current text of Article 7.2 of the Protocol. An interesting note is that the United States applied the last part of this Article via a bilateral agreement with NATO.[[1013]](#footnote-1013)

Article 8.2 of the Paris Protocol, by reference to Article XI of the NATO SOFA, authorizes Allied Headquarters to have and manage canteens, messes, and cafeterias. Since the goods and supplies provided in such facilities are duty and tax-free, access is limited to those enjoying duty and tax-free entitlements. However, there are some points that require clarification on these questions.

“Art. XI, para. 4, is applied without restrictions to the ‘force’ of an Allied Headquarters, unlike the NATO SOFA, Art. XI, para. 5 and 6, which are specifically earmarked for non-Receiving State members of the force in Art. 8, para. 3 of the Protocol ... In comparison, Receiving State civilians are excluded from the definition of ‘civilian component’, both when attached by the Receiving State or employed by an Allied Headquarters as NATO International Civilians. Accordingly, even if a Receiving State permits ‘members of the civilian component’ to the use canteens, cafeterias, and messes, this would not in itself extend the privilege to Receiving State civilians assigned to or in the employ of an Allied Headquarters.

Further access to canteens, cafeterias, and messes for members of the civilian component, dependents and Receiving State civilian staff members is typically addressed in Supplementary Agreements … access to canteens and tax-free fuel are part of the limited privileges Receiving State nationals only enjoy when employed or assigned to an international function on the Headquarters’ staff,””[[1014]](#footnote-1014)

Lazareff points out that practice in France has been that “all members of the headquarters, even nationals of the Receiving State enjoy the privileges and immunities granted by the Protocol (but not necessarily those granted by SOFA),”[[1015]](#footnote-1015) which includes civilian staff. The explicit reference made by France to grant privileges and immunities to SHAPE as long as the other NATO states would do the same for the Allied Headquarters stationed in their territories should not be forgotten.[[1016]](#footnote-1016)

Within the prerogative of Article 8.2 of the Protocol, supplementary agreements extend Article XI.8 and 9 of the NATO SOFA on disposal, export, and re-export of items imported free of duty or purchased in the receiving state. Article 8.2 also covers Article XI.5 of the NATO SOFA, which relates to duty-free import of personal effects and furniture, although it does not apply to nationals of the receiving states.[[1017]](#footnote-1017) The only exception would be if they belong to the armed services of a party to the Protocol, with the exception of those of the receiving state. Finally, the members of an Allied Headquarters can import duty-free and buy tax free private motor vehicles for personal use (Article XI.6 of the NATO SOFA), which does not apply to members of the receiving state in the same conditions as above.

Finally, the above privileges and immunities require the need to control and prevent any kind of abuse.[[1018]](#footnote-1018) Article XII of the NATO SOFA, Article III of the Ottawa Agreement, and supplementary agreements to the Paris Protocol cover the obligation to prevent the abuse of privileges and immunities from the visiting forces, the international secretariat, and civilian agencies, as well as from the Allied Headquarters.

##### 6.5.2 Organizational Immunities

The list of NATO’s organizational immunities and particularities in accordance with NATO’s general multilateral treaties will be presented below, taking into account their connections and complementarities, as well as three peculiarities of special importance. In addition, focus can be placed on the questions of immunity from jurisdiction and execution by showing a series of selected cases and the very few, but fundamental, *travaux* and conventional particularities of NATO’s immunity from jurisdiction[[1019]](#footnote-1019) and immunity from execution.

###### 6.5.2.1 List of NATO Organizational Immunities

Like Díaz González, the following analysis will make a distinction between non-fiscal and financial and fiscal privileges and immunities,[[1020]](#footnote-1020) in order to better understand NATO’s privileges and immunities. Firstly, NATO’s non-fiscal privileges and immunities will first be addressed, among which immunity from legal process and immunity from execution will be the object of a separate sub-section. Secondly, the financial and fiscal immunities will be developed, although to a lesser degree.[[1021]](#footnote-1021) Finally, this sub-section will conclude with a brief reference to certain particularities associated with the compatibility between the EU legal regime and that of NATO with respect to the current question of privileges and immunities.

*Non-fiscal privileges and immunities.* Apart from immunity from jurisdiction, the first of the non-fiscal immunities is the inviolability of premises and assets, as well as the exercise of control by the organization over them. The antecedent is Article 7.2 of the Covenant of the League of Nations: “The buildings and other property occupied by the League or its officials or by Representatives attending its meetings shall be inviolable”. Jenks argues that inviolability “gives a much wider protection in respect of property rights”. [[1022]](#footnote-1022) This inviolability also applies to threats or disturbances on the premises,[[1023]](#footnote-1023) and covers a series of movable, immovable, and other intangible property and assets. In the Ottawa Agreement this immunity is established in Article VI.[[1024]](#footnote-1024) Although in the Paris Protocol there is not an explicit reference to the inviolability of the premises and assets of an Allied Headquarters, this does not mean these NATO entities are not entitled to such inviolability. The obligation for the contracting parties to provide such protection based on Article VII.11 of the NATO SOFA[[1025]](#footnote-1025) could be implicit in Article 3.2 of the Paris Protocol, but, undoubtedly, it is also incorporated by reference in accordance with the ‘paragraph 26’ particularity as stated in the *travaux* *préparatoires*, where the Allied Headquarters’ legal position is completed by the NATO SOFA and the Ottawa Agreement.[[1026]](#footnote-1026) It is also true that supplementary agreements to the Paris Protocol cover the inviolability of premises and leave access for officials of the hosting state up to the approval of the Head of an Allied Headquarters, or the designated representative, even if the entrance to the premises is for the performance of their official functions.

*Inviolability of archives*. Article VII of the Ottawa Agreement and Article 13 of the Paris Protocol cover this as an immunity,[[1027]](#footnote-1027) as well as the supplementary agreements of the latter. The protection of records and information clearly derives, as it does in the United Nations,[[1028]](#footnote-1028) from NATO policy on classified information, which keeps the different entities of the organization functioning and operational in order to comply with the functions and purposes. Additionally, the inviolability of archives is closely connected to the inviolability of the premises occupied by an international organization.[[1029]](#footnote-1029) [[1030]](#footnote-1030)

*Communications*. Jenks submits that “[u]nrestricted freedom, reliability and speed of communications is essential to satisfy the needs of international organisations, especially in times of emergency”. [[1031]](#footnote-1031) It is submitted that the functions and purposes of NATO create a requirement of continuous alertness and, therefore, continuous emergency. Article XI of the Ottawa Agreement[[1032]](#footnote-1032) sets out the immunity of the official correspondence and other official communications, as well as the right to use codes and couriers or sealed bags, with the same immunities and privileges as diplomatic couriers and bags. During the negotiations of the NATO general immunities agreements this question raised much debate, but it was agreed to use Article 8 of the OEEC Convention, which sets out that for the official communications of the organization the treatment of the hosting state must not be less favorable than that accorded by the government of that state to any other government.[[1033]](#footnote-1033) It is interesting to note that the negotiating states referred to the NATO SOFA to cover the communications issue, but the question was never incorporated in the text of the agreement.

“It was also agreed that communications originating from the Organization to military Headquarters of NATO, e.g., Supreme Allied Commander Europe, would be covered by this Article and that communications to the Organization from the military Headquarters of NATO would be covered by the Agreement on the Status of the Armed Forces of the North Atlantic Treaty”.[[1034]](#footnote-1034)

However, this question was left for the bilateral agreements. First, the NATO SOFA did not need to address the question since it deals with states and not with Allied Headquarters, so the rationale presented by the United Kingdom, although presented during the discussions of the Ottawa Agreement, is also valid for visiting forces: “NATO communications could always be sent from one country to another through ordinary governmental channels”. [[1035]](#footnote-1035) Second, upon a request of the Canadian representative,[[1036]](#footnote-1036) the first supplementary agreement to the Paris Protocol, i.e., France-SHAPE, partially covered the need to count on privileges and immunities in communications.

“Article 13

SHAPE and its Subordinate Headquarters may import, install and use on French territory military radio and radar stations. The frequencies used shall be the subject of agreement between the Contracting Parties; they will be used exclusively for official purposes. In peacetime, the technical arrangements connected in particular with the site and transmitting power of the stations shall be decided between the SHAPE services and the appropriate French authorities”.[[1037]](#footnote-1037)

On this matter, there is silence in the NATO SOFA and its supplementary agreement. For this reason, in the most recent supplementary agreements to the Paris Protocol, the ‘paragraph 26 particularity’ applies with respect to official correspondence, official communications, codes, and courier bags. Also, and in order to cover this gap, SHAPE has concluded bilateral MOUs with NATO nations for courier services on the transport of NATO classified material (documents and ciphers).

Nothing in the general multilateral agreements refers to privileges of unrestricted and uncensored distribution of publications (only customs exemptions for import and export of publications - Article IX.c of the Ottawa agreement). However, this has never raised issues in NATO and is likely to be even less in the future if when taking today’s facilities provided by Internet and new technologies into account.

*Financial and fiscal privileges and immunities.* With respect to financial and fiscal privileges and immunities, NATO’s general multilateral treaties are very consistent. For Allied Headquarters, the Paris Protocol mainly refers to the NATO SOFA and minimally to the Ottawa Agreement in the sense of understanding certain concepts such as that of ‘taxes’. However, several elements require explanation in order to better understand the implementation of NATO’s fiscal entitlements, such as the understanding of taxes and duties, their scope, and also their compatibility with EU Law for EU-based NATO bodies. Some critical points can be addressed, which are relevant to understanding certain complexities in NATO general multilateral treaties and more specifically the Paris Protocol.[[1038]](#footnote-1038)

The Ottawa Agreement’s financial and fiscal immunities are covered by Articles VIII to X. Article VIII confirms that there will be no financial controls, regulations, or moratoria of any kind for currency held by the organization, as well as for any transfer and conversion of currency. Article IX exempts the organization from all direct taxes, except from charges for public utility services. Also, it is exempted from all customs duties on imports and exports of articles for its official use, and from any fiscal restriction for their disposal. The Ottawa Agreement also foresees exemption from all customs duties on imports and exports in respect of its publications. Finally, Article X grants exemption from excise duties and from taxes on the sale of movable and immovable property when the Organization makes important purchases for official use.

The Paris Protocol requires a more elaborated exercise to trace the location of privileges and immunities, as many of them are made by reference, use different terminology, require a reading of the *travaux*, or are explicit only in the bilateral supplementary agreements. Fiscal entitlements for Allied Headquarters present a challenge for practitioners, since they are incorporated by reference from different provisions of the NATO SOFA, *inter alia*, Article XI, paragraph 3 (exemption of official documents from customs exemption), paragraph 4 (import and resale of provisions –tax-free canteens, messes and cafeterias), paragraph 8 (disposal), and paragraph 11 (petrol, oil and lubricants). As a result, the Protocol has several peculiarities of which three are worth an explanation: scope, duties, and taxes.

Article 8 of the Paris Protocol gathers many of the Allied Headquarters’ financial and fiscal privileges and immunities. The purpose of this article is to relieve an Allied Headquarters ‘from duties and taxes’ (paragraph 1). Article 8 was subject to numerous discussions by the Paris Protocol drafters, due to contradictions with the NATO SOFA.[[1039]](#footnote-1039) Discussions continued until the end of the negotiations of the Protocol, but eventually the North Atlantic Council recommended NATO constituents to grant international military headquarters an exemption from taxes and duties to the widest possible extent.[[1040]](#footnote-1040) The Council also agreed to recommend that this principle should apply not only to expenditures in the hosting state of an Allied Headquarters, but also to expenditures made in other member states.[[1041]](#footnote-1041) At the very beginning of the negotiations, an interesting particularity took place. NATO states showed concerns about the extent of Article 8.1 and the expression ‘so far as practicable’, which is explicit in this text of the article. The Council asked for more negotiations to understand this point, also taking into account that the chairperson of the Military Budget Committee confirmed that the intent was to cover all international military headquarters.[[1042]](#footnote-1042) The result of those discussions was to apply a peculiarity, i.e., the concept of the ‘reciprocity clause’. The ‘reciprocity clause’ concept details the obligation of NATO nations hosting an international military headquarters to enter into negotiations with Allied Headquarters on their territory in order to apply fiscal exemptions. Since Supreme Headquarters are the entities with legal personality, the concept permits a uniformed implementation of Article 8 of the Protocol in all NATO states. This reciprocity, in spite of SHAPE’s initial reluctance, has taken place since 1953 in the different bilateral supplementary agreements to the Paris Protocol, even in the face of certain difficulties posed by EU law.

“4. The purchases of SHAPE being not limited to the host country, it would be necessary to conduct negotiations with all NATO countries with the additional requirement that all these agreements would have to be consistent with the *reciprocity clause*. Owing to political aspects of a *reciprocal tax relief between France and other countries* and also in view of the time which would be involved in negotiations, SHAPE does not consider itself in a position to undertake such negotiations.

5. It is deemed essential therefore that the suggested reciprocity clause be studied by a NATO committee of financial experts to recommend a practicable solution to implement Article 8 of the Protocol in all NATO countries”.[[1043]](#footnote-1043)

The second peculiarity is the expression ‘duties and taxes’ (mentioned in Article 8, paragraphs 1 and 4), for which the Protocol provides no definition. On ‘duties’, the Protocol may refer to the NATO SOFA Article XI.12, where the term relates to customs duties and to duties and taxes payable on importation or exportation, except those which are just charges for services rendered. On the latter, however, the provisions of the NATO SOFA provide meagre support in shedding light on the concept, with regards to understanding the term ‘taxes’, since Article XI paragraphs 2.b (tax payable in respect of the use of vehicles on the roads); 6 (exemption from taxes payable in respect of the use of roads by private vehicles); 8 (tax and compliance with the requirements of the controls of trade and exchange); and 7 (special arrangements for receiving fuel, oil and lubricants free of all duties and taxes) do not satisfy this need. This is one of the rare occasions in financial and fiscal privileges and immunities where ‘paragraph 26’ needs to be applied for Allied Headquarters. ‘Taxes’ for Allied Headquarters must be understood as ‘direct taxes’[[1044]](#footnote-1044) as referred to in Article IX.a of the Ottawa Agreement. However, practice demonstrates that Allied Headquarters, contrary to NATO civil agencies, enjoy tax-exemption from public utility services, as is the case for SHAPE in Belgium. This shows that Allied Headquarters have been granted relief from the burden of all taxes, in line with the same rationale that Martha argues applies to the United Nations: “[the] term [direct taxes] is to be determined in accordance with its ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.[[1045]](#footnote-1045) This again refers to the functional need concept.

In principle, Article 8.1 sets out the need to conclude agreements for its implementation. However, NATO’s practice has shown that NATO members have applied fiscal entitlements without such agreements. In doing so, NATO states are consistent with the general principle of public international law by which hosting states need to ensure avoidance of financial advantage from collective activities within the framework of an international organization. This comes to show that NATO states are also loyal to the general practice of privileges and immunities in international law, which contributes to the necessary practice and *opinio iuris* required by customary law.[[1046]](#footnote-1046)

NATO requires counting on exemption from currency controls and restrictions, including the right to hold and transfer funds and having immunity from bank deposits. On the question of currency, Chalanouli argues that forces deployed in a variety of forms and circumstances require, in order to carry out their mission, proper monetary instruments, so as to procure goods and services from the local economy and cover everyday needs. She also submits currency and exchange facilities fulfill a fundamental element for an Alliance or visiting forces, i.e., to ensure their independence and avoid the hosting state turning their presence on its territory into an opportunity for financial gain. Providing beneficial arrangements or foreseeing currency exchange regulations provisions in the negotiated instruments is in conformity with the principle of mutual cooperation.[[1047]](#footnote-1047)

“The source documents, such as *travaux préparatoires*, remain also relatively silent on the establishment of the provisions in question”.[[1048]](#footnote-1048) However, while discussions for the Ottawa Agreement did not take a great deal of time, states invested much energy on developing a common understanding for NATO’s military side in Article 12 of the Paris Protocol. Discussions took place in the Military Budget Committee in order to determine the exchange rates and currency value.[[1049]](#footnote-1049) Currently, NATO Financial Regulations and Financial Rules and Procedures,[[1050]](#footnote-1050) applicable to both NATO sides – civil and military, further regulate all aspects of currency exchange. With respect to operating bank accounts, the Paris Protocol and supplementary agreements intend to allow Allied Headquarters to carry out their mission in accordance with the ‘rules of the organization’, which will be consistent with the principles of international law. It is to be noted, that several supplementary agreements also grant deposits free from local regulations against bank and postal accounts. However, and due to the fact that most Allied Headquarters are based in EU states, the transfer of funds triggers inquiries by those states in the application of EU Law on the prevention of money laundering.[[1051]](#footnote-1051) EU Directive 2015/849 of 20 May 2015 addresses the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. In connection with this and taking a broader scope, the next paragraphs will expand upon the question of the relationship of EU law and NATO treaties on the matter of financial and fiscal privileges and immunities.

*EU Law and NATO privileges and immunities.[[1052]](#footnote-1052)*The third peculiarity relates to the compatibility between NATO general multilateral treaties and EU law, due to the stationing of the majority of NATO bodies in EU states and also the extent to which EU law is the states’ domestic law. The principle of primacy of EU law guarantees the superiority of EU law over national law of EU member states.[[1053]](#footnote-1053) However, whilst EU law is a sort of international law for EU members, it is a sort of state law for non-member states and international organizations where the primacy principle becomes a competing arena.[[1054]](#footnote-1054) This peculiarity equally affects the Ottawa Agreement and the Paris Protocol, as well as the non-fiscal, and financial and fiscal privileges and immunities.

EU law is incorporated, directly or indirectly, into the national legal order of EU states, which regulates a multitude of the areas relating to NATO treaties privileges and immunities. It can be posited that this precedence is based on international treaties and common principles of international law, and that EU law cannot negatively influence states’ international obligations to fully implement the provisions of international treaties.[[1055]](#footnote-1055) On this note, it is interesting to consider Pellet’s argument on the relation between international law and EU law.

“en premier lieu, le droit international (public) et le droit de l'Union européenne constituent bien deux ordres juridiques (des « systèmes » - cela m'est égal) distincts qui peuvent avoir des points de contact, s'influencer mutuellement, renvoyer l'un à l'autre, mais qui ne sont pas placés en situation de rapports hiérarchiques;

et, en second lieu, même si c'est sans doute un peu réducteur, le droit européen est un Janus: il se comporte vis-à-vis du droit international (et des Etats non-membres de l'Union) comme un droit national; mais il est « une sorte de » droit international à l'égard des droits internes des Etats membres”.[[1056]](#footnote-1056)

In any case, EU law causes, intentionally or not, certain interferences with the tax-exemptions granted in the NATO general agreements. However, up until now, this mostly concerns questions relating to procedure and not to the essence of NATO privileges and immunities, which are required for fulfilling NATO’s functions and purposes. In any case, it is necessary for NATO to maintain a continuous monitoring of fiscal matters as applied to NATO bodies based on EU territory, since EU law also creates numerous mechanisms of control, which may render NATO treaty fiscal entitlements non-functional at a certain point and to a certain extent.

Similar to Article 103 of the UN Charter, Article 8 of the NAT contains a supremacy clause creating the NAT’s own conflict-of-laws regime. Each party of the NAT declares “that none of the international engagements now in force between it and any other of the Parties or any third State is in conflict with the provisions of this Treaty, and undertakes not to enter into any international engagement in conflict with this Treaty”.[[1057]](#footnote-1057) The article is the result of an initiative of the United States Secretary of State Acheson, at his meeting with Senators Connally and Vandenberg. According to Acheson, the US had in mind “the possibility that one of these countries might go Communist and some ground should be provided for disassociating them from the pact”.[[1058]](#footnote-1058) Even if the actual motivation is not related to privileges and immunities, the article goes beyond the obligations contained in the NAT, that is, mutual self-defence”,[[1059]](#footnote-1059) and its wording has proven extremely functional for NATO. In addition, Article 8 serves to prevent conflicting legal commitments among NATO states.[[1060]](#footnote-1060)

The Treaty on European Union (‘TEU’) also recognizes the above in Article 42(2):

“[t]he policy of the Union ... shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework”.[[1061]](#footnote-1061)

Furthermore, Article 3(5) of the TEU states that the Union “shall contribute ... to the strict observance and the development of international law, including respect for the principles of the United Nations Charter”.[[1062]](#footnote-1062)

EU law must ensure ‘deconfliction’ with the international obligations of those members that are part of NATO. Moreover, and based on the above, EU states have a double obligation to honour the NAT provisions. First, based on obligations derived from the NAT (Article 8), as well as from EU treaties, EU states have to ensure that EU law does not contradict the NAT – and its general multilateral treaties. Second, based on the UN Charter (Article 103) and the EU treaties, EU law cannot contradict the treaties serving to implement the purposes and principles of the UN Charter, and the NAT is one of those. Consequently, Article 42 TEU favors the NATO legal regime in case of conflict with EU laws. This is illustrated, beyond any theoretical formulation, by recent case-law.

In June and July of 2017, the *tribunal de première instance francophone de Bruxelles*, Section civile, issued two *ordonnances* for the execution of two *exequaturs* in order to implement two judgments issued by the Dutch District Court of Limburg in Maastricht[[1063]](#footnote-1063) and the Court of Appeal of ‘s-Hertogenbosch respectively. The question refers to two judgments dismissing the previously granted garnishment on a bank account in Belgium. This was a SHAPE account dedicated to closure activities of the UN-mandate ISAF operation in Afghanistan, which the United Nations terminated on 31 December 2014. The Dutch courts recognized SHAPE’s conventional immunity from execution per Article 11(2) of the Paris Protocol. The question was whether or not Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters should be applied. SHAPE argued before the Brussels court both that the EU law is not applicable to SHAPE, and that the funds for the closure of a UN-mandated mission “are no funds for commercial purposes, but for financing the mission”.[[1064]](#footnote-1064) Eventually, SHAPE, regarding the execution of the Dutch judgment, made reference to a Convention of 1925 signed between Belgium and the Netherlands in order to avoid the recognition of the applicability of EU law to NATO activities and to reaffirm the public nature of the funds dedicated to a Chapter VII operation. Therefore, the two *ordonnances* issued by the Brussels tribunal stated:

“Attendu que le S.H.A.P.E. se réfère à la Convention de 1925 [between Belgium and the Netherlands on territorial judicial competence on bankruptcy, execution authority for judicial decisions, arbitration awards and deeds] pour le motif que les dispositions plus récentes de droit européen ne lui sont pas applicables”.[[1065]](#footnote-1065)

Neither EU law nor the EU institutions have ever challenged the obligations of the EU states which are also members of NATO, with respect to the NAT and general multilateral treaties.[[1066]](#footnote-1066) EU directives explicitly confirm the primacy of NATO privileges and immunities by establishing certain procedures to facilitate their implementation. With respect to tax and duties, several regulations and directives address NATO’s particularities. The Modernised Customs Code established by Regulation (EC) No. 450/2008 and the Union Customs Code (EU) No. 952/2013 makes reference to NATO’s general multilateral treaties’ duty-exemptions. Also, Directive 2006/112/EC identifies VAT exemption for NATO in the supply of goods and services including canteens and messes. This Directive also recognizes the VAT exemption for the importation of goods. Directive 2008/118/EC concerning the general arrangements for excise duty provides an exemption for international organizations, which included the force of NATO states in a separate paragraph:

“Particularly EC Regulation No 1186/2009 (Setting up a Community system of reliefs from customs duty), speaks to this in Article 128 1: ‘[n]othing in this Regulation shall prevent the Member States from granting: (a) relief pursuant to the Vienna Convention on diplomatic relations of 18 April 1961, the Vienna Convention on consular relations of 24 April 1963 or other consular conventions, or the New York Convention of 16 December 1969 on special missions; (b) relief *under the customary privileges accorded by virtue of international agreements or headquarters agreements to which either a third country or an international organisation is a contracting party*, including the relief granted on the occasion of international meetings;’”.[[1067]](#footnote-1067)

This situation has created a series of particularities. One is the reimbursement of taxes instead of granting the exemption *a priori*. This applies for the exemption of VAT on purchases made in EU territory. Although, Article 151.1(b) of Directive 2006/112/EC recognizes the VAT exemption to international organizations, for purchases made within the receiving state, this exemption has been applied differently by the EU states, i.e., exemption at the purchase moment or reimbursement. Article 151.1(c) refers to the supply of goods or services to visiting forces of the North Atlantic Treaty. On this note, the Court of Justice of the European Union (‘CJEU’), in the case C-225/11, makes clear that Directive 2006/112 intends to permit EU states part of NATO to fulfill their NATO obligations,[[1068]](#footnote-1068) which is applicable not only to visiting forces but also to Allied Headquarters, since the implementation of NATO functions and purposes remains paramount. Something similar occurs with excise duties on purchases made in the EU, where the practice of excise duty exemption per Article 12.1(b) of the Directive 2008/118/EC is normally done by way of reimbursing (regulated by Article 11) after its payment, as seen above for VAT exemptions.

The second particularity is the possibility to resale goods in NATO canteens and messes tax free, which is covered by Article 151.1(d) of Directive 2006/112/EC and Article 12.1. These articles recognize that NATO entities can engage in the resale of goods and services to entitled personnel, as well as serving meals and beverages for socialization and duty operational obligations.

The third particularity refers to EU Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. The Directive intends to prevent criminal activities. Article 2 of the Directive regulates financial institutions and certain transactions, but is not related to international organizations. However, these can be affected in the transaction of their funds for daily functions in order to show transparency, which could render NATO treaties non-functional. Since the operation of bank accounts by NATO bodies is a requirement to manage their budgets and carry out the activities established by NATO’s rules of the organization, *a priori*, these bank operations cannot be labeled as non-transparent. This would clash with the principles inspiring Article 1 of the Protocol on the Privileges and Immunities of the European Union, providing that “[t]he property and assets of the Union shall not be the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice”. Furthermore, the Protocol specifically states in article 11 paragraph c, that “[i]n the territory of each Member State and whatever their nationality, officials and other servants of the Union shall […] in respect of currency or exchange regulations, be accorded the same facilities as are customarily accorded to officials of international organisations”.[[1069]](#footnote-1069)

In any case, it is evident that international organizations require a high degree of mobility for their funds, “it is particularly inappropriate that they should be subject to any special financial control by the State where their headquarters are located”.[[1070]](#footnote-1070) Indeed, only the international authorities determine the disposal of international funds in accordance with the rules of the organization.

Finally, EU law appears to limit the implementation of NATO general multilateral treaties; however, it can be concluded that Article 8 of the NAT and Article 42 of the TEU set the rules to make both ‘regimes’ compatible. Moreover, EU secondary law also provides recognition of NATO privileges and immunities, either explicitly or by remaining silent; or by making reference to headquarters agreements. This illustrates the application by EU law of the principle of functional necessity, which, in turn, is applied in its own Protocol. In any case, the EU holds an inherent obligation with respect to its own members in order to facilitate – and not impede - the fulfillment of their international obligations.

###### 6.5.2.2 Immunities from Jurisdiction and Execution

Functional immunities from jurisdiction and execution fall in the category of non-fiscal immunities and are not a derogation of the law; they just prevent adjudication by national courts. Lalive describes the justifications for immunity from jurisdiction for international organizations, and argues that the aim is to facilitate an efficient and effective functioning of international public service.[[1071]](#footnote-1071) Immunity from execution follows the same rationale as that from jurisdiction, but intends to prevent any measure in order for the seizure or attachment of properties or funds of international organizations, since their budgets are not self-generated but provided by member states. This immunity has an absolute nature and is regulated mostly in the headquarters agreements of international organizations.

Another introductory remark concerns the term ‘legal process’. It has already been concluded that NATO privileges and immunities are an adaptation of those of the United Nations and the Specialized Agencies,[[1072]](#footnote-1072) and that many of the drafters of the NAT and the NATO general multilateral agreements[[1073]](#footnote-1073) were part of the teams who drafted the UN Charter. Therefore, many of the rationales followed in the discussions of the Charter are valid for NATO as long as they refer to the fundamentals of international organizations, which the functional immunities do. This takes into account the principles and purposes of the Charter and the keystone principle of the maintenance of international peace and security, which inspired the NAT. The original draft of the 1946 Convention on the Privileges and Immunities of the United Nations used the term ‘judicial process’, but was later changed to ‘legal process’. This was with the intention of developping a common understanding that legal process covers judicial, administrative, or executive functions according to the law of the hosting state, which range from the preparatory to the subsequent proceedings. Reinisch submits that this is “apparently considered to be broader and to comprise also steps preceding laws suits and following them. Thus, it probably also comprises enforcement measures”.[[1074]](#footnote-1074) This rationale also applies to NATO general multilateral agreements on activities run in both the civil and military sides, i.e., by the Secretariat and the civil agencies, and the Allied Headquarters respectively.[[1075]](#footnote-1075)

These immunities are procedural tools in order to avoid a situation where national courts are exercising their local jurisdiction on international institutions. This rests on both an analogical model, and a conventional or customary one. The first *“sur le modèle du privilège reconnu aux Etats souverains, [which permits international organizations] d’échapper aux poursuites judiciaires devant les tribunaux nationaux de l’Etat du siège*”*.*[[1076]](#footnote-1076) This is not equivalent to say that international organizations’ immunities are derivative, since the immunity of international organizations cannot be a patchwork of fragments coming from their constituents.[[1077]](#footnote-1077) The second model bases functional immunities on conventional law by way of general multilateral treaties, headquarters agreements, and domestic law, where gaps are covered by customary law.[[1078]](#footnote-1078)

It is of importance to note that for international organizations there is no distinction between *acta* *iure imperii* and *acta* *iure gestionis*.[[1079]](#footnote-1079) This is simply because international organizations enjoy immunities *ratione* *functionis*. These functional immunities permit international organizations to carry out their functions and purposes under the principle of *ne impediatur officia*. Consequently, an international organization, as a matter of principle, may not act *ultra* *vires*.[[1080]](#footnote-1080) This would mean that international organizations enjoy better and more immunities than their constituents. However, while this might be true due to the noble causes that international organizations pursue, case law has established certain limitations with more or less success.

*The first limitation of functional immunities relates to the type of activity*. Some case law has tried to impose the distinction between official activities and commercial activities.[[1081]](#footnote-1081) But this makes little sense for international organizations, as “the question of immunity from legal process of an international organization it has to be determined whether a particular activity undertaken by it is required by its functions”.[[1082]](#footnote-1082) The fact that an organization concludes commercial agreements does not mean it is entering the marketplace for profit; to the contrary, those commercial activities may most likely be a requirement for the fulfillment of needs coming from its functions and purposes.[[1083]](#footnote-1083) A good example is military equipment and materiel, which are “*achats pour les besoins de l’armée*”.[[1084]](#footnote-1084)

In any case, the distinction between official and commercial activities is equivocal and confusing. Bekker therefore proposes to distinguish between official and non-official, or non-essential, activities.[[1085]](#footnote-1085)

“A way out of this controversy relating to the proper boundaries of the suggested criterion might be to use as a *test* whether the organization concerned not only participates on the market by concluding agreements with private contractors, but enters the marketplace seeking customers as a supplier and trader of good or services for profit, thereby exposing itself to the ordinary forces of market competition”.[[1086]](#footnote-1086)

The *Branno* case, concerning a contractor providing canteen services to NATO’s Allied Headquarters in Naples, involved the distinction between ‘official activity’ versus ‘commercial activity’. Paone presents the case also under this binary position. He describes the rationale of the *Corte di Cassazione* to equate the Allied Headquarters, representing SHAPE (the one holding the legal personality), to a sovereign state that has immunity from jurisdiction and which “*può rinunciare o espressamente o implicitamente, allorchè dimostri che non intende avvalersi della sua supremazia di ente di diritto internazionale (che si svolge nel proprio ordinamento) ed agisca* more privatorum”*.*[[1087]](#footnote-1087) For the court, the waiver comes at the very moment NATO contracts with private citizens and accepts that private law regulates the contract. Consequently, the Italian courts’ jurisdiction applies. Paone also argues that, in the said case, the Allied Headquarters also decided to put the case before the Italian courts (waived the immunity) by addressing the merits of the case in its defence:

“nei sui scritti difensivi di non volersi, allo stato, sottrarre alla giurisdizione italiana per la risoluzione dell’insorta controversia, giacchè, mentre affida al giudice la questione sui limiti della giurisdizione e sul difetto della potestà giurisdizione in ordine al caso concreto, se rilevabile d’ufficio, svolge invece la sua difesa nel merito”.[[1088]](#footnote-1088)

As addressed in previous sections, the operation of canteens is part of the official activities of Allied Headquarters which run their operations outside ordinary working hours and, therefore, merits immunity from jurisdiction.[[1089]](#footnote-1089) Moreover, canteens and cafeterias in Allied Headquarters dedicated to military operations – a clear function of NATO – will function around the clock over the year. In the present case, and in principle, the immunity from jurisdiction applied and was not waived. The waiver of any functional immunity must be express and particular to the case and, therefore, it cannot be implied from the mere fact of acting as a plaintiff in litigation,[[1090]](#footnote-1090) nor is it “up to the domestic courts of a single member state to determine whether immunity is lifted”.[[1091]](#footnote-1091) The only explanation may be that provided by Bonafè, where the state analogy on immunity granted based on the binary *acta* *iure imperii* and *acta* *iure gestionis* was incorporated in the form of the Italian reservation to the 1949 Convention on the Privileges and Immunities of the Specialized Agencies, and therefore applicable to the rest of international organizations and creating a very undesirable and non-functional situation for these institutions.[[1092]](#footnote-1092) Bonafè submits a very disturbing conclusion, had the *Mothers of Srebrenica* case been heard by the Italian Supreme Court the immunity to the United Nations would have been denied.

In order to avoid confusion with the above, and due to the numerous cases brought in Italian courts against Allied Headquarters involving local workers, it is pertinent to develop briefly the nature of these cases. The aim is to show that the binary distinction explained above is not necessary. The legislation of the receiving state always applies to the conditions of employment and work of local workers. Since this is a conventional obligation per Article IX.4 of the NATO SOFA, the immunity from jurisdiction is never invoked, as long as any litigation involving a local worker is about their contract or the conditions of their contract. This is because Article IX.4 of the NATO SOFA is explicit with respect to the applicable legislation to local workers, i.e., that of the receiving state, and it appears to be the norm in other states hosting NATO bodies.[[1093]](#footnote-1093)

Nonetheless, this does not equate to saying that Allied Headquarters cannot invoke their immunities in cases involving local workers if the question under discussion is not directly related to the conditions of employment and work. If immunity from jurisdiction is invoked in local workers’ cases, these cases tend to become a *prima facie* hard case. This is because: a) there is much difficulty to present the case unrelated to the conditions of employment and work and outside the labour law realm of the hosting state, and b) national judges consider Article IX.4 of the NATO SOFA derogatory of conventional obligations of the state. The latter reads as a *renvoi direct* to the applicable hosting state’s labour legislation [and the Allied Headquarters’ -specific collective bargaining agreement], and, accordingly, the article gives national courts jurisdiction over cases related to local workers.

Consequently, in these cases, conventional functional immunities remain a grey zone and, normally, end up giving precedence to Article IX.4 of the NATO SOFA. Immunity from jurisdiction is usually not upheld in these labour cases, no matter the merits.[[1094]](#footnote-1094) These are apparently hard cases since they are located in a twilight zone, but the local judge has no option but to settle the case by looking into the hosting state’s labour legislation and the applicable collective bargaining agreement. The reference to the local labour legislation moves away from the public order path into the private one, disregarding other applicable treaty provisions. This may honour ‘justice’, but may not honour international obligations, regardless of whether the functional test passes for the case in point. De Brabandere highlights the reason of this ‘grey zone’ by arguing that labour disputes involving international organizations are perceived as if the organization is not acting in its public capacity.

“Although no explicit distinction is made on the basis of the types of disputes submitted to the courts or tribunals, it may well be that the difference in treatment of the effectiveness of the alternative mechanisms between labour disputes and those opposing third parties is the result of an underlying belief that in case of labour disputes, the organization is in fact not acting in its ‘public’ capacity, while in other disputes it clearly does”.[[1095]](#footnote-1095)

*The second element limiting functional immunities is the question of the right of access to justice*. Immunities create, in principle, a situation where aggravated individuals may not have the possibility to have their case adjudicated by a municipal court. This is not a new question in the field of international institutional law, since the problem was already addressed in the mid-20th century in the *Effect of Awards*[[1096]](#footnote-1096) and the *Manderlier* cases.[[1097]](#footnote-1097) At that time, renowned publicists advocated for the need to reconcile immunities and the rights of third parties. There are two ways[[1098]](#footnote-1098) in which this can be done: an express and case-specific waiver of immunities,[[1099]](#footnote-1099) and arbitration and *jurisdiction preconstituée*.[[1100]](#footnote-1100)

The further development and awareness of questions related to human rights has made local courts consider limiting the functional immunities of international organizations. Article 10 of the Universal Declaration of Human Rights; Article 14 of the International Covenant on Civil and Political Rights (‘ICCPR’); and [the regional human rights convention like] Article 6 of the European Convention of Human Rights (‘ECHR’); all address the guarantee of access to justice. The leading case is *Waite and Kennedy*[[1101]](#footnote-1101) from the ECtHR. Other cases adjudged by the ECtHR followed the same logic: *Beer and Regan v Germany, Stanislav Galić v The Netherlands, Al-Adsani v The United Kingdom, McElhinney v Ireland,* and *Fogarty v The United Kingdom*.[[1102]](#footnote-1102) In the *Waite and Kennedy case* the ECtHR upheld the functional immunity, and consequently reaffirmed that “immunity from jurisdiction pursues a legitimate objective”.[[1103]](#footnote-1103) Proportionality between immunity and access to justice was weighted with respect to the existence of the availability of reasonable alternative means for the appellants.[[1104]](#footnote-1104) However, “the availability of alternative means was only considered to be one element in assessing the possible limitations to the rights of access to court, not as an *essential* precondition to the application of the immunity as such”.[[1105]](#footnote-1105) This has more recently been confirmed by the ECtHR in the *Stichting Mothers of Srebrenica and Others v The Netherlands* case, since it does not automatically follow from the absence of an alternative remedy that “immunity is *ipso facto* constitutive of a violation of the right of access to court”.[[1106]](#footnote-1106) If Chapter VII of the UN Charter is incorporated into the equation as the ultimate test, this renders inapplicable the ‘non-conditional’ proportionality test of *Waite and Kennedy*.

“Although the view that every violation of a legal obligation must have a judicial remedy is an increasingly common one, such a view is a relative novelty in the context of public international law and it cannot be said that it is generally accepted as a governing principle”.[[1107]](#footnote-1107)

Brabandere submits that courts and tribunals shall maintain a distinction between labour disputes and other disputes involving third parties in order to avoid mistakes in appreciating the immunity from jurisdiction and execution.[[1108]](#footnote-1108) Brabandere is concerned by the ‘labour pattern’ of Belgian courts and tribunals, which wrongly interprets *Waite and Kennedy*. He illustrates his concerns with decisions of the Belgian Court of Cassation in three cases,[[1109]](#footnote-1109) which finally set aside immunity. However, these concerns can be mitigated by the decisions in two recent cases involving NATO that break this trend (*Belgium v International Hotels Worldwide Inc.,* and *NATO v El Hamidi*). While bearing in mind the human rights-inspired requirement of effective alternative remedies, Reinisch’s argument can be noted: “it remains to be seen to what extent national courts also beyond Europe will follow the *Waite and Kennedy* doctrine”.[[1110]](#footnote-1110)

Nevertheless, many international organizations provide for means to settle disputes involving officials or arising out of contracts or other disputes of private character. In NATO, the settlement of disputes has its legal basis in Article XIV of the Ottawa Agreement. A mechanism for settlement of labour disputes in NATO is the Administrative Tribunal, previously called the Appeals Board.[[1111]](#footnote-1111)

On the one hand, the Administrative Tribunal decides any staff dispute brought by a current or retired member of the ‘international staff’ (NATO staff members from Ottawa and Paris Protocol bodies)[[1112]](#footnote-1112) or their legal successors against a decision affecting terms and conditions of employment.[[1113]](#footnote-1113) The jurisdiction of the Administrative Tribunal covers only staff as defined in the NATO Civilian Personnel Regulations. The first body created by NATO for addressing disputes arising out of grievances lodged by ‘international staff’ was the NATO Appeals Board created in 1965 and replaced on 1 July 2013 by the Administrative Tribunal.[[1114]](#footnote-1114) The latter enhances the Appeals Board by putting major emphasis on pre-litigation procedures, providing administrative review, greater use of mediation, and an improved complaints procedure. Although the current internal justice system of NATO is substantially different from that of the Appeals Board, this does not equate to affirming that NATO did not previously count with an efficient one. Indeed, in 2009 in *Gasparini v Italy and Belgium*, the ECtHR stated:

“NATO’s internal dispute resolution mechanism was not “manifestly deficient” within the meaning given to that expression by the Bosphorus judgment, particularly in the specific context of an organisation such as NATO. The applicant had not therefore been justified in complaining that Italy and Belgium had endorsed a system that was in breach of the Convention, and the presumption of compliance with the Convention by those two States had not been rebutted: *manifestly ill-founded*”.[[1115]](#footnote-1115)

In NATO there are no remedies for those who are not formally ‘international staff’. Moreover, NATO’s members do not have the intention to create a review mechanism for them, most likely due to the enormous administrative burden this would put on the organization’s scarce resources, in particular the budget and subject matter experts. However, these are normally considered labour cases, and as discussed above, labour cases are usually admitted by judges, charged to resolve cases they sense hold significant moral value. This creates the potential for unwelcome interference by national courts in the internal order of international organizations, which is not desirable. The *Sevens v NATO and Belgium case*[[1116]](#footnote-1116) illustrates the above. Sevens, a failed job applicant, after addressing NATO and Belgian authorities, lodged an appeal before the Brussels Tribunal of First Instance. The tribunal noted the lack of remedies for failed job applicants within the NATO judicial system and immediately reviewed NATO’s recruitment policies concluding - without contemplating NATO’s immunities, but assuming the European Convention on Human Rights was applicable - that NATO had applied, in a correct manner, its own procedures in the selection process and dismissed the appeal. “This result was gratifying insofar as it upheld the NATO action, but less so as regards the route travelled to get to that result. Cases such as *Sevens* thus leave NATO in a state of increasing uncertainty with respect to the degree to which it can rely on its immunities”.[[1117]](#footnote-1117)

On the other hand, for disputes arising out of contracts or other disputes of a private character, reference can be made to NATO’s information provided to the International Law Commission during the work on the ARIO.[[1118]](#footnote-1118) NATO addresses this question in two ways, contractual claims and non-contractual claims under Article VIII of the NATO SOFA. Additionally, NATO drafts its contracts with external suppliers including clauses on arbitration. In case of disputes this cannot be arranged via negotiations. However, not all NATO bodies apply the same procedure and they vary on both the applicable law for the arbitration process and the same law for governing the contracts.[[1119]](#footnote-1119)

Furthermore, NATO’s commentaries[[1120]](#footnote-1120) on non-contractual claims under Article VIII of the NATO SOFA appear to be ‘covered’ implicitly by ARIO’s Article 64[[1121]](#footnote-1121) *lex specialis*. Article VIII of the NATO SOFA[[1122]](#footnote-1122) addresses three types of claims: (i) claims between NATO nations; (ii) claims related to third parties arising from acts or omissions done in the performance of official duty; and (iii) claims related to third parties arising from private wrongful acts or omissions not done in the performance of official duty. With respect to the first type of claims (i) above, NATO has established a series of countermeasures such as total waivers (Article VIII.1, NATO SOFA), waiver for certain amounts (Article VIII.2, NATO SOFA), and not invoking immunity from jurisdiction (Article 11.1 Paris Protocol). This practice has been extended to exercises and operations with NATO Partnership for Peace nations and adapted by other institutions.[[1123]](#footnote-1123) This *lex specialis* of NATO is very broad; covering not only situations that may affect consequences resulting from a breach of international law when a member state is the injured party, but also third parties affected, i.e., claim types (ii) and (iii) above would cover non-contractual disputes of a private character.

NATO has applied its dispute settlement system successfully for seven decades, and for two decades in conjunction with NATO partners; as stated above, it has has also served as a model for similar relationships elsewhere in the international community. This shows the practicality provided by Article VIII of the NATO SOFA to visting forces and Allied Headqurters. However, neither the holistic conventional immunities as set in the three general multilateral agreements and their supplementary agreements, nor the ‘rules of the organization’ for implementing Article XXIV of the Ottawa Agreement, in both NATO civil and military sides, have spared NATO bodies from appearing in court, invoking their immunities, and proving that their immunities apply.

As discussed *supra*, De Brabandere observes in three cases heard at the Belgium Court of Cassation that it generalizes the functional immunities and applies them in a manner that follows only a labour disputes rationale. This situation derives from an incorrect interpretation and implementation of the *Waite and Kennedy case* principles. However, there are two cases involving NATO and resolved by the *Cour d’appel de Bruxelles* (*17ième and 18ième chambres* respectively), which appear to have changed this tendency.

The first case concerns NATO activities in Kosovo (*International Hotels Worldwide inc*. case). In June 2011, the Brussels Court of First Instance heard a case related to the rent of a press communications centre in support of KFOR, a United Nations mandated peace support operation that NATO led. An arbitral award was issued on 8 October 2001, which ordered NATO to pay USD 393,329.57, plus interest and costs. On 27 March 2007 International Hotels Worldwide inc. requested the *exequatur* in order to enforce the arbitral award, and by order of 26 April 2007 the *exequatur* was granted. On 11 December 2007, International Hotels Worldwide Inc. requested NATO make the payment. On 19 February 2010, after requesting the payment to NATO, it seized and executed the arbitral award for an amount of EUR 533.125,16. The Belgium state authorities reminded the court of Articles V and VI of the Ottawa Agreement and referred to annex 3 of the judgment of 2 March 2007 from the Court of Cassation.

“6. Il ressort de la combinaison des dispositions conventionnelles précitées et de la priorité des normes de droit international sur les dispositions du droit national qu’un débiteur de l’OTAN doit refuser de faire une déclaration en tant que tiers saisi au sens de l’article 1452 du Code judiciaire”.[[1124]](#footnote-1124)

After convening the *huissier de justice* (bailiff) to stop the execution of the garnishment based on the Ottawa Agreement and having a statement of Banca Monte Paschi Belgio SA referring to the same Agreement, the Belgium State finally had to file against International Hotels Worldwide inc. in order to suspend the provisional enforcement of the *exequatur*. On 28 July 2011, the court disregarded the judgment of the Court the Cassation and dismissed NATO’s immunity from execution claim.[[1125]](#footnote-1125) The Brussels Court of First Instance evaluated the availability of alternative mechanisms, and found these did not exist. The court argued that Article 6.1 of the ECHR takes priority over NATO’s immunity. However, the notion of priority was wrongly placed, and Belgium appealed the judgment before the *Cour d’appel de Bruxelles (17ième Chambre)*.[[1126]](#footnote-1126) In 2012, the Court of Appeal ruled against the judgment of the Brussels Court of First Instance. The Court of Appeal firstly concluded that Article 6.1 is outweighed by the interest protected by immunities, and secondly upheld NATO’s immunities against the exercise of jurisdiction to implement the arbitration clause:

“La Cour estime dès lors qu’en l’espèce la proportionnalité entre l’immunité de l’OTAN et les droits d’accès à un tribunal tel que consacré para l’article 6 § 1er de la CEDH n’est pas entravée par le fait de respecter l’immunité l’exécution.

Le bon fonctionnement de l’organisation internationale (à vocation particulière pour le respect de la paix mondiale) prévaut sur la protection des droits subjectifs de INTERNATIONAL HOTELS WORLDWIDE telle que garanties par la CEDH”.[[1127]](#footnote-1127)

The court applied *Waite and Kennedy* properly, i.e., immunity is not conditional upon the existence of alternative mechanisms.[[1128]](#footnote-1128)

The second case is comprised of two joined cases, *El Hamidi v NATO* and *Jafara v NATO*,[[1129]](#footnote-1129) and is based on facts connected to NATO’s air strikes in Libya during the United Nations–mandated ‘Operation Unified Protector’, in implementation of the United Nations Security Council Resolution 1973. The case related to death and injury caused to El Hamidi and Jafara’s relatives. Both challenged NATO immunities by invoking Article III of the Ottawa Agreement (cooperation to facilitate the proper administration of justice and abuse of any immunity or privilege) and invoked the ECHR. On 22 October 2012, the Brussels Court of First Instance found that it did not have jurisdiction over the case, based on NATO’s immunity from jurisdiction. In particular, the court arrived at this conclusion after reasoning that the appellants do not fall within the jurisdiction of Belgium within the meaning of Article 1 ECHR, with the result that they do not hold the rights and freedoms granted by the ECHR, including the right to an effective remedy in Belgium. The court observed that *Operation Unified Protector* did not have ‘boots-on-the-ground’ activities, so there was no opportunity for Belgium to exercise jurisdiction. For that reason, the case was considered inadmissible in Belgian courts, but at that moment the court considered NATO’s immunities.

In January 2013 the plaintiffs appealed and invoked Article 6.1 ECHR; Belgium intervened and the court joined both cases.[[1130]](#footnote-1130) The Court of Appeals studied the NAT and the Ottawa Agreement, concluding that NATO has immunity from jurisdiction (Article V of the Ottawa Agreement) in order to be able to act independently and without interference from the member states. The court examined Article 6.1 of the ECHR, the *Waite and Kennedy* and *Beer and Reagan*[[1131]](#footnote-1131) cases, Article 14 of the ICCPR, Article 6.3 of the Treaty of the European Union (‘TEU’),[[1132]](#footnote-1132) and the court’s jurisprudence. This review demonstrated first that the court has set aside immunities of international organizations in cases of international staff disputes and quasi-delictual responsibility cases, which are not applicable to the current case. Second, the court recalled both that NATO’s activities display a willingness to comply with the purposes and principles of the UN Charter and that NATO’s immunity from jurisdiction aims to permit NATO to achieve its fundamental mission, which includes the effective conduct of military operations. These operations require there to be no interference. For this argument the court recalls the *Stichting Mothers of Srebrenica* case. Third, the court highlighted that there are no cases or authorities resulting from Article 14 of the ICCPR, and fourth, that there is no customary law obligation imposing that immunity from jurisdiction must be set aside in these types of cases. And finally, that Article 6 of the TEU does not apply to the appellants. These conclusions led the court to uphold NATO’s immunities.

Overall, these cases show that the Belgian court of appeals follows a detailed analysis taking into account the precedence of international law and the noble cause of the maintenance of international peace and security. Also, and likely most important, the court of appeals confirms that in the original case of *Waite and Kennedy* the availability of alternative means was only considered to be one element, among others, in order to assess limitations to the rights of access to justice, and not an essential precondition for the application of the immunity. The ECtHR, in the *Stichting Mothers of Srebrenica and Others v The Netherlands* case, whilst still looking to the proportionality analysis, has broken with its earlier case law. In the recognition of the immunity of international organizations, the absence of an alternative remedy does not constitute a violation of the right of access to court.

###### 6.5.2.3 Supreme Group v SHAPE Case.

The *Supreme* case[[1133]](#footnote-1133) touches upon several of the elements described above, such as the different international organizations within NATO, customary immunities, the hybridity of the Paris Protocol, official versus commercial activities, waiver of immunities, EU regime versus NATO regime, Article 6 of the ECHR, alternative remedies, and operations under Chapter VII of the UN Charter.[[1134]](#footnote-1134) The case took place before the Dutch courts, which discussed the immunity of jurisdiction and the immunity of execution of SHAPE and its subordinate headquarters in Brunssum. However, an analysis of the case is of significance for illustrating the elements cited above.

In December 2015, Supreme Site Services GmbH, Supreme Fuels GmbH & Co KG and Supreme Fuels Trading FZE (Supreme) lodged a writ of summons with the District Court of Limburg in Maastricht. Supreme provided fuel to the ISAF mission from 2006 to 2014 under Basic Ordering Agreements (‘BOA’).[[1135]](#footnote-1135) The BOA were a piece of the contracting architecture, together with the fuel order lodged by ISAF and the invoice issued by Supreme. Altogether, this formed the contract. Supreme claimed more than USD 400 million from SHAPE and its subordinate headquarters, Joint Force Command Brunssum Headquarters (JFCBS), which was in charge of the operational conduct of ISAF. The writ of summons was made after Supreme withdrew from the negotiations that had been ongoing since March 2015 with the US Defense Logistics Agency (‘DLA’). DLA acted on behalf of JFCBS and its intervention was due to the fact that the United States had used more than seventy-five per cent of the fuel provided by Supreme. DLA had already identified overcharges from the fuel supplier company.[[1136]](#footnote-1136) Separately, the United States already had a negative experience with Supreme in Afghanistan. In 2014, the Supreme food branch pled guilty to major fraud against the United States, conspiracy to commit major fraud, and war profiteering.[[1137]](#footnote-1137)

In July 2016, and based on conventional and customary immunities, SHAPE, following discussions with the Dutch Ministry of Foreign Affairs, decided to file an incidental appeal on immunity from jurisdiction (ancillary proceedings).

Almost parallel to this process, Supreme began a campaign to ensure that SHAPE would not withdraw USD 145 million from a bank account in BNP Paribas Fortis S.A. (‘BNP’). In this regard, Supreme obtained a garnishment order of USD 217.8 million from the District Court of Limburg in Maastricht, the Netherlands. The Court applied the seizure in Belgium under EU Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[[1138]](#footnote-1138) On 2 May 2016, SHAPE filed a writ (*opposition a saissie-arret conservatoire*) before the Court of Mons, Belgium, with intervention of the Belgian government on 11 May 2016, invoking its conventional immunity from execution. However, SHAPE decided to withdraw via *désistement d’instance* from the Belgian courts[[1139]](#footnote-1139) and filed a writ in Maastricht invoking its immunity from execution.

Certain aspects relating to both the immunity from jurisdiction and immunity from execution proceedings merit further development below.

*Immunity from Jurisdiction Proceedings*. On 8 February 2017, the District Court of Limburg in Maastricht gave its judgment and granted SHAPE and its subordinate headquarters immunity from jurisdiction under customary law and based on ratione functionis,[[1140]](#footnote-1140) yet upheld its jurisdiction based on Article 6 of the ECHR. The judgment provided a thorough background to the case, starting from the World Trade Center attacks on 11 September 2001 and the reactions under Article 51 of the United Nations Charter, as well as the Bonn Agreement[[1141]](#footnote-1141) and the request to the United Nations Security Council to give consent for a United Nations mission to help the Afghan interim government to maintain peace and security, first in Kabul and later (October 2003) in other Afghan provinces. The United Nations Security Council Resolution 1386 inaugurated a series of resolutions under Chapter VII, which ended in 2014, NATO having led ISAF since 2003. The court also explained the BOA, the RFWG and the ‘escrow account’.

The court examined the conventional immunity from jurisdiction in the text of the Paris Protocol and established that “is silent on the matter of immunity from jurisdiction”.[[1142]](#footnote-1142) The same is considered for the headquarters agreement between SHAPE and the Netherlands.[[1143]](#footnote-1143) [[1144]](#footnote-1144) However, the 2018 *Klag* case in the Kaiserslautern Labour Court,[[1145]](#footnote-1145) mentioned ‘paragraph 26’ and confirmed the intention of NATO members to provide Supreme Headquarters with conventional immunity from jurisdiction. As demonstrated in the several subsections above, whilst the Paris Protocol remains silent on the question of immunity from jurisdiction, this is not the same as not having such immunity. Indeed, there are many other issues not explicitly covered in the text that are nevertheless essential for the effective functioning of Allied Headquarters.[[1146]](#footnote-1146)

The instant judgment recognized SHAPE and its subordinate headquarters as international organizations completing NATO, which confirms that NATO is composed of a series of functional international organizations each with their own legal position, like those of the World Bank. The court also confirmed both the existence of functional immunities and the applicability of immunity from jurisdiction under customary international law.[[1147]](#footnote-1147)

“4.23. In the opinion of the district court, NATO and its sub-organisations AJFCH and SHAPE thereby acted within the limits of the task performance charged to the individual States which it took on for these States.

Applying the criterion laid down by the Netherlands Supreme Court in the *Spaans* judgment, AJFCH and SHAPE have functional immunity”.[[1148]](#footnote-1148)

The court also confirmed that fuel supply “is integrally connected with the execution of any military operation whatsoever”[[1149]](#footnote-1149) and that United Nations Security Council Resolution 1386 and subsequent resolutions authorized, without stating which ones, the performance of all necessary activities for the fulfilment of the ISAF mission.[[1150]](#footnote-1150)

In spite of all recognitions and confirmations, the court considered that recognizing immunity did not prevent the application of a proportionality test under the *Waite and Kennedy* criterion.[[1151]](#footnote-1151) Moreover, the court established that the proceedings were about “the failure to perform two contracts for the supply of goods and services”.[[1152]](#footnote-1152) Therefore, the judgment examined the validity of alternative remedies and held that it was not clear, for lack of substantiation, that the DLA negotiations offered the necessary objective legal safeguards.[[1153]](#footnote-1153) Equally, the court observed that the RoFWG and the ‘escrow account’ did not satisfy “the requirement of reasonable alternative right to a court”.[[1154]](#footnote-1154) The court eventually set aside the customary immunity from jurisdiction, giving precedence to Article 6 of the ECHR.[[1155]](#footnote-1155)

The case went to the Court of Appeals of ‘s-Hertogenbosch, which ruled in favor of SHAPE granting not only the immunity, but also considering that there was a mechanism in place to address the claims that Supreme did not exhaust.[[1156]](#footnote-1156) This was confirmed by the Supreme Court on 24 December 2021.[[1157]](#footnote-1157) The Supreme Court dismissed the appeal of Supreme and ruled that SHAPE, and its subordinate headquarters, as an international organization have immunity from jurisdiction in Belgium, as in the Netherlands, based on customary international law. The Court also ruled that this immunity from jurisdiction does not contravene Article 6 of the ECHR, and that Article 6 of the ECHR could be infringed if there are no reasonable alternatives means available to have a dispute resolved. On this particular issue, the Court ruled that the requirement of that alternative has been met by SHAPE on the basis of the financial settlement system in place. The Supreme Court followed the advice of the Attorney-General. It did not touch upon the question whether the immunity from jurisdiction of SHAPE follows from the treaties and is based only on customary law.

Finally, it is to be noted that from the earliest stages of this case, significant topics have been put on the table, including the structure of NATO (composed of several international organizations), functional immunities, customary international law, UNC Chapter VII, alternative remedies, and Article 6 of the ECHR.

*Immunity from Execution Proceedings.* After SHAPE decided to withdraw *via désistement d’instance* from the Belgian courts, it filed a writ in Maastricht invoking its immunity from execution. The District Court of Limburg in Maastricht (Preliminary Relief Judge) and the Court of Appeals of ‘s-Hertogenbosch, both in the Netherlands, have delivered judgments on these proceedings on 12 and 27 June 2017 respectively.[[1158]](#footnote-1158) In Maastricht, the court lifted Supreme’s garnishment on the grounds that international organizations have absolute immunity from execution, since they have only the powers given to them.[[1159]](#footnote-1159)

The standard in the Netherlands is the application of international law and there is no evidence that Belgium deviated from that standard.[[1160]](#footnote-1160)SHAPE did not waive its immunity from execution by establishing an ‘escrow account’.[[1161]](#footnote-1161)The funds in the ‘escrow account’ belong to SHAPE, they are part of the logistics of the ISAF mission and they are not funds for commercial purposes, but for financing ISAF activities.[[1162]](#footnote-1162)The ‘escrow account’ has not been reserved to pay Supreme’s claim.[[1163]](#footnote-1163) [note that only USD 22 million came from the price per liter mechanism to accommodate future disputes].

Case law shows that granting immunity from execution in accordance with public international law does not constitute a violation of Article 6 of the ECHR.[[1164]](#footnote-1164)Supreme chose to contract with an institution holding immunity from execution.[[1165]](#footnote-1165)

Supreme filed a ‘turbo’ appeal before the Court of Appeals of ‘s-Hertogenbosch, which upheld the decision of the lower court.[[1166]](#footnote-1166) Before concluding, reference must be made to the execution of these rulings in Belgium. The public funds were deposited with BNP in Brussels; SHAPE requested the execution and the Dutch courts issued their corresponding *exequaturs*. In June and July of 2017, the *tribunal de première instance francophone de Bruxelles, Section civile*, issued two *ordonnances* for the execution of those *exequaturs*. Supreme, for the garnishment of the ‘escrow account’, used Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, something SHAPE could not accept since EU law is not applicable to NATO. Moreover, the funds lifted were not intended for public use. Instead of using EU law, SHAPE made reference to the convention of 1925 signed between Belgium and the Netherlands on the execution of judgments, arbitral rulings, and *actes authentiques*. The court granted the lift and stated that EU law was not applicable to SHAPE.[[1167]](#footnote-1167)

However, on 21 December 2018, the Supreme Court in the Netherlands decided *ex officio* to refer the case to the CJEU. The advocate general poised three preliminary rulings, of which only two are of interest to the present analysis: a) whether Regulation (EU) No. 1215/2012 applies to the present case, i.e. whether the dispute is a *civil or commercial matter* as per EU law, and b) if question one is affirmative, whether the Belgian courts would have exclusive competence to lift the attachment on the escrow account. These questions opened proceedings before the CJEU, despite the opposition of SHAPE, who considered it a violation of the principle *par in parem imperium non habet* for the tribunal of a different international organization to rule on its own matters. The CJEU answered the second question in favor of SHAPE’s arguments, ruling that the proceedings do not concern the enforcement of judgements and hence the Belgian courts do not have exclusive competence under EU law.

In an *obiter dictum* arguably unnecessary to answer the first question posed, the CJEU stated, among others, that “case-law concerning the immunity from jurisdiction of States … can be transposed to the case where the privilege derived from immunity is relied upon by an international organization”.[[1168]](#footnote-1168) This conclusion is not only incorrect under public international law, since these immunities have completely different sources and purposes, but it is also highly damaging for the functioning of international organizations on EU territory. As explained above, international organizations do not act *iure gestionis*, they can only exercise the functional powers assigned by their member states and hence can act only *iure imperii*. The very same source of their immunities - functionality- informs the limitation of international organizations’ acts.

Moreover, the CJEU concluded that, because the fuel supply to the UNSC-mandated mission was organized under private law (the BOAs):

“[h]ow SHAPE subsequently used the fuel supplied in execution of the BOAs is not … such as to have an effect on the nature of such a legal relationship. The public purpose of certain activities does not, in itself, constitute sufficient evidence to classify them as being carried out *iure imperii*, in so far as they do not entail the exercise of any powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals”.[[1169]](#footnote-1169)

Setting a dangerous precedent for the mission of international organizations, the CJEU here mixed elements of EU law (the concept of exercise of public authority) and public international law (*iure imperii*) to conclude that, because SHAPE used private law to conduct its mission, it was not exercising public authority - nor *iure imperii* (!). The above extract shows a disregard for the applicable public international law to the case - the Dutch Courts, in every instance, have concluded indeed that SHAPE/JFCBS were acting in the exercise of their functions, which would mean, applying *mutatis mutandis* the doctrine of states, that they were acting *iure imperii*. In the present case, if the delivery of fuels had been organized by, for instance, the Netherlands, the applicable rules to exercise the same *public function* (i.e. delivery of fuels in a military operation) would have been those of public procurement. International organizations should not be penalized because they do not fit in the very state-oriented particularities of EU law; this is why they have their own legal regime under public international law. After CJEU’s answers the parties have not requested the Supreme Court to rule on the matter.

To conclude, it is to be submitted that this multiple-proceedings case is of major interest for academia and NATO practitioners, since it covers in one case several areas, such as conventional and customary immunities, applicability of Article 6 of the ECHR, applicability of EU law to other international organizaiton, waiver of immunities, and commercial versus official funds in situations ruled by Chapter VII of the UN Charter.

#### 6.5 Conclusion

The second major issue concerning NATO’s legal position is the question of privileges and immunities. Privileges and immunities are established to grant functional independence to international organizations with respect to their constituents and to respect the principle of equality of states. The need to count on functioning international organizations is a requirement in a peace-based international system promoting cross-border intensive, multi-disciplinary, and multi-functional cooperation. Functional necessity is the basis for granting privileges and immunities.

In this chapter, the study of privileges and immunities of international organizations has been divided into ‘organizational immunities’ (privileges and immunities granted to the actual international organization) and ‘international immunities’ (privileges and immunities given to the organization’s staff). The fact that NATO’s main civil and military subsidiary bodies, i.e., the ‘Organization’ and the ‘Supreme Headquarters’, have different legal positions affects the taxonomy of NATO’s privileges and immunities. However, there are no major discrepancies between the privileges and immunities for these two types of NATO bodies; to the contrary, even if NATO bodies are based on different treaties, they interoperate among each other, in most cases, thanks to their privileges and immunities. The explanation for this is that all of NATO’s common organs jointly pursue NATO’s functions and purposes as set up by governing treaties and the rules of the organization.

Granting organizational immunities safeguards the independence of NATO to the extent necessary for the unimpeded performance of its functions and purposes, which is based on the *ne impediatur officia* principle, as well as the principle of equality among the member states. NATO’s organizational immunities are included in three general multilateral treaties interacting and complementing each other: Ottawa, NATO SOFA, and Paris Protocol. These organizational immunities may be divided into non-fiscal privileges and immunities, and financial and fiscal privileges and immunities. These privileges also need to be studied from the perspective of compatibility between NATO general multilateral treaties and EU law, since the majority of NATO bodies are stationed in EU states, and EU law has been incorporated within EU states’ domestic law. Another point is the question of the immunity from jurisdiction for NATO bodies under the Paris Protocol, which exists under conventional terms, but its location has caused much confusion among publicists and practitioners. The identification of the immunity from jurisdiction for NATO bodies under the Paris Protocol requires a thorough analysis based on the *travaux* and on the conventional particularities of NATO’s three general multilateral treaties and their connections.

International immunities, i.e., privileges and immunities for international civil servants are normally codified in treaties, although they may exist also in the absence of explicit provisions, with the purpose of guaranteeing the necessary functional independence required by international organizations. In NATO, the privileges and immunities provided to high officials of Allied Headquarters, for which the Paris Protocol is silent, are granted by supplementary agreements taking the principle from the Ottawa Agreement.

NATO’s functions and purposes are established in the preamble of the NAT, and they coincide with those of the United Nations. NATO is not only ready to apply the inherent right of collective defence, as granted in the UN Charter, but also to preserve international peace and security. The complexity of the NATO structure derives from the absence of hierarchy between organs (NATO bodies) below the NAC, and the fact the organization has separate civilian and military sides. This makes the Council the beginning and the end of NATO bodies. This particular institutional framework needs to be functional, and its functionality provides justification for granting privileges and immunities under the necessity to preserve *inter alia*, the independence and impartiality of NATO common organs, the sovereign equality of allies, and the avoidance of financial advantage to remove any unwanted influence from the members, in particular those hosting headquarters or units. The study of NATO’s privileges and immunities requires analysis of a series of particularities, which shed light on the understanding of the inception and intention of the three general multilateral treaties. The most salient particularities are the following: a) SHAPE is the first NATO subsidiary body, created by the NAC, and was born from no agreement; b) the NATO SOFA, the visiting forces treaty, is also a source of privileges and immunities for NATO’s institutions; c) the United Nations privileges and immunities are incorporated in NATO’s institutions; d) the Ottawa Agreement covers it all, which explains the peculiar hybrid nature of the Paris Protocol; e) the supplementary agreements to the three general multilateral treaties reinforce both NATO’s institutional framework and NATO bodies’ privileges and immunities; f) customary law informs NATO’s privileges and immunities; and g) the *travaux préparatoires* enlighten NATO’s conventional privileges and immunities.

## CHAPTER 7

RESPONSIBILITY

#### 7. Responsibility

##### 7.1 Introduction

In the previous chapters, two key elements of the legal position of NATO as an international organization have been analyzed in detailed, i.e., its legal status - and its three elements, i.e., legal personality, legal capacity and powers, and privileges and immunities. That analysis would be incomplete without making reference to the consequences of potential NATO bodies’ violation of their legal obligations.[[1170]](#footnote-1170) The completion of the analysis of the legal position of any international organization requires an approach to the concept of responsibility. It is acknowledged that an international organization is an international person. However, per the ICJ in the *Reparation* case, this is not tantamount to saying that the international organization is either a state, which it is certainly not, or has the same legal personality, or the same rights and duties.[[1171]](#footnote-1171)

In 2001, the ILC drafted the Articles on Responsibility of States for Internationally Wrongful Acts,[[1172]](#footnote-1172) which in its Article 57 stated that the articles were set “without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization”. Therefore, in 2002 the ILC decided to work on the responsibility of international organizations.

International organizations are very diverse from one other, and definitely are not states, since they were created by states to exercise very specific functions and purposes. Therefore, when the International Law Commission drafted the Articles on the Responsibility of International Organizations (ARIO),[[1173]](#footnote-1173) it took into account the idea of functions and purposes. An example is Article 8, which refers to the excess of authority or contravention of instructions, which is complemented by the provision on *lex specialis* of Article 64 in order to identify the impact of the rules of the organization on the international responsibility of the organization in point. ARIO assumes that the conduct of an international organization is attributable to it and that conduct could be internationally wrongful. However, articles 60 and 61 create exceptions for certain cases involving the coercion suffered from an international organization and exercise by a state member, when this circumvents one of the its international obligations by using or misusing the international organization’s powers.

Since NATO is an international organization made of different organizations with its different and distinct legal positions, it means that those organizations and their subordinate entities are bound by legal obligations. When these legal obligations are not fulfilled, there will be third parties affected by that failure and then questions of responsibility, liability and accountability appear. Therefore, if NATO’s attribution is demonstrated, NATO is commensurately accountable and subsequently potentially responsible for the violation of those legal obligations and liable for it. In this regard, ‘responsibility’ arises out of internationally wrongful acts. ‘Liability’ has a broader scope, and applies not necessarily to wrongful acts, but to acts that cause damage or injury. ‘Accountability’ is a much broader notion, covering not only responsibility and liability, but also the degree to which international organizations are subject to forms of internal and external scrutiny and monitoring.[[1174]](#footnote-1174) Suzuki and Nanwani, referring to the 1998 first report of the International Law Association’s Committee on Accountability of International Organizations,[[1175]](#footnote-1175) argued that accountability is multifaceted in terms of processes, i.e., oversight, monitoring, and the evaluation processes “to censorship or other forms of sanctions to the attribution of legal liability for injuries, resulting in binding remedial action”.[[1176]](#footnote-1176)

Blokker argues that the division of responsibility between the organization and its constituents is fundamental and mustn’t undermine the principle that international wrongful acts of international organizations make the organizations themselves responsible as established by Article 3 of the ARIO.[[1177]](#footnote-1177) He refers to Gaja’s observations in the fourth report of the International Law Commission on Responsibility of International Organizations,[[1178]](#footnote-1178) to conclude that this article must be the rule, and only in exceptional cases member states can be made responsible for wrongful acts of international organizations they are members of.

However, on the one hand, Gaja has already considered an exceptional case with respect to NATO’s bombing campaign over Yugoslavia. Gaja submitted in the second report on responsibility of international organizations that “one envisageable solution would be for the relevant conduct to be attributed both to NATO and to one or more of its member States, for instance because those States contributed to planning the military action or to carrying it out”.[[1179]](#footnote-1179) Gaja is referring to the concurrent responsibility, whereby the organization and the constituents would be responsible for the wrongful act of the organization, and seeks to protect the victim by giving them the choice to respond to one or the other. Much earlier, Tunkin also submitted that the responsibility of the organization goes hand in hand simultaneously and for the same wrongful act, with that of the member states.[[1180]](#footnote-1180) This is explained by the idea that the international organization is weak with respect to the states, so it would often be financially and legally impossible (lack of law enforcement means) for it to assume any reparation. This does not imply that international organizations cannot establish dispute-settlement mechanisms.

On the other hand, Zwanenburg argues that NATO-led operations, with their different actors made of the organization and its constituents as well as partners and host nations, support the argument that NATO has a large potential for shared responsibility and, therefore, are in line with Gaja’s ‘exceptional case’.[[1181]](#footnote-1181) In support of this argument, Ryngaert submits that under ARIO’s rules of attribution, nothing prevents responsibility being shared between a given international organization and its constituents and this “may possibly be the rule rather than the exception”.[[1182]](#footnote-1182)

Finally, the Office of Legal Affairs of the United Nations has always been clear on this matter by arguing that in order to fulfil obligations which require the exercise of powers, these have to be granted to the Organization otherwise it cannot achieve them.

“that the United Nations is not substantively in a position to become a party to the 1949 Geneva Conventions, which contain many obligations that can only be discharged by the exercise of juridical and administrative powers which the Organization does not possess, such as the authority to exercise criminal jurisdiction over members of the Forces, or administrative competence relating to the territorial sovereignty. Thus the United Nations is unable to fulfil obligations which for their execution require the exercise of powers not granted to the Organization, and therefore cannot accede to the Conventions”.[[1183]](#footnote-1183)

The above sets the tone of the complex and debatable nature of the matter under analysis.

##### 7.2 NATO’s Idiosyncrasy

The very nature and structure of NATO is at the origin of the debate on the distribution of international responsibility between the organization and its constituents. Indeed, Wellens argues:

“in most situations states face challenges to their conduct individually and in their own right … in situations where states have intentionally acted jointly and in concert, legal remedies actions based on claims of state responsibility have in most cases been addressed to a single state allegedly being solely liable or responsible. Requesters or claimants considering similar actions vis-à-vis an international organisation … face the additional problem that acts, actions or omissions being decided or undertaken by an international organisation are the direct result of member states”.[[1184]](#footnote-1184)

On the same note, and internally, it is necessary to consider the behavior of state representatives within an international organization, sitting as part of the decision-making organ or organs. NATO decision-making, in accordance with the rules of the organization, is consensus by silence procedure, except for the admission of new members where unanimity applies.[[1185]](#footnote-1185) Zwanenburg argues that “[t]his means that there is no voting at NATO. This fact has given rise to claims that one or more member states have committed an internationally wrongful act, by not opposing a particular decision that led to, or at least contributed to, a harmful outcome”.[[1186]](#footnote-1186) States’ participation in the decision-making organs is done in “furthering their own national interests [which] may thus influence eventual decisions”.[[1187]](#footnote-1187)

Externally, the constituents of an international organization act, in many cases, as executors of the organization. NATO does not have its own troops, as it is the member states who execute military actions in theatre, nor does NATO have its own law-enforcement agencies. Either under an internal or external approach, like in many other international organizations, NATO member states are never far away each time the organization is acting and, most importantly, the members are not and cannot be strangers to the organization and the legal implications of its actions. This takes place regardless of NATO’s legal personalities and its functional autonomy.

In this regard, NATO’s comments on the draft version of the ARIO are of relevance in order to understand NATO’s rules of the organization, and its link to Article 64 of ARIO. This article refers to *lex specialis*, which actually allows IOs to have their own responsibility rules that may deviate from the ARIO. Those are special rules relating to international responsibility that supplement or replace, in whole or in part, general rules. This *lex specialis* may contain rules affecting the type of relationship between the international organization and the member states. It may also contain matters relating to the responsibility of a state in connection with the conduct of the international organization of which it is a member.

NATO submitted that *“[e]ach member State retains full responsibility* for its decisions [taken within the North Atlantic Council]”.[[1188]](#footnote-1188) NATO’s comments clearly challenge the argument that the rule [for NATO] must be that international wrongful acts of international organizations make them responsible. NATO’s comments also challenge the concurrent responsibility or shared responsibility argument.

In regards to attribution, NATO “suggested varying principles of attribution to apply, depending on the role of states in the organisation, more so than is provided by the ARIO”.[[1189]](#footnote-1189) Accordingly, the applicable attribution principles in NATO activities appear to be influenced by the context of decision-making within NATO and the implementation by the member states of the decisions of the NAC, which will necessarily affect the division of responsibility and liability. Attribution in NATO appears to be in the realm of the particular factual circumstances and behavior of a particular member state(s) in a particular NATO event.

NATO’s rules of the organization on decision-making and practice show how much its members are involved in its structures and procedures on a daily basis. The rules also acknowledge the level of institutionalization reached by NATO’s committee system comprised of states representatives, the International Secretariat, and the Supreme Headquarters. This follows a distribution of key and ordinary posts among states, as established during ‘peace establishment conferences’. These officials occupy either nationally allocated (seconded) or international posts – the latter funded by NATO common funds – during the numerous phases of NATO’s decision-making process. The question then arises whether these officials represent their states or the organization.

Wessel and Dekker speak on this ‘dual identity’: “the fact that by becoming a ‘member State’, States do not lose their identity as a ‘State’”.[[1190]](#footnote-1190) This ‘dual identity’ also confirms the need for states to have a supportive attitude *vis-à-vis*  the international organization to which they belong, since sending seconded personnel and contributing to the budget does not mean ‘fire and forget’.[[1191]](#footnote-1191) This creates in NATO an ‘incomplete secondment’ *modus operandi*, which would launch Article 7 of ARIO on the criterion of attribution of conduct depending on the effective control exercised over the organ or agent assigned to the international organization. This idea of incomplete secondment is reinforced in the context of NATO-led operations, where NATO members and troop contributing nations, in spite of doing the transfer of authority to a given NATO commander, still retain control via ‘caveats’ and ‘red card holder’ mechanisms. Moreover, operational plans and rules of engagement are approved by consensus by the NATO members at the NAC. This may contribute to identify the link between NATO members and attribution of a specific conduct carried out in the context of a given NATO-led operation. The first NATO Secretary General, Lord Ismay, established four principles relating to NATO’s staff relationships. In the second principle, Ismay sought to have “the [North Atlantic] Council, the International Staff/Secretariat, and the delegations to work as a single team and not to be at cross purposes”.[[1192]](#footnote-1192) Moreover, in search of NATO’s *volonté distincte*, Ismay “also wanted to possess freedom of appointment to his higher staff positions”.[[1193]](#footnote-1193) This would clearly affect NATO’s political consultation[[1194]](#footnote-1194) of NATO’s cross-border cooperative mechanism per excellence. In this regard, Lord Ismay saw his role and that of the secretariat with a “broader scope – that of maintaining political unity between the allies”.[[1195]](#footnote-1195)

As explained in Part I, NATO’s decision-making mechanism changed from unanimity to consensus (silence procedure) as a way to assert equality among member states; this resulted in enabling a collegial environment to partially fulfill Ismay’s vision of having the North Atlantic Council and the national delegations working as a team. However, this change did not set any NATO rule of attribution of conduct and accountability. Actually, NATO members continued in that understanding, later reflected in the comments and observation provided to the ILC, i.e., each member holds responsibility for its decisions within NATO. However, it is necessary to go through real-case situations in order to enter into meaningful discussions concerning responsibility in the NATO context, which is not the same as presenting a standard rule on NATO’s international responsibility.

##### 7.3 NATO’s Veil

How thick does NATO’s ‘functional independence’ make the veil of NATO? Since the preceding paragraphs suggest that NATO’s veil is very thin, or easily lifted, it appears that member states are very visible through that veil. Be that as it may, scrutiny by NATO’s institutions or external courts on NATO decisions would lead to the identification of the organization’s decision-making processes and the individual conduct of member states as the critical elements that form the attribution and the responsibility. In NATO, based on the commentaries submitted to the ILC, it appears that the organization can be attributed a certain act, but not with the primary wrong. This constitutes a “breaking point”[[1196]](#footnote-1196) in the legal logic.

###### 7.3.1 Exercise Mainbrace

On 2 December 1953, the Swedish Ambassador in Paris sent a letter to NATO asking the organization to entertain a request from the owner and crew of the Swedish Boat GG574 Kullen for compensation for damages caused by NATO naval units during the NATO exercise Mainbrace on 23 and 24 September 1952. The Kullen, which had a crew of four fishermen, was fishing on 23 September 1952 twenty nautical miles south of the Lindesnes lighthouse – the southern tip of Norway. Fifteen naval units allegedly sailed through their fishing gear. The crew, due to the rainy and misty weather, could not identify the name or nationality of these naval units. On 24 September, the same events took place again, this time at twenty nautical miles southeast of the Oxo lighthouse. This event appeared to have involved a group of twenty or twenty-five naval units, which appeared from the West, and caused damage to fishing gear. The weather conditions again made any identification impossible.

This case appears to fit better in the area of third party claims or tortious liability. However, if it had happened today one could argue that the NATO naval units had engaged in an internationally wrongful act regarding either environmental laws or the safety of life at sea.[[1197]](#footnote-1197) In any case, the value of this situation is in how NATO reacted. On 13 January 1954 the International Staff reported to the NATO Standing Group that the claim had been transmitted by the Swedish government to each government whose naval units may be responsible for the damage. NATO’s Secretary General was tasked with informing the Swedish ambassador of the nationality of the naval units.[[1198]](#footnote-1198) In the present case, NATO’s institutions did not contemplate any responsibility from the organization, regardless of the fact that the conduct of the military activity was part of NATO’s functions – the planning and execution of collective exercises.

One could think that this situation might fit today within the application of Article 8 of the ARIO, even if the organ or agent of an international organization exceeds the authority of that organ or agent or contravenes instructions of the international organization. Article 8 deals with *ultra vires* conduct of organs or agents of an international organization, which may be within the powers of the organization. It is necessary to highlight that Article 8 has to be read in the context of Article 6 (organs and agents are persons and entities exercising functions of the organization) and other provisions relating to attribution. Nevertheless, in the context of Article 8 the rules of the organization will be decisive.[[1199]](#footnote-1199) Therefore, those powers may go beyond the authority given to the acting organ or agent. This matter also influences the topic of attribution. Article 8 only concerns attribution of conduct, without prejudicing the question of the validity of an *ultra vires* act under the rules of the organization. On this note, and in order to protect third parties, invalid acts may trigger the responsibility of the organization.

However, NATO operational plans remind participants to observe conventional and customary international obligations of troop-contributing nations. This fact could have indicated that NATO did not exercise effective control over the conduct of the naval units. NATO is not a signatory of those agreements and the application of customary law to NATO is *non liquet*. Moreover, by virtue of Article 57 of the Responsibility of States for Internationally Wrongful Acts (ARS), any question of the responsibility of a state for its own conduct is not excluded from the scope of the ARS.[[1200]](#footnote-1200) Finally, a reference to Article 61 of the ARIO can help demonstrate that international responsibility may have arisen from a NATO member state circumventing one of its international obligations in the present situation.

Article 61 refers to the circumvention of a member state of one of its international obligations when it refers to the separate legal personality of the international organization for that circumvention. The ARIO commentary sets three conditions for the applicability of Article 61: a) the international organization has competence in relation to the subject matter of an international obligation of a state, i.e., the international obligation covers the area in which the international organization is provided with competence, b) there must be a significant link between the conduct of the circumventing member state and that of the international organization, i.e., the act of the international organization has to be caused by the member state., and c) the international organization commits an act that, if committed by the state, would have constituted a breach of the obligation. An act that would constitute a breach of the obligation has to be committed.[[1201]](#footnote-1201) Circumvention is more likely to occur when the international organization is not bound by international obligation, which could easily have been the case in the present situation. Finally, and based on NATO’s comments and observation to the ARIO, Article 64 would have been most likely the argument in the answer to the Swedish ambassador, when he addressed his letter with the identified nations only and disregarded NATO.

###### 7.3.2 Admission of a New NATO member

The former Yugoslav Republic of Macedonia brought Greece before the ICJ for opposing its[[1202]](#footnote-1202) membership application of NATO. Greece’s reason ‘to oppose’ at the NAC was the use of the former Yugoslav Republic of Macedonia’s constitutional name – the Republic of Macedonia.

Under Article 11, paragraph 1 of the Interim Accord,[[1203]](#footnote-1203) Greece agreed to not object to the application by, or the membership of, the former Yugoslav Republic of Macedonia in international, multilateral and regional organizations and institutions of which Greece is a member. Nevertheless, Greece kept the right to object if the former Yugoslav Republic of Macedonia is to be referred to in such organization differently than mentioned above. On the 2nd and 3rd of April 2008, during NATO’s Bucharest Summit, the former Yugoslav Republic of Macedonia was not invited for accession talks pending a mutually acceptable solution to the question of its name.

The Court concluded that Greece had not demonstrated that a requirement under the NAT compelled it to object to the admission of the former Yugoslav Republic of Macedonia to NATO. The Court considered that NATO’s institutional decision-making process is irrelevant, arguing that Greece violated its international obligations by its conduct, and not due to the result.[[1204]](#footnote-1204) This conclusion was erroneous.

Article 8 of the NAT establishes that none of the international engagements in force between NATO members or any third state can be in conflict with the provisions of the NAT. The subsequent practice among NATO members on the application of Article 10, admission of new member by unanimity, requires an individual explicit explanation or ‘positive consent’ from each of the member states. Greece fulfilled its NAT obligation. First, the interim agreement was posterior to the NAT and, second, Greece, based on NAT practice of unanimity, voiced its right to object to the admission if the question of the name is not resolved. The ICJ did right to distinguish the present case from the *Monetary Gold* case[[1205]](#footnote-1205) and only assessed Greece’s conduct, not NATO’s nor its members’.[[1206]](#footnote-1206) This appears correct under NATO comments to the ILC, which clearly set out that each member state retains full responsibility for its decisions. However, the ICJ not only failed to take into account both that the NAT is a treaty *ex ante* *vis-à-vis* the Interim Agreement, and also the particularities of NATO’s decision-making, since it disregards the different practical natures of unanimity and consensus. In NATO, unanimity applies only for the admission of new members per Article 10 of the NAT, and requires an individual explicit explanation from each member state. In spite of Greece’s international obligation under articles 8 and 10 of the NAT, the ICJ blamed Greece for having made public statements before the summit.

Those statements were no other than Greece’s prerogative under Article 10 of the NAT announcing the obligation under Article 8, i.e., that none of the international engagements in force between NATO members or any third state can be in conflict with the provisions of the NAT. Therefore, Greece could only vote against it. Greece did nothing other than what Articles 8 and 10 of the NAT oblige and the process of unanimity requires that within the NAC, i.e., be vocal on the decision.

In this case, the ARS would have been applicable and, per Article 5, attributable to Greece only. However, Greece would not have been found responsible under Article 12 since the final analysis on whether and when there has been a breach of an obligation depends on the purpose and the facts of the case.[[1207]](#footnote-1207) The facts, disregarded by the ICJ, were related to Greece’s precedential application of international obligations derived from articles 8 and 10 of the NAT *vis-à-vis* the obligations set in the Interim Agreement. The ARS Article 12 commentaries submit that courts and tribunals have consistently affirmed the principle that there is no *a priori* limit to the subject matters on which states may assume international obligations.[[1208]](#footnote-1208) In the present case the precedence of the different treaties and therefore their respective international obligations assumed by Greece, which would have favored those with respect to NATO due to the *ex ante* nature of the NAT and the practice of unanimity at the NAC for the admission of new members. Therefore, there was no breach of an international obligation by Greece.

###### 7.3.3 Incidental Damage

Injury and death as incidental outcomes of military operations are not new. The principle of distinction between combatants and civilians is expressed in the absolute prohibition of intentional targeting of civilians as established in the Additional Protocol I to the Geneva Conventions. Articles 57 and 58 of the Protocol set a due diligence standard and if not complied with, international responsibility arises from failure to honour this standard of care. The injury of civilians must be considered unavoidable even if the attacking party complies with precautionary requirements - distinction and proportionality. Therefore, the attack is not a breach of international law and the attacking party does not bear international responsibility for the resulting injury. However, a given victim may have an Article 58 claim against the attacking party for failure to take adequate precautions. Moreover, the situation may be a breach of international law but the party attacking may be exempted due to justification.

“Incidental injury may be regarded as a situation where a breach of international law occurs but the injuring party is exempted from fault by a justification or excuse. The adoption of no-fault liability reflects a needs-oriented approach in this case, which proceeds from the needs of the victim rather than from the fault of the injurer”. [[1209]](#footnote-1209)

Parallel to the above, Ronen argues that states may “pay compensation [*ex gratia* payments] to civilian victims of military attack despite believing that they are not obligated to do so. They do so for political reasons and do not see such compensation as a reflection on the legality of their own military conduct that led to the injury”.[[1210]](#footnote-1210)

Notwithstanding the above and regardless of the reason why, there are cases where NATO has provided compensation thus appearing to be attributable to the actions, as well as responsible and liable per Article 3 of the ARIO. This has caused a positive effect since the organization appears stronger and in control of its functional independence. There are two cases that illustrate this situation, both of which relate to damages caused during operations. In both cases, the veil looks thicker, and the existence of a wrongful act remains debatable.

The first case relates to a Bulgarian family to whom NATO, as an organization, paid compensation for damage suffered on their property by an off-route missile during NATO’s 1999 bombing campaign.[[1211]](#footnote-1211)

The second case reaffirms NATO’s legal personality due to the establishment in 2007 of an Alliance’s humanitarian relief fund in order to compensate victims of NATO operations’ collateral damage.

“NATO has moved forward on this issue of providing relief to those caught up in NATO operations,” he said. “And indeed, before Christmas, NATO established a humanitarian relief fund which has already had different NATO members contributing money. Upwards of $65,000 was paid out to help relief efforts. It is also a national responsibility -- and individual nations within the NATO mission have different procedures and different approaches”.[[1212]](#footnote-1212)

##### 7.4 NATO’s Remedies

In November 1963, the NAC started discussions for the establishment of an accurate judicial appeals procedure within NATO.[[1213]](#footnote-1213) The main reason argued by the Council was that the solution to receive complaints and appeals, and their settlement by arbitration of the Secretary General [and the Supreme Commanders] was only on a provisional basis. Moreover, the Council admits it is necessary to “[e]stablish a permanent appeals procedure of a judicial nature which would be applicable throughout the Organization”[[1214]](#footnote-1214) under Article XXIV of the Ottawa Agreement.

In 1964 and under the chairmanship of the Deputy Secretary General, the Deputy Permanent Representatives gathered in the form of a High Level Working Group[[1215]](#footnote-1215) in order to study the regulations proposed in 1963. The intent was to consider in detail “[t]he consequences of the institution of a judicial appeals procedure in NATO”.[[1216]](#footnote-1216) The background is a reference made in 1963 by the Secretary General to a recommendation of the Consultative Committee of the European Civil Service fifth report on judicial problems on the European Civil Service.[[1217]](#footnote-1217)

Until the establishment of the NATO Appeals Board (‘NAB’), NATO bodies’ staff did not have access to any judicial avenue when in disagreement with administrative decisions of any of the Heads of the NATO Bodies (‘HoNB’). Their grievances, as stated above, were decided by conciliation or sent to the NAC, which tasked the Secretary General as arbitrator for their settlement.[[1218]](#footnote-1218) In 1965 and after five sessions, the High Level Working Group[[1219]](#footnote-1219) prepared a complaints and appeals procedure for all NATO bodies’ staff subject to the Ottawa Agreement or the Paris Protocol. The NAB was approved and the High Level Working Group disbanded.[[1220]](#footnote-1220) Finally, the first meetings of the NAB took place on 11 and 12 October 1966.[[1221]](#footnote-1221) Gilbert’s reference[[1222]](#footnote-1222) to 16 March 1966 as the date the NAC created the NAB, however appears to be incorrect. Since then, the NAB has been adjusted by means of amendments to the CPR by PO/73/151 of 22 November 1973, until its 2013 transformation into the AT.[[1223]](#footnote-1223)

In 2011 the NAC established a ‘Panel of External Experts on Modernization of the NATO Appeals Board and Dispute Resolution System’. The discussions took place at the Deputies Permanent Representatives Committee. The Committee and the Panel focused on a thorough review of NATO bodies’ dispute resolution system. On 23 January 2013, the Council approved amendments to CPR and established the AT, which would enter into effect on 1 July 2013.[[1224]](#footnote-1224)

One of the major NATO bodies, SHAPE has issued an executive policy to include modern arbitration clauses in all contracts aimed at providing services to NATO operations. The contracts for operations are governed by international law, while the arbitration process is by French law. And since 2019, SHAPE relies on a ‘Missions Appeals Tribunal’ (‘MAT’) to provide a second instance for outsourced in-theatre personnel employed by theatre headquarters in operations led by NATO or to which NATO contributes.[[1225]](#footnote-1225)

##### 7.5 Conclusion

The above illustrates NATO’s particularities on matters relating to attribution, responsibility and liability, which indicate that when an internationally wrongful act or a quasi-wrongful act is committed during NATO activities, the responsibility tends to fall on the member states. However, there are cases where those members have decided to address situations, which involve responsibility and liability, in a solidary manner, like the cases of incidental damage incurred during certain military operations.

This behavior does not come as a surprise; the explanation can be found in the fact that NATO states are involved in the control of the organization and in the concept of ‘due diligence’ respectively. On this note, the conduct of the international organization is not attributed to the state, instead it is the omission of the constituents to exercise due diligence that is directly attributable to an individual state.[[1226]](#footnote-1226) NATO members are bound voluntarily by an obligation of due diligence, under which they have developed several accountability measures, some of which are entrusted to their common organs in order to address any impact on NATO’s mission, functions, and purposes. [[1227]](#footnote-1227) This is not a negative situation nor does it diminish NATO’s institutional value. The involvement of NATO members demonstrates their collective desire for the functioning of the institution and their determination to have an organization operating in the boundaries delineated by its function and the rules of the organization.

The fact that NATO members still retain sovereign rights while being members of the organization and participating in the NATO bodies appears to be a positive feature desired by NATO’s constituents. Under this perspective of responsibility, NATO’s institutional dynamism is reinforced and in fact, NATO’s particularities described above inspire ‘audacious internationalist schemes’.[[1228]](#footnote-1228) It also highlights the conceptual and practical difficulties confronted by the architects of the articles on international responsibility.

The greater involvement of NATO states is seen as part of their international organizations’ activism; preventing commission of wrong acts by the organization; and enhancing accountability.[[1229]](#footnote-1229) Additionally, these schemes may also demonstrate the “additional, parallel or at least subsidiary responsibility of the Member States [when] attributing an activity to an international organization”.[[1230]](#footnote-1230)

The NATO’s institutional veil nature demonstrates that “the relationship between international organizations and their members is “sufficiently unclear to raise doubts about the *locus* of responsibility”.[[1231]](#footnote-1231) Indeed, Barros submits that “[i]n a global governance scheme wherein international organizations are embraced as international legal subjects, with their own responsibilities, (member) States are, and will remain, the ultimate source of responsibility for governance”. [[1232]](#footnote-1232) This conclusion fully coincides with NATO’s comments to the ILC and the fact that NATO is only capable of achieving those obligations for which the member states provide the necessary powers. The explanation suggested in this dissertation is that the immense majority of conventions have the states as parties, and not any of the NATO bodies with powers to conclude treaties. Therefore, it is the states the ones subject to their obligations and they cannot address them to NATO bodies.

## PART II : CONCLUSIONS

### Conclusions to Part II

Part II perseveres in the functional approach to explain NATO’s full institutional building manifested in NATO’s ‘legal position’. An in-depth analysis of NATO’s ‘legal position’ has served to shed light on NATO’s rights and duties, i.e., its legal status, its privileges and immunities, and its responsibility. The chapters of this second part have demonstrated that NATO is an international organization, as unique as others are. They have also made a thorough evaluation of elements that form NATO’s legal position. The taxonomy provided above has explained the key legal aspects of NATO's complex structures. Nevertheless, this taxonomy intends to facilitate the endeavors of academics or practitioners when they confront situations where documents and actors have different natures and roles respectively, like in the case of activities run by the NATO Command Structure, NATO Force Structure or other entities established in support of out-of-area operations, and their different legal natures. This part has dedicated also a detailed explanation to NATO’s privileges and immunities, since they allow the independent functioning of NATO bodies.

Chapter five has addressed NATO’s legal status, since this is most likely the most complex matter within NATO’s legal position. NATO bodies, as subjects of law, interact within the international and domestic legal orders, as well as within NATO’s internal legal order. This fact brings difficulties in terms of determining the roles and functions of the different civil and military [subsidiary] bodies with respect to NATO’s ultimate mission, i.e., the contributing to the maintenance of international peace and security.

NATO holds legal personality, and it has been shown that NATO fulfils all the criteria to be considered as having both domestic and international legal personalities. Moreover, NATO has both subjective and objective legal personalities, which eventually give treaty-making power and recognition to conclude contracts, acquire or dispose property or engage in legal proceedings. The particularity of NATO is that it holds two different operating legal personalities, which are held and ‘administered’ by three NATO bodies. In the case of NATO’s legal capacity, it has been explained that NATO bodies have the capacity to conclude international agreements, while in the domestic arena they are capable of acquiring and disposing of property. NATO’s powers have evolved over the time based on the rules of the organization.

The question of NATO’s privileges and immunities has been developed in the sixth chapter under the paramount idea that they are established to grant functional independence to international organizations with respect to their constituents and to grant the principle of equality of states. This chapter has addressed NATO’s privileges and immunities in the form of ‘organizational immunities’, i.e., privileges and immunities granted to the actual international organization, and ‘international immunities’, privileges and immunities given to the organization’s staff. The analysis has shed light on the fact that even if NATO bodies are based on different treaties, the immunities therein work in a complementary manner. This can be explained by arguing that all NATO’s common organs require pursuing jointly NATO’s functions and purposes. Chapter six has addressed in detail certain particularities without which NATO’s privileges and immunities cannot be fully understood. These particularities refer to the following facts: a) SHAPE is the first NATO subsidiary body and was born from no agreement, b) the NATO SOFA, the visiting forces treaty, is a source of privileges and immunities also for NATO’s institutions, c) the United Nations privileges and immunities are incorporated in NATO’s institutions, d) the Ottawa Agreement covers it all, it is a kind of ‘passepartout’ agreement; this explains the peculiar hybrid nature of the Paris Protocol, e) the supplementary agreements to the three general multilateral treaties add a fundamental value to NATO bodies’ activities; this since they facilitate, and sometimes augment, the application of the multilateral treaties’ provisions, f) customary law informs NATO’s privileges and immunities, and g) the *travaux préparatoires* enlighten the original intention of NATO’s privileges and immunities.

Finally, Chapter seven analysed questions relating to attribution, responsibility and liability, which concludes that when an internationally wrongful act or a quasi-wrongful act is committed during NATO activities, the responsibility tends to fall on the member states. This chapter has illustrated the above with several cases, which also demonstrate that NATO member states, who, without renouncing their individual responsibility, are willing to use the organization to address specific situations relating to incidental damage during NATO operations.

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Judgment of the First Instance Francophone Tribunal of Brussels (9th Chamber) in Case 17/2141/B *Exequator SHAPE v Supreme* (12 July 2017).

Judgment of the Brussels Court of Appeals (18th Chamber) in Case No. 2017/9240 *El Hamidi v NATO*  (30 November 2017).

Judgment of the Belgian Court of Cassation (3rd Chamber) in Case No. C.07.0407.F *Secrétariat du Groupe acp v.B.D.* (21 December 2009).

Judgment of the Belgian Court of Cassation (3rd Chamber) in Case No. C.03.0328.F *Secrétariat du Groupe acp v. Lutchmaya (L. M. A.)* (21 December 2009).

Judgment of the Belgian Court of Cassation (3rd Chamber) in Case No. S.04.0129 *Siedler (S.M.) v. Union de l’Europe Occidentale* (21 December 2009).

##### ***United Kingdom***

##### Judgment of the United Kingdom House of Lords in Case No. EWCA Civ J0427-11 *Maclaine Watson & Co. Ltd v. International Tin Council* (26 October 1989).

Judgment of the United Kingdom House of Lords in Case UKHL J0221-1 *Arab Monetary Fund v. Hashim and others Arab Monetary Fund v. Hashim and others* (21 February 1991).

Judgment of the Royal Courts of Justice (Strand, London) in Case Nos. A2/2014/1862, A2/2014/4084, A2/2014/4086 *Mohammed Serdar and others v. Secretary of State for Defence*  (30 July 2015).

##### ***Italy***

Judgment of the Italian Court of Cassation in *Branno v. Ministry of War and Allied Forces Headquarters* (14 June 1954).

##### ***Germany***

Judgment of the Second Senate (GFCC) in Case No. 2 BvE 6/99 (22 November 2001).

Judgment of the Kaiserlautern Labour Court in Case No. 843/17 *Klag v. Supreme Headquarters Allied Powers Europe (SHAPE)* (20 February 2018).

##### ***Spain***

Judgment of the Spanish Supreme Court (T.S. (Sala 3))], in Case STS 4370/*2011 IMHQ tax exemption for nationals assigned assigned to that IMHQ* (20 June 2011).

##### ***United States***

Judgment of the United States’ Third Circuit Court in Case Nos. 09-3640 -617 F.3d 756 *OSS Nokalva, Inc. v European Space Agency* (10 August 2010).

## ANNEX AND APPENDICES

### ANNEX

#### The North Atlantic Treaty

Washington D.C. - 4 April 1949

The Parties to this Treaty reaffirm their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments.

They are determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law. They seek to promote stability and well-being in the North Atlantic area.

They are resolved to unite their efforts for collective defence and for the preservation of peace and security. They therefore agree to this North Atlantic Treaty:

Article 1

The Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

Article 2

The Parties will contribute toward the further development of peaceful and friendly international relations by strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded, and by promoting conditions of stability and well-being. They will seek to eliminate conflict in their international economic policies and will encourage economic collaboration between any or all of them.

Article 3

In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack.

Article 4

The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened.

Article 5

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

Article 6\*

For the purpose of Article 5, an armed attack on one or more of the Parties is deemed to include an armed attack:

on the territory of any of the Parties in Europe or North America, on the Algerian Departments of France,\*\* on the territory of or on the Islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer;

on the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer.

Article 7

This Treaty does not affect, and shall not be interpreted as affecting in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security.

Article 8

Each Party declares that none of the international engagements now in force between it and any other of the Parties or any third State is in conflict with the provisions of this Treaty, and undertakes not to enter into any international engagement in conflict with this Treaty.

Article 9

The Parties hereby establish a Council, on which each of them shall be represented, to consider matters concerning the implementation of this Treaty. The Council shall be so organised as to be able to meet promptly at any time. The Council shall set up such subsidiary bodies as may be necessary; in particular it shall establish immediately a defence committee which shall recommend measures for the implementation of Articles 3 and 5.

Article 10

The Parties may, by unanimous agreement, invite any other European State in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area to accede to this Treaty. Any State so invited may become a Party to the Treaty by depositing its instrument of accession with the Government of the United States of America. The Government of the United States of America will inform each of the Parties of the deposit of each such instrument of accession.

Article 11

This Treaty shall be ratified and its provisions carried out by the Parties in accordance with their respective constitutional processes. The instruments of ratification shall be deposited as soon as possible with the Government of the United States of America, which will notify all the other signatories of each deposit. The Treaty shall enter into force between the States which have ratified it as soon as the ratifications of the majority of the signatories, including the ratifications of Belgium, Canada, France, Luxembourg, the Netherlands, the United Kingdom and the United States, have been deposited and shall come into effect with respect to other States on the date of the deposit of their ratifications.\*\*\*

Article 12

After the Treaty has been in force for ten years, or at any time thereafter, the Parties shall, if any of them so requests, consult together for the purpose of reviewing the Treaty, having regard for the factors then affecting peace and security in the North Atlantic area, including the development of universal as well as regional arrangements under the Charter of the United Nations for the maintenance of international peace and security.

Article 13

After the Treaty has been in force for twenty years, any Party may cease to be a Party one year after its notice of denunciation has been given to the Government of the United States of America, which will inform the Governments of the other Parties of the deposit of each notice of denunciation.

Article 14

This Treaty, of which the English and French texts are equally authentic, shall be deposited in the archives of the Government of the United States of America. Duly certified copies will be transmitted by that Government to the Governments of other signatories.

\*The definition of the territories to which Article 5 applies was revised by Article 2 of the Protocol to the North Atlantic Treaty on the accession of Greece and Turkey signed on 22 October 1951.

\*\*On January 16, 1963, the North Atlantic Council noted that insofar as the former Algerian Departments of France were concerned, the relevant clauses of this Treaty had become inapplicable as from July 3, 1962.

\*\*\*The Treaty came into force on 24 August 1949, after the deposition of the ratifications of all signatory states.

### APPENDICES TO THE ANNEX

#### APPENDIX 1

AGREED INTERPRETATIONS OF THE TREATY[[1233]](#footnote-1233)

Foreign Relations of the United States, 1949, Volume IV, pages 222-223. Minutes of the Ambassadors’ Committee, March 15, 1949.[[1234]](#footnote-1234)

During the exploratory talks which resulted in the draft treaty, agreement was reached on the meaning of certain phrases and articles. These agreements were not formal, but constituted the understanding of the representatives participating in the discussions as to the interpretation of those phrases and articles. The committee reviewed those interpretations and instructed the Secretary to make note of them. They are:

“(1) The participation of Italy in the North Atlantic Treaty has no effect upon the provisions of the Italian Peace Treaty.

“(2) ‘Mutual aid’ under Article 3 means the contribution by each Party, consistent with its geographic location and resources and with due regard to the requirements of economic recovery, of such mutual aid as it can reasonably be expected to contribute in the form in which it can most effectively furnish it, e.g., facilities, manpower, productive capacity, or military equipment.

“(3) Article 4 is applicable in the event of a threat in any part of the world, to the security of any of the Parties, including a threat to the security of their overseas territories.

“(4) a. For the purposes of Article 6 the British and American forces in the Free Territory of Trieste are understood to be occupation forces.

“b. The words, ‘North Atlantic Area north of the Tropic of Cancer’ in Article 6 mean the general area of the North Atlantic Ocean north of that line, including adjacent sea and air spaces between the territories covered by that Article.

“(5) With reference to Article 8, it is understood that no previous international engagements to which any of the participating states are parties would in any way interfere with the carrying out of their obligations under this Treaty.

“(6) The Council, as Article 9 specifically states, is established ‘to consider matters concerning the implementation of the Treaty’ and is empowered ‘to set up such subsidiary bodies as may be necessary’. This is a broad rather specific definition of functions and is not intended to exclude the performance at appropriate levels in the organization of such planning for the implementation of Article 3 and 5 or other functions as the Parties may agree to be necessary.

“(7) It is the common understanding that the primary purpose of this Treaty is to provide for the collective self-defense of the Parties, as countries having common interests in the North Atlantic area, while reaffirming their existing obligations for the maintenance of peace and the settlement of disputes between them.

“It is further understood that the Parties will, in their public statements, stress this primary purpose, recognized and preserve by the Article 51, rather than any specific connection with Chapter VIII or other Article of the United Nations Charter”.

#### APPENDIX 2

AGREED INTERPRETATIONS OF THE TREATY[[1235]](#footnote-1235)

Sir O. Franks (Washington) to Mr Bevin, 15 March 1949, 9.12 p.m.

Tel. No. 1523 Immediate, Top Secret (FO 371/79236, Z2355/1074/72/G)[[1236]](#footnote-1236)

My telegram No. 1521 [No. 286]

Following is the text interpretative minutes as agreed at today’s meeting of the Ambassadors Committee. These will be included in the final minutes of the Ambassadors Committee, and are, of course, not (repeat not) intended for publication.

[Begins]

The working group suggest that interpretations along the following lines should be recorded in the minutes of the Ambassadors Committee and that representatives of the negotiating Governments should so far as possible adhere to them in any public statements they may make.

1. The participation of Italy in the North Atlantic Pact has no effect upon the provision of the Italian Peace Treaty.
2. ‘Mutual Aid’ under Article 3 means the contribution of each party, consistent with its geographic location, and with due regard to the requirements of economic recovery, of such mutual aid as it can reasonably be expected to contribute in the form in which it can most effectively furnish it, e.g. facilities, manpower, productive capacity or military equipment.
3. Article 4 is applicable in the event of a threat in any part of the world, to the security of any of the parties, including a threat to the security of their overseas territories.
4. (A) for the purposes of Article 5 and 6, an armed attack is understood to mean one of sufficient gravity to endanger the maintenance of international peace and security.

(B) for the purposes of Article 6 the British and American forces in the Free Territory of Trieste are understood to be occupation forces.

1. With reference to Article 8, it is understood that no previous international engagements to which any of the participating States are parties would in any way interfere with the carrying out of their obligation under this treaty.
2. The Council, as Article 9 specifically states, is established ‘to consider matters concerning the implementation of the treaty’ and is empowered ‘to set up such subsidiary bodies as may be necessary’. This is a broad rather than specific definition of functions and is not intended to exclude the performance at appropriate levels in the organization of such planning for the implementation of Article 3 and 5 or other functions as the parties may agree to be necessary.
3. It is the common understanding that the primary purpose of this treaty is to provide for the collective self-defence of the parties, as countries having common interests in the North Atlantic area, while reaffirming their existing obligations for the maintenance of peace and the settlement of disputes between them.

It is further understood that the parties will, in their public statements, stress this primary purpose, recognised and preserved by Article 51, rather than any specific connection with Chapter VIII or other Article of the United Nations Charter.

Andres Munoz Mosquera ©

1. I. Claude, *Swords into Plow Shares* (Random House: New York, 1971), at 266-267.  [↑](#footnote-ref-1)
2. *Inter alia*: J.R. Deni, *NATO and Article 5: The Transatlantic Alliance and the Twenty-First-Century Challenges of Collective Defense* (Rowan & Littlefield: Lanham, 2017), a recent assessment reflecting the rebalancing of allies’ attention to collective defense since 2014; L.S. Kaplan, *NATO Divided, NATO United: The Evolution of an Alliance* (Praeger: London, 2004), a history introducing recurring themes in transatlantic Alliance relations, by the distinguished authority on NATO history; Belfer Center for Science and International Affairs of Harvard Kennedy School, *NATO at Seventy: An Alliance in Crisis* (2019), available at: <[www.belfercenter.org/publication/nato-seventy-alliance-crisis](http://www.belfercenter.org/publication/nato-seventy-alliance-crisis)>, a widely cited analysis of contemporary challenges, written by N. Burns and D. Lute, two former US ambassadors to NATO; I. Shapiro and A. Tooze (eds.), *Charter of the North Atlantic Treaty Organization* (Yale University Press: New Haven, 2018), curated primary source documents with commentary by respected scholars; United States Institute of Peace, *NATO’s Balancing Act* (2014), available at: < [www.usip.org/publications/2014/01/natos-balancing-act](http://www.usip.org/publications/2014/01/natos-balancing-act)>, a detailed assessment by D.S. Yost of NATO’s three self-described “core tasks”—collective defence, crisis management, and cooperative security—written just before Russia’s invasion of Ukraine; D.P. Auerswald, ‘Explaining Wars of Choice: An Integrated Decision Model of NATO Policy in Kosovo’ (2004) 48 *International Studies Quarterly* 631; Research Division, NATO Defense College, *NATO’s Effects Based and Comprehensive Approach to Operations: Making Sense of the Past and Future Prospects* (2008), available at: <ciaotest.cc.columbia.edu/wps/nat/0015654/f\_0015654\_13656.pdf>; Christopher John Chivers and Eric Schmitt, ‘In Strikes on Libya by NATO, an Unspoken Civilian Toll’ 17 December 2011, *The New York Times* at: < <https://www.nytimes.com/2011/12/18/world/africa/scores-of-unintended-casualties-in-nato-war-in-libya.html>> (accessed 4 August 2023); I.H. Daalder and M.E. O’Hanlon, *Winning Ugly: NATO’s War to Save Kosovo* (Brookings Institution: Washington, DC, 2000); Congressional Research Service, *NATO in Afghanistan: A Test of the Transatlantic Alliance* (2007), available at: <https://crsreports.congress.gov/product/pdf/RL/RL33627/24>; J. Haines, ‘ESDP and NATO’, in: Gnesotto (ed.), *EU Security and Defence Policy: The First Five Years 1999–2004* (EU Institute for Security Studies: Paris, 2004); V. Krüger-Klausen and L. Odgaard, ‘Introduction: The Challenges of Strategic Planning in Contemporary Politics’, in: Odgaard (ed.), *Strategy in NATO: Preparing for an Imperfect World* (Palgrave Macmillan: Houndmills, 2014); T. Noetzel and B. Schreer, ‘Does a Multi-Tier NATO Matter? The Atlantic Alliance and the Process of Strategic Change’ (2009) 85 *International Affairs* 211; Danish Institute For International Studies, *DIIS Report:* *NATO’s New Strategic Concept: A Comprehensive Assessment* (2011), available at: < https://www.econstor.eu/bitstream/10419/59845/1/656748095.pdf>; T. Ripley, *Operation Deliberate Force. The UN and NATO Campaign in Bosnia 1995* (Bailrigg Publications: Lancaster 1999); J. Shea, ‘NATO at Sixty—and Beyond’, in: Aybet and Moore (eds.), *NATO in Search of a Vision* (Georgetown University Press: Washington, DC, 2010); M. Webber, ‘NATO: Crisis? What Crisis?’ (2013) *Great Decisions* 31. [↑](#footnote-ref-2)
3. D. Nauta, *The International Responsibility of NATO and its Personnel during Military Operations* (Brill Nijhoff: Leiden/Boston, 2018). [↑](#footnote-ref-3)
4. P. Reinsch, ‘International Unions and their Administration’ (1907) 1 *AJIL* 579, at 579-581. Reinsch refers to the establishment of the International Agricultural Union, of which King Victor Emmanuel III recalls it was created to contribute to peace. Koskenniemi’s general argument is that international law represents the arena for political controversy in a disorganized world, in M. Koskenniemi, *From Apology to Utopia, the Structure of International Legal Argument, Reissue with New Epilogue* (Cambridge University Press: Cambridge, 2005). On the other hand, Kelsen’s theory argues that legality is separated from moral rules as well as power and interests; this is based on the existence of a distinct legal order, international law, for the maintenance of world peace, in H. Kelsen, *Pure Theory of Law* (University of California Press: Berkley, 1967), 66-67. As a result of the nineteenth century victory of positivism, pragmatism broke through, but as Kennedy says, using Berman’s arguments, “any hopes we now place in the peaceful entailments of a pragmatic as opposed to a formal international legal order are probably exaggerated”, in D. Kennedy, ‘International Law and The Nineteenth Century: History of an Illusion' (1997) 17 *Quinnipiac Law Review* 99, 103-104. Yet international law dynamics in the twentieth century harnessed international institutions “to narratives of progress toward the ‘international’, a place figured as both practical and humane” [D. Kennedy, ‘International Law and The Nineteenth Century: History of an Illusion' (1997) 17 *Quinnipiac Law Review* 99, 104], where organization favors peace and marginalizes war to short-termism arguments. This concept of international order (a world organized around law), as “*grand facteur*[s] *de paix dans les relations internationales*” [P. Kazansky, ‘Les Premiers Éléments de l’Organisation Universelle’ (1897) 29 *Revue de doit international et de législation comparée* 238, 239-240] is not only in evidence in the nineteenth century and the precursors of actual international organizations, “*les unions générales administratives*” [P. Kazansky, ‘Les Premiers Éléments de l’Organisation Universelle’ (1897) 29 *Revue de droit international et de législation comparée* 238, 246.], but also a necessity. Kant had already identified that the “state of peace … is not the natural state (*status naturalis*), which is rather to be described as a state of war: that is to say, although there is not perhaps always actual open hostility, yet there is a constant threatening that an outbreak may occur. Thus, the state of peace must be established”: I. Kant, *Perpetual Peace: A Philosophical Essay* (George Allen and Unwin ltd: New York, 1903 – First edition 1795), 117-118; “*Dans ce cadre [Droit ne peut être que le produit de la raison de l’être humain], la guerre devient un moyen à court terme qui aide l’humanité à avancer, mais qui est dépassé par la civilisation humaine*", C. Chalanouli, *Kant et Dworkin* (L’Harmattan: Paris, 2010), 262. *See also* P. Kazansky, ‘Les premiers éléments de l’organisations universelle’ (1897) 24 *Revue de droit international et de législation comparée* 238, 239-240, 246. [↑](#footnote-ref-4)
5. North Atlantic Treaty (Washington Treaty), adopted 4 April 1949, entered into force 24 August 1949, Preamble, final paragraph (see Annex). [↑](#footnote-ref-5)
6. E. Reid, *Time of Fear and Hope* (McClelland and Stewart: Toronto, 1977), 33-34. Olav Riste quotes former Norwegian Foreign minister Trygve Lie: “Norway’s interests would be best served by an agreement embracing the countries bordering on the North Atlantic, on condition that it was subordinated to an international organisation [UN]”, O. Riste, ‘Norway and the genesis of North Atlantic defence cooperation’, in N. Sherwen (ed.), *NATO’s Anxious Birth. The Prophetic vision of the 1940s* (C. Hurst and Company: London, 1985), 27. Other authors such as De Visscher argued that the North Atlantic Treaty “*ne s’insère ni ne s’intègre dans la Charte*”: C. De Visscher, *Théories et Réalités en Droit International Public* (Pédone: Paris, 1970), 147. [↑](#footnote-ref-6)
7. Charter of the United Nations, adopted 26 June 1945, entered into force 24 October 1945, 1 UNTS XVI, Preamble, first paragraph. [↑](#footnote-ref-7)
8. B. Simma, *The Charter of the United Nations: A Commentary* (Oxford University Press: Oxford, 2012), 103; United Nations Conference on International Organization (Vol. VI), *Report of Rapporteur, Subcommittee I/1/A (Farid Zeineddine, Syria), Section 3, TO Committee I/1, June 5, 1945*, Doc. 785 (1945), 359. [↑](#footnote-ref-8)
9. Kelsen, (n. 4), at 48. [↑](#footnote-ref-9)
10. Note that the principle of *bellum iustum* refers to “[w]ar, like reprisal, is itself a delict, unless it is a sanction … it is hardly possible, in other words, to deny the general validity of the *bellum iustum* principle,” Kelsen (n. 4), at 322. [↑](#footnote-ref-10)
11. “Today, there seems to be almost a common understanding that the founding treaty of the UN contains elements of a constitutional nature”: Simma (n. 8), at 81. [↑](#footnote-ref-11)
12. J. Crawford, *Chance, Order, Change: The Course of International Law* (Brill Nijhoff: Leiden/Boston, 2014), 459. [↑](#footnote-ref-12)
13. “The static and dynamic principles may be combined in the same system if the presupposed basic norm, according to the dynamic principle, merely authorizes a norm-creating authority, and if this authority (or one authorized by it in turn) not only established norms by which other norm-creating authorities are delegated, but also norms in which the subjects are commanded to observe a certain behavior and from which further norms can be deduced, as from the general to the particular”: Kelsen (n. 4), at 197-198. [↑](#footnote-ref-13)
14. M. Diaz de Velasco Vallejo, *Les organisations internationales* (Economica: Paris, 1999), 142. [↑](#footnote-ref-14)
15. L. Henkin, ‘The Reports of the Death of Article 2(4) are Greatly Exaggerated’ (1971) 65 *AJIL* 544*,* 544; Simma (n. 8), at 207. [↑](#footnote-ref-15)
16. A. Orford, ‘The Gift of Formalism’ (2004) 15 *EJIL* 179, 181. [↑](#footnote-ref-16)
17. “As held by the ICJ in the Nuclear Weapons opinion, the logic of the overall system contemplated by the Charter has to be taken into account when interpreting another international organizations’ ‘Constitution’”: Simma (n. 8), at 82. [↑](#footnote-ref-17)
18. North Atlantic Treaty Organization, *Final Communiqué of the first Session of the North Atlantic Council - (Terms of Reference and Organisation)* (1949), available at: < www.nato.int/cps/en/natohq/official\_texts\_17117.htm>. [↑](#footnote-ref-18)
19. Today, North Atlantic Council’s ‘resolutions’ are called ‘decisions’. On this particular question, see Chapter 3 below. [↑](#footnote-ref-19)
20. North Atlantic Treaty (n. 5), Art 9. [↑](#footnote-ref-20)
21. M. Reichard, *The EU-NATO Relationship: A Legal and Political Perspective* (Ashgate Publishing Limited: Hampshire, 2006), 101. [↑](#footnote-ref-21)
22. “Four of the fourteen articles [of the NAT], in addition to the preamble, referred to the charter by name, and Article 7 piously respected the primary responsibility of the Security Council for the maintenance of international peace and security”, L. Kaplan, *NATO 1948, the Birth of the Transatlantic Alliance,* (Rowman and Littlefield Publishers: Lanham, 2007), 218. “The Charter is surely not to be construed like a lease of land or an insurance policy; *it is a constitutional instrument* whose broad phrases were designed to meet changing circumstances for an undefined future”: O. Schachter, ‘Review: The Law of the United Nations’ (1951) 60 *Yale L. J.* 189*,* 193 (emphasis added). Schachter reviews the book of H. Kelsen, *The Law of the United Nations* (Frederick A. Praeger, Inc.: New York, 1950) under the auspices of the London Institute of World Affairs. [↑](#footnote-ref-22)
23. And its subsequent practice. [↑](#footnote-ref-23)
24. “The word ‘instrument’ has been used in this study as a useful term to denote every written type of treaty or international agreement, but without regard as to whether in any particular case such an ‘instrument’ is a ‘treaty’ or ‘international agreement’ with the meaning of Art. 102 of the Charter”: M. Brandon, ‘Analysis of the Terms “Treaty” and “International Agreement” for Purposes of Registration under Article 102 of the United Nations Charter’ (1953) 47 *AJIL* 49, 49. [↑](#footnote-ref-24)
25. M. Aguilar Navarro, *Vol. I: Derecho Internacional Público, Tomo II Constitución de la Sociedad Internacional* (EISA: Madrid, 1954), 223 (free translation). [↑](#footnote-ref-25)
26. M. Virally, ‘La Notion de Fonction’, *Le Droit International en Devenir, Essais Ecrits au Fil des Ans* (Presses Universitaires de France: Paris, 1990), 228. [↑](#footnote-ref-26)
27. United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, *Draft articles on the law of treaties between States and international organizations or between international organizations adopted by the International Law Commission at its thirty-fourth session*, UN Doc. A/CONF.129/4 (1986). The same definition is codified in the 1969 Vienna Convention on the Law of the Treaties, adopted 23 May 1969, entered into force 27 January 1980, 115 UNTS 331. [↑](#footnote-ref-27)
28. International Law Commission, *Report of the International Law Commission Sixty-third session (26 April–3 June and 4 July–12 August 2011)*, UN Doc. A/66/10 (2011). [↑](#footnote-ref-28)
29. International Law Commission, *Responsibility of international organizations: Comments and observations received from Governments*, UN Doc. A/CN.4/L.636/Add. 1 (2011), 5-7; International Law Comission, *Report of the International Law Commission Sixty-third session (26 April–3 June and 4 July–12 August 2011)*, UN Doc. A/66/10 (2011), 74-75: “Most international organizations are established by treaties. Thus, a reference in the definition to treaties as constituent instruments reflects prevailing practice. However, forms of international cooperation are sometimes established without a treaty. In certain cases, for instance with regard to the Nordic Council, a treaty was subsequently concluded. In order to cover organizations established by States on the international plane without a treaty, article 2 refers, as an alternative to treaties, to any “other instrument governed by international law”. This wording is intended to include instruments, such as resolutions adopted by an international organization or by a conference of States. Examples of international organizations that have been so established include the Pan American Institute of Geography and History (PAIGH), and the Organization of the Petroleum Exporting Countries (OPEC)”. *See also* M. Virally, ‘La Notion de Fonction’, *Le Droit International en Devenir, Essais Ecrits au Fil des Ans* (Presses Universitaires de France : Paris, 1990), 227 : “*De telles définitions et classifications constituent de simples précisions terminologiques, destinées à fixer la portée d’application des conventions en cause. Orientées exclusivement vers des fins pratiques, elles sont dépourvues de toute valeur scientifique et habituellement très succinctes (les deux conventions précitées se bornent à dire que l’expression « organisation internationale » désigne des organisations intergouvernementales)*”. Originally quoted in M. Virally, ‘La notion de fonction dans la théorie de l’organisation internationale’, in : C. Rousseau, *Mélanges offerts á Charles Rousseau – La communauté internationale* (Éditions A. Pédone : Paris, 1974). [↑](#footnote-ref-29)
30. D. Bederman, ‘The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel’, in: Johns (ed.), *International Legal Personality* (Ashgate Publishing Limited: Surrey, 2010), 371. Originally published as D. Bederman, ‘The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel’ (1995-1996) 36 *Virginia Journal of International Law* 275, 371. [↑](#footnote-ref-30)
31. B. Simma, ‘From Bilateralism to Community of Interest’ (1994) 250 *Collected Courses of the Hague Academy of International Law*, 236. [↑](#footnote-ref-31)
32. North Atlantic Treaty Organization, *Report by the Secretary General of Progress during the Period 4th April, 1952 to 30th November, 1952*, C-M(52)125, (1952), 18, available at: <<https://archives.nato.int/uploads/r/null/2/0/20903/C-M_52_125_ENG.pdf>>, (emphasis added). [↑](#footnote-ref-32)
33. D. Anzilotti, ‘Gli organi communi nelle Societa di Stati’ (1914) 8 *Rivista di diritto internazionale*, 158-160. [↑](#footnote-ref-33)
34. Bederman, (n. 30), at 341. [↑](#footnote-ref-34)
35. M. Webber, J. Sperlin, M. Smith, *NATO’s Post-Cold War Trajectory. Decline or Regeneration* (Palgrave Macmillan: London, 2012), 30 (emphasis added). [↑](#footnote-ref-35)
36. There are two treaties dealing with NATO’s legal personalities: Agreement on the status of the North Atlantic Treaty Organization, National Representatives and International Staff signed in Ottawa (Ottawa Agreement), adopted 20 September 1951, 200 UNTS 1, Art 5; Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Paris Protocol), adopted 28 August 1952, 200 UNTS 340, Art 10. [↑](#footnote-ref-36)
37. G. Mangone, *A Short History of International Organizati*on (McGraw-Hill: New York, 1954), 129. [↑](#footnote-ref-37)
38. O. von Gierke, *Community in Historical Perspective: a translation of selections from Das Deutsche Genossenschaftsrecht,* (Cambridge University Press: Cambridge, 1990), 7-8. *See also* R. Harris, ‘The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business’ (2006) *63 Wash. & LEE 1. Rev.* 1421, 1437. [↑](#footnote-ref-38)
39. Gierke, as cited by Bederman (n. 30), at 371. [↑](#footnote-ref-39)
40. “The preservation of peace is the very essence of that [North Atlantic] community, and free discussion as to how this can best be done is a source of continuing strength”: North Atlantic Treaty Organization, *Future Development of NATO, Other than in Connection with Defence Plans, Note by the Executive Secretary*, C7-D/18 (1951), available at: <archives.nato.int/uploads/r/null/1/9/19674/C\_7-D\_18\_ENG.pdf>. [↑](#footnote-ref-40)
41. P. Buteux, *The Politics of Nuclear Consultation in NATO 1965-1980* (Cambridge University Press: Cambridge, 1983), 4-5. [↑](#footnote-ref-41)
42. Anzilotti (n. 33), at 156-164. [↑](#footnote-ref-42)
43. “[T]he practice has created legal norms within the alliance … [s]uch cases [decisions relating to the Conference on Security and Cooperation in Europe ,where no individual state or small group of NATO states could hope to gain much by taking independent positions] test the extent of allied cooperation and make it possible to gauge a political alliance’s capability to influence member governments’ conduct through the growth of procedural legal norms”: F. Kirgis, ‘NATO Consultations as a Component of Nation Decisionmaking’ (1979) *73 AJIL* 372*,* 373-374. [↑](#footnote-ref-43)
44. North Atlantic Treaty Organization, *Membership Action Plan*, NAC-S(99) 066 (1999), available at: <www.nato.int/cps/fr/natohq/official\_texts\_27444.htm?selectedLocale=en>. [↑](#footnote-ref-44)
45. Following the understanding of the term “rules of the organization”, which includes, in addition to the constituent instruments, relevant decisions and resolutions and the established practice of the organization; it can be argued that NATO strategic concepts, standardization agreements, operational plans, Military Committee’s concepts, different NATO bodies’ policies and directives, and other international agreements, all together form the NATO’s constitutional structure. See 2009 Yearbook of the International Law Commission (Vol. II, Part One), *Fourteenth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur*, A/ CN.4/ SER.A/2009/Add. 1 (Part 1) (2009), 32; *see also* 1982 Yearbook of the International Law Commission, *Report of the International Law Commission on the work of its thirty-fourth session (3 May-23 July 1982)*, UN Doc. A/37/10 (1982), 41. [↑](#footnote-ref-45)
46. North Atlantic Treaty Organization, *Renewing the Transatlantic security community in the age of globalisation', Speech by NATO Secretary General Anders Fogh Rasmussen at the Central Military Club, Sofia, Bulgaria on 20 May 2010* (2010), available at < https://www.nato.int/cps/en/natolive/opinions\_63773.htm>: (emphasis added). [↑](#footnote-ref-46)
47. “As IOs, whether prompted by the functionalist needs of their members or the desires of their bureaucrats, expand their original mandates, their normative reaches extend beyond what their creators had anticipated”: J.E. Alvarez, *International Organizations as Law-makers* (Oxford University Press: Oxford, 2005), 328. [↑](#footnote-ref-47)
48. Virally, (n. 29), at 275. [↑](#footnote-ref-48)
49. M. Virally, ‘La notion de fonction dans la théorie de l’organisation internationale’, in : C. Rousseau, *Mélanges offerts á Charles Rousseau – La communauté internationale* (Éditions A. Pédone : Paris, 1974), 281-282. [↑](#footnote-ref-49)
50. Ibid., at 283. [↑](#footnote-ref-50)
51. Ibid., at 279. [↑](#footnote-ref-51)
52. Bederman (n. 30), at 341-343. [↑](#footnote-ref-52)
53. G. Marchegiano was the Italian juridical counsellor of the International Zone of Tangier. He was requested to give his opinion and his views on the personality of the Commission of the Cape Spartel. A translation of his notes from French into English was published as G. Marchegiano,‘The Juristic Character of the International Commission of the Cape Spartel Lighthouse’ (1931) 25 *AJIL* 339. [↑](#footnote-ref-53)
54. Bederman (n. 30), at 341. [↑](#footnote-ref-54)
55. R. Jordan, *The NATO International Staff/Secretariat 1952-1957* (Oxford University Press: London, 1967), vii. [↑](#footnote-ref-55)
56. Ibid., 19. [↑](#footnote-ref-56)
57. Speech by Charles M. Spofford, former Chairman of the Council Deputies, 10 May 1951 (NATO Speech Series No. 2) quoted by R. Jordan, (n. 55), at 32 (emphasis added). [↑](#footnote-ref-57)
58. These multilateral treaties are: Agreement on the status of the North Atlantic Treaty Organization, National Representatives and International Staff signed in Ottawa (Ottawa Agreement), adopted 20 September 1951, 200 UNTS 1; Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (NATO SOFA), adopted 19 June 1951, 199 UNTS 67; Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Paris Protocol), adopted 28 August 1952, 200 UNTS 340. The bilateral agreements (Supplementary Agreements) flesh up NATO’s core *corpus legis*, and help to form NATO’s constitutional structure, together with NATO strategic concepts, standardization agreements, operational plans, Military Committee’s concepts, and different NATO bodies’ policies and directives, as well as other international agreements like specific memoranda of understanding in so far as they [the MOUs] are concluded in the fulfillment of the obligations set up in Article 3 of the North Atlantic Treaty. [↑](#footnote-ref-58)
59. P.H.F. Bekker, *The Legal Position of Intergovernmental Organizations. A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff Publishers: Dordrecht, 1994), 81; See Pellet (n. 45). [↑](#footnote-ref-59)
60. Ibid. [↑](#footnote-ref-60)
61. *See* Jordan (n. 55), at 32. [↑](#footnote-ref-61)
62. Ibid. [↑](#footnote-ref-62)
63. P. Reuter, ‘La Communauté européenne du Charbon et de l’Acier*’* (1954) 4 *Revue française de science politique*, 899. *See also* P. Gautier, ‘The Reparation for Injuries Case Revisited: The Personality of the European Union’ (2000) 4 *Max Plank UNYB* 331, 336. [↑](#footnote-ref-63)
64. In order to illustrate NATO’s intellectually far-reaching institutionalization, it is worth recalling what the French delegation memorialized in 1950 in order to establish the ‘legal status’ of the Supreme Headquarters Allied Powers Europe (SHAPE). France stated that for the provisional financing of SHAPE, it would extend the conditions set forth in the Franco-American agreement of 14 December 1950 and that “[t]he French delegation is perfectly conscious of the fact that SHAPE in its character of an *international organisation* is different from the Franco-American organisation. Faced with the necessity of taking provisional measures at this time it appears that it would be best to proposes system which has already been proven” (emphasis added). France acted not obliged by the provisions of a treaty – i.e., in a contractualist manner, actually the Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Paris Protocol – concluded on 28 August 1952) did not exist. France acted in a constitutionalist manner. Based on institutionalization powers given in Article 9 of the NAT, the North Atlantic Council created in its fifth session (New York, 15-18 September 1950) an integrated military force under SHAPE. France justified its proposal in order “[t]o facilitate the functions of SHAPE,” North Atlantic Treaty Organization, *Provision of Budget for SHAPE. Note by the Secretary*, D-D(51)52 Appendix B (1951), 13. [↑](#footnote-ref-64)
65. “*Organisation du Traité de l'Océan Atlantique Nord - Décret n° 55-267 du 3 février 1955 portant publication de la convention sur le statut de l'Organisation du traité de l'Atlantique Nord, des représentants nationaux et du personnel international, signé à Ottawa le 20 septembre 1951 (1) (J. O. du 18 février 1955, p. 1917). Décret n. 55-268 du 3 février 1955 portant publication du Protocole sur le statut des Quartiers Généraux militaires internationaux créés (1) (Même J.O., p. 1919)*” (sic), J. Personnaz, ‘Principaux textes intéressant le Droit International Public’ (1955) 1 *Annuaire français de droit international* 515, 517-518 : Note the editorial mistake above using “l'Océan”. [↑](#footnote-ref-65)
66. Bederman, (n. 30), at 342. [↑](#footnote-ref-66)
67. M. Shaw, *International Law* (Cambridge University Press: Cambridge, 2008), 1289-1290. [↑](#footnote-ref-67)
68. Membership Action Plan (n. 44). It is also to note the controversial bombing campaign in Kosovo. Debatably, NATO - without turning solutions for ‘hard cases’ (a humanitarian disaster was taking place) into the rule - was capable of stressing the purposes and principles of the Charter of the United Nations, when its institutions become case-specific stagnant. *See* A. Cassese, ‘*Ex iniura ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?’ (1999) 10 *EJIL* 23, 27. [↑](#footnote-ref-68)
69. M. Virally, *L’Organisation Mondiale* (Armand Colin: Paris, 1972). [↑](#footnote-ref-69)
70. Ibid., at 28; D. Kennedy, ‘The Move to Institutions’ (1987) 8 *Cardozo Law Review* 841, from which the institutional analysis is partly drawn. Virally analyzes the United Nations and Kennedy the League of Nations. [↑](#footnote-ref-70)
71. “An institution is an idea of a work or enterprise that is realised and endures juridically in a social milieu; for the realisation of this idea, a power is organised that equips it with organs; on the other hand, among the members of the social group interested in the realisation of the idea, manifestations of community occur that are directed by the organs of the power and regulated by procedures” (free translation): M. Hauriou, ‘La théorie de l'institution et de la fondation’ (1925) 4 *Cahiers de la Nouvelle Journée,* 99. More information on the theory of institutions can be found online, source: <<https://www.hauriou.net/p/la-theorie-classique-de-linstitution.html>>, (accessed 4 August 2023). [↑](#footnote-ref-71)
72. Hauriou’s institutional theory qualifies bodies as institution-persons (note that *institution-chose* relates only to rules). These become subjects of the moral persons and come into being in constituted bodies. Ibid., at 100. [↑](#footnote-ref-72)
73. The term is borrowed from W. Kuehl, *Seeking World Order – The United States and International Organization to 1920* (Vanderbilt University Press: Michigan, 1969). [↑](#footnote-ref-73)
74. This coincides with Kennedy’s postulate which argues that in order to comprehend the discipline of ‘international institution’, it is necessary to observe its settlement process. This originates in three ways: a ‘break’, “the institution opposes a social situation which it organizes”; a ‘movement’, “the institution is a continual transcendence of chaos, a continual movement forward from its origin and differentiation from its own history”; and a ‘repetition’, “an institutional practice of repletion and exclusion which sustains the momentum of that movement into the institution,” Kennedy (n. 70), at 844-848. This construct is also similar to that of Virally: ‘*Le dispositif institutionnel*’ and ‘*Les pouvoirs institutionnels’.* Virally (n. 69), at 37-230. [↑](#footnote-ref-74)
75. H. Ismay, *NATO: the First Five Years, 1949-1954* (Bosch-Utrecht: Utrecht, 1954), ix. [↑](#footnote-ref-75)
76. Virally, (n. 69), at 29. [↑](#footnote-ref-76)
77. The term ‘legal position’ is coined by Bekker, based on the relevant work of El-Erian and others in the International Law Commission. *See* Bekker (n. 59), at 51. *See* 1963 Yearbook of the International Law Commission (Vol. I), *717th meeting — 9 July 1963, Relations between States and inter-govemmental organizations (A/CN.4/161)*, UN Doc. A/CN.4/SER.A/1963 (1963), 298 [110]. The same term, ‘legal position’, is used by J. Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press: Cambridge, 2009), 38. [↑](#footnote-ref-77)
78. “The emergence of military alliances with institutional features demanded an expansion of functionalism”: J. Klabbers, ‘The Transformation of International Organizations Law’ (2015) 26 *EJIL* 9, 82. [↑](#footnote-ref-78)
79. Ibid., at 52. *See* Calero Rodrigues, in 1985 Yearbook of the International Law Commission (Vol. I), 1926*th meeting—16 July 1985, Relations between States and international organizations (second part of the topic) {continued) (A/ CN.4/370,1 A/CN.4/391 and Add.l,2 A/CN.4/ L.383 and Add.1-33)*, UN Doc. A/CN.4/SER.A/1985 (1985), 292 [25]. [↑](#footnote-ref-79)
80. H. H. Shelton, ‘A Word from the Chairman’ (1999) *Joint Force Quarterly*, 1; W.B. Norman, ‘NATO's New Strategic Concept’ (2010) *U.S. War College Strategy Research Project*, 1, available at: <<https://ndupress.ndu.edu/portals/68/Documents/jfq/jfq-27.pdf>>. [↑](#footnote-ref-80)
81. University of Oregon (Renascence Editions), *T. Hobbes. Leviathan. The Second Part* (*Of Commonwealth, Chapter XVII, Of the Causes, Generation, and Definition of a Commonwealth)*, available at: <https://www.luminarium.org/renascence-editions/hobbes/leviathan2.html> (accessed 4 August 2023). [↑](#footnote-ref-81)
82. L. Oppenheim, *The League of Nations and its Problems: Three Lectures (First Lecture)* (Longmans, Green and Co.: London, 1919), 7 [II-V], [↑](#footnote-ref-82)
83. The “definition of “community of interest” could perceive it as a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se* but is recognized and sanctioned by international law as a matter of concern to all States”, Simma (n. 31), at 233. Simma references Jessup’s essays on this topic. *See also* Saint Agustin, La Ciudad de Dios, L. II, 21: “an association based on the consent of law and on the community of interest”.

    Available at: < <https://www.augustinus.it/spagnolo/cdd/index2.htm>>. [↑](#footnote-ref-83)
84. B. Simma, ‘Universality of International Law from the Perspective of a Practitioner’, in: Ruiz Fabri, Wolfrum and Gogolin (eds.), *Select Proceedings of the European Society of International Law*, *Volume 2 2008* (Hart Publishing: Oxford, 2010), 3. [↑](#footnote-ref-84)
85. I. Claude, *Swords into Plow Shares* (Random House: New York, 1971), 139. [↑](#footnote-ref-85)
86. Simma, (n. 31), at 256. [↑](#footnote-ref-86)
87. M. Ball, *NATO and the European Union Movement* (Stevens and Sons Limited: London, 1959), 34. [↑](#footnote-ref-87)
88. Ibid., at 246. [↑](#footnote-ref-88)
89. Ibid., at 251. [↑](#footnote-ref-89)
90. D. J. Bederman, *International Law in the Antiquity* (Cambridge University Press: Cambridge, 2001), 135-136. [↑](#footnote-ref-90)
91. Ibid., at 135-136. [↑](#footnote-ref-91)
92. De Visscher, C.. ‘G. Tenekides, Droit international et communautés fédérales dans la Grèce des cités (Ve-IIIe siècles avant Jésus-Christ) (Review)’ (1962) 40 *Revue belge de philologie et d’histoire* 906, 906-907. [↑](#footnote-ref-92)
93. Plato, *The Laws* (Penguin Classics: London, 1975), 87-92. [↑](#footnote-ref-93)
94. Oppenheim, (n. 82), [III: First Lecture]. *See also* A. Nussbaum, ‘The Significance of Roman Law in the History of International Law’ (1952) 100 *University of Pennsylvania Law Review* 678, 679: “Passing from municipal “external” law to real international law, we find that Rome did participate to some extent in the formation of the latter”. [↑](#footnote-ref-94)
95. “where there is society/community of interest, there is law” (author’s translation). [↑](#footnote-ref-95)
96. D. Kennedy, ‘Primitive Legal Scholarship’ (1986) 27 *Harvard International Journal* 1, at 2-3. [↑](#footnote-ref-96)
97. B. Simma, ‘The Contribution of Alfred Verdross of the Theory of International Law’ (1995) 6 *EJIL* 33, 39. [↑](#footnote-ref-97)
98. C. Rousseau, *Droit International Public, Tome II, Les sujets de droit* (Sirey : Paris, 1974), 454-461. [↑](#footnote-ref-98)
99. Oppenheim, (n. 82). [↑](#footnote-ref-99)
100. Kennedy (n. 96), at 8. [↑](#footnote-ref-100)
101. Rousseau (n. 98). [↑](#footnote-ref-101)
102. Kennedy (n. 96), at 8. [↑](#footnote-ref-102)
103. Rousseau (n. 98), at 456. [↑](#footnote-ref-103)
104. Ibid., at 456-457. [↑](#footnote-ref-104)
105. “It was not till the nineteenth century that wars for the purpose of national unity broke out, and dynastic wars began gradually to disappear. During the nineteenth century the nations, so to say, found themselves; some kind of constitutional government was everywhere introduced; and democracy became the ideal, although it was by no means everywhere realised”: Oppenheim (n. 81), [III, First Lecture]. [↑](#footnote-ref-105)
106. Kennedy (n. 96), at 8. [↑](#footnote-ref-106)
107. Kennedy (n. 22), at 852. [↑](#footnote-ref-107)
108. Oppenheim (n. 82), at [III, First Lecture]. [↑](#footnote-ref-108)
109. J. D. Singer, M. Wallace, ‘Intergovernmental Organization and the Preservation of Peace, 1816-1964: Some Bivariate Relationships’ (1970) 24 *International Organization* 520. [↑](#footnote-ref-109)
110. Ibid.*,* at 531. [↑](#footnote-ref-110)
111. Simma (n. 31), at 236. [↑](#footnote-ref-111)
112. Ibid., at 235. [↑](#footnote-ref-112)
113. Since 1999 Serbia/Kosovo bombing campaign, all NATO operations and missions have followed specific Security Council resolutions or sought explicit consent of the state hosting NATO activities. [↑](#footnote-ref-113)
114. Cassese (n. 68), at 27. [↑](#footnote-ref-114)
115. North Atlantic Treaty Organization, *Reasons and Circumstances Leading to the Signature of the North Atlantic Treaty*, RS/67/12 (1967), 1. [↑](#footnote-ref-115)
116. S. Bergsmann, ‘The Concept of Military Alliance’, in: Reiter and Gärtner (eds), *Small States and Alliances* (Physica-Verlag: Heidelberg, 2001), 26. [↑](#footnote-ref-116)
117. “Unanimous proclamation of Alliance resolutions was a form of exercising solidarity”: J. Vincent, I. Straus, R. Biondi, ‘Capability Theory and the Future of NATO’s Decisionmaking Rules’ (2001) 38 *Journal of Peace Research* 67, 70. Thus, solidarity would be then transmitted “through lifeworld contexts and into democratic institutions and practices via the medium of law”: M. Pensky, *The Ends of Solidarity: Discourse Theory in Ethics and Politics* (State University of New York Press: Albany, 2008), 50 and 111. Taking the abstract of both quotes and plugging it into NATO’s practices, one can understand why consultations, as established in Article 4 of the NAT, are a proclamation of the democratic principle which guides NATO’s institutions (“Mr. Bevin declared: “At last democracy is no longer a series of isolated units. It has become a cohesive organization, determined to fulfil its great purpose”: North Atlantic Treaty Organization (n.115), at 2). This is supported by the North Atlantic Council’s resolution of December 1966: North Atlantic Council, Resolution on Future Tasks of the Alliance, C-M(66)145 (1966), ‘where the Council established, in its first paragraph, that “cohesion and solidarity between the signatories of the Treaty” leads to achieve the fundamental purposes of the North Atlantic Treaty. [↑](#footnote-ref-117)
118. Hauriou (n. 71), at 99. [↑](#footnote-ref-118)
119. “The scholarly formulation of the juristic concepts of a law of nations based on the interdependence of States”: C.W. Jenks, ‘Some Constitutional Problems of International Organizations’ (1945) 22 *British Yearbook of International Law* 11, 72. [↑](#footnote-ref-119)
120. P. Kazansky, ‘Théorie de l’administration internationale’ (1902) 9 *Revue général de droit international public* 353, 357. [↑](#footnote-ref-120)
121. T. White, ‘The Basin of Freedom’, in: Kaplan (ed.), *NATO and the Policy of Containment* (Raytheon Education Company: Lexington, 1968), 62 (emphasis added). [↑](#footnote-ref-121)
122. A. Linklater, *International Relations: Critical concepts in political science* (Rutledge: London, 2000), 221. [↑](#footnote-ref-122)
123. Reichard (n. 21), at 111. [↑](#footnote-ref-123)
124. Kennedy (n. 70), 899. [↑](#footnote-ref-124)
125. D. Calleo, *The Atlantic Fantasy: The U.S., NATO, and Europe* (The Johns Hopkins Press: Baltimore, 1970), 24 (emphasis added). [↑](#footnote-ref-125)
126. R. Strausz-Hupé, ‘The Crisis of Political Leadership’, in: Cerny and Briefs (eds.), *NATO in Quest of Cohesion* (Praeger Publishers: New York, 1965), 137. [↑](#footnote-ref-126)
127. M. Virally, ‘La Notion de Fonction’, in : *Le Droit International en Devenir, Essais Ecrits au Fil des Ans* (Presses Universitaires de  France: Paris, 1990), 275. *See also* J. Klabbers, ‘The Emergence of Functionalism in International Institutional Law: Colonial Inspirations’ (2014) 25 *EJIL* 645, 650: “The emergence of international organizations during the 19th century culminated, in the first decade of the 20th century, in the writings of Paul Reinsch, who started to publish the results of serious, methodical, and systematic research on the institutional aspects of international organizations as early as 1907: this work is eminently recognizable to today’s audiences as research into international institutional law”. [↑](#footnote-ref-127)
128. S. Kay, *NATO and the Future of European Security* (Rowman & Littlefield Publishers: Oxford, 1998), 34. [↑](#footnote-ref-128)
129. Ismay (n. 75), at x. [↑](#footnote-ref-129)
130. Bergsmann (n. 116), at 34-36. [↑](#footnote-ref-130)
131. Mangone (n. 37), at 129. [↑](#footnote-ref-131)
132. Buteux (n. 41), at 4-5. [↑](#footnote-ref-132)
133. Jordan (n. 55), at vii. [↑](#footnote-ref-133)
134. Other authors argue that NATO was also envisioned in the Atlantic Charter. *See* B. Grady, ‘Article 5 of the North Atlantic Treaty: past, present, and uncertain future’ (2002) 31 *Ga. J. Int’l & Comp. L*. 167, 171-172. Also, it is interesting to note that NATO’s website refers to the Atlantic Charter, and more particularly, to the “Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom” of 14 August 1941 as part of the “Antecedents of the Alliance”: North Atlantic Treaty Organization, *'The Atlantic Charter'. Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom* (1941), available at: <www.nato.int/cps/en/natohq/official\_texts\_16912.htm?>, (accessed 4 August 2023). [↑](#footnote-ref-134)
135. Inter-American Treaty of Reciprocal Assistance, adopted 2 September 1947, entered into force 3 December 1948, 324 UNTS 21 (1947). [↑](#footnote-ref-135)
136. T. Insall and P. Salmon, ‘The Brussels and North Atlantic Treaties, 1947-1949’, in: Insall and Salmon (eds.), *Documents on British Policy Overseas, Series I, Volume X* (Routledge: Oxon, 2015), 233-x; Treaty of Alliance and Mutual Assistance between the United Kingdom and France (Treaty of Dunkirk), signed 4 March 1947, entered into force 8 September 1947 (1947), preamble. [↑](#footnote-ref-136)
137. A. L. Goodhart, ‘The North Atlantic Treaty of 1949’ (1951) 79 *Collected Courses of the Hague Academy of International Law*, 215. [↑](#footnote-ref-137)
138. “Resolved to co-operate closely with one another as well as with the other United Nations in preserving peace and resisting aggression, in accordance with the Charter of the United Nations and in particular with Articles 49, 51, 52, 53 and 107 thereto”, Treaty of Dunkirk (n. 136). [↑](#footnote-ref-138)
139. Treaty of Brussels, signed 17 March 1948, entered into force 25 August 1948 (1948). [↑](#footnote-ref-139)
140. Ernest Bevin, United Kingdom Foreign Secretary in 1948. [↑](#footnote-ref-140)
141. Insall and Salmon (n. 136), at x. [↑](#footnote-ref-141)
142. “The Treaty of Brussels was simply a first step in that direction”: C. Wiebes and B. Zeeman, ‘The Pentagon negotiations March 1948: the Launching of the North Atlantic Treaty’ (1983) 59 *International Affairs* 351, 352. The statement is footnoted as follows: “Lord Gladwyn (Jebb) called the Treaty of Brussels an attempt ‘… to encourage Hercules to come to the help of those who were prepared to help themselves’”: Lord Gladwyn, review of Reid (n. 6), 251. [↑](#footnote-ref-142)
143. “The signature of the Brussels treaty on March 17 provided an opportunity for the governments of the United States and Canada to indicate publicly, though in guarded language, their willingness to consider ways by which they might associate themselves with the Brussels treaty powers”: E. Reid (n. 6), at. 43. [↑](#footnote-ref-143)
144. Insall and Salmon (n. 136), at xi; Goodhart (n. 137), at 215-216. [↑](#footnote-ref-144)
145. Goodhart (n. 137), at 215. [↑](#footnote-ref-145)
146. Treaty of Friendship, Co-Operation And Mutual Assistance, signed 14 May 1955, entered into force 6 June 1955 (1955). “The Western Alliance bears no comparison to the Warsaw Pact, imposed on tis members and superimposed on an existing hegemonic system, whose 1955 treaty mimics the articles of the Washington Treaty”, A. Staercke, ‘Editorial Note’, in: Sherwen (ed.), *NATO’s Anxious Birth. The Prophetic vision of the 1940s* (C. Hurst and Company: London, 1985), vii. [↑](#footnote-ref-146)
147. De Visscher (n.6), at 147. [↑](#footnote-ref-147)
148. Ibid., at 148. [↑](#footnote-ref-148)
149. Virally (n. 69), at 28. [↑](#footnote-ref-149)
150. G. Scelle, ‘Le problème du fédéralisme’ (1940) 2 *Politique étrangère* 143*,* 146. *See also* Ministerio de Asuntos Exteriores, *Union Europea y Cooperation on the question of the Spanish referendum for entering NATO*, available at: <<https://www.exteriores.gob.es/RepresentacionesPermanentes/otan/es/Organismo/Paginas/Espa%C3%B1a-en-la-OTAN.aspx>>, (accessed 4 August 2023). [↑](#footnote-ref-150)
151. On the ‘legal evolutionary theory’, see M. Zamboni , ‘Evolutionary Theory and Law’ (2008) 9 *German Law Journal* 515. On the ‘functional evolution’, see D. Mitrany, *A Working Peace System* (Oxford University Press: London, 1943). [↑](#footnote-ref-151)
152. K.D.A,‘A Working Peace System. An Argument for the Functional Development of International Organization (Review)’ (1944) 20 *International Affairs* 109, 109. [↑](#footnote-ref-152)
153. Jenks (n. 119), at 16-17. [↑](#footnote-ref-153)
154. Virally (n. 69), at 337. [↑](#footnote-ref-154)
155. See North Atlantic Treaty (n. 5), Preamble. [↑](#footnote-ref-155)
156. Ibid. [↑](#footnote-ref-156)
157. “The commercial spirit cannot co-exist with war, and sooner or later it takes possession of every nation. For, of all the forces which lie at the command of a state, the power of money is probably the most reliable. Hence states find themselves compelled - not, it is true, exactly from motives of morality - to further the noble end of peace and to avert war, by means of mediation, wherever it threatens to break out, just as if they had made a permanent league for this purpose. For great alliances with a view to war can, from the nature of things, only very rarely occur, and still more seldom succeed. In this way, nature guarantees the coming of perpetual peace, through the natural course of human propensities: not indeed with sufficient certainty to enable us to prophesy the future of this ideal theoretically, but yet clearly enough for practical purposes. And thus this guarantee of nature makes it a duty that we should labour for this end, an end which is no mere chimera”, Kant (n. 4), at 157. [↑](#footnote-ref-157)
158. See North Atlantic Treaty (n. 5), Art 2. [↑](#footnote-ref-158)
159. Reid (n. 6), at 133. [↑](#footnote-ref-159)
160. M. Hudson, *Synopsis of the Geneva Protocol for the Pacific Settlement of International Disputes. What it is, What it Means to World Peace, What it Means to America* (The League of Nations Non-Partisan Association: New York, 1924), 3. [↑](#footnote-ref-160)
161. H. Wehberg, E.H. Zeydel, ‘The outlawry of war’ (1931) *A series of lectures delivered before the Academy of International Law at The Hague and in the Institut universitaire de hautes études internationales at Geneva*, 27-30. [↑](#footnote-ref-161)
162. W. Churchill, ‘The Sinews of Peace’ speech, available at: <<https://winstonchurchill.org/resources/speeches/1946-1963-elder-statesman/the-sinews-of-peace/>>, (accessed 4 August 2023). [↑](#footnote-ref-162)
163. Ibid. [↑](#footnote-ref-163)
164. “At about the same time the Soviet Government, having in 1945 refused to renew its 20-year-old friendship treaty with Turkey, revived a claim to two provinces of eastern Turkey, and demanded a share in the control of the Dardanelles”. Goodhart (n. 137), at 211. [↑](#footnote-ref-164)
165. “What was the Atlantic Alliance in 1949? – The reasons which led to the creation of the Alliance (1) Failure of the United Nations (2) Expansionist policy of the USSR (3) Success of the Alliance – Communist expansion checked”: North Atlantic Treaty Organization, *Future Tasks of the Alliance*, DPA/67/2007 (1967); North Atlantic Treaty Organization, *Draft* *Report of Mr. Spaak on ‘The Ideological Foundation and the Unity of the Alliance’* (1967), available at: <https://archives.nato.int/draft-report-by-mr-spaak-rapporteur-of-sub-group-2-ideological-foundation-and-unity-of-alliance-19-september-1967-fre-1>, (accessed 4 August 2023). [↑](#footnote-ref-165)
166. Staercke (n. 145), at ix. *See also* Insall and Salmon (n. 136), at ix. [↑](#footnote-ref-166)
167. In 1943, Senator Truman said: “I am just as sure as I can be that this World War is the result of the 1919-1920 isolationist attitude …”, C. Clifford, ‘A Land Mark of the Truman Presidency’, in: Sherwen (ed.), *NATO’s Anxious Birth. The Prophetic vision of the 1940s* (C. Hurst and Company: London, 1985), 1. [↑](#footnote-ref-167)
168. Reid (n. 6), at 126. [↑](#footnote-ref-168)
169. The Truman Doctrine, 1947: “Truman also argued that the United States was compelled to assist “free peoples” in their struggles against “totalitarian regimes,” because the spread of authoritarianism would “undermine the foundations of international peace and hence the security of the United States” … Truman argued that the United States could no longer stand by and allow the forcible expansion of Soviet totalitarianism into free, independent nations, because American national security now depended upon more than just the physical security of American territory”. U.S. Department of Stat, Office of the Historian, *The Truman Doctrine, 1947*, available at: <<https://history.state.gov/milestones/1945-1952/truman-doctrine>>, (accessed 4 August 2023). [↑](#footnote-ref-169)
170. Gladwyn Jebb, Assistant Undersecretary of State for the United Kingdom Foreign Affairs in 1948. [↑](#footnote-ref-170)
171. Sir Ivone Augustine Kirkpatrick, Permanent Under-Secretary of State for Foreign Affairs (the highest-ranking civil servant in the Foreign Office) in 1948. Sir Orme Sargent, Permanent Under-Secretary in the British Foreign and Commonwealth Office (different from the Parliamentary Under-Secretary of State for Foreign Affairs) in 1948. [↑](#footnote-ref-171)
172. Insall and Salmon (n. 136), at 233-234. [↑](#footnote-ref-172)
173. President Truman’s special message to the Congress on the Threat to the Freedom of Europe delivered to a joint congressional session on 17 March 1948, available at: <www//trumanlibrary.org/publicpapers/index.php?pid=1417>, (accessed 4 August 2023). [↑](#footnote-ref-173)
174. Reid (n. 6), at 40-41. Reid refers to a memo prepared by George Kennan delivered to the British Ambassador Lord Inverchapel. Kennan was director of the policy planning staff of the State Department. [↑](#footnote-ref-174)
175. The National Archives, *Foreign Office: Political Departments: General Correspondence from 1906-1966,* FO 371/68068A, AN1411/1195/45/G (1948) (Telegram between Lord Inverchapel (Washington) to Mr. Bevin dated 31 March 1948), in: Insall and Salmon (n. 136), at 140. [↑](#footnote-ref-175)
176. “The making of the North Atlantic treaty was a lengthy and difficult task. It was much lengthier and more difficult than any of us who were concerned with the first state of the negotiations thought it would be”: Reid (n. 6), at 45. [↑](#footnote-ref-176)
177. “NATO was simply a necessity. The developing situation with the Soviet Union demanded the participation of the United States in the defence of western Europe. Any other solution would have opened the area to Soviet domination”: C. Bohlen, *Witness to History 1929-1969* (WW Norton: New York, 1973), at 267-268. [↑](#footnote-ref-177)
178. The North Atlantic Treaty was forged through four series of negotiations. The first round ran from 22 March to 1 April 1948 (known as the ‘secret negotiations’), the second from 6 July to 10 September 1948, the third from 10 to 24 December 1948, and the fourth from 10 January to 28 March 1949. [↑](#footnote-ref-178)
179. A. Danchev, ‘Taking the Pledge: Oliver Franks and the Negotiations of the North Atlantic Treaty’ (1991) 15 *Diplomatic History* 199, 204. [↑](#footnote-ref-179)
180. Wiebes and Zeeman (n. 142), at 351-363. Insall and Salmon (n. 136) , at xiii. *See also* The National Archives (Foreign Office document FO 371/68067, AN1276/1195/45/G) (n. 175); Insall and Salmon (n. 136), at 128-130. [↑](#footnote-ref-180)
181. North Atlantic Treaty Organization (n. 115), cover page: The document used as materials the first edition of the NATO Handbook, the speeches made for the signature of the NAT, and materials from Ismay’s essay. For the latter, see Ismay (n. 75). [↑](#footnote-ref-181)
182. A thorough analysis of France’s withdrawal can be found in E. Stein, D. Carreau, ‘Law and Peaceful Change in a Subsystem: “Withdrawal” of France from the North Atlantic Treaty Organization’ (1968) 62 *AJIL* 577. This work relies on J. Charpentier, ‘Organisation de l’Europe: Le Retrait Français de l’OTAN’ (1966) 12 *Annuaire Français de Droit International* 409, 411. [↑](#footnote-ref-182)
183. United States Senate Resolution 239, of 11 June 1948 (Vandenberg Resolution). [↑](#footnote-ref-183)
184. D. Cook, *Forging the Alliance. NATO, 1945-1950,* (Arbor House/William Morrow: New York, 1989), 157. [↑](#footnote-ref-184)
185. Kaplan (n. 22), at 218. [↑](#footnote-ref-185)
186. “That the Senate reaffirm the policy of the United States to achieve international peace and security through the United Nations so that armed force shall not be used except in the common interest …” See United States Senate (n. 184). [↑](#footnote-ref-186)
187. Reid (n. 6), at 46. [↑](#footnote-ref-187)
188. See telegram between Sir O. Franks (Washington) to Mr. Bevin (18 September 1948), in: Insall and Salmon (n. 136), at 250-251. [↑](#footnote-ref-188)
189. J. Milloy, *The North Atlantic Treaty Organization, 1948-1957: Community Or Alliance?* (McGill-Queen’s University Press: Québec, 2006), 26. [↑](#footnote-ref-189)
190. The National Archives, *CAB 129 Post War Memoranda*, CAB 129/30 (1948), 1 [CP(48)249] 6 [15], 6 [19], in: Insall and Salmon (n. 136), at 266-267. [↑](#footnote-ref-190)
191. Ibid., at 267 [20]. [↑](#footnote-ref-191)
192. The National Archives, *Defence of Western Europe. Code 72, file 2307*

     FO 371/73083 Z10182/2307/72/G (1948) (Telegram between Mr. Hoyer Millar (Washington) to Sir Kirkpatrick, dated 11 December 1948), in: Insall and Salmon (n. 136), at 296-297. [↑](#footnote-ref-192)
193. The National Archives, *Foreign Office: Political Departments: General Correspondence from 1906-1966,* FO 371/68068A, AN1411/1195/45/G (1948) (Telegram between Lord Inverchapel (Washington) to Mr. Bevin dated 31 March 1948), in: Insall and Salmon (n. 136), at 297. [↑](#footnote-ref-193)
194. Ibid., at 301. [↑](#footnote-ref-194)
195. Ibid., at 304. [↑](#footnote-ref-195)
196. The United States had important military bases in Italy. [↑](#footnote-ref-196)
197. The National Archives, *Foreign Office: Political Departments: General Correspondence from 1906-1966,* FO 371/68068A, AN1411/1195/45/G (1948) (Telegram between Lord Inverchapel (Washington) to Mr. Bevin dated 31 March 1948), in: Insall and Salmon (n. 136), at 305. [↑](#footnote-ref-197)
198. The National Archives, *Defence (*Foreign Office, Private Offices: Various Ministers' and Officials' Papers*)*, FO 800/454, Def/48/101 (1948), (Communication from Mr. Bevin to Mr. Attlee, dated 31 December 1948), in: Insall and Salmon (n. 136), at 311. [↑](#footnote-ref-198)
199. “Throughout these negotiations the Soviet Government did their best to prevent the conclusion of the Treaty. On the 29th January, 1949, they inveighed against the Brussels Pact and warned all Europeans that a North Atlantic Alliance was simply an instrument for furthering the imperialist aims of the Anglo-Saxon Powers. On the 31st March, they presented a memorandum to the twelve prospective signatories claiming that the Treaty was contrary to the United Nations Charter and to the decisions of the Council of Foreign Ministers. The twelve countries replied in a joint note delivered to Russia two days later. It stated quite simply, in a mere 21 lines, that the text of the Treaty was the best answer to Soviet allegations, since it showed beyond a shadow of doubt that the Alliance was not aimed against any nation or group of nations, but only against armed aggression”, Ismay (n. 75), at 11. *See also* The National Archives, *North Atlantic Treaty: ratifications; Soviet objections to Pact; meeting of Foreign Ministers; talks on security; signature by Secretary of State in Washington; administration; staff matters; procedural rules*, FO 371/79918, ZW12/1071/170 (1949) (Minute from Mr. Hankey to Sir W. Strang, dated 1 April 1949), in: Insall and Salmon (n. 136), at 450. [↑](#footnote-ref-199)
200. M. Carlyle, *Documents on International Affairs*, *1949-1950* (Oxford University Press: Oxford, 1953), 245. [↑](#footnote-ref-200)
201. J. Baylis, *The Diplomacy of Pragmatism: Britain and the Formation of NATO, 1942–49* (McMillan Press Limited: London,1993), 104. [↑](#footnote-ref-201)
202. The National Archives, *Defence of Western Europe: proposed North Atlantic Pact. Code 72, file 1074 (papers 1675 - 1774)*, FO 371/79228, ZW1718/1074/72/G (1949) (Mr. Bevin to Sir O. Franks (Washington), dated 23 February 1949), in: Insall, Salmon (n. 136) at 395. *See also* North Atlantic Council, *Article 2 Of The North Atlantic Treaty - Note By The United Kingdom Delegation*, C-M(56)3 (1956); North Atlantic Council, *The Implementation of Article 2 of the North Atlantic Treaty*, C-M(56)5) (1956). [↑](#footnote-ref-202)
203. North Atlantic Treaty (n. 5), Art 5: “The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action *as it deems necessary*, including the use of armed force, to restore and maintain the security of the North Atlantic area …” (emphasis added). [↑](#footnote-ref-203)
204. “The pledge in the Rio treaty was much weaker. It was only “to assist in meeting the attack … The members of the North Atlantic alliance undertook to consider an armed attack on one to be an attack on all. Each undertook to come forthwith to the assistance of an ally which was attacked. Each undertook that this assistance would consist of much action as it deemed necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area”, in Reid (n. 6), at 145, 156. [↑](#footnote-ref-204)
205. There is a contradiction between what Reid shows as the interpretations of the Treaty (Reid, (n. 6), at 248), and those that Insall and Salmon present (Insall and Salmon (n. 136), at 434-435). Reid claims the source of the text he presents is: United States Department of State, *Foreign Relations of the United States 1949, Volume IV (Minutes of the Eighteenth Meeting of the Washington Exploratory Talks on Security, March 15, 1949)*, 840.20/3–1549 (1949), in Reid (n. 6), at 222-223. On the other hand, Insall and Salmon reproduce a telegram from Franks to Bevin, dated 15 March 1949: The National Archives, *Defence of Western Europe: proposed North Atlantic Pact*, FO/79236, Z2355/1074/72/G (1949). The first difference between both references is that the latter interprets Article 5 and the former does not. The second difference is that Reid’s reference defines the words ‘North Atlantic area north of the Tropic of Cancer’ and the Foreign Office does not. The text missing in Reid’s that appears in the United Kingdom’s archives is: “(4) (A) for the purpose of *Article 5 and 6, an armed attack* is understood to mean one of a sufficient gravity to endanger the maintenance of international peace and security” (emphasis added). The text in the United States’ Department of State’s archives is: “the words, ‘North Atlantic area north of the Tropic of Cancer’ in Article 6 mean the general area of the North Atlantic Ocean north of that line, including adjacent sea an air spaces between the territories covered by that Article”. [↑](#footnote-ref-205)
206. North Atlantic Treaty (n. 5), at Art 9: “The Parties hereby establish a *Council*, on which each of them shall be represented, *to consider matters concerning the implementation of this Treaty*. The Council shall be so organised as to be able to meet promptly at any time. The Council shall set up such *subsidiary bodies* as may be necessary; in particular it shall establish immediately a defence committee which shall recommend measures for the implementation of Articles 3 and 5” (emphasis added). [↑](#footnote-ref-206)
207. The National Archives, *North Atlantic Treaty: ratifications; Soviet objections to Pact; meeting of Foreign Ministers; talks on security; signature by Secretary of State in Washington; administration; staff matters; procedural rules*, FO 79918, ZW16/1071/170 (1949) (Sir O. Franks (Washington) to Foreign Office, dated 2 April 1949), in: Insall and Salmon (n. 136), at 451. [↑](#footnote-ref-207)
208. “The climax came on the 4th April, 1949. On that date, the North Atlantic Treaty was signed in Washington by the Foreign Ministers of Belgium (M. Paul-Henri Spaak), Canada (Mr. Lester B. Pearson), Denmark (Mr. Gustav Rasmussen), France (M. Robert Schuman), Iceland (Mr. Bjarni Benediktsson), Italy (Count Carlo Sforza), Luxembourg (M. Joseph Bech), the Netherlands (Dr. D. U. Stikker), Norway (Mr. Halvard M. Lange), Portugal (Dr. Jose Caerio da Matta), the United Kingdom (Mr. Ernest Bevin), the United States (Mr. Dean Acheson). It was ratified by the parliaments of the member countries within five months. Later, Greece and Turkey were invited to join the Alliance, to which they formally acceded on the 18th February, 1952”: Ismay (n. 75) at 11. [↑](#footnote-ref-208)
209. The National Archives, *North Atlantic Treaty: ratifications; Soviet objections to Pact; meeting of Foreign Ministers; talks on security; signature by Secretary of State in Washington; administration; staff matters; procedural rules*, FO 371/79920, ZW163/1071/170 (1949) (Sir O. Franks (Washington) to Mr. Attlee, dated 7 April 1949), in: Insall and Salmon (n. 136), at 452-454. [↑](#footnote-ref-209)
210. Kennedy (n. 70), at 899-903. [↑](#footnote-ref-210)
211. Reid (n. 6), at 49. [↑](#footnote-ref-211)
212. Ibid., at 45. [↑](#footnote-ref-212)
213. Kennedy (n. 70), at 899. [↑](#footnote-ref-213)
214. Ibid. [↑](#footnote-ref-214)
215. Ibid. [↑](#footnote-ref-215)
216. Ibid. [↑](#footnote-ref-216)
217. “[the North Atlantic Treaty] raises a number of problems which concern International Law generally, and others which involve the construction of the Charter of the United Nations”: Goodhart (n. 137), at 187. [↑](#footnote-ref-217)
218. Calleo (n. 125), at 25. [↑](#footnote-ref-218)
219. Kennedy (n. 70), at 901. [↑](#footnote-ref-219)
220. See North Atlantic Treaty (n. 5), Art. 9. [↑](#footnote-ref-220)
221. France’s withdrawal from NATO’s integrated military structure in 1966 illustrates this distinction between Alliance and Organization. France’s highest-ranking leaders stated that France left the ‘organization’ while it remained an active member of the ‘alliance’. The French Minister of Foreign Affairs: “[L]a France se retire d’une organisation sans base juridique contraignante, elle respecte un traité solennellement ratifié…le retrait de *l’organisation, mais non de l’alliance*.” (emphasis added), cited in Charpentier (n. 183), at 411. *See also* Stein and Carreau (n. 183), at 605. [↑](#footnote-ref-221)
222. Danchev (n. 180), at 204. The documents Danchev refers to have been recently compiled by the NATO ACO Office of Legal Affairs with the help of Lewis Bumgardner from the HQ SACT Legal Office and taken from the United States Department of State: United States Department of State (Office of the Historian), *Foreign Relations of the United States, 1948, Western Europe, Volume III— United States encouragement of a Western European Union; antecedents of the North Atlantic Treaty Organization; negotiations regarding a Nordic Defense Pact, Swedish neutrality, and possible Scandinavian participation in a Western European Union*, Documents 1-203 (1948); United States Department of State (Office of the Historian), *Foreign Relations of the United States, 1948, Western Europe, Volume IV, Participation by the United States in the North Atlantic Treaty Organization and in efforts for European integration; the military assistance program*, Documents 1-210 (1948). Additionally, in 2019 Emory University published an issue of the Emory Law Journal with a thorough analysis of the NAT made by NATO Legal Advisors: *The North Atlantic Treaty Organization's Seventieth Anniversary* (2019) 34 Emory International Law Review. [↑](#footnote-ref-222)
223. “The International Court of Justice, The International Court of Justice (1976) … The International Court (n. 7) at 105. M. Ris, ‘Treaty Interpretation and ICJ Recourse to *Travaux* *Préparatoires*: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties’ (1991) 14 *Boston College International and Comparative Law Review* 111, 111-112; *See also* J. Pratter, ‘À la Recherche des *Travaux* Préparatoires: An Approach to Researching the Drafting History of International Agreements’ (2005) *Global Lex*, available at <www.nyulawglobal.org/globalex/*Travaux*\_Preparatoires.html>, (accessed 4 August 2023). Pratter categorizes “a set of models of publication of *travaux préparatoires* that helps to clarify the situation for anyone who is about to embark on a search for them”: Model I – Unavailable (nonexistent or inaccessible); Model II – Collected under one title; Model III – Treaty-specific conference records; Model IV – Integrated with standard international organization documents. The one that would apply to the NAT would be Pratter’s Model I, unavailable (nonexistent or inaccessible). *See also* O. Corten, *Méthodologie du droit international public* (Editions de l’Université de Bruxelles : Bruxelles, 2017), at 244-245. [↑](#footnote-ref-223)
224. M. Smith, *NATO in the First Decade after the Cold War* (Kluwer Academic Publishers: Dordrecht, 2000), 1. [↑](#footnote-ref-224)
225. R. Monaco, *Manuale de Diritto Internazionale Pubblico (2e ed)* (UTET: Torino 1971), 641. “One of the most surprising phenomena in the arena of international organizations is the fact that an institution, like the one envisioned by the Atlantic Alliance, would become one of the most complex international structures in time. And this on the basis of very simple rules, such as those contained in the Treaty of April 4, 1949. The expansion of the objectives of the Alliance, as well as its structure have among other things given rise to delicate legal problems, such as those deriving from creation of numerous military bases in various countries” (courtesy translation). [↑](#footnote-ref-225)
226. On multilateral agreements, see n. 58. The bilateral agreements put bones and flesh to this NATO core *corpus legis*, or NATO ‘constitution’. These are the Supplementary Agreements to the multilateral agreements. The Paris Protocol is the general multilateral treaties with more supplementary agreements due to the numerous existing international military headquarters. Also to be included are exchanges of letters, and specific memoranda of understanding in so far as they are concluded in the fulfillment of the obligations set up in Article 3 of the North Atlantic Treaty (n. 5). [↑](#footnote-ref-226)
227. P. Reuter, ‘Les organes subsidiaires des organisations internationales’, in : *Hommage d’une génération de juristes au Président Basdevant* (Pédone : Paris, 1960), 423. [↑](#footnote-ref-227)
228. Jenks (n. 119), at 17-18. [↑](#footnote-ref-228)
229. Kaplan (n. 22), at 217. Reid (n. 6), at 33. [↑](#footnote-ref-229)
230. Ismay (n. 75), at 12. [↑](#footnote-ref-230)
231. Article 9 is a prospective for a transformative institution establishing an open-ended capacity of the North Atlantic Treaty to establish subsidiary bodies. “[T]he basis for an institutional evolution lay in Article 9”, in Stein and Carreau (n. 182), at 588. [↑](#footnote-ref-231)
232. “What was especially disappointing to me was that the treaty did not in the preamble or elsewhere establish an organization to be known as the North Atlantic community”, in Reid (n. 6) at 227. [↑](#footnote-ref-232)
233. Stein and Carreau (n. 182), at 587. [↑](#footnote-ref-233)
234. G. Hellmann, ‘A Brief Look at the Recent History of NATO’s Future’, in: Peters (ed.), *Transatlantic Tug-of-War: Prospect for the US-European Cooperation* (Lit-Verlag: Munster, 2006), at 196 [16]. [↑](#footnote-ref-234)
235. Reid (n. 6), at 228. [↑](#footnote-ref-235)
236. Smith (n. 224), at 5. [↑](#footnote-ref-236)
237. See n. 18. A detailed explanation on the terms ‘subsidiary bodies’ and ‘NATO bodies’, which are used indistinctly, is given in footnote 77. [↑](#footnote-ref-237)
238. “*Toute l’analyse visant à dégager la physionomie originale de l’organe subsidiaire réponse donc sur la distinction de la convention entre Etats et de l’acte imputable à l’organisation. Cette distinction est certaine : elle découle de la personnalité même de l’Organisation. Toutefois, précisément parce qu’elle se fonde sur une personnalité qui ne s’affirme pas encore dans sa plénitude … tout en maintenant le principe, conduira à lui apporter les compléments et les retouches qui permettent de tenir compte de la pratique*”, in Reuter (n. 227), at 422. [↑](#footnote-ref-238)
239. Bekker (n. 59), at 56. [↑](#footnote-ref-239)
240. Jenks (n. 119), at 18. [↑](#footnote-ref-240)
241. Goodhart (n. 137), at 219. [↑](#footnote-ref-241)
242. See North Atlantic Treaty (n. 5), Art 1. [↑](#footnote-ref-242)
243. Reichard (n. 21), at 100. [↑](#footnote-ref-243)
244. Charter of the United Nations (n. 7), Art 2 [3-4],: “3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. [↑](#footnote-ref-244)
245. Tomuschat, in: Simma (n. 8), 184. [↑](#footnote-ref-245)
246. North Atlantic Council, *Resolution on the Peaceful Settlement of Disputes and Differences between Members of the North Atlantic Treaty Organization*, (1956), available at: < <https://www.nato.int/cps/en/natohq/official_texts_17482.htm?selectedLocale=en>, (accessed 4 August 2023). [↑](#footnote-ref-246)
247. E. Beckett, ‘The North Atlantic Treaty, the Brussels Treaty, and the Charter of the United Nations’, in: Keeton and Schwarzenberger (eds.), *The Library of World Affairs no. 12* (Stevens and Sons Limited: London, 1950), 25. [↑](#footnote-ref-247)
248. “[T]he principle that the parties to any dispute, particularly any dispute the continuance of which is likely to endanger the maintenance of international peace and security, should seek a solution by peaceful means. Enshrined in Article 33 of the United Nations Charter, which also indicates a number of peaceful means which are available, this principle has also the status of customary law”: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Judgment, ICJ Reports 1986, 145 [290]. [↑](#footnote-ref-248)
249. Tomuschat, in: Simma (n. 8), 188. [↑](#footnote-ref-249)
250. Beckett (n. 247), 25. [↑](#footnote-ref-250)
251. R. Mayer, *Le Pacte de l’Atlantic, Paix ou Guerre?* (Presses Universitaires de  France: Paris, 1952), 20. [↑](#footnote-ref-251)
252. Randelzhofer/ Dörr, in: Simma (n. 8), at 205. [↑](#footnote-ref-252)
253. Ibid., at 206-207. [↑](#footnote-ref-253)
254. Ibid., at 213. [↑](#footnote-ref-254)
255. North Atlantic Treaty (n. 5), Art 2. [↑](#footnote-ref-255)
256. Wolfrum, in: Simma (n. 8), at 114. Note too that Wolfrum says that this paragraph differs from the Dumbarton Oaks text. [↑](#footnote-ref-256)
257. Reid (n. 6), at 177. [↑](#footnote-ref-257)
258. See Mayer (n. 251), at 21-22. [↑](#footnote-ref-258)
259. Set up by the Council on 5 May 1956 (see C-R(56)23) in order to "advise the Council on ways and means to improve and extend NATO cooperation in non-military fields and to develop greater unity within the Atlantic Community", the Committee comprised three ministers – Mr Halvard Lange, Norwegian Minister of Foreign Affairs, Mr Gaetano Martino, Italian Minister of Foreign Affairs, and Mr Lester B. Pearson, Canadian Secretary of State for External Affairs. The International Staff provided support for the preparation of their documents and administrative matters”: North Atlantic Treaty Organization, *The Committee of Three*, CT (2005), available at: <www.nato.int/archives/committee\_of\_three/index>, (accessed 4 August 2023). [↑](#footnote-ref-259)
260. North Atlantic Treaty Organization, *Report of the Committee of Three on Non-Military Cooperation in NATO*, CT-WP/7 (Final) (1956), 15 [64]. Available at <<https://www.nato.int/archives/committee_of_three/CT.pdf>> accessed 4 August 2023. [↑](#footnote-ref-260)
261. Reichard (n. 21), at 100. [↑](#footnote-ref-261)
262. North Atlantic Treaty (n. 5), Art 3. [↑](#footnote-ref-262)
263. Beckett (n. 247), at 25. [↑](#footnote-ref-263)
264. Reid (n. 6), at 267. [↑](#footnote-ref-264)
265. Ismay (n. 75), at 14. [↑](#footnote-ref-265)
266. Mayer (n. 251), at 22. [↑](#footnote-ref-266)
267. A. Munoz Mosquera, ‘Memorandum Of Understanding (MOU): A Philosophical and Empirical Approach (Part I)’ (2014) 34 *NATO Legal Gazette* 55. [↑](#footnote-ref-267)
268. North Atlantic Treaty (n. 5), Art 4. [↑](#footnote-ref-268)
269. *See* Reid (n. 6), at 247. “(3) Article 4 is applicable in the event of a threat in *any part of the world*, to the security of any of the Parties, including a threat to the security of their overseas territories” (emphasis added). [↑](#footnote-ref-269)
270. Kirgis (n. 43), at 374-376. [↑](#footnote-ref-270)
271. North Atlantic Treaty Organization, *The evolution of NATO political consultation 1949-1962,* NHO/63/1 (1963), c. II. [↑](#footnote-ref-271)
272. Report of the Committee of Three (n. 259). [↑](#footnote-ref-272)
273. Ibid., 11 [43]. [↑](#footnote-ref-273)
274. North Atlantic Treaty Organization (n. 271). [↑](#footnote-ref-274)
275. Report of the Council of Deputies, *Reorganization of NATO*, C9-D4-Final, 12 March 1952, at <<https://www.fransamaltingvongeusau.com/documents/dl2/h1/2.1.9.pdf>>, 4 August 2023 (para. 6). [↑](#footnote-ref-275)
276. “The distinction was thus clear: Article 9 was permissive; Article 4 was mandatory. Under Article 9 the North Atlantic Council had the right to discuss any matter concerning the implementation of the treaty. Under Article 4 each of the allies undertook a treaty obligation to participate in consultations with all the other allies whenever any one of them considered that the territorial integrity, political independence or security of itself or of any other ally was threatened”, in Reid (n. 6), at 165. [↑](#footnote-ref-276)
277. B. Eriksen, *The Committee System of the NATO Council* (Scandia Books: Oslo, 1967), at 66. [↑](#footnote-ref-277)
278. North Atlantic Treaty, Art 5. [↑](#footnote-ref-278)
279. Reid (n. 6), at 143. [↑](#footnote-ref-279)
280. “[There is nothing in the North Atlantic pact] which is not written within the four corners of the United Nations Charter,” 19 March 1949, *The Ottawa Journal* at <www.newspapers.com/newspage/48789894/>, (accessed 4 August 2023). [↑](#footnote-ref-280)
281. “In particular, Article 5 with its recognition that an armed attack against one of the parties is an attack against them all, and its reference to the use of force, is much stronger than at one time we thought possible”: The National Archives, *Defence of Western Europe: proposed North Atlantic Pact,*  FO 371/79238, Z2476/1074/72/G (1949) (Brief for Mr. Bevin for Consultative Council meeting, dated [14] March 1949), in: Insall and Salmon (n. 136), at 431. [↑](#footnote-ref-281)
282. Beckett (n. 247), at 28. [↑](#footnote-ref-282)
283. Randelzhofer/Nolte in Simma (n. 8), at 1402 (referring to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (n. 248) and *Oil Platforms (Islamic Republic of Iran v. United States)*, Judgment, *ICJ* *Reports 1996*). [↑](#footnote-ref-283)
284. United Nations General Assembly, *Definition of Aggression  
     General Assembly Resolution 3314 (XXIX*), A/RES/3314 (1974) :

     “Article 3

     Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

     (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,

     (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

     (c) The blockade of the ports or coasts of a State by the armed forces of another State;

     (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

     (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

     (f) The action of a State in allowing its temtory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

     (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

     Article 4

     The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

     Article 5

     1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

     2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.

     3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

     Article 6

     Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

     Article 7

     Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration … ”. . [↑](#footnote-ref-284)
285. Randelzhofer/Nolte, in: Simma (n. 8), at 1402. [↑](#footnote-ref-285)
286. A.K. Henrikson, ‘The United Nations and Regional Organization: “King-Links” of a “Global Chain” (1996) 7 *Duke Journal of Comparative and International Law* 35, 42. *See also* Beckett (n. 247), at 29. [↑](#footnote-ref-286)
287. Randelzhofer/Nolte, in: Simma (n. 8), at 1425. [↑](#footnote-ref-287)
288. North Atlantic Treaty Organization, *NATO Secretary General, Lord George Robertson, Speech to the NATO Parliamentary Assembly, Ottawa, Canada, 9 October 2001* (2001), available at: <www.nato.int/docu/speech/2001/s011009a.htm>, (accessed 4 August 2023). [↑](#footnote-ref-288)
289. K. Klima, *Interpretations of Article 5 of the North Atlantic Treaty, 1949-2002* (Dudley Know Library/Naval Postgraduate School: Monterey, 2002), 83. [↑](#footnote-ref-289)
290. F. Hoffman, ‘Conflict in the 21st Century: The Rise of Hybrid Wars’ (2007) *Potomac Institute for Policy Studies*, 57. [↑](#footnote-ref-290)
291. On Hybrid Wars and Russia: “At one point during the Ukrainian crisis, Russia had 40,000 troops lined up on the Ukrainian border, but when it came to sowing instability in Ukraine, it was not conventional forces who were used, but rather unorthodox and varied techniques, which have been dubbed hybrid warfare … Russia is going to use special operations and intelligence forces, economic pressure, energy pressure, cyber-attacks and potential conventional force directly to achieve imperial goals. And is NATO willing to use any of those tools to prevent that or not? That’s what we need to see”. NATO Review, *Hybrid War – Hybrid Response?* (2014)*,* available at: <www.nato.int/docu/review/2014/Russia-Ukraine-Nato-crisis/Russia-Ukraine-crisis-war/EN/index.htm>, (accessed 4 August 2023). [↑](#footnote-ref-291)
292. Hoffman (n. 290), at 59. This has been the case of NATO, as the agreed in the 2018 Summit: “29. … We will *establish a Cyberspace Operations Centre in Belgium* to provide situational awareness and coordination of NATO operational activity within cyberspace …” (emphasis added): North Atlantic Treaty Organization, *Brussels Summit Declaration Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Brussels 11-12 July 2018*, PR (2018) 074 (2018), 1 [29]. [↑](#footnote-ref-292)
293. “[P]rovisions of the NAT were reinterpreted and given new meaning by the parties …”, Reichard (n. 21), at 103. [↑](#footnote-ref-293)
294. “21. Our nations have come under increasing challenge from both state and non-state actors who use hybrid activities that aim to create ambiguity and blur the lines between peace, crisis, and conflict.  While the primary responsibility for responding to hybrid threats rests with the targeted nation, NATO is ready, upon Council decision, to assist an Ally at any stage of a hybrid campaign.  *In cases of hybrid warfare, the Council could decide to invoke Article 5 of the Washington Treaty, as in the case of armed attack”* (emphasis added): North Atlantic Treaty Organization (Brussels Summit Declaration) (n. 292). [↑](#footnote-ref-294)
295. North Atlantic Treaty Organization, *Wales Summit Declaration Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Wales,* PR (2014) 120 (2014); North Atlantic Treaty Organization, *Warsaw Summit Communiqué Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 8-9 July 2016,* PR (2016) 100 (2016); North Atlantic Treaty Organization (Brussels Summit Declaration) (n. 292). [↑](#footnote-ref-295)
296. North Atlantic Treaty (n. 5), Art 6. [↑](#footnote-ref-296)
297. Note the contradiction between United Kingdom and United States (n. 205). *See also* Reid (n. 6), at 247; Insall and Salmon (n. 136), at 434-435. [↑](#footnote-ref-297)
298. Goodhart (n. 137), at 223. *See also* Grady (n. 134), at 182. “A strong policy argument can be made that once Article 5 is invoked, the limits in Article 6 no longer apply. If, for example, the Soviet Union had attacked NATO in Western Europe, this would have been a classic case for invocation of Article 5. Once Article 5 had been invoked in this type of situation, however, NATO could not be expected to confine its military operations to Western Europe. Certainly the military forces of NATO member states that were stationed in other parts of the world might have participated in actions against the Soviets. To hold otherwise would pose a grave danger; for example, if the Soviets had launched a small-scale attack on purely European forces in Western Europe while simultaneously massing huge numbers of forces in the Bering Straits for an attack on Alaska, NATO would have been justified in using force in Western Europe, but NATO would not have been justified in using force in the Bering Straits. Similarly, the United States could not use force in the Bering Straits by itself under Article 51 of the UN Charter because its forces were not attacked!” [↑](#footnote-ref-298)
299. H. Schmidt, ‘The transatlantic alliance in the 21st century’ (1999) *NATO Review (50th Anniversary)*, 22-23. [↑](#footnote-ref-299)
300. North Atlantic Treaty Organization, *1991 Strategic Concept agreed by the Heads of State and Government participating in the Meeting of the North Atlantic Council*, (1991), 1 [12]. [↑](#footnote-ref-300)
301. Ibid.: “Alliance security interests can be affected by other risks of a wider nature, including proliferation of weapons of mass destruction, disruption of the flow of vital resources and actions of terrorism and sabotage. Arrangements exist within the Alliance for consultation among the Allies under Article 4 of the Washington Treaty and, where appropriate, coordination of their efforts including their responses to such risks”. [↑](#footnote-ref-301)
302. “3. The dangers of the Cold War have given way to more promising, but also challenging prospects, to new opportunities and risks. A new Europe of greater integration is emerging, and a Euro-Atlantic security structure is evolving in which NATO plays a central part … 24. Any armed attack on the territory of the Allies, from whatever direction, would be covered by Articles 5 and 6 of the Washington Treaty. However, Alliance security must also take account of the global context. Alliance security interests can be affected by other risks of a wider nature, including acts of terrorism, sabotage and organised crime, and by the disruption of the flow of vital resources. The uncontrolled movement of large numbers of people, particularly as a consequence of armed conflicts, can also pose problems for security and stability affecting the Alliance. Arrangements exist within the Alliance for consultation among the Allies under Article 4 of the Washington Treaty and, where appropriate, co-ordination of their efforts including their responses to risks of this kind”. North Atlantic Treaty Organization (1999 Strategic Concept) (n. 300), at [3 and 24]. [↑](#footnote-ref-302)
303. M. Metreveli, ‘Legal Aspects of NATO’s Involvement in the Out-of-Area Peace Support Operations’ (2003) *NATO-EAPC Research Fellowship 2001-2003 Final Report*, xxx. [↑](#footnote-ref-303)
304. North Atlantic Treaty Organization, *Active Engagement, Modern Defence Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organisation adopted by Heads of State and Government in Lisbon (2010 Strategic Concept),* (2010), 1 [5 and 31]. [↑](#footnote-ref-304)
305. This term was used in the Foreign Office document dated 2 March 1949: The National Archives, *Defence of Western Europe: proposed North Atlantic Pact*, FO 371/79232, Z2042/1074/72/G (1949) (Minute from Mr Schukburgh to Sir G. Jebb), in: Insall, Salmon (n. 136), at 405. [↑](#footnote-ref-305)
306. North Atlantic Treaty (n. 5), Art 7. [↑](#footnote-ref-306)
307. Insall and Salmon (n. 136), at 405. [↑](#footnote-ref-307)
308. Charter of the United Nations (n. 7), Art 103: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”. [↑](#footnote-ref-308)
309. Beckett (n. 247), at 30-31. [↑](#footnote-ref-309)
310. North Atlantic Treaty (n. 5), Art 8. [↑](#footnote-ref-310)
311. Reid (n. 6), at 247: “(5) With reference to Article 8, it is understood that *no previous international engagements to which any of the participating states are parties would in any way interfere* with the carrying out of their obligations under this Treaty”. *See also* Insall and Salmon (n. 136), at 434-435. [↑](#footnote-ref-311)
312. Paulus/Ließ, in: Simma (n. 8), at 2118. [↑](#footnote-ref-312)
313. Reichard (n. 21), at 148. [↑](#footnote-ref-313)
314. Ibid. Reichard refers to C. von Buttlar, ‘The EU’s new relations with NATO shuttling between relations and autonomy’ (2003) 6 ZEuS 399, 405. [↑](#footnote-ref-314)
315. Three bodies hold legal personality in NATO, i.e., the NATO HQ (represented by the Secretary General and his/her International Staff), the Supreme Headquarters Allied Powers Europe (SHAPE), and the Headquarters, Supreme Commander Allied Transformation (HQ SACT). [↑](#footnote-ref-315)
316. See n. 225. [↑](#footnote-ref-316)
317. 1982 Yearbook of the International Law Commission (Vol. II), *Draft articles on the law of treaties between States and international organizations or between international organizations with commentaries* *(34th Session),* UN Doc. A/ 37/ 10 (1982), 17 . [↑](#footnote-ref-317)
318. Granting privileges and immunities to an international organization is “founded on the principle underlying the legal status of those organizations, i.e. the guarantee afforded by the host country that they can, with complete freedom and independence, exercise on its territory their constitutional and statutory activities or any other activity connected with the functions assigned to them,” 1986 Yearbook of the International Law Commission (Vol. II), *Third Report of the Special Rapporteur, Mr. Leonardo Diaz Gonzalez (38th session of the ILC)*, UN Doc. A/CN.4/SER.A/1986 Add.1 (Part 1) (1986), 167 [30]. [↑](#footnote-ref-318)
319. Paulus/Ließ, in: Simma (n. 8), at 2137. [↑](#footnote-ref-319)
320. North Atlantic Treaty (n. 5), Art. 9. A. Munoz Mosquera, ‘The North Atlantic Treaty: Article 9 and NATO’s Institutionalization’ (2019) 34 *Emory International Law Review* 149*,* 149. [↑](#footnote-ref-320)
321. Reid (n. 6), at 247 “(6) The Council, as Article 9 specifically states, is established ‘to consider matters concerning the implementation of the Treaty’ and is empowered ‘to set up such subsidiary bodies as may be necessary’. This is a broad rather specific definition of functions and is not intended to exclude the performance at appropriate levels in the organization of such planning for the implementation of Article 3 and 5 or other functions as the Parties may agree to be necessary”. *See also* Insall and Salmon (n. 136), at 434-435. [↑](#footnote-ref-321)
322. Reichard (n. 21), at 101. [↑](#footnote-ref-322)
323. Kennedy (n. 70), at 943. [↑](#footnote-ref-323)
324. Mayer (n. 251), at 44-45. [↑](#footnote-ref-324)
325. Ismay (n. 75), at 15. [↑](#footnote-ref-325)
326. Ibid. *See also* The National Archives, *Defence of Western Europe: proposed North Atlantic Pact*, FO 371/79239, Z2564/1074/72/G (1949) (Sir O. Franks (Washington) to Mr Bevin, dated 23 March 1949), in: Insall and Salmon (n. 136), at 445. [↑](#footnote-ref-326)
327. The idea of ‘institutional momentum’ is partially drawn from Kennedy (n. 70), at 903-951. [↑](#footnote-ref-327)
328. Reid (n. 6), at 267 (emphasis added). Reid takes this interpretation verbatim from the wording of the ‘Minutes of the Eighteen Meeting of the Washington Exploratory Talks on Security, March 15, 1948’ held in Washington: United States Department of State, *Foreign Relations of the United States, 1949, Western Europe, Volume IV*, 840.20/3-1549 (1974), 223-224. [↑](#footnote-ref-328)
329. International Law Commission, *Draft articles on the responsibility of international organizations, with commentaries*, A/66/10 (2011), 52 (emphasis added). [↑](#footnote-ref-329)
330. North Atlantic Treaty Organization, *Protocol on the Status of Allied Headquarters*, Document D-D(52)2 (1952), in: J. Snee, ‘NATO Agreements on Status: *Travaux* Préparatoires’ (1961) 54 *International Law Studies, Naval War College* 592. Note that J. Snee’s works consisted in collecting all documents used during the discussions of the NATO SOFA, the Ottawa Agreement and the Paris Protocol. [↑](#footnote-ref-330)
331. North Atlantic Treaty Organization, *Defence Committee,* available at: <archives.nato.int/defence-committee-2>, (accessed 4 August 2023). [↑](#footnote-ref-331)
332. H. Ismay (n. 75), at 72 (emphasis added). *See also* North Atlantic Treaty Organization, *Memorandum of the International Planning Team on ‘The Phasing out of the NAOROG’*, Standing Group SCM-1750-51 (1951), 6. [↑](#footnote-ref-332)
333. North Atlantic Treaty (n. 5), Art 10. [↑](#footnote-ref-333)
334. Ibid., Art 11-13. [↑](#footnote-ref-334)
335. The National Archives, *Defence of Western Europe: proposed North Atlantic Pact,* FO 371/79232, Z2042/1074/72/G (1949) (Minute from Mr Shuckburgh to Sir G. Jebb, dated 2 March 1949), in: Insall and Salmon (n. 136), at 405. [↑](#footnote-ref-335)
336. Vincent, Straus and Biondi (n. 117), at 71. [↑](#footnote-ref-336)
337. Kennedy (n. 70), at 972. [↑](#footnote-ref-337)
338. North Atlantic Treaty Organization, *Study on NATO Enlargement* (1995),available at: <www.nato.int/cps/en/natolive/official\_texts\_24733.htm>, (accessed 4 August 2023). [↑](#footnote-ref-338)
339. Ibid., 1 [12]. [↑](#footnote-ref-339)
340. Ibid., 1 [3]. [↑](#footnote-ref-340)
341. “It may be noted that the provision is applicable to all European States, and is not limited to those along the Atlantic seaboard. It is applicable also to all European States, whether Members of the United Nations or not, and whether former enemy States or not”. Goodhart (n. 137), at 224. [↑](#footnote-ref-341)
342. Beckett (n. 247), at 30. [↑](#footnote-ref-342)
343. Mayer (n. 251), at 48. [↑](#footnote-ref-343)
344. “The MAP was launched in April 1999 at the Alliance’s Washington Summit to help countries aspiring to NATO membership in their preparations. The process drew heavily on the experience gained during the accession process of the Czech Republic, Hungary and Poland, which became members in the Alliance’s first post-Cold War round of enlargement in 1999”. ‘Membership Action Plan’, *see* n. 44. [↑](#footnote-ref-344)
345. North Atlantic Treaty Organization, *Membership Action Plan*, PR NAC-S (99) 66 (1999), 1 [4]. [↑](#footnote-ref-345)
346. A. Belke, I. Bordon, I. Melnykovska et al., ‘Prospective NATO or EU Membership and Institutional Change in Transition Countries’ (2009) 4483 *Institute for the Study of Labor Discussion Paper (Series)*, 2. See also page 14: “One novel finding of this study is that, in addition to EU accession conditionality, the perspective of NATO membership has also influenced institutional development positively. Measuring this influence by the existence of a NATO Membership Action Plan for a country, we find strong evidence for this positive influence. Using different estimators which account for unobserved heterogeneity and endogeneity we find a sizeable positive and significant coefficient across many different model specifications. While, to our knowledge, this influence of NATO has been neglected in the existing literature, we offer an explanation of this influence similar to that used in earlier papers for the EU membership perspective. Via one of its five criteria for membership, the NATO induces countries to commit to the rule of law and human rights, the democratic control of the armed forces, and to settle conflicts peacefully. In contrast to the EU and other international organizations, NATO is able to offer regional and international security as a big “carrot” in return for institutional development and is, therefore, able to provide additional incentives beyond economic incentives”. [↑](#footnote-ref-346)
347. Goodhart (n. 137), at 224-225. [↑](#footnote-ref-347)
348. Mayer (n. 251), at 45-47. [↑](#footnote-ref-348)
349. Ibid., at 51. [↑](#footnote-ref-349)
350. “The Treaty is therefore more precise on this point that in the Charter which has no express provision concerning resignation by a Member State. This omission was deliberate as it was thought that a definite statement on this point might hereafter encourage recalcitrant States to withdraw”. Goodhart (n. 136), at 225. [↑](#footnote-ref-350)
351. Witschel, in: Simma (n. 8), at 2237. [↑](#footnote-ref-351)
352. Mayer (n. 251), at 51. [↑](#footnote-ref-352)
353. The National Archives, *Defence of Western Europe: proposed North Atlantic Pact*, FO 371/79232, Z2042/1074/72/G (1949) (Minute from Mr Shuckburgh to Sir G. Jebb, dated 2 March 1949), in: Insall and Salmon (n. 136), at 406. [↑](#footnote-ref-353)
354. Webber, Sperlin and Smith (n. 35), at 26-27. [↑](#footnote-ref-354)
355. For this conclusion, *see* Stein and Carreau (n. 183), at 595, 598-605. *See also* J. Gaddis, *We Now Know: rethinking Cold War History* (Oxford University Press: New York, 1997), at 219: “The fact that NATO could absorb and adapt to as easily as it did the challenge from Paris, while the Warsaw Pact felt obliged to resist and ultimately crush the one from Budapest; the fact that it is so difficult in retrospect to imagine these roles being reversed; the fact that neither side at the time gave serious thought to behaving otherwise – all of this suggests an important difference between the two great Cold War coalitions, which is that one was resilient and the other brittle. NATO, we can now see, was an *organic* Alliance; it proved to be deeply rooted, in tune with its environment, capable even of shedding branches and limbs when necessary without serious damage”. [↑](#footnote-ref-355)
356. Stein and Carreau (n. 182), at 625. *See also* Kay (n. 79), at 43. [↑](#footnote-ref-356)
357. North Atlantic Treaty (n. 5), Art 14. [↑](#footnote-ref-357)
358. See North Atlantic Treaty Organization (Final Communiqué of the first Session of the North Atlantic Council) (n. 18). [↑](#footnote-ref-358)
359. Mayer (n. 251), at 60-78. [↑](#footnote-ref-359)
360. North Atlantic Treaty Organization, *Possible Implication for NATO if it were to become a Regional Organization in the Terms of Chapter VIII of the United Nations Charter*, CT-D/4 (1956), 2 [1]. *See also* Walter, in: Simma (n. 8), at 1446 and 1457. [↑](#footnote-ref-360)
361. “The [regional] organization may or may not have a constitutive treaty instrument. Additionally, collective self-defense organizations were less within Charter VIII’s contemplation than were organizations that would engage in intra-regional politicking and dispute settlement”. S. Paliwal, ‘The Primacy of Regional Organizations in International Peacekeeping: The African Example’ (2010) 51 *Va. J. Int'l L.* 185, at 193. Walter argues “[t]he various activities of NATO in the conflict relating to Yugoslavia cannot be qualified as self-defence- no member State of NATO was attacked-nor do they fit under the classical scheme of collective security, because Yugoslavia was not a member of NATO. In sum, for the application of Chapter VIII the distinction between organizations of collective security and organizations of collective self –defence has become largely obsolete and must be replaced by an analysis which seeks to establish the legal basis for each individual action”. Walter, in: Simma (n. 8), at 1452-1453. [↑](#footnote-ref-361)
362. The National Archives, *CAB 129 Post War Memoranda*, CAB 129/23 (1948), [CP(48)46] (Memorandum Mr Bevin for the Cabinet on Western Union, dated 19 February 1948), in: Insall and Salmon (n. 136), at 61. See also, *inter alia*, the following documents: The National Archives, *British foreign policy related to the Western Union. Proposed treaties with Benelux Countries. Draft Five Power Treaty*, FO 371/73046, Z894/273/72/G (1948), in: Insall and Salmon (n. 136), at. 52; The National Archives, *British foreign policy related to the Western Union. Proposed treaties with Benelux Countries. Draft Five Power Treaty*, FO 371/73050, Z1827/273/72/G (1948), in: Insall and Salmon (n. 87), at 84; The National Archives, *British foreign policy related to the Western Union. Proposed treaties with Benelux Countries. Draft Five Power Treaty*, FO 371/73050, Z1930/273/72/G (1948), in: Insall and Salmon (n. 136), at 88; The National Archives, *The possibility of Soviet demands on Norway; consideration of the advisability of a Regional Atlantic Pact of mutual assistance by all countries threatened by Russia*, PREM 8/788 (1948), in: Insall and Salmon (n. 136), at 97; The National Archives, *Meetings of the Consultative Council of the Five-Power Brussels Treaty*, FO 371/79242, Z2108/1074/72/G (1948), dated 8 March 1948 (Insall, Salmon (n. 136), at 415. [↑](#footnote-ref-362)
363. T. Gazzini, ‘NATO Coercive Military Activities in the Yugoslav Crisis (1992-1999)’ (2001) 12 *EJIL* 391, 415. [↑](#footnote-ref-363)
364. Carlyle (n. 200), at 246. Carlyle reproduces the statement made by the Russian [Soviet Union] Ambassador in Oslo to the Norwegian Ministry of Foreign Affairs on 29 January 1949. [↑](#footnote-ref-364)
365. Ibid. [↑](#footnote-ref-365)
366. Ibid., at 248. Carlyle refers to a second Russian [Soviet] note, offering a non-aggression pact to Norway on 5 February 1949. *See also* Mayer (n. 251), at 61. [↑](#footnote-ref-366)
367. M. Inzov, *The North Atlantic Treaty – A Weapon of Aggression* (TRUD, - April 7, 1949), cited by Goodhart (n. 137), at 228. [↑](#footnote-ref-367)
368. “If it is true, as can hardly be doubted, that the U.S.S.R. has actively interfered in the internal affairs of other States, such as Czecho-Slovakia”: Ibid., at 227. *See also* RS/67/12 (n. 115), at 3 [3]. [↑](#footnote-ref-368)
369. R. Taft, ‘A Conservative Opposes the Treaty’, in L. Kaplan (ed.), *NATO and the Policy of Containment* (Raytheon Education Company: Lexington, 1968), 18. [↑](#footnote-ref-369)
370. H. Wallace, ‘A Liberal Testifies Against the Treaty’, in L. Kaplan (ed.), *NATO and the Policy of Containment* (Raytheon Education Company: Lexington, 1968), 23. [↑](#footnote-ref-370)
371. Mayer (n. 251), at 61. [↑](#footnote-ref-371)
372. Taft (n. 369). [↑](#footnote-ref-372)
373. Wallace (n. 370), at 23. [↑](#footnote-ref-373)
374. Mayer (n. 251), at 61. [↑](#footnote-ref-374)
375. Ibid., at 64. [↑](#footnote-ref-375)
376. Note that Claude considers that “NATO represents a more practicable and effective approach to the problem of containing Soviet expansiveness than the effort to establish a collective security system would have been”. Claude argues that “NATO is a system of *selective* security, embodying the principle of some for some whereas collective security is dedicated to the concept of all for all … Far from contributing to the collective security ideal of disarmament, NATO is fundamentally concerned with the rearmament of its members in competition with the Soviet coalition”: Claude (n. 85), at 266. [↑](#footnote-ref-376)
377. Reid (n. 6), at 186 and Taft (n. 369), at 19. [↑](#footnote-ref-377)
378. “First, a voluntary agreement to remove the veto from many questions; second, maximum efforts to obtain agreement for a United Nations armed force and the reduction of national armaments; and third, a review of the charter by a general conference called under article 109 of the Charter”. See n. 35. [↑](#footnote-ref-378)
379. RS/67/12 (n. 115), at 3 [4]. [↑](#footnote-ref-379)
380. Claude (n. 85), at 265. [↑](#footnote-ref-380)
381. Reid (n. 6), at 186. Reid refers to a statement made by Lovett at the Ambassadors’ Committee on 14 January 1949 and is referenced by the document of Foreign Affairs, 1949, IV, 34, at <<https://history.state.gov/historicaldocuments/frus1949v04/pg_34>> accessed 4 August 2023. [↑](#footnote-ref-381)
382. Mayer (n. 251), at 65-66. [↑](#footnote-ref-382)
383. Wallace (n. 370), at 25. Wallace referenced an article of The Wall Street Journal and adds on that “[t]he pact not only rejects the basic principles upon which the United Nations was founded. It violates the plain provisions of the Charter”. In this regard, Wallace considers NATO a regional agreement under Article 52, and for this reason he argues that the NAT bypasses Article 53. On the other hand, Wallace affirms that NATO is just a military alliance and that self-defense per Article 51 cannot be the excuse to create one. [↑](#footnote-ref-383)
384. Ibid., at 24. [↑](#footnote-ref-384)
385. See Vienna Convention of the Law of the Treaties (n. 27), Arts 31, 32. [↑](#footnote-ref-385)
386. Insall and Salmon (n. 136). [↑](#footnote-ref-386)
387. The National Archives, *Atlantic Security Talks*, FO 371/68067, AN1325/1195/45/G (1948) (Telegram from Mr Bevin to Lord Inverchapel (Washington), dated 29 March 1948), in: Insall and Salmon (n. 136), at 137. [↑](#footnote-ref-387)
388. The National Archives, *Defence of Western Europe,* FO 371/73083, Z10274/2307/72/G (1948) (Telegram from Sir O. Franks (Washington) to Mr Bevin, dated 16 December 1948), in: Insall and Salmon (n. 136), at 298. [↑](#footnote-ref-388)
389. Reid (n. 6), at 186. [↑](#footnote-ref-389)
390. North Atlantic Treaty Organization (2010 Strategic Concept) (n. 304); North Atlantic Treaty Organization (Warsaw Summit Communiqué) (n. 295), 1 [2]: “NATO's essential mission is unchanged: to ensure that the Alliance remains an unparalleled community of freedom, peace, security, and shared values, including individual liberty, human rights, democracy, and the rule of law. We are united in our commitment to the Washington Treaty, the purposes and principles of the Charter of the United Nations (UN), and the vital transatlantic bond”. [↑](#footnote-ref-390)
391. Henrikson (n. 286), at 38-41. [↑](#footnote-ref-391)
392. Paraphrasing Ismay (n. 75), at 12-13. On NATO and the question of this being or not a regional organization see A. Munoz Mosquera and N. Chalanouli, ‘NATO Peace Support Operations: A Brief Institutional View’, in: Fernandez (ed.), *Peacekeeping: Global Perspectives, Challenges and Impacts* (Nova Publishers: New York, 2018). [↑](#footnote-ref-392)
393. D.W. Wainhouse, F. Bohannon, J. Knott et al., *International peacekeeping at the crossroads: national support—experience and prospects* (Johns Hopkins University Press: Baltimore MD, 1973), at 414-436. *See also* the Report of the Committee on Foreign Affairs of the French National Assembly, No. 7849, at 21-24. E. C. Smith, ‘Legal Aspects of the North Atlantic Treaty’ (1952) 20 *Geo. Wash. L. Rev.* 497, 500-501. See the ‘Agreed Interpretations of the Treaty’ dated 15 March 1949: “It is further understood that the Parties will, in their public statements, stress this primary purpose, recognized and preserve by the Article 51, *rather than any specific connection with Chapter VIII or other Article of the United Nations Charter*” (emphasis added). *See* Reid (n. 6), at 247; Insall and Salmon (n. 136), at 434-435. [↑](#footnote-ref-393)
394. B. Simma, *The Charter of the United Nations: A Commentary (2nd Ed.)*, (Oxford University Press: Oxford, 2002), 807-853. [↑](#footnote-ref-394)
395. Ibid., at 819. [↑](#footnote-ref-395)
396. Walter, in: Simma (n. 8), at 1446-1534. [↑](#footnote-ref-396)
397. Walter’s arguments do not coincide with Goodhart who argues that “the concept includes both the idea of some territorial relationship and of some common characteristic or principles”. Goodhart (n. 137), at 206. [↑](#footnote-ref-397)
398. This is an argument already presented by Kelsen in 1951: “[T]he system of collective security established by Chapter VII does not work, collective self-defense is, for the time being, the only effective means for the maintenance of international security applicable under the Chapter”, H. Kelsen, ‘Is the North Atlantic Treaty a Regional Arrangement?’ (1951) 45 *AJIL* 162, 163. [↑](#footnote-ref-398)
399. “But the wording of the Charter does not exclude organization of collective self-defense through regional arrangements even as a substitute for the paralyzed system of collective security”. Ibid., at 164. [↑](#footnote-ref-399)
400. Henrikson (n. 286), at 42. [↑](#footnote-ref-400)
401. Hummer/Schweitzer, in: Simma (n. 394), at 819. [↑](#footnote-ref-401)
402. “UN Docs. A/C.1/SC 597, paras. 39-40. A/C.1/SC 599, para. 21; A/C.1/SC 603, paras. 53-4; A/C.1/SC 674, paras. 51; A/C.1/SC 675, paras. 13, 29; A/C.1/SC 597, paras. 56-8” Ibid., in footnote 126. [↑](#footnote-ref-402)
403. Ibid. [↑](#footnote-ref-403)
404. Ibid., at 823. [↑](#footnote-ref-404)
405. Walter, in: Simma (n. 8), at 1448, 1452-1453. [↑](#footnote-ref-405)
406. “For the State of Department has belatedly recognized that if it were, any enforcement measure would require Security Council authorization under article 53 [and 54], the very procedure which the authors of the pact want desperately to avoid by bypassing the United Nations entirely”: Wallace (n. 370), at 25. [↑](#footnote-ref-406)
407. Walter, in: Simma (n. 8), at 1452. [↑](#footnote-ref-407)
408. Virally (n. 78), at 275. [↑](#footnote-ref-408)
409. Walter, in: Simma (n. 8), at 1450. [↑](#footnote-ref-409)
410. Adapted from the Preamble of the Charter of the United Nations (n. 7). [↑](#footnote-ref-410)
411. Virally (n. 127), at 287. [↑](#footnote-ref-411)
412. D.W. Bowett, ‘Collective Self-Defence under the Charter of the United Nations’ (1955-1956) 32 *British Yearbook International Law* 130, at 154. [↑](#footnote-ref-412)
413. Claude (n. 85), at 266-267. *See also* Buteux (n. 41), at 4-5, and R. Jordan (n. 55), at vii. [↑](#footnote-ref-413)
414. N. Henderson, *The Birth of NATO* (Westview Press: Boulder, 1983), 102-103. [↑](#footnote-ref-414)
415. CT-D/4 (n. 37). [↑](#footnote-ref-415)
416. Ibid., at 2. On this distinction, see Beckett (n. 247), at 15-18. In this regard and contrary to NATO and Beckett, Kelsen admits the possibility of not distinguishing between enforcement action and the exercise of the right of self-defense: Kelsen (n. 398), at 164. [↑](#footnote-ref-416)
417. Kelsen (n. 398), at 164. [↑](#footnote-ref-417)
418. “In paragraph 10 of resolution 836, the Security Council further decided that ‘... Member States, acting nationally or through regional organizations or arrangements, may take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary

     measures …”: United Nations Secretary-General, *Letter dated 18 April 1994 from the Secretary-General addressed to the President of the Security Council*, UN Doc. S/1994/466 (1994), 2 [2]. [↑](#footnote-ref-418)
419. “Authorizes Member States and relevant international organizations to establish the international security presence in Kosovo …”: United Nations Security Council, *Resolution 1244 (1999) Adopted by the Security Council at its 4011th meeting, on 10 June 1999*, UN Doc. S/RES/1244 (1999), 2 [7]. [↑](#footnote-ref-419)
420. “*Welcoming* the initiatives already taken by regional or sub regional organizations in the maintenance of international peace and security including the African Union, the European Union, the Economic Community of Central African States (ECCAS), and the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC) and the Eastern African Community (EAC), the Organization of American States (OAS), the Union of South American Nations (UNASUR), the Community of Latin America and Caribbean States (CELAC), the Caribbean Community and Common Market (CARICOM), the Collective Security Treaty Organization (CSTO), the League of Arab States (LAS), the Association of Southeast Asian Nations (ASEAN) and the Arab Maghreb Union (UMA)”. United Nations Security Council, *Resolution 2167 (2014) Adopted by the Security Council at its 7228th meeting, on 28 July 2014*, UN Doc. S/RES/2167 (2014), 4 [2-3]. [↑](#footnote-ref-420)
421. CT-D/4 (n. 360). [↑](#footnote-ref-421)
422. Kelsen (n. 398), at 164. [↑](#footnote-ref-422)
423. “NATO cannot be considered, in its present form, as a "regional arrangement or agency" within the meaning of Chapter VIII of the United Nations Charter”: CT-D/4 (n. 360), at 2. [↑](#footnote-ref-423)
424. Ibid., at 3. [↑](#footnote-ref-424)
425. “The point at issue has been sufficiently cleared by authoritative jurists to the effect that a definite distinction must be drawn between “measures of self-defence, individual or collective” as authorized by Article 51 of the Charter (and contemplated by the Treaty), and, on the other hand, “measures of enforcement” which do require prior authority from the Security Council and imply action decided for the purpose of the restoration of peace … The fact remains, however, that Article 53 of the United Nations Charter offers a margin of doubt for discussion and that any debate on its practical implications in the case of NATO becoming a regional organization, would tend to avoid any possible misunderstanding or hesitancy, the authors of the Treaty preferred to avoid any reference to regional agreements. This consideration still appears valid today”. Ibid., at 4. [↑](#footnote-ref-425)
426. Ibid., at 5. [↑](#footnote-ref-426)
427. Ibid. [↑](#footnote-ref-427)
428. Gazzini (n. 363), at 415. Hummer/Schweitzer, in: Simma (n. 394), at 892. [↑](#footnote-ref-428)
429. D. Yost, ‘NATO and International Organizations’ (2007) *Forum Papers Series NATO Defense College*, 35. [↑](#footnote-ref-429)
430. Cassese (n. 68). [↑](#footnote-ref-430)
431. United Nations Security Council Resolution 1244 (n. 419). [↑](#footnote-ref-431)
432. United Nations Security Council, *5007th meeting Tuesday, 20 July 2004, 10 a.m. New York*, UN Doc. S/PV.5007, 25. [↑](#footnote-ref-432)
433. D. Leurdijk, ‘NATO and the UN: The Dynamics of an Evolving Relationship’ (2004) 149 *RUSI Journal* 24, 26-27. [↑](#footnote-ref-433)
434. F. Fontanelli, ‘I know it’s wrong but I just can’t do right: First impressions on judgment no. 238 of 2014 of the Italian Constitutional Court’ (2014) *Verfassungsblog on Matters Constitutional,* available at: <www.verfassungsblog.de/en/know-wrong-just-cant-right-first-impressions-judgment-238-2014-italian-constitutional-court/>, (accessed 4 August 2023). *See also* A. Tzanakopoulus, *Disobeying the Security Council* (Oxford University Press: Oxford, 2011), 160. [↑](#footnote-ref-434)
435. Ibid. [↑](#footnote-ref-435)
436. “The UN Security Council on several occasions branded the ethnic cleansing in Kosovo and the mounting number of refugees driven from their homes as a threat to international peace and security. NATO’s Operation Allied Force was launched despite the lack of Security Council authorisation to prevent the largescale and sustained violations of human rights and the killing of civilians … In Crimea, with no evidence of a crisis and no attempt to negotiate any form of solution, Russia bypassed the whole international community, including the UN, and simply occupied a part of another country’s territory”. North Atlantic Treaty Organization, *Russia’s accusations - setting the record straight* (2014), available at: <https://www.nato.int/cps/en/natohq/115204.htm>, 3-4. See also President Putin’s address to the Duma on 18 March 2014: “We keep hearing from the United States and Western Europe that Kosovo is some special case. What makes it so special in the eyes of our colleagues? It turns out that it is the fact that the conflict in Kosovo resulted in so many human casualties” President of Russia, *Address by President of the Russian Federation* (2014), available at: <http://en.kremlin.ru/events/president/news/20603>, (accessed 4 August 2023). [↑](#footnote-ref-436)
437. Smith (n. 394), at 503. [↑](#footnote-ref-437)
438. See judgment of the ICJ in the Nuclear Weapons opinion (n. 17), in: Simma (n. 8), at 82. [↑](#footnote-ref-438)
439. Idea drawn from Kennedy (n. 22), at 952. [↑](#footnote-ref-439)
440. Smith (n. 175), at 15-16. [↑](#footnote-ref-440)
441. Kennedy (n. 22), at 951. [↑](#footnote-ref-441)
442. International Law Commission, *Responsibility of international organizations. Comments and observations received from international organizations*, UN Doc. A/CN.4/637 (2011), 139 [4]. [↑](#footnote-ref-442)
443. “When for national reasons the consensus is not followed, the government concerned should offer an explanation to the Council. It is even more important that where an agreed and formal recommendation has emerged from the Council's discussions, governments should give it full weight in any national actions or policies related to the subject of that recommendation”. Report of the Committee of Three’ (n. 259). Note that the three wise men did not use the term obligation when referring to Council’s decision. This may be explained by the mandate received for broadening areas of cooperation beyond the military and encouraging regular political consultation among NATO states. [↑](#footnote-ref-443)
444. UN Doc. A/CN.4/637 (2011) (n. 442), 139. [↑](#footnote-ref-444)
445. N. Blokker, ‘International Organizations and Their Members’ (2004) 1 *International Organizations Law Review* 139, 144. *See also* Jenks (n. 119), 27-28. [↑](#footnote-ref-445)
446. On the necessity of initiatives in international organization see H. Schermers and N. Blokker, *International Institutional Law* (Martinus Nijhoff Publishers: Leiden, 2011), 504. [↑](#footnote-ref-446)
447. North Atlantic Treaty Organization, *Revised Terms of Reference for the Supreme Allied Commander Europe*, MC/53 (1955). [↑](#footnote-ref-447)
448. North Atlantic Treaty Organization (Resolution on the Peaceful Settlement of Disputes and Differences between Members of the North Atlantic Treaty Organization) (n. 246). [↑](#footnote-ref-448)
449. Schermers and Blokker (n. 446), at 13. [↑](#footnote-ref-449)
450. North Atlantic Treaty Organization, *Committees* (2023), available at: <www.nato.int/cps/en/natolive/topics\_49174.htm>, (accessed 4 August 2023). [↑](#footnote-ref-450)
451. Eriksen (n. 277). Note also that the EU follows a similar pattern. “EU laws sometimes authorise the European Commission to adopt implementing acts, which set conditions that ensure a given law is applied uniformly. Comitology refers to a set of procedures, including meetings of representative committees, that give EU countries a say in the implementing acts”: European Commission, *Comitology*, available at: <ec.europa.eu/info/implementing-and-delegated-acts/comitology\_en>, (accessed 4 August 2023). [↑](#footnote-ref-451)
452. Blokker (n. 446), at 161. [↑](#footnote-ref-452)
453. A. Cassese, ‘Scelle’s Theory of “Role splitting”’ (1990) 1 *EJIL* 210, 211-212. [↑](#footnote-ref-453)
454. North Atlantic Treaty Organization, *Deputies Committee* (2023), available at: <www.nato.int/cps/en/natohq/topics\_69343.htm>, (accessed 4 August 2023). [↑](#footnote-ref-454)
455. See North Atlantic Treaty Organization (Final Communiqué of the first Session of the North Atlantic Council), (n. 18). [↑](#footnote-ref-455)
456. In 1952 it was agreed to issue terms of reference to the Council, the composition of the international staff, as well as the relationship between NATO civilian and military agencies: North Atlantic Council, *Final Communiqué. Chairman: Mr. Acheson*, *Secretary of State of the USA*, Press Communiqué Washington 17th Sept (1949); North Atlantic Council, *Final Communiqué. Chairman: Mr. L.B. Pearson*, Ministerial Communiqué Lisbon 20-25th Feb (1952). [↑](#footnote-ref-456)
457. North Atlantic Treaty Organization, *NATO Summits* (2023), available at: **<**www.nato.int/cps/en/natohq/topics\_50115.htm#>, (accessed 4 August 2023). [↑](#footnote-ref-457)
458. North Atlantic Treaty Organization, *The London Declaration* (1990), available at: <www.nato.int/cps/en/natohq/official\_texts\_23693.htm>, (accessed 4 August 2023). [↑](#footnote-ref-458)
459. North Atlantic Treaty Organization (1991 Strategic Concept) (n. 300). [↑](#footnote-ref-459)
460. North Atlantic Treaty Organization, *The Rome Declaration* (1991), available at: <www.nato.int/docu/comm/49-95/c911108a.htm>, (accessed 4 August 2023). [↑](#footnote-ref-460)
461. North Atlantic Treaty Organization, *Partnership for Peace Programme* (2023), available at: <www.nato.int/cps/en/natolive/topics\_50349.htm#>, (accessed 4 August 2023). [↑](#footnote-ref-461)
462. North Atlantic Treaty Organization, *1997 Madrid Summit* (1997), available at: <www.nato.int/docu/comm/1997/970708/home.htm>, (accessed 4 August 2023). [↑](#footnote-ref-462)
463. North Atlantic Treaty Organization (1999 Strategic Concept) (n. 302). [↑](#footnote-ref-463)
464. M. Zapolskis, ‘1999 and 2010 NATO Strategic Concepts: A Comparative Analysis’ (2012) 10 *Lithuanian Annual Strategic Review* 35, 53. [↑](#footnote-ref-464)
465. North Atlantic Treaty Organization, *2002 Prague Summit* (2002), PR (2002) 127. [↑](#footnote-ref-465)
466. This continues to be updated. The latest version is: North Atlantic Military Committee, *MC Concept For Counter-Terrorism*, MC 0472/1 (2016). [↑](#footnote-ref-466)
467. North Atlantic Treaty Organization, *2004 Istanbul Summit* (2004), available at: <www.nato.int/docu/comm/2004/06-istanbul/home.htm>, (accessed 11 December 2016). [↑](#footnote-ref-467)
468. North Atlantic Treaty Organization, *Comprehensive Political Guidanc*e (2006), available at: <www.nato.int/cps/en/natohq/official\_texts\_56425.htm>, (accessed 4 August 2023). [↑](#footnote-ref-468)
469. North Atlantic Treaty Organization, *Bucharest Summit Declaration,* PR (2008) 049 (2008), available at: <<https://www.nato.int/cps/en/natolive/official_texts_8443.htm>>, (accessed 4 August 2023). [↑](#footnote-ref-469)
470. North Atlantic Treaty Organization (NATO Summits) (n. 458). [↑](#footnote-ref-470)
471. Stein and Carreau (n. 182), at 605. [↑](#footnote-ref-471)
472. North Atlantic Treaty Organization, *2010 Lisbon Summit*, PR (2010) 155 (2010). [↑](#footnote-ref-472)
473. Zapolskis (n. 464), at 53. [↑](#footnote-ref-473)
474. North Atlantic Treaty Organization (Wales Summit Declaration) (n. 295). [↑](#footnote-ref-474)
475. North Atlantic Treaty Organization (Warsaw Summit Communiqué) (n. 295). [↑](#footnote-ref-475)
476. North Atlantic Treaty Organization, *Joint Declaration*, PR (2016) 119 (2016). [↑](#footnote-ref-476)
477. ‘Brussels Summit Declaration’ (n. 292). [↑](#footnote-ref-477)
478. North Atlantic Treaty Organization, *NATO 2022 Strategic Concept*, available at: <www.nato.int/strategic-concept/index.html>, 4 August 2023. [↑](#footnote-ref-478)
479. Ibid., 1 [13]. [↑](#footnote-ref-479)
480. D. Bland, *The Military Committee of the North Atlantic Alliance. A Study of Structure and Strategy* (Praeger: New York, 1991), 7-9. [↑](#footnote-ref-480)
481. Ibid., at 10. [↑](#footnote-ref-481)
482. S. Zamora, ‘Voting Rule in International Economic Organizations’ (1980) 74 *AJIL* 566. [↑](#footnote-ref-482)
483. Schermers and Blokker (n. 446), at 547-548. [↑](#footnote-ref-483)
484. North Atlantic Treaty Organization, *N.A.T.O. What it is and how it works* (1954), available at: <www.nato.int/docu/speech/1954/s19541105.htm>, (accessed 4 August 2023). [↑](#footnote-ref-484)
485. Ismay (n. 75), at 24-30. [↑](#footnote-ref-485)
486. As will be further discussed below, in the first years of NATO the decision-making mode in the North Atlantic Council was referred to as ‘unanimity’ and since the 1970s as ‘consensus’ [by silence procedure]. NATO confirmed the official practice of the consensus method in its submission to the International Law Commission by the draft Articles on the Responsibility of International Organizations in United Nations document [described later in this section]. [↑](#footnote-ref-486)
487. “Above all, NATO is an international, not a supranational organization. It is composed of sovereign nations which have relinquished none of their independence in the field of foreign policy. No decision can be taken in the Council unless it is unanimous, in other words, by common consent. And the process of achieving common consent among a number of parties, each of which brings to any given problem its individual experience and outlook, necessarily demands patience and time”. North Atlantic Treaty Organization, *Facts and Figures 1969*, (NATO Information Service: Brussels, 1969), 90. [↑](#footnote-ref-487)
488. Bland (n. 480), 7. [↑](#footnote-ref-488)
489. Schermers and Blokker (n. 446), 547-548. [↑](#footnote-ref-489)
490. Ibid. 568. [↑](#footnote-ref-490)
491. North Atlantic Treaty Organization (n. 450), 11-12. [↑](#footnote-ref-491)
492. “The legal foundation of the NATO military structure consists, as we have seen, of the international agreements and North Atlantic Council resolutions establishing the subsidiary organs … and defining duties; international agreements on the legal status of the headquarters, forces an staff; and in particular the Final Act of the London Conference with the implementing Council resolution of October 22, 1954; and portions of the Paris Agreement of 1954 embodying the “general “settlement reached at the preceding London Conference. All these acts were designed to implement the North Atlantic Treaty, and, it must be kept in mind, the Council adopted the resolution in the exercise of its general Treaty Mandate “to consider matters concerning the implementation of this Treaty …” Stein and Carreau (n. 182), 605-606. [↑](#footnote-ref-492)
493. Defense Planning Committee’s adopted acts were call ‘decisions’. North Atlantic Treaty Organization, *NATO Strategy Documents 1949-1969*, D.C. 13 (1950). [↑](#footnote-ref-493)
494. RS/67/12 (n. 115). [↑](#footnote-ref-494)
495. North Atlantic Council, *Final Communiqué. Chairman: Mr. M. Brosio*, Ministerial Communiqué Reykjavic 24th-25th June, (1968): The North Atlantic Council met in Ministerial Session in Reykjavik on 24th and 25th June, 1968. [↑](#footnote-ref-495)
496. North Atlantic Treaty Organization, *NATO Handbook 1969* (NATO Information Service: Brussels, 1969). [↑](#footnote-ref-496)
497. Secretary-General Spaak, Speech at the Meeting of the Political Committee (B) of the Atlantic Congress, 8 June 1959: F. Beer, *Integration and Disintegration in NATO* (Ohio State University Press: Ohio, 1969), 31-36 and 286. Note that Spaak made most of his recommendations based on the Report of the Committee of Three, in which it is recommended that the term unanimity is avoided in favor of that of consensus.Report of the Committee of Three (n. 259), [51.e]. However, as Kaplan has observed: “[t]he “Wise Men's” report was essentially a *cri de coeur* of smaller nations that had felt excluded from the decision-making process. They were asking for genuine collaboration in NATO councils. That report was overshadowed by the Suez crisis which in itself was an illustration of the marginalisation of the smaller NATO Allies. While the Council endorsed the report in May 1957, its specific recommendation of “expanded cooperation and consultation in early stages of policy formation” was largely ignored over the following decade”: L. Kaplan, ‘The 40th anniversary of the Harmel Report’ (2007) *NATO Review*. [↑](#footnote-ref-497)
498. Ibid. [↑](#footnote-ref-498)
499. “NATO being an organization of sovereign states equal in status, all decisions are expressions of the collective will of member governments, taken not by majority vote but by common consent”: North Atlantic Treaty Organization, *NATO Handbook* (NATO Information Service: Brussels, 1978), 38. Note how the 1971 NATO Handbook addresses the North Atlantic Council decision: “The North Atlantic Council is the highest authority of the Alliance. It is composed of representatives of the fifteen member countries. These being sovereign states, equal in status, all decisions of the Council are taken unanimously”. North Atlantic Treaty Organization, *NATO Handbook* *1971* (NATO Information Service: Brussels, 1971), 23. [↑](#footnote-ref-499)
500. North Atlantic Treaty Organization, *Facts and Figures 1981* (NATO Information Service: Brussels, 1981), 91-92. [↑](#footnote-ref-500)
501. Virally (n. 69), at 197. [↑](#footnote-ref-501)
502. M. Ruffert and C. Walter, *Institutionalised International Law* (Nomos Verlagsgesellschaft: Baden-Baden, 2015), 152. [↑](#footnote-ref-502)
503. Vincent, Straus and Biondi (n. 117), at 71 ; Schermers and Blokker (n. 446), 545. [↑](#footnote-ref-503)
504. R. Monaco, ‘Les principes régissant la structure et le fonctionnement des organisations internationales’ (1977) 156 *Collected Courses of the Hague Academy of International Law*; Virally (n. 68), 197; Schermers and Blokker (n. 446), 545-546. [↑](#footnote-ref-504)
505. Kennedy (n. 70), at 962. [↑](#footnote-ref-505)
506. Ibid. [↑](#footnote-ref-506)
507. Ibid., citing D. Jerrold, *They that Take the Sword – The Future of the League of Nations* (John Lane the Bodley Head: London, 1936), 97: ‘Efforts by the authors of the League Covenant to promote the equality of nations and to protect sovereign authority resulted in an organization devoted to upholding the “lower common denominator of the moralities of the world’. [↑](#footnote-ref-507)
508. Ibid. [↑](#footnote-ref-508)
509. Bederman (n. 30), at 346-347. [↑](#footnote-ref-509)
510. Ibid., 346. *See also* N. Hill, ‘Unanimous Consent in International Organization’ (1928) 22 *AJIL* 319. [↑](#footnote-ref-510)
511. Stein and Carreau (n. 182), at 598-600. [↑](#footnote-ref-511)
512. Beer (n. 497), at 15-16. [↑](#footnote-ref-512)
513. Ruffert and Walter (n. 502). [↑](#footnote-ref-513)
514. *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece*), Judgment, *ICJ Reports* 2011. [↑](#footnote-ref-514)
515. North Atlantic Treaty (n. 5), Art 8; *see also* n. 312 and n. 313. [↑](#footnote-ref-515)
516. Beer (citing speech by Spaak) (n. 497). [↑](#footnote-ref-516)
517. Kaplan (n. 497). [↑](#footnote-ref-517)
518. Stein and Carreau (n. 182). [↑](#footnote-ref-518)
519. *See infra* n. 527 and n. 528. [↑](#footnote-ref-519)
520. The Library of Congress (Congressional Research Service), *NATO’s Decision-Making Procedure*, Order Code RS21510 (2004): “There is virtually no literature on these issues. This report is based primarily on interviews of U.S. and European officials, and of NATO officials, March-April 2003. An earlier version of this study was provided as a memorandum to Senator Richard Lugar, and has been printed as a CRS report with his permission”. [↑](#footnote-ref-520)
521. Monaco (n. 504), at 39. [↑](#footnote-ref-521)
522. See Virally’s definition of “*la procédure du consensus*” (n. 70), at 196. [↑](#footnote-ref-522)
523. Monaco (n. 504), at 140. [↑](#footnote-ref-523)
524. The Library of Congress (Congressional Research Service), *NATO’s Decision-Making Procedure*, Order Code RS21510 (2003), 2-4. [↑](#footnote-ref-524)
525. International Democracy Watch, *North Atlantic Treaty Organization*, available at: <www.internationaldemocracywatch.org/index.php/north-atlantic-treaty-organization>, (accessed 6 April 2015 (Link broken in 2023)). [↑](#footnote-ref-525)
526. R. Hendrickson, *Diplomacy and War at NATO: The Secretary General and Military Action After the Cold War* (University of Missouri Press: Columbia, 2006), 108. [↑](#footnote-ref-526)
527. Ibid. [↑](#footnote-ref-527)
528. W. Clark, *Waging Modern War* (Perseus Books Group: Cambridge, 2001), 233-256. [↑](#footnote-ref-528)
529. The Library of Congress (Congressional Research Service), *NATO’s Decision-Making Procedure*, Order Code RS21510 (2004): “There is virtually no literature on these issues. This report is based primarily on interviews of U.S. and European officials, and of NATO officials, March-April 2003. An earlier version of this study was provided as a memorandum to Senator Richard Lugar, and has been printed as a CRS report with his permission”. [↑](#footnote-ref-529)
530. Note that the unanimity rule will always apply for admission of new members in accordance with Article 10 of the NAT and there is no indication that NATO is willing to change this treaty obligation by practice or rules of the organization. [↑](#footnote-ref-530)
531. Monaco (n. 504), at 139. [↑](#footnote-ref-531)
532. North Atlantic Treaty Organization, *Consensus decision-making at NATO. A fundamental principle* (2023)*,* avaialble at: <www.nato.int/cps/en/natolive/topics\_49178.htm>, (accessed 4 August 2023). [↑](#footnote-ref-532)
533. Ibid. [↑](#footnote-ref-533)
534. See ‘Harmel Report’, in: Kaplan (n. 497). [↑](#footnote-ref-534)
535. Schermers and Blokker (n. 446), at 546. [↑](#footnote-ref-535)
536. Ibid., 547. [↑](#footnote-ref-536)
537. See ‘Harmel Report’, in: Kaplan (n. 497). [↑](#footnote-ref-537)
538. See n. 18. [↑](#footnote-ref-538)
539. Kennedy (n. 70), at 972-973. *See also* n. 74, on Kennedy’s ‘movement’. [↑](#footnote-ref-539)
540. Ibid. [↑](#footnote-ref-540)
541. The anti-fungal and antibacterial bee glue used for reinforcing the structural stability of the hive, reducing vibration; sealing alternative entrances, blocking parasites from entering, and preventing putrefaction within the hive. [↑](#footnote-ref-541)
542. Claude (n. 85), at 266-267. [↑](#footnote-ref-542)
543. “An institution is an idea of a work or enterprise that is realised and endures juridically in a social milieu; for the realisation of this idea, a power is organised that equips it with organs; on the other hand, among the members of the social group interested in the realisation of the idea, manifestations of communion occur that are directed by the organs of the power and regulated by procedures” (free translation). Hauriou (n. 71), at 99. [↑](#footnote-ref-543)
544. The term is borrowed from Kuehl (n. 73). [↑](#footnote-ref-544)
545. “The term ‘Legal *position*’ is coined by Bekker based on the relevant work of El-Erian and others in the International Law Commission”, in Bekker (n. 59), at 51. *See also* El-Erian, in: 1963 Yearbook of the International Law Commission (Vol. I) (n. 77), at 298 [110]. The same term, ‘Legal *position*', is used by Klabbers (n. 77), at 38. [↑](#footnote-ref-545)
546. “The emergence of military alliances with institutional features demanded an expansion of functionalism,” Klabbers (n. 78), at 82. Klabbers treats functionalism with a certain skepticism: see Klabbers (n. 127). [↑](#footnote-ref-546)
547. Bekker (n. 59), at 81. *See also* 1982 Yearbook of the International Law Commission (n. 45). [↑](#footnote-ref-547)
548. 1985 Yearbook of the International Law Commission (Vol. II), *Second report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Diaz Gonzalez, Special Rapporteur*, UN Doc. A/CN.4/SER.A/1985/Add.1 (Part 1), 110 [62]: “International organization, according to their speciality, exercise the powers attributed to them within the framework of their functions, which depend on the purposes assigned to them by their creators. Thus, as has already been seen, their powers are functional.” [↑](#footnote-ref-548)
549. “Moral entities, regarded on the analogy of substances, are termed moral persons”. S. Pufendorf, *De Iure Naturae et Gentium*, *Libri Octo* (Junghans imprimebat, London, 1672), at 9-11,

     <archive.org/stream/samuelispufendor1672pufe#page/8/mode/2up>, 4 August 2023. [↑](#footnote-ref-549)
550. “[T]he law’s old habit of co-ordinating men and ‘bodies politic’ as two kinds of Persons seems to deserve the close attention of the modern philosopher”. F. Maitland, *Political Theories of the Middle Age by Otto von Gierke* (Cambridge University Press: Cambridge, 2003), 3. [↑](#footnote-ref-550)
551. North Atlantic Treaty Organization, *NATO Pipeline Committee: Terms and Conditions of Service and Status of Personnel in National Pipeline Organizations, Divisions and Central Europe Operating Agency*, AC-112-D/2 (1956), 6 and 30 (emphasis added). [↑](#footnote-ref-551)
552. “When international institutions make this kind of law [through relatively informal operations, directives and initiatives] they are acting less as persons, and more as *communities”* (emphasis added): Bederman (n. 30), at 371. *See also* C. W. Jenks, ‘The Legal Personality of International Organizations’ (1945) 22 *British Yearbook of International Law* 267, at 271. [↑](#footnote-ref-552)
553. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *ICJ Rep.* 1949*,* 179. See *Exchange of Greek and Turkish Populations Opinion*, Judgment, *PCIJ Series B – No. 10* 1923, 11[24-25]. See *Jurisdiction European Commission on the Danube Opinion*, *PCIJ* *Series B - No. 14* 1927, 64. [↑](#footnote-ref-553)
554. “The legal status of international organizations” is the third designation of the topic related to the law of relations between states and international organizations that El-Erian proposed to the International Law Commission: El-Erian, in: 1963 Yearbook of the International Law Commission (Vol. I) (n. 77), 298, [111 and 114]. [↑](#footnote-ref-554)
555. Díaz González (n. 496). [↑](#footnote-ref-555)
556. Ibid. [↑](#footnote-ref-556)
557. Yasseen, in: 1963 Yearbook of the International Law Commission (Vol. I) (n. 77), 302 [21], *See also* the following case law applicable to legal personality: Judgment of the Italian Court of Cassation in *Branno v. Ministry of War and Allied Forces Headquarters*; Judgment of the Court of Justice of the EC in Case No. 22/70 *Commission of the European Communities v. Council of the European Communities (European Road Transport Agreement)*; Judgment of the United Kingdom House of Lords in Case No. EWCA Civ J0427-11 *Maclaine Watson & Co. Ltd v International Tin Council*; Judgment of the United Kingdom House of Lords in Case UKHL J0221-1 *Arab Monetary Fund v Hashim and others*; Judgment of Court of Justice of the EC in Cases 7/56, 3/57 to 7/57 *Algera*  v*. Common Assembly of the European Coal and Steel Community*; Judgment of the Court of Justice of the EC in Case No. C-327/91, *French Republic v Commission of the European Communities*; *Application of the Interim Accord of 13 September 1995 (former Yugoslav Republic of Macedonia v. Greece*), Judgment, *ICJ Reports* 2011. [↑](#footnote-ref-557)
558. H. Kelsen, ‘Théorie du Droit international public’ (1953) 84 *Collected Courses of the Hague Academy of International Law*, 101 ; “[I]n itself the attribution of personality to an entity means nothing. ‘Personality’ – the quality of being a ‘person’ – only possesses significance in terms of a specific system of law”, in E. Lauterpacht, ‘The Development of the Law of International Organization by the Decisions of International Tribunals’ (1976) 152 *Collected Courses of the Hague Academy of International Law* 403. [↑](#footnote-ref-558)
559. M. Dendias, ‘Les principaux services internationaux administratifs’ (1938) 63 *Collected Courses of the Hague Academy of International Law. The Hague Academy of International Law*, at 288. [↑](#footnote-ref-559)
560. Schermers and Blokker (n. 446), at 993. [↑](#footnote-ref-560)
561. Koroma argues the *Reparation* case washes out any neo-positivist attempt to attribute international legal personality to explicit recognition of the status: 1987 Yearbook of the International Law Commission (Vol. I), *Relations between States and international organizations (second part of the topic) (continued) (A/CN.4/391 and Add.I,1 A/CN.4/401,2 A/CN.4/L.383 and Add.1-3,3 ST/LEG/17) (Third Report Of The Special Rapporteur),* 205 [58]. [↑](#footnote-ref-561)
562. F. Seyersted, *Common Law of International Organizations* (Martinus Nijhoff Publishers: Leiden, 2008), 48-49, 364. [↑](#footnote-ref-562)
563. P.M. Dupuy and T. Kerbrat, *Droit international public* (Dalloz: Paris, 2012), 204. [↑](#footnote-ref-563)
564. See *Reparation for Injuries Suffered in the Service of the United Nations* (n. 553). [↑](#footnote-ref-564)
565. Alvarez (n. 47), 134. *See also* UN Doc. A/66/10 (n. 28), 52. [↑](#footnote-ref-565)
566. Bekker (n. 59), 56. [↑](#footnote-ref-566)
567. R.J. Dupuy, ‘Le Droit des relations entre les organisations internationales’ (1960) 100 *Collected Courses of the Hague Academy of International Law*, at 532. [↑](#footnote-ref-567)
568. *Reparation for Injuries Suffered in the Service of the United Nations* (n. 553), at 178, 180. [↑](#footnote-ref-568)
569. The term ‘subsidiary bodies’ and ‘NATO bodies’ are used indistinctly. A detailed analysis of the terms ‘subsidiary bodies’ and ‘NATO bodies’ can be found in Section 2.7.1 ‘Subsidiary Bodies’. [↑](#footnote-ref-569)
570. Kay (n. 128), at 35-57. See Stein and Carreau (n. 182), at 588. [↑](#footnote-ref-570)
571. North Atlantic Treaty Organization, *Final Communiqué of the first Session of the North Atlantic Council - (Terms of Reference and Organisation)* (1949), available at: <https://www.nato.int/cps/en/natohq/official\_texts\_17117.htm>, (accessed 4 August 2023). [↑](#footnote-ref-571)
572. These were known at the time as “military and civilian agencies”. Today, references made to NATO Agencies do not include the integrated military structure. North Atlantic Treaty Organization, *Press communiqué North Atlantic Council eighth session, Rome, 2 November 1951*, C8-D/15 (1951), [2]. [↑](#footnote-ref-572)
573. North Atlantic Treaty Organization, *North Atlantic Treaty, Fourth Session, London, 18 May, 1950* (1950), available at: <https://www.nato.int/docu/comm/49-95/c500518a.htm>, accessed 4 August 2023. [↑](#footnote-ref-573)
574. “The NATO International Staff (IS) has its roots in a 1951 resolution outlining the need for a permanent organisation to support the Council Deputies (D-D(51)30). The staff was quickly in need of reorganizing, as seen in a report the following year; the Council Deputies recommended the appointing of a Secretary General at the head of a permanent International Staff (C9-D/4). After deliberation in the Council, The Final Communiqué from the Lisbon Conference, February 1952, establishes the post of Secretary General as the head of an International Secretariat, which would support the work of the Council (C9-D/22)”: North Atlantic Treaty Organization, *04 - International Staff / International Secretariat*, IS (1951-2003); see Snee (n. 331), at 1. [↑](#footnote-ref-574)
575. Snee (n. 330), at 4. [↑](#footnote-ref-575)
576. Ibid., at 6. [↑](#footnote-ref-576)
577. Ibid. [↑](#footnote-ref-577)
578. North Atlantic Treaty Organization, *North Atlantic Council fifth session, communiqué New York, 26 September 1952*, C5-D/10 (1952), [1-4]; see Snee (n. 330), at 6 (emphasis added). [↑](#footnote-ref-578)
579. The United States started the works using the “Agreement Relative to the status of Members of the Armed Forces of the Brussels Treaty Powers”, which was never ratified. See A. Sari, ‘The NATO SOFA at Sixty: Heading for Retirement or Has Life Just Begun?’, available at: <www.aurelsari.co.uk/2011/12/nato-sofa-at-sixty/>, (accessed 4 August 2023). Also in (2012) NATO Legal Gazette, 21, both cited in footnote 11 as ‘Agreement Relative to the Status of Members of the Armed Forces of the Brussels Treaty Powers, 21 December 1949, (1950) Cmd. 7868. *See* M. Johnson, ‘NATO Military Headquarters’, in: Fleck (ed.) *The Handbook of The Law of Visiting Forces* (Oxford University Press: Oxford, 2001)*,* 269 [footnote 33]. [↑](#footnote-ref-579)
580. The provisions of the NATO SOFA have been incorporated by reference in all Partnership for Peace nations pursuant to Article I of the Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces, dated 19 June 1995. [↑](#footnote-ref-580)
581. North Atlantic Treaty Organization, *Protocol on the Status of Allied Headquarters*, Document D-D(52)2 (1952), in: Snee (n. 330), 592. Note that the question of the possibility of having a specific agreement (Paris Protocol) for international military headquarters was already discussed by the nations on 16 and 26 April 1951 (documents MS-D(51)24 and MS-R(51)16 respectively. Both documents can be found in Snee (n. 330), at 183 (MS-R(51)16 ) and 475 (MS-D(51)24). [↑](#footnote-ref-581)
582. Snee (n. 330), at 593. [↑](#footnote-ref-582)
583. Ibid., at 6. [↑](#footnote-ref-583)
584. “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) (n. 581), in Snee (n. 330), at 596. See further discussions in sections 6.3.4 and 6.3.7. [↑](#footnote-ref-584)
585. Calleo (n. 125), at 26. [↑](#footnote-ref-585)
586. J. Wouters and F. Naert, ‘Some Challenges for (Teaching) the Law of International Organizations’ (2004) 1 *International Organizations Law Review* 23, at 24. [↑](#footnote-ref-586)
587. Snee (n. 330), at 7. [↑](#footnote-ref-587)
588. North Atlantic Treaty Organization, *Status of NATO Representatives and International staff. Memorandum of the United Kingdom Deputy*, D-D (51) 58 (1951), 1. [↑](#footnote-ref-588)
589. Ibid., at 10. [↑](#footnote-ref-589)
590. NATO document MS-D(51) 24 (1951), in: Snee (n. 330), at 475-476. [↑](#footnote-ref-590)
591. On this question it is interesting to note the legal discussions that took place at the time France withdrew from the integrated military structure. “[L]a France reste fidèle à l’Alliance; elle se retire seulement de l’Organisation, base sure des textes postérieurs à la signature du Traité” in : Charpentier (n. 182), at 419-425. [↑](#footnote-ref-591)
592. Most probably the intention was that the, already extinct, Defence Planning Committee (DPC), which was the ultimate authority on all questions related to NATO’s integrated military structure, could replace the Council. However, facts show that not only the DPC could represent the Organization. [↑](#footnote-ref-592)
593. NATO document MS-R(52) 2 (1952), in: Snee (n. 330), at 271. [↑](#footnote-ref-593)
594. North Atlantic Treaty Organization. *North Atlantic Council fifth session, communiqué New York, 26 September 1952*, C5-D/10 (1952), 1 [1-4], in: Snee (n. 330), at 6 (emphasis added). [↑](#footnote-ref-594)
595. Snee (n. 330), at 6. [↑](#footnote-ref-595)
596. NATO document MS-R(52) 2 (1952), in: Snee (n. 330), at 273. [↑](#footnote-ref-596)
597. Ibid., at 284. [↑](#footnote-ref-597)
598. “1) les organismes subsidiaires ont des fonctions délimitées par les fonctions de l’organisation”, in : P. Reuter (n. 227), at 426. [↑](#footnote-ref-598)
599. P. Olson, ‘Immunities of International Organization. A NATO View’ (2013) 10 International Organizations Law Review 419, 421. [↑](#footnote-ref-599)
600. Belgium therefore registered NATO [the Organization] and SHAPE [the Supreme Headquarters] as two distinct international organizations. Federal Public Service Foreign Affairs (Belgium), ‘Liste Organisations internationales en Belgique avec Accord de siège’, at 4-5, available at : <<https://diplomatie.belgium.be/sites/default/files/2022-01/list_intergovernmental_organizations_with_seat_or_representation_in_belgium_170122_1.pdf>>, (accessed 4 August 2023).

     It is interesting to note that several NATO members include in their lists of international organizations entities of the NATO Force Structure or centres of excellence, which are MOU organizations created by NATO nations and put at the disposal of the Organization, but they do not have any of the two legal personalities described above. Ministry of Foreign Affairs of Estonia, ‘International Organisations in Estonia’, <vm.ee/en/node/9853>, 4 August 2023. A COE is definitely not a subsidiary body of the NAC. As a matter of fact, some have argued that COEs could be considered as subsidiary bodies of the NAC, in the meaning of Article 9 of the North Atlantic Treaty. This assumption is not correct and is contradicted by the very wording of said Article 9, which provides that “the Council shall set up such subsidiary bodies as may be necessary”. Indeed, it is clear that COEs are neither set up by decision of the NAC, nor vested with any authority to act on its behalf. Footnote 3: Most of the COEs being covered by the provisions of the Protocol on the Status of International Military Headquarters established pursuant to the North Atlantic Treaty (Paris Protocol), signed in Paris on 28 August 1952 – it is interesting to note here that its Article 1.d defines the NAC as “the council established by article 9 of the North Atlantic Treaty or any of its subsidiary bodies authorised to act on its behalf”: F. Tuset-Anres, ‘Frequently Asked Legal Questions about the NATO-Accredited Centres of Excellence’ (2014) 34 *NATO Legal Gazette* 8. [↑](#footnote-ref-600)
601. I.F.I. Shihata, ‘The Role of the World Bank’s General Counsel’, in: United Nations Office of Legal Affairs (OLA), *Collection of Essays by Legal Adviser of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (United Nations: New York, 1999), 317. [↑](#footnote-ref-601)
602. North Atlantic Treaty Organization, *NATO Legal Deskbook,* (2010), at 131-132. The NATO Legal Deskbook is obsolete and it is not any longer in the NATO webpage. It is necessary to amend and improve this deskbook in order to refer to the tasks of the legal offices of the main bodies vested with legal personality in NATO. [↑](#footnote-ref-602)
603. Agreement Between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status Of NATO Forces and NATO Personnel Conducting Mutually Agreed NATO-Led Activities in Afghanistan (NATO-Afghanistan SOFA), concluded on 13 September 2014. [↑](#footnote-ref-603)
604. R. Muzalevsky, ‘NATO-Kazakhstan Transit Agreement: Unleashing the Potential of Northern Supply Route’ (2010) 7 *Eurasia Daily Monitor*, available at:<jamestown.org/single/?tx\_ttnews%5Btt\_news%5D=36080#.VleRz66rS8U>, (accessed 4 August 2023). [↑](#footnote-ref-604)
605. North Atlantic Treaty Organization, *Israel signs security agreement with NATO* (2001), available at: <https://www.nato.int/cps/en/natohq/news\_18727.htm?selectedLocale=en>, (accessed 4 August 2023). [↑](#footnote-ref-605)
606. North Atlantic Treaty Organization, *Russia signs IFOR Participation and Financial Agreements* (1996), available at: <https://www.nato.int/cps/en/natohq/news\_24997.htm?selectedLocale=en>, (accessed 4 August 2023) [↑](#footnote-ref-606)
607. NATO Staff Centre, ‘NATO Legal Eagles’ (Interview with NATO International Staff Legal Advisor) (2014) 9 *NATO Staff Centre Magazine* 12, at 12, <issuu.com/natostaffcentremag/docs/nscm\_9\_issue>, (accessed 4 August 2023). [↑](#footnote-ref-607)
608. Some are available online. Belgium: available at: <www.dekamer.be/digidoc/DPS/K2004/K20040215/K20040215.pdf>, (accessed 4 August 2023); Estonia: available at: <[www.riigiteataja.ee/aktilisa/2140/5201/3002/NATO\_HQ\_engl.pdf](http://www.riigiteataja.ee/aktilisa/2140/5201/3002/NATO_HQ_engl.pdf)>, (accessed 4 August 2023). [↑](#footnote-ref-608)
609. For example, Latvia, available at: <m.likumi.lv/doc.php?id=217498 >, (accessed 4 August 2023). *See* A. Munoz Mosquera, ‘Host Nation Support Arrangements: the NAC-approved Military-to-Military Tools’ (2011) 24 *NATO Legal Gazette* 3. *See* North Atlantic Treaty Organization Standardization Office, *Allied Joint Doctrine for Host Nation Support* (2021). [↑](#footnote-ref-609)
610. See North Atlantic Treaty Organization (NATO Legal Deskbook) (n. 602), at 131-132. [↑](#footnote-ref-610)
611. Ibid. [↑](#footnote-ref-611)
612. Schermers and Blokker (n. 446), at 994-995. [↑](#footnote-ref-612)
613. P. Reuter, in: 1973 Yearbook of the International Law Commission (Vol. II), *Second report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur*, UN Doc. A/CN.4/SER.A/1973/Add.1 (A/CN.4/271) (1973), 86 [67]. [↑](#footnote-ref-613)
614. The next paragraphs rephrase parts of A. Munoz Mosquera and N.P. Chalanouli, ‘NATO Peace Support Operations, a Brief Institutional View’, in: Fernandez-Sanchez (ed.), *Peacekeeping: Global Perspectives, Challenges and Impacts* (Nova Science Publishers: New York, 2018), 283-303. [↑](#footnote-ref-614)
615. A. Paulus, ‘Article 29’, in B. Simma (ed.), *The Charter of the United Nations: A Commentary* *(2nd Edition)* (Oxford University Press: Oxford, 2002), 542. [↑](#footnote-ref-615)
616. “In the Istanbul Summit in June 2004, NATO leaders decided to bring SFOR to a conclusion by the end of the year as a result of the improved security situation in Bosnia and Herzegovina and the wider region. The SFOR mission was officially ended on 2 December 2004. In its place, a European Union-led force is deployed, known as Operation Althea. The Alliance is providing planning, logistic and command support for the EU mission, in the framework of a package of agreements known as “Berlin Plus”. These agreements provide the overall framework for NATO-EU cooperation”. [for this support NATO created NATO Headquarters Sarajevo]: North Atlantic Treaty Organization, *Peace Operations in Bosnia and Herzegovina* (2023), available at: <<http://www.nato.int/cps/en/natohq/topics_52122.htm>> , (accessed 4 August 2023). [↑](#footnote-ref-616)
617. General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Accords), entered into force 21 November 1995. [↑](#footnote-ref-617)
618. Paulus argues that a subsidiary organ has implied powers to establish its own sub-organs, which explains how PSO develop institutions as that of the NATO Headquarters Sarajevo. A. Paulus (n. 618), at 545. [↑](#footnote-ref-618)
619. G. Jaenicke, ‘Chapter III. Organs’, in: Simma (ed.) (n. 619), at 224; note also that the Dayton Accords Appendix B Annex 1A, states as applicable treaty for the privileges and immunities the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 concerning experts on mission and the Appendix in question itself. [↑](#footnote-ref-619)
620. In the *International Hotels Worldwide* case, Hotels argued that the immunity from execution could not be applicable to NATO per Article II of the Ottawa Agreement. Judgment of the Belgian Court of Appeals (17th Chamber) in Case No. 2011/AR/558 *Belgian State v.* *International Hotels Worldwide.* The court by referring to Article 11 of the Paris Protocol appears to compare Allied Headquarters with field headquarters. None of the Peace Support Operations to which NATO contributes to have ‘field headquarters’ created under Article 14 of the Paris Protocol nor the North Atlantic Council has ever contributed to the creation of Peace Support Operations’ institutions (‘field headquarters’) using its specific policy for this matter, i.e., C-M(69)22. This document C-M(69)22 is cited by J.A. Burger, ‘Headquarters IFOR/SFOR’, in: Fleck (n. 579), at 329. [↑](#footnote-ref-620)
621. Jaenicke (n. 619), at 224. [↑](#footnote-ref-621)
622. NATO Headquarters Sarajevo international legal personality exist, this in spite of being limited to the implementation of Dayton Accords, *e.g*., the MOU between EUFOR and NHQSa on the management of Camp Butmir dated 29 December 2006. W. Greco, ‘Legal Aspects of NATO Support to the European Union Mission in Bosnia and Herzegovina’ (2010) 20 *NATO Legal Gazette,* 12. [↑](#footnote-ref-622)
623. “A UN SG document defines a subsidiary organ as: one which is established by or under the authority of a principal organ of the United Nations, in accordance with Article 7, paragraph 2, of the Charter, by resolution of the appropriate body … Most subsidiary organs have in common their establishment by parent bodies which presumably may change their terms of reference and compositions, issue policy directives to them, receive their reports and accept or reject their recommendation. Generally speaking, a subsidiary organ may be abolished or modified by action of the parent body. [footnote 189: “Summary of internal Secretariat studies of constitutional questions relating to agencies within the framework of the United Nations: this document was proposed to the General Assembly: UN Doc. A/C1/758, paras 1-2,], D. Sarooshi, The U.N. and the Development of Collective Security: The Delegation by the Security Council of its Chapter VII Powers (1999)”: M. Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff Publishers: The Hague, 2005), 43-47. However, Zwanenburg is not precise. It is to be noted that UN Doc. A/C.1/758 is a Secretary General’s document ‘Summary of Internal Studies of Constitutional Questions relating to Agencies within the Framework of the United Nations’ and it is not a resolution of the General Assembly or the Security Council. The document came from the Secretariat of the UN in 1954, during Dag Hammarskjöld’s term of office as Secretary General where it is stated: A subsidiary organ is one which is established by, or under the authority of, a principal organ of the United Nations in accordance with Article 7, paragraph 2, of the Charter, by resolution of the appropriate body. Such an organ is an integral part of the Organisation”. *See* S. Torres Bernardez, ‘Subsidiary Organs’, in: Dupuy (ed.), *Manuel sur les organisations internationales / Handbook on International Organizations* (Nijhoff: The Hague, 1998). *See also* Jaenicke (n. 619), at 218. [↑](#footnote-ref-623)
624. Zwanenburg (n. 623), at47. He uses, without mentioning it, the description of the *Repertory of Practice of United Nations Organs* on subsidiary organs, which are explained as having a wide range of differences, and also common features: (a) A subsidiary organ is created by, or under the authority of, a principal organ of the United Nations; (b) The membership, structure and terms of reference of a subsidiary organ are determined, and may be modified by, or under the authority of, a principal organ; (c) A subsidiary organ may be discontinued by, or under the authority of, a principal organ, United Nations Codification Division, *Repertory of Practice of United Nations Organs (Vol. I*) (United Nations: New York, 1963), 228. [↑](#footnote-ref-624)
625. Reuter (n. 178), at 423-425 (emphasis added). NATO’s statutory provisions, i.e., Article 9 of the NAT and specific policy as C-M(69)22 regulate the establishment of subsidiary bodies. Peace Support Operations to which NATO contributes to have not been created under NATO’s rules of the organization. [↑](#footnote-ref-625)
626. Paulus (n. 618), at 545. [↑](#footnote-ref-626)
627. *See* paras. 2-3-21 Appendix B Annex 1A. [↑](#footnote-ref-627)
628. *See* for example Human Rights Agreements in Annex 6 or the reference made to the 1946 Convention on the Privileges and Immunities of the United Nations. [↑](#footnote-ref-628)
629. Two examples: 1. The creation of the Defense Committee, in North Atlantic Treaty Organization (Final Communiqué of the first Session of the North Atlantic Council) (n. 18); 2. the creation of the Supreme Headquarters Allied Powers Europe in North Atlantic Treaty Organization, *Final Communiqué of the sixth Session of the North Atlantic Council* (1950), available at: <www.nato.int/docu/comm/49-95/c501219a.htm>, (accessed 4 August 2023). [↑](#footnote-ref-629)
630. *See* n. 57. The bilateral agreements put bones and flesh to this NATO core *corpus legis*, or NATO constitution (NATO’s constitutional structure also includes the “rules of the organization”. The latter were interpreted by the International Law Commission, in: 2009 Yearbook of the International Law Commission (Vol. II), *Report of the International Law Commission on the work of its sixty-first session (4 May–5 June and 6 July–7 August 2009)*, UN Doc. A/CN.4/SER.A/2009/Add.1(Part 2) (A/64/10), 32.)

     These are the Supplementary Agreements to the Ottawa de Agreement and Paris Protocol and relating Exchanges of Letters, and specific memoranda of understanding in so far as they are concluded in the fulfillment of the obligations set up in Article 3 of the North Atlantic Treaty. Also, as part of NATO’s constitutional structure one needs also to mention the NAC’s resolutions/decisions, and NAC, Military Committee, Supreme Headquarters and Agencies policies and directives. *See also* Wouters and Naert (n. 586), at 24. [↑](#footnote-ref-630)
631. “The alliance is stable because it is essentially a product of the structure of the system and of the common security interest generated thereby”, in G. Snyder, ‘The Security Dilemma in Alliance Politics’ (1984) 4 *World Politics* 461, 485. [↑](#footnote-ref-631)
632. I. Brownlie, *Principles of Public International Law* (Oxford University Press: Oxford, 2008), 677. [↑](#footnote-ref-632)
633. “[T]he North Atlantic Council is in effect an International Cabinet so far as concerns NATO affairs. Secondly, the authority of the Council is in no way altered by the presence or absence of Ministers”, speech of Secretary General Lord Ismay, 8 September 1952 in Jordan (n.55), at 59. [↑](#footnote-ref-633)
634. Munoz Mosquera (n. 267), at 55-69. [↑](#footnote-ref-634)
635. *E.g*., Security Agreements for exchange of classified material, North Atlantic Treaty Organization, *Israel Signs Security Agreement with NATO* (2001), available at: <www.nato.int/cps/en/natohq/news\_18727.htm?>, (accessed 4 August 2023); Participation and Financial Agreements for becoming a troop-contributing-nation in NATO-led operations,North Atlantic Treaty Organization, *Russia Signs IFOR Participation and Financial Agreements* (1996), available at: <www.nato.int/cps/en/natohq/news\_24997.htm?selectedLocale=en>, (accessed 4 August 2023). [↑](#footnote-ref-635)
636. North Atlantic Treaty Organization, *Allied Command Operations* (2023), available at: <<https://www.nato.int/cps/en/natohq/topics_52091.htm>>, (accessed August 2023). [↑](#footnote-ref-636)
637. North Atlantic Treaty Organization, *Purchases by SHAPE from International Funds from non-NATO countries*, C-M(52)59 (1952). [↑](#footnote-ref-637)
638. “RS International Civilian Consultants (ICCs) and Local Civilian Hires (LCHs) are Civilians employed by RS in support of specialized mission requirements ... [t]his category of civilians includes nationals of NATO member countries or RS Troop Contributing Nations (TCNs) … [f]or Local Civilian Hires (LCH) posts, only Afghan Nationals are eligible to apply”. North Atlantic Treaty Organization. Resolute Response Mission in Afghanistan, ‘The Resolute Support (RS) Recruitment Office manages the recruitment for all International Civilian Consultants (ICCs) and Local Civilian Hire (LCH) positions, within the Crisis Establishment for all RS Area of Operations: North Atlantic Treaty Organization, *General Information for Applicants,* available at: <<https://jfcbs.nato.int/resources/site2512/General/Documents/General%20Information%20for%20Applicants.pdf>>, (accessed 4 August 2023). [↑](#footnote-ref-638)
639. North Atlantic Treaty Organization (Final Communiqué of the sixth Session of the North Atlantic Council) (n. 629); *See also* V. Gavin, *Europa unida: Orígenes de un malentendido consciente* (Publicacions i Edicions de la Universitat de Barcelona: Barcelona, 2007), 175 [footnote 33]. [↑](#footnote-ref-639)
640. North Atlantic Treaty Organization, *ACO History. 1949-1952: Creating a Command Structure for NATO,* available at: <<https://shape.nato.int/page14612223>>, (accessed 4 August 2023). [↑](#footnote-ref-640)
641. North Atlantic Treaty Organization, *North Atlantic Council ninth session, final communiqué Lisbon, 20-25 February 1952*, available at: <www.nato.int/docu/comm/49-95/c520225a.htm>, (accessed 4 August 2023). *See* North Atlantic Treaty Organization, *Lisbon Reorganization* (2001), available at: <www.nato.int/archives/ismayrep/text.htm#1>, (accessed 4 August 2023). [↑](#footnote-ref-641)
642. North Atlantic Treaty Organization, *Lord Ismay. NATO Secretary General 1952 – 1957* (2011), available at: <www.nato.int/cps/en/natolive/who\_is\_who\_7294.htm>, (accessed 4 August 2023). [↑](#footnote-ref-642)
643. Reuter (n. 178), at 423-425 (emphasis added). [↑](#footnote-ref-643)
644. International Law Commission (n. 442), 11. [↑](#footnote-ref-644)
645. Alvarez (n. 47), at 135. [↑](#footnote-ref-645)
646. D.H. Vignes, ‘La Personnalité Juridique de l’O.T.A.N’ (1955) 1 *Annuaire français de droit international* 471; Dupuy (n. 567), at 534; Gazzini (n. 363), at 423. Some irrational controversy still impinges on the existence of the personality of NATO, *see* J. Verhoeven, *Droit international Public* (Larcier: Bruxelles, 2000), 613; *see also* M. Zwanenburg, ‘What’s in a Word? ‘Partnerships’ between NATO and Other International Institutions and Some Issues of Shared Responsibility’ (2016) 13 *International Organizations Law Review* 100, 103. [↑](#footnote-ref-646)
647. *Inter alia* *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Judgment, *ICJ Reports 2004*; Judgment of the European Court of Human Rights in Case No. 2.5.2007 [GC] *Behrami v. France* and *Saramati v. France*, *Germany and Norway*. On this point it is interesting to refer to what is stated by the Venice Commission: “As to applications for alleged human rights breaches resulting from actions or failures to act by KFOR troops, the matter is very complex. KFOR, unlike UNMIK, is not a UN peacekeeping mission. Therefore, although KFOR derives its mandate from UN SC Resolution 1244, it is not a subsidiary organ of the United Nations. Its acts are not attributed in international law to the United Nations as an international legal person. This includes possible human rights violations by KFOR troops. It is more difficult to determine whether acts of KFOR troops should be attributed to the international legal person NATO (in which case the jurisdiction of the ECHR could not be established against the impugned act) or whether they must be attributed to their country of origin (which means that the jurisdiction of the ECHR could be established if the state whose troops acted is a member of the Council of Europe). Not all acts by KFOR troops which happen in the course of an operation “under the unified command and control” (United Nations Security Council Resolution 1244 (n. 419), Annex 2, [4]) of a NATO Commander must be attributed in international law to NATO but they can also be attributed to their country of origin … Thus, acts by troops in the context of a NATO-led operation cannot simply all be attributed either to NATO or to the individual troop-contributing states. There may even be difficult intermediate cases, such as when soldiers are acting on the specific orders of their national commanders which are, however, themselves partly in execution of directives issued by the KFOR commander and partly within the exercise of their remaining scope of discretion”: Council of Europe, European Commission for Democracy Through Law (Venice Commission), *Human Rights in Kosovo: Possible Establishment of Review Mechanisms*, CDL-AD (2004) 033 (2004), 18 [79]. [↑](#footnote-ref-647)
648. C.W. Jenks, *The Headquarters of International Institutions, a Study of their Location and Status* (Royal Institute of International Affairs: London, 1945), 39. [↑](#footnote-ref-648)
649. “[Neither the term “state”] nor the term “legal personality is equivocal,” H. Aufricht, ‘Personality in International Law’ (1943) 317 *The American Political Science Review* 217. [↑](#footnote-ref-649)
650. Verhoeven (n. 646), at 260. [↑](#footnote-ref-650)
651. Arangio-Ruiz, in 1985 Yearbook of the International Law Commission (Vol. I), *Relations between States and international organizations (second part of the topic) {continued),* A/ CN.4/370,1 A/CN.4/391 and Add.l,2 A/CN.4/ L.383 and Add.1-33 (1985), 291 [18]. [↑](#footnote-ref-651)
652. Bekker (n. 59), at 61. *See* Arangio-Ruiz, Ibid., 291 [17]. *See also* J. Vanderschuren, ‘De quelques considérations sure les immunités octroyées aux organisations internationales’ (2014) 9 *Larcier Journal des Tribunaux* 145, 146. [↑](#footnote-ref-652)
653. Dupuy and Kerbrat (n. 563), at 200. [↑](#footnote-ref-653)
654. “*Arbitration is the last recourse*. Arbitration, like court litigation, is time-consuming and costly. In arbitration, parties agree to submit their dispute to a panel of persons who will apply the same laws that would have been applied by regular courts. However, the arbitrators can use simplified procedures, conduct the arbitration in the language of choice of the parties, and need not be judges or even lawyers. No one can ever be entirely sure of its result. It rarely results in a truly satisfactory resolution of a dispute, and it sours commercial relationships. For these reasons, it is to be avoided, if possible. One of the goals of the responsible staff members should be to resolve disputes without arbitration whenever possible. Efforts will be made to settle disputes through *negotiation, including mediation or conciliation*, which sometimes can be considered as a less formal stage before formal arbitration”. North Atlantic Treaty Organization, *NATO International Staff Procurement* *Manual*, EM (2010) 0285-REV1 (2011), 173 (emphasis added). [↑](#footnote-ref-654)
655. In NATO bodies exercising contracting arbitration is a normal practice, although the applicable law varies, which can be from a specific nation or applicable public international law and the legal order of the international organization. The major NATO contracting agency, NATO Support and Procurement Agency, specifies in its contracts the French law: North Atlantic Treaty Organization, General Provisions for Fixed-Price Contracts (Services) (2023), available at: <<https://www.nspa.nato.int/resources/site1/General/business/procurement/General%20info/GP_FP_Services.pdf> >, (accessed 4 August 2023); *See* M. Verwilghen, ‘La 57e session de l’Institut de Droit International’, (Oslo, 30 août - 8 septembre 1977):

     “Article 2. — 1) Afin de faciliter le règlement des difficultés pouvant survenir au sujet des contrats considérés, il est souhaitable que les parties désignent expressément les sources, nationales ou internationales, d ’où découle le droit applicable.

     /…/

     Article 6. — Dans la mesure où le droit applicable est le droit de l’organisation, ce droit s’entend de l’acte constitutif, des autres règles régissant l’organisation et de la pratique établie par elle, ces sources étant complétées par les principes généraux du droit”. [↑](#footnote-ref-655)
656. In the United Nations recourse to arbitration is also a last recourse, only “[v]ery few cases regarding commercial contracts to which the United Nations was a party have come before municipal courts; in instances in which the United Nations was the plaintiff the most frequent issue was the capacity of the Organization to institute proceedings”. United Nations Codification Division, *United Nations Juridical Yearbook 1976, Part Two* (United Nations: New York, 1976), 170. In NATO, SHAPE has resorted to court action to recover salary continuation paid from an insurance company for international civilians injured in road accidents. *See* M. Johnson, ‘NATO Military Headquarters’, in: Fleck (n. 579)*,* at 309. [↑](#footnote-ref-656)
657. Verhoeven (n. 646), at 260. *See also* Bekker (n. 59), at 62. [↑](#footnote-ref-657)
658. Gobierno de España, *Boletin Oficial del Estado*, N. 258 (2015), 101313. Note this is a ‘*ley orgánica’*, which is considered a piece of legislation between ordinary laws and the constitution. The approval of this special type of laws requires an ample majority of the parliament for it covers subjects of major sensitivity for the Spanish society. [↑](#footnote-ref-658)
659. “*Además de los convenios internacionales, concurren igualmente obligaciones derivadas del Derecho Internacional consuetudinario, que inciden directamente en el régimen de las inmunidades en España de los sujetos de Derecho Internacional … Con todo, perviven amplias dudas a propósito del carácter consuetudinario o no de buen número de aspectos de las inmunidades, en cuestiones de índole tanto sustantiva como procesal*”,Ibid., at 101301. [↑](#footnote-ref-659)
660. “Since its creation in 1955 … [t]he Assembly is institutionally separate from NATO, but serves as an essential link between NATO and the parliaments of the NATO nations. It provides greater transparency of NATO policies, and fosters better understanding of the Alliance’s objectives and missions among legislators and citizens of the Alliance”. NATO Parliamentary Assembly, *Our Mission*, available at : <<https://www.nato-pa.int/content/our-mission>>, (acessed 4 August 2023). Note that the *Sénat de Belgique* law of 28 Mars 1973 on the Assembly states: “*Cette institution a été créée en 1954 à l’initiative de parlementaires des pays membres de l’OTAN en vue de combler une lacune du Traité de l’Organisation de l’Atlantic Nord singe en 1949, qui, à côté du Conseil des Ministres et du Secrétariat général, ne fait aucune place à une organisme de nature parlementaire … En 1955, s’est réuni pour la première fois*”: Sénat de Belgique, Proposition de Loi Relative au Statut en Belgique de l’Assemblée de l’Atlantique Nord (1973), available at: <www.senate.be/lexdocs/S0640/S06401048.pdf>, (accessed 4 August 2023). [↑](#footnote-ref-660)
661. Verhoeven (n. 646), at 236. [↑](#footnote-ref-661)
662. The Assembly is financed by all NATO countries. *See* Sénat de Belgique, *Proposition de loi modifiant la loi du 14 août 1974 relative au statut en Belgique de l'Assemblée de l'Atlantique Nord* (1974), 6, available at:

     <www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=2&NR=843&VOLGNR=1&LANG=fr>, (accessed 4 August 2023). [↑](#footnote-ref-662)
663. Ibid., at 2. Note a different link on the *Sénat de Belgique* law of 14 August 1974, 2, at <www.senate.be/lexdocs/S0640/S06401048.pdf>, (accessed 4 August 2023). The link provided by the Belgian Ministry of Foreign Affairs includes only the ‘proposition de loi’ and not the actual law’; Comité Interministériel pour la Politique de Siège. Modèle Accord de Siège (2022), available at:

     <<https://diplomatie.belgium.be/fr/politique/comite-interministeriel-pour-la-politique-de-siege/modele-accord-de-siege>>, (accessed 4 August 2023). [↑](#footnote-ref-663)
664. *Sénat de Belgique* (n. 664), at 2. [↑](#footnote-ref-664)
665. Bekker (n. 59), at 63. *See* Schermers and Blokker (n. 446), at 1025. *See* Sinclair in 1985 Yearbook of the International Law Commission (Vol. I), *Relations between States and international organizations (second part of the topic) {continued)*, A/ CN.4/370,1 A/CN.4/391 and Add.l,2 A/CN.4/ L.383 and Add.1-3(1985), 289 [3]. [↑](#footnote-ref-665)
666. North Atlantic Treaty Organization (Final Communiqué of the first Session of the North Atlantic Council) (n. 629). *See* North Atlantic Treaty Organization, *NATO Reorganization Communiqué* (1951), available at: <www.nato.int/docu/pr/1951/p510503e.htm>, (accessed 4 August 2023). [↑](#footnote-ref-666)
667. Ismay (n. 75), at 25-26. *See* North Atlantic Treaty Organization, *Provision of Budget for SHAPE*, SGM-30-51 (1951). Note that later the Council with an incipient staff started being budgeted: see North Atlantic Treaty Organization, *Report of the Budget Committee of July 1951*, D-D(51)183 (1951). [↑](#footnote-ref-667)
668. SHAPE in the Hotel Astoria. *See* North Atlantic Treaty Organization, *SHAPE and Allied Command Europe, 1951-1971. Twenty years in the service of peace and security* (1971), 25. [↑](#footnote-ref-668)
669. Bekker (n. 59), at 71. [↑](#footnote-ref-669)
670. Snee (n. 330), at 187 [9-10]. [↑](#footnote-ref-670)
671. On the nature of Article II *see* S. Lazareff, *Status of Military Forces under current International Law* (A.W.Sijthoff: Leiden, 1971), 101, *See also* R. Batstone, ‘Respect for the Law of the Receiving State’, in Fleck (n. 579)*,* at 69, A. Munoz Mosquera, ‘Respect versus Obey : When the longstanding debate needs to be seen under the Receiving State’s International Law Obligations’ (2012) *NATO Legal Gazette* 29, 29. [↑](#footnote-ref-671)
672. Bekker (n. 59), at 55. [↑](#footnote-ref-672)
673. Ibid., at 63. [↑](#footnote-ref-673)
674. Ibid. [↑](#footnote-ref-674)
675. The idea of this paragraph has been drawn from Díaz González, in: 1989 Yearbook of the International Law Commission (Vol II), *Fourth report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Diaz Gonzalez, Special Rapporteur* , UN Doc. A/CN.4/424 and Corr.1 (1989), 155, [16 (9)]. [↑](#footnote-ref-675)
676. “*[L]’importance de l’activité juridique des organizasions sur le plan international: conclusion d’accords, envoi de représentations paradiplomatiques, rapports structures*”*.* Dupuy (n. 569), at 531. [↑](#footnote-ref-676)
677. North Atlantic Treaty Organization, *Note on Procedures for the Pacific Settlement of Disputes within various International Organizations*, CT-D/6 (1956), 8. [↑](#footnote-ref-677)
678. Ibid., 8, 3. *See* on page 3 the reference to the Organizations of American States procedure: “The Pact refers specifically to Article 36, paragraph 2 of the Statute of the International Court of Justice and recognises as compulsory the jurisdiction of the Court in all disputes of a juridical nature (e.g. the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute the breach of an international obligation; the nature or extent of the reparation to be made for the breach of an international obligation)”. [↑](#footnote-ref-678)
679. *See* n. 638. *See also* Berlin Plus agreement of 16 December 2002, adopted on 17 March 2003, in: North Atlantic Treaty Organization, *NATO-EU Strategic Partnership* (2004), at 3-4, available at: <www.nato.int/docu/comm/2004/06-istanbul/press-kit/006.pdf>, (accessed 4 August 2023); and in Reichard (n. 21), at 273-310. *See* the Founding Act on Mutual Relations, Cooperation and Security between NATO and the Russian Federation, signed on 27 May 1997 (not legally binding): “The international personality of international organization – i.e., of organizations of States – is becoming generally recognized. The capacity to conclude treaties is both a corollary of international personality and a condition of the effective fulfillment of their functions on the apart of the international organizations”. *See* H. Lauterpacht, in: 1953 Yearbook of the International Law Commission (Vol. II), *Report by Mr. H. Lauterpacht, Special Rapporteur*, UN Doc. A/CN.4/SER.A/1985/Add.1, A/CN.4/63, 100. [↑](#footnote-ref-679)
680. North Atlantic Treaty Organization, *Agreement between France and SHAPE on the special conditions applicable to the establishment and operation on French metropolitan territory of the Supreme Headquarters Allied Powers Europe and its Subordinate Allied Headquarters*, I.P.T. 153/6/INFO (1954); Agreement Between the United States of America and the Headquarters SACLANT regarding the Headquarters of the Supreme Allied Commander of the Atlantic, signed 22 October 1954, entered into force 10 April 1954. [↑](#footnote-ref-680)
681. “NATO also proceeded to deepen and extend its partnerships and, essentially, accelerate its transformation to develop new political relationships”: North Atlantic Treaty Organization, *NATO Strategic Concepts* (2022), available at: <www.nato.int/cps/en/natohq/topics\_56626.htm#>, (accessed 4 August 2023). Note that security agreements, participation, financial agreements and transit agreements are concluded with non-NATO nations: a good example is the Colombia-NATO Security Agreement of June 2013, <www.nato.int/cps/en/natolive/news\_108117.htm>, 4 August 2023. [↑](#footnote-ref-681)
682. “In the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, the principle has been recognized that member states may send permanent missions to international organizations if the rules of the organization so permit”: Schermers and Blokker (n. 446), at 1159. [↑](#footnote-ref-682)
683. “The fact that they [international organizations] do not have territory in which to receive them is no obstacle. The Holy See has long received diplomatic missions established in Italian territory. The territory of the Holy See is too small and is unsuitable for accommodating foreign diplomats”: Schermers and Blokker (n. 446), ibid., at 1159. [↑](#footnote-ref-683)
684. NATO bodies are numerous and can be considered NATO’s legations on the territory of the allies [few allies do not count on a headquarters or unit – Albania, Canada, Island, Montenegro] and although they do not represent the organization *per se*, they are missions for the development and implementation of NATO’s functions and purposes. [↑](#footnote-ref-684)
685. North Atlantic Treaty Organization, *NATO’s relations with the United Nations* (2023), available at: <<https://www.nato.int/cps/en/natohq/topics_50321.htm#:~:text=NATO%20and%20the%20United%20Nations,support%20and%20crisis%2Dmanagement%20operations>.>, (accessed 4 August 2023). [↑](#footnote-ref-685)
686. North Atlantic Treaty Organization, *NATO opens Military Liaison Office in Belgrade* (2006), available at: <www.nato.int/cps/en/natohq/news\_22054.htm?selectedLocale=en>, (accessed 4 August 2023). [↑](#footnote-ref-686)
687. North Atlantic Treaty Organization, *NATO and the Republic of Djibouti consolidate their cooperation*(2015), available at: <www.nato.int/cps/en/natohq/news\_118880.htm?selectedLocale=en>, (accessed 4 August 2023). [↑](#footnote-ref-687)
688. Schermers and Blokker (n. 446), at 1162. [↑](#footnote-ref-688)
689. In 2010, NATO reinforced its liaison arrangements by establishing the post of NATO Civilian Liaison Officer to the United Nations. North Atlantic Treaty Organization, *Allied contact point embassies (01.01.2015 - 31.12.2016)* (2015), available at: <www.nato.int/nato\_static\_fl2014/assets/pdf/pdf\_2015\_07/150713-cpe-2015-2016.pdf>, (accessed 4 August 2023). *See* North Atlantic Treaty Organization, *Contact Point Embassies in partner countries Helping NATO to work closely with its Partners* (2023), available at: <<https://www.nato.int/cps/en/natohq/topics_49190.htm>>, (accessed 4 August 2023). [↑](#footnote-ref-689)
690. This term refers to posts, while being the occupied by the same persons, accounts to the personnel establishment of two organizations/administration. [↑](#footnote-ref-690)
691. North Atlantic Treaty Organization (NATO-EU Strategic Partnership)(n. 681), at 3-4; European Union Council, *Joint Action 2004/570/CFSP on the European Union military operation in Bosnia and Herzegovina* (2004), Art 13. As of 29 March 2019 and as a consequence of BREXIT, the Vice-Chief of Staff (VCOS) of SHAPE became the post holding leadership instead of the Deputy Supreme Allied Commander in Europe (DSACEUR). [↑](#footnote-ref-691)
692. North Atlantic Treaty Organization, *NATO and the African Union boost their cooperation* (2014), available at: <www.nato.int/cps/en/natolive/news\_109824.htm >, (accessed 4 August 2023). [↑](#footnote-ref-692)
693. Dupuy (n. 569), at 531. [↑](#footnote-ref-693)
694. The cases of regional organizations as the Organization of American States (OAS), the Organization of African Union (OAU) and the Economic Community of West African States (ECOWAS) “suggest that the United Nations cannot expect to rely on such organization … to relieve it of a growing burden of regional peacekeeping … Regional security organizations such as the OAS and OAU first must improve their decision making capabilities, strengthen their financial bases, and address key issues of command and control before they will be capable of shouldering more of that burden on their own. The record suggests, however, that such organizations can usefully operate in partnership with the UN in certain circumstances … [w]here a military component is required, it might be added under UN auspices … [to] permit that component to be drawn from outside of the region”. V. Page Fortna, *Regional Organization and Peacekeeping: Experiences in Latin America and Africa* (The Henry L. Stimson Center: Washington D.C., 1993), iv. [↑](#footnote-ref-694)
695. “Authorizes Member States and *relevant international organizations* to establish the international security presence in Kosovo …” UNSCR 1244 (n. 418 (emphasis added). To confirm that NATO is not a regional organization on the question of the maintenance of international peace and security, *see* United Nations Security Council, *Resolution 2167 on enhancing the relationship between the United Nations and regional/subregional organizations, in particular the African Union,* UN Doc. S/RES/2167 (2014), 2-3. [↑](#footnote-ref-695)
696. North Atlantic Treaty Organization, *Crisis Management. Crisis decision-making at NATO* (2022), available at: <www.nato.int/cps/en/natolive/topics\_49192.htm>, (accessed 4 August 2023). *See* above Part 1 Chapter 3, ‘The Idea Settles: Institutions and NATO’s Decision-Making Process’. [↑](#footnote-ref-696)
697. *See* reference to North Atlantic Council, Revised Funding Policy for Non-Article 5 NATO-led Operations, PO(2005)0098 (2005), in: Homan, ‘NATO, Common Funding and Peace Support Operations: A comparative perspective’, *Clingendael Institute: Road to Transformation Summit*, 20-31. [↑](#footnote-ref-697)
698. M. Hura, G. McLeod, J. Schneider et al., ‘Command and Control’ in: *Interoperability: A Continuing Challenge in Coalition Air Operations A Continuing Challenge in Coalition Air Operations* (RAND: Santa Monica, 2000), 37-53. [↑](#footnote-ref-698)
699. “An international organization, regardless of any legal theory, must, for the purpose of fulfilling its task and the aims for which is has been establish, operate”. Díaz Gonzalez (n. 550). Domestic legal capacity has been also recognized by municipal courts as seen in the often-cited case *Branno v. Ministry of War and Allied Forces Headquarters* (n. 557), as cited by Shaw (n. 67), at 942 [footnote 58]. [↑](#footnote-ref-699)
700. Personnaz (n. 65), at 518. *See* Ruffert and Walter (n. 502), at 81. [↑](#footnote-ref-700)
701. Snee (n. 330), at 187 [8]. [↑](#footnote-ref-701)
702. Ibid., at 187 [9-10]. [↑](#footnote-ref-702)
703. Ibid., at 299 [23]. [↑](#footnote-ref-703)
704. North Atlantic Treaty Organization, MS-R(52) (1952), in: Snee (n. 330), at 299. [↑](#footnote-ref-704)
705. Ibid., at 299 [260]. [↑](#footnote-ref-705)
706. On the nature of Article II *see* Lazareff (n. 671), at 101. *See also* Batstone (n. 674)*,* at 69; Munoz Mosquera (n. 671), at 29;Personnaz (n. 65), at 518. [↑](#footnote-ref-706)
707. Munoz Mosquera (n. 671), at 38. [↑](#footnote-ref-707)
708. J. L. Kunz, ‘Privileges and Immunities of International Organizations’ (1947) 41 *AJIL* 828, 849. [↑](#footnote-ref-708)
709. “[T]he defence efforts would be furthered if supplies were purchases by Allied Headquarters in the cheapest market whether host or non-host or NATO or non-NATO countries,” North Atlantic Treaty Organization (Purchases by SHAPE from International Funds from non-NATO countries) (n. 637). [↑](#footnote-ref-709)
710. North Atlantic Treaty Organization Standardization Office (Allied Joint Doctrine for Host Nation Support) (n. 609), at 3-1. [↑](#footnote-ref-710)
711. Ibid. at 1-1. [↑](#footnote-ref-711)
712. “In English terminology these reflections revolve around the concept of “power”, while the term “competence” is nearer to continental legal thought. Whatever the term employed, the central issue is enabling International Organizations to act *vis-à-vis* its Member States as well as third party States”. Ruffert and Walter (n. 502), at 91. Case law applicable on legal powers: *Interpretation of the Greco-Turkish Agreement of 1 December 1926*, Advisory Opinion, *PCIJ Series B - No. 16* 1926; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal,* Advisory Opinion, *ICJ Reports* 1954; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, *ICJ Reports* 1962; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict International* Court of Justice, Advisory Opinion, *ICJ Reports* 1966. [↑](#footnote-ref-712)
713. S. Besson, ‘Sovereignty in Conflict’ (2004) 8 *European Integration online Papers*, 2.1 and footnote 82, available at: <eiop.or.at/eiop/pdf/2004-015.pdf>, (accessed 4 August 2023). Besson’s footnote 82: “See Waldron, 1994, 529-530 on these two meanings added by the term ‘essential’ to the contestability of a concept. See also Freeden, 2003, 53”: this refers to J. Waldron, ‘Is the rule of law an essentially contested concept?’ (2002) 21 *Law and Philosophy* 137 and M. Freeden, *Ideology, A very short introduction* (Oxford University Press: Oxford, 2003). [↑](#footnote-ref-713)
714. Bekker (n. 59), at 78. [↑](#footnote-ref-714)
715. Dupuy and Kerbrat (n.563), at 213. [↑](#footnote-ref-715)
716. Jenks (n. 119), at 18. [↑](#footnote-ref-716)
717. North Atlantic Treaty Organization (Strategic Concepts) (n. 681) (emphasis added). [↑](#footnote-ref-717)
718. Ibid (emphasis added). [↑](#footnote-ref-718)
719. Bekker refers to the “competence framework” and the International Court of Justice advisory opinion in *Namibia* (*Legal Consequences for States of the Continued Presence of south Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 2767 (1970)*, Advisory Opinion, *ICJ Reports* 1971, 31 [53]), which argues that “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation”. In other words “[it] is this framework which reflects the institutional structure of an international organization. As has been demonstrated, this structure goes beyond the constituent instrument of the organization, but it remains within the realm and the spirit of the purposes and functions which the organization is meant to pursue”. Bekker also refers to Pescatore and Zourek in: 55 *Annuaire* 214, 347 and 340 (1973), Bekker (n. 59), at 77 and 84-85. [↑](#footnote-ref-719)
720. Also named the principle of specialty. [↑](#footnote-ref-720)
721. Klabbers (n. 546), at 54. [↑](#footnote-ref-721)
722. Ibid., at 60. [↑](#footnote-ref-722)
723. Shaw (n. 67), at 1307. [↑](#footnote-ref-723)
724. *See* *Reparation for Injuries* (n. 553). [↑](#footnote-ref-724)
725. *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (n. 712), at 47, 56-57. [↑](#footnote-ref-725)
726. *Certain Expenses of the United Nations* (n. 712), at 151, 168. [↑](#footnote-ref-726)
727. Reid (n. 6), at 267. Reid makes a reference to the agreed interpretation of the treaty: United States Department of State, *Foreign Relations of the United States, 1949, Volume IV*, 222-223 (Minutes of the Ambassadors’ Committee, March 15, 1949) (emphasis added). [↑](#footnote-ref-727)
728. All quotations are in Reid (n. 6), at 268. [↑](#footnote-ref-728)
729. Ibid., at 267 (emphasis added). [↑](#footnote-ref-729)
730. North Atlantic Treaty Organization, *Resolution adopted by the North Atlantic Council to implement Section IV of the Final Act of the London Conference of 22 October 1952* (1954), available at: <www.nato.int/cps/en/natohq/official\_texts\_17409.htm?>, (accessed 4 August 2023). [↑](#footnote-ref-730)
731. North Atlantic Treaty Organization (Resolution on the Peaceful Settlement of Disputes and Differences between Members of the North Atlantic Treaty Organization) (n. 246). [↑](#footnote-ref-731)
732. M. Merle, ‘Le pouvoir règlementaire des institutions internationales’ (1958) 4 *Annuaire français de droit international* 341, 348. [↑](#footnote-ref-732)
733. North Atlantic Treaty Organization, *Relations with Sweden* (2023), available at: <<https://www.nato.int/cps/en/natohq/topics_52535.htm>>, (accessed 4 August 2023). [↑](#footnote-ref-733)
734. Judge Hackworth dissenting opinion to the ICJ advisory opinion in the *Reparation* case (n.553), at 198. [↑](#footnote-ref-734)
735. Ibid. [↑](#footnote-ref-735)
736. Shaw (n. 67), at 1307. [↑](#footnote-ref-736)
737. Stein and Carreau (n. 182), at 612. [↑](#footnote-ref-737)
738. Ibid., at 608-610. [↑](#footnote-ref-738)
739. North Atlantic Treaty Organization (Strategic Concepts) (n. 681) (emphasis added). [↑](#footnote-ref-739)
740. NATO has concluded Security Agreements and other arrangements with remote states as Australia, New Zealand, Japan, Colombia, etc. [↑](#footnote-ref-740)
741. North Atlantic Treaty Organization, (Strategic Concepts) (n. 681). [↑](#footnote-ref-741)
742. Ibid. [↑](#footnote-ref-742)
743. This idea is drawn from Ruffert and Walter (n. 502), at 94. [↑](#footnote-ref-743)
744. Ibid., at 94. [↑](#footnote-ref-744)
745. Ibid., at 48. [↑](#footnote-ref-745)
746. Reichard (n.21), at 103. [↑](#footnote-ref-746)
747. Judgment of the German Bundesverfassungsgerict (Second Senate) in Case No. 2 BvE 6/99, Headnote 6, available at: <www.bverfg.de/e/es20011122\_2bve000699en.html>, (accessed 4 August 2023). [↑](#footnote-ref-747)
748. Ibid., 10 (emphasis added). [↑](#footnote-ref-748)
749. Ibid., para. 19 (emphasis added). [↑](#footnote-ref-749)
750. Ibid., para. 148 (emphasis added). [↑](#footnote-ref-750)
751. Ibid., para. 19 (emphasis added). [↑](#footnote-ref-751)
752. S. Rosenne, ‘United Nations Treaty Practice’ (1954) 86 *Collected Courses of the Hague Academy of International Law*, at 296, cited in : R.J. Dupuy ‘L’application des règles du droit international général des traités aux accords conclus para les Organisations internationales’ (1973) 55 *Annuaire de l’Institut de Droit Internationale* 214, at 268. [↑](#footnote-ref-752)
753. Ibid. [↑](#footnote-ref-753)
754. Stein and Carreau (n. 182), at 610. [↑](#footnote-ref-754)
755. *See* n. 680. [↑](#footnote-ref-755)
756. “In this regard, note that, under the Shape Agreement, the Office of the Prosecutor is the liaising body between SHAPE and the Tribunal (para. 1.2) and that it undertakes to "defend SHAPE and IFOR for any errors or omissions occurring as a result of the applications of Articles 1, 2 and 3 by IFOR personnel acting in good faith during such detentions”: Judgment of the ICTY in Case IT-95-9/2-S 2002 *Prosecutor* *v.* *Blagoje Simi, Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric,* Separate Opinion of Judge Robinson, [3.2], footnote 2. [↑](#footnote-ref-756)
757. “In recent years, and in particular since the signing of a Memorandum of Understanding in 1997, the ICRC has participated increasingly in PfP exercises, in order to bring a realistic humanitarian dimension in to the military training scenarios. ICRC delegates are also regular speakers at training courses at the NATO School in Oberammergau (Germany) and the Defence College in Rome (Italy)”, in: ICRC Resource Centre, *ICRC and its relations with NATO & SHAPE* (2001), available at: <www.icrc.org/eng/resources/documents/misc/57jqwr.htm>, (accessed 4 August 2023). [↑](#footnote-ref-757)
758. This idea is drawn from Bekker (n. 59), at 77. [↑](#footnote-ref-758)
759. P.T. Pilidis ‘La capacité de conclure des traits des Organisations internationales’, Paris 1952, at 187 ; cited by Dupuy (n. 569), at 222. [↑](#footnote-ref-759)
760. Ibid. [↑](#footnote-ref-760)
761. *See* n. 593, at 213. [↑](#footnote-ref-761)
762. U.S. State Department, International Security Advisory Board, *Report on Status of Forces Agreements* (2015), 2, available at: <<https://2009-2017.state.gov/documents/organization/236456.pdf>>, (accessed 4 August 2023). [↑](#footnote-ref-762)
763. NATO-Afghanistan SOFA (n. 603). [↑](#footnote-ref-763)
764. U.S. Mission to the North Atlantic Treaty Organization, Afghanistan, available at: <<https://nato.usmission.gov/tag/afghanistan/>>, (accessed 4 August 2023). [↑](#footnote-ref-764)
765. Judgment of the Royal Courts of Justice (Strand, London) in Case Nos. A2/2014/1862, A2/2014/4084, A2/2014/4086 *Mohammed Serdar and others v. Secretary of State for Defence,* 17 [39], 20 [51], 49 [156], available at: <www.judiciary.gov.uk/wp-content/uploads/2015/07/serdar-mohammed-v-ssd-yunus-rahmatullah-v-mod-and-fco.pdf >, (accessed 4 August 2023). [↑](#footnote-ref-765)
766. Ibid., 49 [156]. [↑](#footnote-ref-766)
767. Ibid., 78 [272-273]. [↑](#footnote-ref-767)
768. Alvarez (n. 47), at 145. [↑](#footnote-ref-768)
769. This structure is proposed by Dupuy and Kerbrat (n. 563)*,* at 217-222. [↑](#footnote-ref-769)
770. Díaz González (n. 550). [↑](#footnote-ref-770)
771. Schermers and Blokker (n. 446), at 766. [↑](#footnote-ref-771)
772. F. Seyersted, ‘Applicable Law and Competent Courts in Relations Between Intergovernmental Organization and Private Parties’, in Académie de Droit International*, Recueil de Cours,* *III, Tome 122* (A.W.Sijthoff: Leyden, 1969), at 434-435. *See also* Schermers and Blokker (n. 446), at 766 [footnote 193]. [↑](#footnote-ref-772)
773. Alvarez (n. 47), at 144. [↑](#footnote-ref-773)
774. Ibid. [↑](#footnote-ref-774)
775. North Atlantic Treaty Organization Standardization Office (Allied Joint Doctrine for Host Nation Support) (n. 609), 5 [0003]. [↑](#footnote-ref-775)
776. Council of Europe, *EU Concept for Logistic Support for EU-led Military Operations*, 8641/11(2011), 8, available at: <register.consilium.europa.eu/doc/srv?l=EN&f=ST%208641%202011%20INIT>, (accessed 4 August 2023). [↑](#footnote-ref-776)
777. European Commission, Commission Staff Working Document EU Host Nation Support Guidelines, SWD(2012) 169 final (2012), 31, available at: <ec.europa.eu/echo/files/about/COMM\_PDF\_SWD%2020120169\_F\_EN\_.pdf., (accessed 4 August 2023). [↑](#footnote-ref-777)
778. North Atlantic Treaty Organization Standardization Office, (Allied Joint Doctrine for Host Nation Support) (n. 609), 5 [0003]. [↑](#footnote-ref-778)
779. United Nations Security Council, *Resolution 1325 on Women Peace and Security* (2000)*,* S/RES/1325, available at: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/720/18/PDF/N0072018.pdf?OpenElement>>, (accessed 4 August 2023). Other related UNSC Resolutions: 1820 (2008), S/RES/1820 , 1888 (2009), S/RES/1888 , 1889 (2009), S/RES/1889 and 1960 (2010), S/RES/1960. [↑](#footnote-ref-779)
780. North Atlantic Treaty Organization, *Women, Peace and Security. NATO, UNSCR 1325 and Related Resolutions* (2023), available at: <[www.nato.int/cps/en/natohq/topics\_91091.htm#](http://www.nato.int/cps/en/natohq/topics_91091.htm)>, (accessed 4 August 2023). [↑](#footnote-ref-780)
781. International Committee of the Red Cross, *The Montreux Document, on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict* (2008), 11, available at: <[www.icrc.org/eng/assets/files/other/icrc\_002\_0996.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf)>, (accessed 4 August 2023). [↑](#footnote-ref-781)
782. A. Guzman, ‘International Organizations and the Frankenstein Problem’ (2013) 24 *EJIL* 999, 1018. [↑](#footnote-ref-782)
783. *See* n. 784. [↑](#footnote-ref-783)
784. A. Munoz Mosquera, N. Chalanouli, ‘Regulating and Monitoring PMSCs in NATO Operations’, in: D’Aboville (ed.), *Private Military and Security Companies*, *35th Round Table on Current Issues of International Humanitarian Law* (FancoAngeli: Milano, 2012), 144. [↑](#footnote-ref-784)
785. Munoz Mosquera and Chalanouli (n. 784), at 141. [↑](#footnote-ref-785)
786. Swiss Confederation, International Code of Conduct for Private Security Service Providers (2021), available at: <<https://icoca.ch/wp-content/uploads/2022/01/INTERNATIONAL-CODE-OF-CONDUCT_Amended_2021.pdf>>, (accessed 4 August 2023). [↑](#footnote-ref-786)
787. “The following international organisations have joined the Montreux Document since its release, with date of communication of support: 1. European Union (27.07.2012), 2. Organization for Security and Co-operation in Europe (OSCE) (21.11.2013), 3. North Atlantic Treaty Organization (NATO) (6.12.2013)”. Swiss Confederation, *Participating States of the Montreux* *Document*, available at: <www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html>, (accessed 4 August 2023). [↑](#footnote-ref-787)
788. C. Economides, ‘Les actes institutionnels internationaux et les sources du Droit international’ (1988) 34 *Annuaire français de droit international* 131, 137. [↑](#footnote-ref-788)
789. Dupuy and Kerbrat (n.563), at 217. [↑](#footnote-ref-789)
790. J. Klabbers, ‘The Paradox of International Institutional Law’ (2008) 5 *International Organizations Law Review* 151, 165. [↑](#footnote-ref-790)
791. R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford University Press: Oxford, 1963), where she “did not waste time worrying about the supposed distinction between internal and external forms of UN law-making,” cited in: Alvarez (n. 47), at 148. [↑](#footnote-ref-791)
792. Bederman (n. 90), at 106-107. [↑](#footnote-ref-792)
793. Ibid., at 111. [↑](#footnote-ref-793)
794. The Convention of Contingents of the Panama Congress, the International Finance Control Commission of Greece, the Central Commission for the Navigation of the Rhine, the European Danube Commission, the International Congo Commission, the Permanent Court of Arbitration, the Court of Arbitral Justice, the International Prize Court and the International Commission for the Cape Spartel Light are some examples. *See* Kunz (n. 708), at 828-829. *See also* Bederman (n. 30), at 298. [↑](#footnote-ref-794)
795. Kunz (n. 708), at 829-836. [↑](#footnote-ref-795)
796. D. Hammarskjöld, ‘The International Civil Servant in Law and in Fact’, Lecture delivered to Congregations of Oxford University on 30 May 1961, 342, available at: <www.un.org/depts/dhl/dag/docs/internationalcivilservant.pdf >, (accessed 4 August 2023). *See also* J.F. Lalive, ‘L’immunité de juridiction des états et des organisations internationales’ 84 *Collected Courses of the Hague Academy of International Law*, 299. *See* I. Brownlie (n. 632), at 680. *See* Schermers and Blokker (n. 446), at 258. [↑](#footnote-ref-796)
797. Kunz (n. 708), at 847. [↑](#footnote-ref-797)
798. I. Seidl-Hohenveldern, ‘L’immunité de juridiction et d’exécution des états et des organisations internationales’, in *Institut des hautes études internationales de Paris, Cours et Travaux, Droit international 1* (Pédone : Paris, 1981), 160. [↑](#footnote-ref-798)
799. Bekker (n. 59), at 96, citing Sucharitkul: “The privileges and immunities of an international organization, of whatever type, were necessarily qualified or limited by the functions of the organization” (1977 Yearbook of the International Law Commission (Vol. I), 207 [52], *Preliminary Report On The Second Part Of The Topic Of Relations Between States And International Organizations (A/CN.4/304),* UN Doc. A/CN.4/SER.A/1977); “It is these functional needs which constitute both the justification for and the measure of international immunities”, C.W. Jenks, *International Immunities* (Oceana Publications; New York, 1961), at xxxviii. *See also* the Council of Europe, Report on Privileges and Immunities, Resolution (69) 29 (1969); Explanatory Report from the sub-committee of the European Committee on the Legal Cooperation; Memorandum by the Government of the United Kingdom – Foreign Office, 10 March 1965, at 79, in file with the author [↑](#footnote-ref-799)
800. “[F]ounded on the principle underlying the legal status of those organizations, i.e. the guarantee afforded by the host country that they can, with complete freedom and independence, exercise on its territory their constitutional and statutory activities or any other activity connected with the functions assigned to them,”, 1986 Yearbook of the International Law Commission (Vol. II) (n. 318), 167 [30]. [↑](#footnote-ref-800)
801. 1983 Yearbook of the International Law Commission (Vol. I), *Relations between States and international organizations (second part of the topic) (A/CN.4/3701),* UN Doc. A/CN.4/SER.A/1983 (1983), 240 [20]. [↑](#footnote-ref-801)
802. C. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press: Cambridge, 2005), 315-343. [↑](#footnote-ref-802)
803. This list has been constructed by analyzing not only Ibid., but also taking into account Bekker (n. 59), at 117-121, and D.B. Michaels, *International Privileges and Immunities* (Martinus Nijhoff: The Hague, 1971), 148-149. [↑](#footnote-ref-803)
804. “This clarification and relative crystallisation of the law of international immunities has taken place at a time when the general tendency of legal thought, national and international, has been to eliminate or restrict all forms of immunity”: C.W. Jenks (n. 799), at xxxv. “[E]xemption from legal process is not congenial to the climate of the modern State”: E. Lauterpacht, ‘The Codification of the Law of Diplomatic Immunity’, 40 *Transactions of the Grotius Society for 1954* 65, 71. [↑](#footnote-ref-804)
805. M. Akehurst, *A Modern Introduction to International Law* *(6th ed.)* (Routledge: Oxfordshire, 1987), 494. [↑](#footnote-ref-805)
806. A. Hammarskjöld, ‘Les immunités des personnes investies de fonctions internationales’ (1936) 56 *Collected Courses of the Hague Academy of International Law,* 111-129 and Kunz (n. 708), at 847. [↑](#footnote-ref-806)
807. Schermers and Blokker (n. 446), at 259. [↑](#footnote-ref-807)
808. “In the long run the increasing resistance towards immunities of all kinds including those deriving from inter-State relations, and the pressures resulting from the significant increase in the number of these [international] organizations, their activities and their staff, are likely to lead to substantial clashes involving and possibly significantly diminishing even the functional immunities of [intergovernmental organizations]”: P.C. Szasz, ‘International Organizations, Privileges and Immunities’, in: Bernhardt (ed.), *Encyclopedia of Public International Law* (Elsevier: New York, 1983), 159. [↑](#footnote-ref-808)
809. P. Webb, ‘The Immunity of States, Diplomats and International Organizations in Employments Disputes: The New Human Rights Dilemma’ (2016) 27 *EJIL* 745, 756. [↑](#footnote-ref-809)
810. Kunz (n. 708), at 847. [↑](#footnote-ref-810)
811. Klabbers (n. 545), at 136-137. *See also* Klabbers (n. 546), at 9-82. [↑](#footnote-ref-811)
812. Klabbers (n. 546), at 64. [↑](#footnote-ref-812)
813. Advisory Committee on Issues of Public International Law (CAVV), *Responsibility of International Organizations*, Advisory Report No. 27 (2015), 22-23, 19-22, available at: <<https://www.advisorycommitteeinternationallaw.nl/publications/advisory-reports/2015/12/23/responsibility-of-international-organisations>>, (accessed 4 August 2023). [↑](#footnote-ref-813)
814. Wouters and Naert (n. 586), at 24. [↑](#footnote-ref-814)
815. Judge Hackworth’s dissenting opinion to the ICJ advisory opinion in the *Reparation* case (n.553), at 198. [↑](#footnote-ref-815)
816. This structure is drawn up from Bekker (n. 59), at 99-151. [↑](#footnote-ref-816)
817. It could be said ‘coincide’ due to the economic and social dimension given by Article 2 of the NAT to the Alliance since the parties “will seek to eliminate conflict in their international economic policies and will encourage economic collaboration between any or all of them”. *See also* “Economic cooperation within the Alliance will continue to be important as political and economic relations within and outside NATO evolve”: North Atlantic Treaty Organization, ‘Aspects of NATO-Economic Cooperation’, 1 *Aspects of NATO Series*,5. [↑](#footnote-ref-817)
818. Emphasis added. [↑](#footnote-ref-818)
819. Emphasis added. [↑](#footnote-ref-819)
820. Ismay (n. 75), at 10. *See also* S.C. Ivrakis, *Privileges and Immunities of the United Nations – Precedents and Present-Day Developments* (Unpublished PhD dissertation: Cambridge, 1954), 653 [footnote 445], in: Bekker (n.59), 100 (emphasis added). [↑](#footnote-ref-820)
821. Olson (n. 599), 423. [↑](#footnote-ref-821)
822. Snee (n. 330), 1. [↑](#footnote-ref-822)
823. Jenks (n. 799), 17. [↑](#footnote-ref-823)
824. Ibid. [↑](#footnote-ref-824)
825. Ibid. [↑](#footnote-ref-825)
826. Ibid. [↑](#footnote-ref-826)
827. NATO Agencies are executive bodies of their respective NATO procurement, logistics or service organisations, and operate under North Atlantic Council-approved charters and under the delegated legal personality provided by the Ottawa Agreement. [↑](#footnote-ref-827)
828. North Atlantic Treaty Organization, *International Staff* (2023), available at: <www.nato.int/cps/ua/natohq/topics\_58110.htm>, (accessed 4 August 2023). [↑](#footnote-ref-828)
829. Ibid. [↑](#footnote-ref-829)
830. North Atlantic Treaty Organization, *Allied Command Transformation* (2023), available at: <www.nato.int/cps/ic/natohq/topics\_52092.htm>, (accessed 4 August 2023). [↑](#footnote-ref-830)
831. Note that International Military Staff does not have a constituent treaty, and while it is a common organ it does not have a unique legal position. The International Military Staff must be understood as an institutional bridge between the International Staff and the Supreme Headquarters’ staff. On this note, the organization and international immunities come roughly from both the Ottawa and the Paris Protocol respectively. Note also that the Agencies, by their NAC-approved charters their legal position is that given by the Ottawa Agreement. [↑](#footnote-ref-831)
832. Jenks (n.648), at xiii. [↑](#footnote-ref-832)
833. Bekker (n. 59), at 101. [↑](#footnote-ref-833)
834. Lalive (n. 796), at 299. [↑](#footnote-ref-834)
835. Ibid., at 299. [↑](#footnote-ref-835)
836. *Branno v. Ministry of War and Allied Forces Headquarters* (n. 557). [↑](#footnote-ref-836)
837. The legal position of the NATO headquarters in Naples comes from the 1952 Paris Protocol, and it is an Allied Headquarters directly subordinate to SHAPE. [↑](#footnote-ref-837)
838. E. De Brabandere, ‘Belgian Courts and the Immunity of International Organizations’ (2014) 10 *International Organizations Law Review* 464*,* 504. The cases refer to NATO Headquarters (International Staff) in Brussels whose legal positions come from the 1951 Ottawa Agreement. [↑](#footnote-ref-838)
839. Judgment of the District Court of Limburg in Case No. C/03/217614/ HA ZA 16/130 *Supreme Site Services GMBH, Supreme Fuels GMBH & Co KG, and Supreme Trading FZE v. SHAPE and JFCBS*. [↑](#footnote-ref-839)
840. Ibid.; Judgment of the Court of Appeal of ‘s-Hertogenbosch in Case No. 2000.217.388/01 *Supreme Site Services GMBH, Supreme Fuels GMBH & Co KG, and Supreme Trading FZE v. SHAPE*. [↑](#footnote-ref-840)
841. Judgment of the Supreme Court of the Netherlands in Case No. 20/00937 *Supreme Site Services GmbH, Supreme Fuels GmbH & Co KG and Supreme Fuels Trading FZE (Supreme) v. SHAPE and JFCB*. [↑](#footnote-ref-841)
842. Lalive (n. 796), at 299. [↑](#footnote-ref-842)
843. C. Amanpour, ‘NATO Commander: ‘Strong Russian-backed forces in Ukraine’ 5 February 2015, *CNN* at

     <edition.cnn.com/videos/world/2015/02/05/intv-amanpour-ukraine-general-philip-breedlove-line-aid.cnn>, (accessed 4 August 2023). [↑](#footnote-ref-843)
844. On file with the author. Note that this is an example of the negative use of Lawfare against NATO. For more on Lawfare, see A. Munoz Mosquera and S. Dov Bachmann, ‘Lawfare in Hybrid Wars: The 21st Century Warfare’(2016)7 *Journal of International Humanitarian Legal Studies* 63. *See also* A. Munoz Mosquera and S. Dov Bachmann, ‘Understanding Lawfare in a Hybrid Warfare Context’ (2016) 37 *NATO Legal Gazette* 38, and A. Munoz Mosquera Abraham Munoz Bravo, ‘The Legal Domain: A Need for Hybrid Warfare Environments’ (2017) *NATO Legal Newsletter (NATO Legal Matters)*. [↑](#footnote-ref-844)
845. Kingdom of Belgium (Foreign Affairs, Foreign Trade and Development Cooperation), *The Interministerial Committee for Host Nation Policy* (2022), available at: <https://diplomatie.belgium.be/en/policy/interministerial-committee-host-nation-policy/mission>, (accessed 4 August 2023): “The Interministerial Committee for Host Nation Policy (CIPS in French) is in charge of the implementation of the host nation policy (NHP) of the Belgian authorities towards the international governmental organisations (IOs).

     Mandated as the sole Belgian focal point for host nation affairs vis-à-vis all international organisations, CIPS fulfils many tasks:

     1. insure the mutual exchange of information among Belgian authorities on all aspects of the HNP to ensure coherence in implementation of this policy.
     2. coordinate positions of all levels of governance in Belgium, i.e. the federal authorities, the language-based communities and the geography-based regions, and the local authorities (“communes”).
     3. timely detect and point out new problems which could arise between Belgium as host country and the IO’s and formulate solutions.
     4. develop new initiatives in the framework of HNP and present them to the political authorities.
     5. take action as helpdesk in case security problems are encountered by IO’s and their staff.”

     [↑](#footnote-ref-845)
846. SHAPE - Kingdom of Belgium Agreement, signed 12 May 1967, implemented in accordance with Article 16 of the 1952 Paris Protocol. [↑](#footnote-ref-846)
847. Bekker (n. 59), at 103. [↑](#footnote-ref-847)
848. Ibid., at 103. [↑](#footnote-ref-848)
849. North Atlantic Treaty Organization, *NATO Code of Conduct* (2020), at 1, available at: <www.nato.int/structur/recruit/info-doc/code-of-conduct.pdf>, (accessed 4 August 2023). [↑](#footnote-ref-849)
850. Ibid., at 2. [↑](#footnote-ref-850)
851. “[T]here was agreement on the importance of preserving to the greatest extent possible, equality of treatment as between employees of different nationalities belonging to an international organization. The preservation of equality would facilitate recruitment of suitable personnel; it would also prevent friction and misgivings between employees”. North Atlantic Treaty Organization. *Working Group on Taxation of Certain International Employees*, AC/50-D/7(Revised) (1953), 3. [↑](#footnote-ref-851)
852. North Atlantic Treaty Organization, *Speech by President Kennedy on 4th July 1962*, LOM 133/62 (1962), 2. [↑](#footnote-ref-852)
853. North Atlantic Treaty Organization, *Defence Problems Addendum to RDC/57/U28: Note by the French Delegation*, Annex B/9 to RDC/57/428 (1957), at 1. [↑](#footnote-ref-853)
854. A.S. Muller, *International Organizations and their Host States. Aspects of their Legal Relationship* (Kluwer Law International: The Hague, 1995), 233-234. [↑](#footnote-ref-854)
855. North Atlantic Treaty Organization, *Protocol on the Status of Allied Headquarters – Tax Exemption for Allied Military Headquarters and Organizations*, CM(53)74(1953), 2 (emphasis added). [↑](#footnote-ref-855)
856. Snee (n. 330), at 623. [↑](#footnote-ref-856)
857. Ibid., at 646. [↑](#footnote-ref-857)
858. Bekker (n. 59), at 105. [↑](#footnote-ref-858)
859. Ibid., at 105. [↑](#footnote-ref-859)
860. R.S.J. Martha, ‘Exemptions form Taxes, Customs Duties, and Prohibitions on Imports and Exports (Article II Sections 7-8 General Convention)’ in: Reinisch (ed.) *The Convention on the Privileges and Immunities of the United Nations and Specialized Agencies. A Commentary* (Oxford University Press: Oxford, 2016), at 219-220. *See also* Schermers and Blokker (n. 446), at 1028; and Muller (n. 854), at 233-234. [↑](#footnote-ref-860)
861. 1989 Yearbook of the International Law Commission (Vol. II), *Fourth report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Diaz Gonzalez, Special Rapporteur*, UN Doc. A/CN.4/SER.A/1989/Add. 1, A/CN.4/424 (1989), 158 [28]: “[N]o State should derive unwarranted fiscal advantages from the funds put at an organization’s disposal”. [↑](#footnote-ref-861)
862. Martha (n. 860), at 195. [↑](#footnote-ref-862)
863. France renewed this commitment by updating the privileges and immunities to SHAPE by aligning them to the United States in the Franco-American Agreement of 13 March and 13 June 1952. Snee (n. 330), at 657. [↑](#footnote-ref-863)
864. North Atlantic Treaty Organization (n. 64) (emphasis added). [↑](#footnote-ref-864)
865. Ibid. [↑](#footnote-ref-865)
866. Snee (n. 330), at 660. [↑](#footnote-ref-866)
867. Mutual Defense Assistance Agreement between the United States of America and France, 27 January 1950, at 12 (on file with the author). [↑](#footnote-ref-867)
868. Snee (n. 330), at 657-660. [↑](#footnote-ref-868)
869. Martha (n. 860), at 223. *See also* the Council of Europe (n. 799), at 12 [9(c)]. [↑](#footnote-ref-869)
870. Snee (n. 330), at 660-661. [↑](#footnote-ref-870)
871. Ibid., at 660-661. [↑](#footnote-ref-871)
872. Ibid., at 661. [↑](#footnote-ref-872)
873. K. Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations* (Martinus Nijhoff: The Hague, 1964), 90. [↑](#footnote-ref-873)
874. Snee (n. 330), at 446. [↑](#footnote-ref-874)
875. Council of Europe (n. 799), at 13 [9(d)]. [↑](#footnote-ref-875)
876. Ibid. [↑](#footnote-ref-876)
877. Ibid., at 75, [8], in: Bekker (n. 59), at 107. [↑](#footnote-ref-877)
878. Lalive (n. 796), at 300. [↑](#footnote-ref-878)
879. North Atlantic Treaty Organization, *1951–1952. The Origin and Development of SHAPE* (Supreme Headquarters Allied Powers Historian Office: Mons, 1953), 67. [↑](#footnote-ref-879)
880. Ibid., at 69, 107–114. [↑](#footnote-ref-880)
881. Ibid., at 69. [↑](#footnote-ref-881)
882. Ibid., at 79. [↑](#footnote-ref-882)
883. This situation begs the question of whether France saw the Council’s decisions for establishing SHAPE as binding. Everything appears to point towards the idea that France felt bound by the Council. On this question, see Charpentier (n. 182), at 409–433. *See also* North Atlantic Council, *Resolution on the Creation of an Integrated Force*, C/6-D/7 (1950), available at: <https://archives.nato.int/creation-of-integrated-force-for-defence-of-western-europe>, (accessed 4 August 2023); Standing Group, *Provision of a Budget for SHAPE*, SGM-0030-51(1951), available at: < <https://archives.nato.int/provision-of-budget-for-shape-7>>, (accessed 4 August 2023); and Standing Group, *Official Title of Supreme Allied Commander Europe and of his Headquarters*, SGM-0004-51 (1951), available at: < <https://archives.nato.int/official-title-of-supreme-allied-commander-europe-and-of-his-headquarters>>, (accessed 4 August 2023). [↑](#footnote-ref-883)
884. Beckett (n. 248), at 30-31. [↑](#footnote-ref-884)
885. “[A] rule to interpretation of international law in line with the Charter”, Paulus/Ließ, in: Simma (n. 8), at 2137. [↑](#footnote-ref-885)
886. Henkin (n. 15)*,* at 544; *See also* Simma (n. 8), at 207; A. Orford, ‘The Gift of Formalism’ (2004) 15 *EJIL* 179, 181. [↑](#footnote-ref-886)
887. Ibid. [↑](#footnote-ref-887)
888. Klabbers (n. 77), at 139. [↑](#footnote-ref-888)
889. Snee (n. 330), at 2. The development this paragraph refers to is: “On the military side, by the time the Council held its fifth session, in New York on 15-18 September 1950, it was clear that the military security of the NATO countries required the creation of an integrated military force under a Supreme Commander supported by an international staff and subject to the direction of the subsidiary body of the Council called the Standing Group. In accordance with a decision reached at the sixth session of the Council, held in Brussels on 18-19 December 1950, the United States nominated and the Council confirmed General Eisenhower as Supreme Allied Commander Europe (SACEUR), who chose a site near Paris for the Supreme Headquarters Allied Powers Europe (SHAPE). Also on the military side, several of the NATO countries, and particularly the United States, had armed forces serving on the territories of other NATO countries in connection with the operations of the North Atlantic Treaty”: Snee (n. 330), at 2. [↑](#footnote-ref-889)
890. “NATO combines the traditional functions of an alliance with the institutions, procedures, and operation of an international organization”: P. Buteux (n. 41), at 4-5. *See also* R. Jordan (n. 54), at vii: “NATO stands as much in the growing tradition of functional international organization as in that of military alliances. In NATO the two are intertwined to an unprecedented extent”. [↑](#footnote-ref-890)
891. J. Snee (n. 330), at 474. Note also that SHAPE already existed as an international organization although it has neither a general multilateral treaty nor a bilateral treaty defining its status. This begs the question of the existence of international organizations without a standing constitution. Like the OSCE, *inter alia*, SHAPE comes to show that this is possible. [↑](#footnote-ref-891)
892. Examples of the most ancient and the most recent: The US *International Organizations Immunities Act (IOIA)* of 29 December 1945, and the *Ley Orgánica 16/2015 Privilegios e inmunidades de los estados extranjeros, las organizaciones internacionales con sede u oficina en España y las conferencias y reuniones internacionales celebradas en España* (BOE 258) of 20 October 2015. *See generally* International Law Commission, *Handbook on the Legal Status, Privileges and Immunities of the United Nations,* UN Doc. ST/LEG/2 (1952), Codification Division (UN Office of Legal Affairs), *Book 10: Legislative Texts and Treaty Provisions Concerning the Legal Status, Privileges and Immunities of International Organizations (Vol. I)*, UN Doc. ST/LEG/SER.B/10 (1959); Codification Division (UN Office of Legal Affairs), *Book 11: Legislative Texts and Treaty Provisions Concerning the Legal Status, Privileges and Immunities of International Organizations (Vol. II)*, UN. Doc. ST/LEG/SER.B/11 (1961), and the UN Juridical Yearbooks. [↑](#footnote-ref-892)
893. “The legal basis of international privileges and immunities is found ostensibly in special treaty law, which may be supplemented by others sources such as judicial precedent and customary practice”: Michaels (n. 803), at 30. [↑](#footnote-ref-893)
894. Snee (n. 330), at 7. [↑](#footnote-ref-894)
895. “Desiring to define the status of such Headquarters and of the personnel thereof within the North Atlantic Treaty area, Have agreed to the present Protocol to the Agreement signed in London on 19th June, 1951, regarding the Status of their Forces”; See NATO SOFA (n. 58), preamble. [↑](#footnote-ref-895)
896. “26. 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 question not covered by that Agreement – and for those question only – it is possible to refer to the Agreement signed at Ottawa on 20 September 1951, concerning the status of NATO civilian agencies”: North Atlantic Treaty Organization, *Protocol on the Status of Allied Headquarters*, D-D (52) 2 (1952) and North Atlantic Treaty Organization, *Report and Comments by France and SHAPE on the Draft Protocol and the Draft France-SHAPE Agreement* (1952), [26], in: Snee (n. 330), at 596. [↑](#footnote-ref-896)
897. NATO’s main organ – through its resolutions – created subsidiary bodies in accordance with Article 9 of the NAT. In order to anchor those subsidiary bodies, institutionally speaking, the states concluded the general multilateral treaties, which where, in turn and over NATO’s history, complemented by administrative acts of those NATO’s subsidiary bodies. These general multilateral treaties solely apply to subsidiary bodies created under Article 9 of NAT and under very specific policies: North Atlantic Treaty Organization, *Procedures For The Activation and Reorganisation in Peacetime of NATO Military Bodies And Rules for Granting Them International Status and International Financing*, C-M(69)22 (1969); NAC approved by C-R(69)30 (1969), in: Burger (n. 620), at 329. In order to avoid confusion with other entities in which NATO participates in operations, note that none of the field or in-theatre headquarters have been created as a subsidiary body per Article 9 of the NAT, but under UN-mandated and PSO-specific status of forces (in the case of Resolute Support it was under a bilateral agreement with Afghanistan as it is the NATO Mission in Iraq). [↑](#footnote-ref-897)
898. International Law Commission (Report of the International Law Commission Sixty-Third Session) (n. 29), 6-7. [↑](#footnote-ref-898)
899. Seyersted argues that a convention is not a necessary requirement to constitute an international organization. Seyersted footnotes this argument by making reference to the judgment of *Mazzanti v Headquarters Allied Forces Southern Europe* (1955): Seyersted (n. 562), at 46, 49. [↑](#footnote-ref-899)
900. International Law Commission (n. 29), at 7 [↑](#footnote-ref-900)
901. “The Council yesterday unanimously decided to ask the President of the United States to make available General of the Army Dwight D. Eisenhower to serve as Supreme Commander. Following receipt this morning of a message from the President of the United States that he had made General Eisenhower available, the Council appointed him. He will assume his command and establish his headquarters in Europe early in the New Year. He will have the authority to train the national units assigned to his command and to organize them into an effective integrated defence force. He will be supported by an international staff drawn from the nations contributing to the force”: North Atlantic Council, *Press Communiqué Brussels, Sixth session of the North Atlantic Council held in Brussels on 19th December, 1950*, C6/D-6 (1950), in: Ismay (n. 75), at 186. *See also* North Atlantic Council, *Summary Record of the second meeting of the Sixth Session*, C6-R/2 (1950), 1 [5]: “The Council: (i) Adopted the draft resolution on the appointment of General Eisenhower (subsequently circulated as document C6-D/9)”. [↑](#footnote-ref-901)
902. SHAPE History 1951-1952 (n.879), at 67. [↑](#footnote-ref-902)
903. On 2 April 1951, General Eisenhower executed the Council’s sixth session mandate to create a subsidiary ‘military body’, and representing the Council, he signed the activation of SHAPE. The Council decided only in February 1952 to appoint a Secretary General; *see* North Atlantic Treaty Organization (History of SHAPE, 1949-1952) (n. 640); *see* North Atlantic Council (Ninth Session, Final Communiqué Lisbon) (n. 641); *see also* North Atlantic Treaty Organization (Lisbon Reorganization) (n. 641). [↑](#footnote-ref-903)
904. “The first non-US staff officers arrived on 10 January 1951. From this date the “US Advance Planning Group, SHAPE” became international, and from then until its activation [by the NAC] on 2 April 1951 it was known as the SHAPE Planning Group. By 21 January 1951 thirty-nine allied officers had reported for duty at the Hotel Astoria,” SHAPE, *Origin and Development of SHAPE*, available at: <archives.nato.int/uploads/r/nato-archives-online/9/5/8/95882fd864bd8319e4ea8e53c9ca2e40cff8db1131d89f3c2eeb301efdd714fe/SHAPE\_HISTORY\_VOLUME\_I.pdf>, (accessed 4 August 2023). On the activation, this took place per General Order No. 1: see North Atlantic Treaty Organization (n. 668), at 150. [↑](#footnote-ref-904)
905. Ibid., at 69, 107-114. [↑](#footnote-ref-905)
906. Ibid., 69. [↑](#footnote-ref-906)
907. Ibid., 79. [↑](#footnote-ref-907)
908. On the question of the North Atlantic Council’s powers, see Charpentier (n.183), at 409-433. *See also* North Atlantic Council (Resolution On The Creation of an Integrated Force) (n. 883). [↑](#footnote-ref-908)
909. Mutual Defense Assistance (n. 867), at 12 (on file with the author). [↑](#footnote-ref-909)
910. Ibid., at 2 (on file with the author). [↑](#footnote-ref-910)
911. Snee (n. 330), at 474 (emphasis added). Note also that SHAPE already existed as an international organization although it has neither a general multilateral treaty nor a bilateral treaty defining its status. This begs the question of the existence of international organizations without a standing constitution. Note also that reference made to the intrinsic difficulty of implementing Article VII of the NATO SOFA to SHAPE is due to the fact the Article VII is aimed at exclusive and concurrent ‘national’ military justice and criminal laws. SHAPE was and is not a sovereign state with laws on those realms. [↑](#footnote-ref-911)
912. Amerasinghe (n. 802), at 335. See also Snee (n. 330), at 183. [↑](#footnote-ref-912)
913. El-Erian, in 1963 Yearbook of the International Law Commission (Vol. I) (n. 77), at 172-173. [↑](#footnote-ref-913)
914. Jenks (n. 799), at 37. [↑](#footnote-ref-914)
915. Snee (n. 330), at 4, 137. [↑](#footnote-ref-915)
916. Ibid., at 232. [↑](#footnote-ref-916)
917. “7. The French Representative said that, although he was quite willing to see Article 4 amended, he could not agree to the insertion of former Article 22. This Article appeared only in the Agreement on the status of UNO specialized agencies and not in the Agreement on the status of UNO itself. In view of the political character of NATO, the French Government considered that the Agreement on the status of UNO should be taken as a model”. Snee (n. 330), at 186 (emphasis added). [↑](#footnote-ref-917)
918. “3. The United States Representative recalled that, in connection with this Article, he had raised the question of the method whereby it could be made clear that the Agreement applied to the political subdivisions of a Contracting Party. This problem arose for the United States, since they were a federation, and the individual federal States had legislative autonomy. If no clause to this effect were included in the Agreement, the individual States would be free not to apply the Agreement and this might be the cause of considerable difficulties, such as those which had already arisen in connection with the Agreement on UNO”.Ibid., at 195. [↑](#footnote-ref-918)
919. “8. The Chairman pointed out that completely new principles were now being put forward, quite different from those adopted for UNO and the OEEC and those which had served as a basis in preparing the NATO draft Agreement”. Ibid., at 228. [↑](#footnote-ref-919)
920. “9. The French Representative pointed out that it was not his intention to introduce a new conception of international law, but merely to specify to whom exactly the system of privileges should apply. In any case, national delegations were not accredited to the host Government, but were delegations to the international Organization, and this was true both for UNO and for NATO ... He also pointed out that, in the case of UNO, the Convention on privileges was concluded with the Secretary General and the host Government, and not exclusively with the host Government”. Ibid., at 228-229. [↑](#footnote-ref-920)
921. “11. With regard to the second alternative, the Belgian Government could only reaffirm its opposition in principle to any extension to new categories of officials of the immunities accorded to the officials of other international organizations such as UNO, OEEC, etc.”.Ibid., at 233. [↑](#footnote-ref-921)
922. Díaz González, in: 1985 Yearbook of the International Law Commission (Vol. I), *Relations between States and international organizations (second part of the topic) (A/CN.4/370,1 A/CN.4/391 and Add.l,2 A/CN.4/L.383 and Add.1-33),* UN Doc. A/CN.4/SER.A/1985 (1985) [1985], 283 [4, 5]. [↑](#footnote-ref-922)
923. Ibid. [↑](#footnote-ref-923)
924. Bekker (n. 59), at 114. [↑](#footnote-ref-924)
925. This follows the rationale of the Preparatory Commission of the United Nations, *Report of the Preparatory Commission of the United Nations*, UN Doc. PC/20(1945), at 62: “No specialized agency would, however, require greater privileges than the United Nations itself. The privileges and immunities, therefore, of the United Nations are a maximum”. [↑](#footnote-ref-925)
926. Council of Europe (n. 799), at 115. [↑](#footnote-ref-926)
927. Announcement of Joint Declaration Agreed upon by Fourteen Member Nations of the North Atlantic Treaty Organization, 18 March 1966: “The following declaration has been agreed between the heads of governments of Belgium, Canada, Denmark, Federal Republic of Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Turkey, the United Kingdom, and the United States. The North Atlantic Treaty and the organization established under it are both alike essential to the security of our countries. The Atlantic Alliance has ensured its efficacy as an instrument of defense and deterrence by the maintenance in peacetime of an integrated and interdependent military organization in which, as in no previous alliance in history, the efforts and resources of each are combined for the common security of all.

     We are convinced that this organization is essential and will continue. No system of bilateral arrangements can be a substitute. “The North Atlantic Treaty and the organization are not merely instruments of the common defense. *They meet a common political need* *and reflect the readiness* and determination of the member countries of the North Atlantic community to consult and act together wherever possible in the safeguard of their freedom and security and in the furtherance of international peace, progress and prosperity”; Office of the Federal Register, National Archives and Records Administration (NARA)**,** *Public Papers of the Presidents of the United States: Lyndon B. Johnson* (1966), at 354 (emphasis added). [↑](#footnote-ref-927)
928. Reid (n. 6), at 62-69. [↑](#footnote-ref-928)
929. D.W. Bowett, *The Law of International Institutions* (Stevens and Sons: London, 1963), at 282. On the Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15, adopted 13 February 1946 and the Convention on the Privileges and Immunities of the Specialized Agencies, adopted 21 November 1947, 33 UNTS 261: Bowett argues “[t]hese two conventions formed the model for later agreements made by other organisations such as the League of the Arab States, the Organisation of American States, the Council of Europe, Western European Union”. Thus, Bowett’s argument is more accurate and it is most probable that only the two cited United Nations conventions and that of the OEEC [and not the Council of Europe’s] are the source of NATO general multilateral treaties on privileges and immunities. [↑](#footnote-ref-929)
930. Snee (n. 330), at 6. [↑](#footnote-ref-930)
931. “The criterion “*lex generalis derogat speciali*” and other clauses. From all this, it can be said that special rules derogate from general ones but it can also be said that certain general rules shall derogate from special rules and prevail on them according to the opposite criterion *lex generalis derogat legi speciali* … [T]he *lex specialis* principle is part of positive law, where it may function equally as a criterion to solve or prevent antinomies and as a criterion to connect and unify special and general rules in order to achieve a more complete regulation of a certain matter”: in S. Zorzetto, ‘The Lex Specialis Principle and its Uses in Legal Argumentation. An Analytical Inquire’ (2012/2013) 3 *Eunomía. Revista en Cultura de la Legalidad* 61, at 76-77. For ‘default rules’, see the Spanish legal term *‘derecho supletorio’: “Derecho cuya aplicación está prevista para los casos en que el ordenamiento específico no regule el supuesto contemplado*”. The law that applies in the event of lack or insufficiency of a rule in the system considered to be the main one for the case in question. The most common example is the supplementary application of civil law in the absence of specific commercial rules. Spanish Royal Academy Dictionary, ‘Derecho Supletorio’, at <dpej.rae.es/lema/derecho-supletorio>, (accessed 4 August 2023). [↑](#footnote-ref-931)
932. Snee (n. 330), at 596 (emphasis added). While it is true the possibility exists both under Article II of the Ottawa Agreement for assigning to a military headquarters, fully or partially, status directly under the Ottawa Agreement, this only happens in an indirect manner, as will be seen at the bottom of this paragraph. However, this is not equivalent to saying that Allied Headquarters cannot refer to the Ottawa Agreement for the implementation of the Paris Protocol. Denying this reality is to deny that the military side of NATO is always more exposed than the civilian side. [↑](#footnote-ref-932)
933. “Also on the military side, several of the NATO countries, and particularly the United States, had armed forces serving on the territories of other NATO countries in connection with the operations of the North Atlantic Treaty … [o]f these three agreements, the first to be drafted and signed was the Status of Forces Agreement. Since the United States maintained the largest contingent of troops in other NATO countries”: Snee (n. 330), at 2-3. [↑](#footnote-ref-933)
934. Ibid.. LIV, at 6. [↑](#footnote-ref-934)
935. Ibid., at 596 [26]. [↑](#footnote-ref-935)
936. See C-M(52)30 “(3) civilian personnel directly employed by the Headquarters … The third category can be assimilated to the international staff of NATO and should therefore be subject to the regime set out in Article 19 of the Agreement on the Status of NATO, National Representatives and International Staff, signed in Ottawa on 20 September 1951”, in: Snee (n. 330), at 596 [26]. *See also* NATO Civilian Personnel Regulations as approved by the North Atlantic Council establish: “A. Applicability (i) These Civilian Personnel Regulations are applicable throughout the North Atlantic Treaty Organization and shall govern personnel administration in each NATO body for personnel of the following classes: international civilian personnel, consultants [and] temporary (civilian) personnel”., 1. But, are Allied Headquarters included in the concept of ‘NATO body’? “B. Definitions (v) For purposes of these Regulations, the following phrases have the meanings indicated: (a) NATO bodies - means all civilian and military headquarters, agencies and other organizational units established pursuant to the North Atlantic Treaty and fully financed through international budgets”. It is ‘international civilian personnel’ the same as ‘international staff’? “(c) International civilian personnel, staff, or members of the staff - means personnel of a NATO body recruited from among the nationals of members of the Alliance and appointed to the Organization and assigned to international posts appearing on the approved establishment of that NATO body”: North Atlantic Treaty Organization, NATO Civilian Personnel Regulations (2005), 2, available at: <<https://www.nato.int/nato_static_fl2014/assets/pdf/2023/2/pdf/230210-CPR-amend-47-EN.pdf>>, (accessed 4 August 2023). [↑](#footnote-ref-936)
937. Snee (n. 330), at 650. See also 254, for arguments presented by Belgian and Portugal to justify those privileges in the Ottawa Agreement, both refer to the fact that international law provided in fact for two kinds of privileges only: immunity from jurisdiction and inviolability. Although the final decision was to delete “international law” and “international practice”, the privileges remain in its plenitude and were later incorporated in the supplementary agreements to the Paris Protocol. [↑](#footnote-ref-937)
938. Michaels (n. 803), at 149. [↑](#footnote-ref-938)
939. Although not stated in the text, the NATO SOFA can be supplemented, and this has taken place in practice. Bilateral agreements supplementing the NATO SOFA have been concluded with Germany, by Belgium, the Netherlands, France, the United Kingdom, and the United States. [↑](#footnote-ref-939)
940. See the Further Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces (FAP), signed on 19 December 1997: This Protocol incorporates by reference the provisions of the Paris Protocol. Therefore, Art 16 applies. [↑](#footnote-ref-940)
941. “As is explained in E. Satow, A Guide to Diplomatic Practice (Cambridge University Press: Cambridge, 1917), 376 [40.18], a headquarters agreement may be *in addition to* the multilateral agreement which specifies the privileges and immunities to be accorded by all member States, or it may be *in substitution for* the multilateral agreement if the host State is not a party to that agreement, or it may be required because the multilateral agreement may contain *no detailed provisions* in regard to privileges and immunities of the international organization”, in: Bekker (n. 59), at 136 [footnote 603]. [↑](#footnote-ref-941)
942. Muller (n. 854), at 47. [↑](#footnote-ref-942)
943. Snee (n. 330), at 118. [↑](#footnote-ref-943)
944. Council of Europe (Report on Privileges and Immunities) (n. 799), at 17 [18], in: Bekker (n. 59), at 138. [↑](#footnote-ref-944)
945. “9. The Canadian Representative, while conscious of the difficulties involved in extending privileges and immunities to a new category of officials, felt that while Article 11 would be more than sufficient for individuals attending *ad hoc* NATO meetings, there was a strong case for granting diplomatic privileges in full to specified members of the permanent NATO delegations. This point might be covered by a series of supplementary agreements under Article 24 of the draft or by some other more convenient means”, in: Snee (n. 330), at 143; “(b) It was proposed that the Supreme Commander and the Commander-in-Chief directly subordinate to him be granted certain personal privileges analogous to those accorded to diplomatic personnel. This presented difficulties for certain Governments, and the Working Group agreed to leave this question to national arrangements”, in Snee (n. 330), at 650. [↑](#footnote-ref-945)
946. They are “an acknowledgment of the will of the Alliance, both collectively and individually among its Member States, to make the SOFA and the Paris Protocol work so that it is practised in a manner that makes it remain valid and relevant”. A. Munoz Mosquera and M. P. Hartov, ‘NATO International Military Headquarters’, in: Fleck (ed.) *The Handbook of The Law of Visiting Forces* (Oxford University Press: Oxford, 2018 – Second Edition), 481-482 (emphasis added). [↑](#footnote-ref-946)
947. Ibid., at 481-482 (emphasis added). [↑](#footnote-ref-947)
948. T. Henquet, ‘International Organisations in the Netherlands: Immunity from the Jurisdiction of the Dutch Courts’, (2010) 57 *Netherlands International Law Review* 267, 274. *See* Amerasinghe (n. 802), at 344-348, and R. Pavoni, ‘Inviolability of Premises (Article III Section 5 Specialized Agencies Convention)’, in: A. Reinisch, *International organizations before national courts* (Cambridge University Press: Cambridge, 2000), 145-146. [↑](#footnote-ref-948)
949. Privileges and immunities to general officers and civilian equivalents, inviolability of premises, waiver of immunities, etc. [↑](#footnote-ref-949)
950. International Law Commission, *Report of the International Law Commission. Sixty-eight session (2 May-10 June and 4 July-12 August 2016). Supp. No. 10,* A/71/10 (2016), 89. [↑](#footnote-ref-950)
951. “The discussion in the Sixth Committee revealed wide-spread agreement on the need for the representatives of Member States to the United Nations, the organization and its staff to enjoy appropriate privileges and immunities, *and on the importance of respect for these privileges and immunities for the effective functioning of international organizations*. The development of international organizations since 1945 and their central position in present-day international relations were stated to have served to underline the significance of the diplomatic law of international organizations. It was emphasized that if Member States wished the work of the Organization to be properly carried out, they must be prepared to observe strictly the immunities designed to secure the free and successful performance of its functions … Many speakers indicated that the privileges and immunities of representatives of Member States to the principal and subsidiary organs of the United Nations "were based not only on a system of conventional norms but also on the progressive development of customary law": El-Erian, in: 1968 Yearbook of the International Law Commission (Vol. II), *Document A/CN.4/203 and Add. 1-5: Third report on relations between States and intergovernmental organizations, by Mr. Abdullah El-Erian, Special Rapporteur*, UN Doc. A/CN.4/SER.A/1968/Add. 1 (1968), 121-122[6, 8] (emphasis added). [↑](#footnote-ref-951)
952. It refers to the North Atlantic Council Deputies, *Draft Agreement On The Status Of The North Atlantic Treaty Organization, National Representatives And The International Staff*, D-D (51) 178 on the Ottawa Agreement (1951), in: Snee (n. 330), at 570. [↑](#footnote-ref-952)
953. Olson (n. 599), at 422. [↑](#footnote-ref-953)
954. Seidl-Hohenveldern (n. 798), at 283. *See also* A. Bianchi, (Book review) ‘S. de Bellis “L’immunità delle organizzazioni internazionali dalla giurisdizione (1992)’, (1994) 88 *AJIL* 212, 221-224. [↑](#footnote-ref-954)
955. Lalive (n. 796), at 299 (emphasis added). Dominicé argues “l’apparition d’un droit coutumier spécifique, propre aux relations entre organisations internationales et Etats, pourrait être le fait, principalement, de la *répétition systématique d’une même règle dans de nombreuses conventions*. On sait qu’un tel phénomène peut être analyse, selon les circonstances, comme traduisant dans le chef des Etats le sentiment d’une obligation” (emphasis added), in C. Dominicé, ‘L’Immunité des Organisations Internationales’ (1984) 187 *Collected courses of The Hague Academy of International Law,* 176. Other authors do not agree with this conclusion like Guggenheim, who denies the existence of customary law based on identical provisions in several agreements on the same matter. However, he does not refer to joint endeavors or to privileges and immunities of international organizations, but to the establishment of consulates or extradition. P. Guggenheim*, Traité de droit international public* *(Avec Mention de la Pratique Internationale et Suisse) (Vol. I)* (Librairie de l'Université, Georg & Cie. : Geneva, 1953), 52. [↑](#footnote-ref-955)
956. Seidl-Hohenveldern (n. 798), at 162-163 (emphasis added). The quoted sentence contains the following relevant text in footnote 98: “*Toutefois, l’effort de l’ONU de codifier une partie de ce droit coutumier par la Convention du 14 mars 1975 sur la représentation des Etats dans leurs relations avec les organisations internationales paraît voué à un échec. La Convention a prévu des privilèges si importants qu’elle est devenue inacceptable pour les Etats de siège*”. Cf. J.P. Ritter, ‘La Conférence et la Convection sur la représentation des Etats dans leurs relations avec les organisations internationales’ (1975) 21 *AFDI* 445, 482. [↑](#footnote-ref-956)
957. International Law Commission (Report of the International Law Commission) (n. 950), at 79-80 (emphasis added). [↑](#footnote-ref-957)
958. “A number of paragraphs of the United States draft, in particular par. 1, 3 and 4 of Article VI, developed the right of jurisdiction of the courts of the receiving State, which appeared in Article 7, par. 1-2 of the Brussels Agreement. Paragraph 4 of the United States draft, however, provided certain safeguards, in conformity with the procedure followed in the United States; it might be necessary to amend those safeguards, *in order to bring them into line with the practice in other countries*”: Snee (n.330), at 65 (emphasis added). [↑](#footnote-ref-958)
959. “In the case of damage caused to the property of the receiving State in its own territory, it would be the procedure laid down by the draft Agreement; in the case of damage caused outside the territory of the receiving State, it would be *common international practice*”: Snee (n. 330), at 65 (emphasis added). [↑](#footnote-ref-959)
960. “The Belgian Representative pointed out that international law provided in fact for two kinds of privilege only: immunity from jurisdiction and inviolability. Other privileges were granted simply as of courtesy. Now, the Working Group certainly did not intend to refuse the courtesy privileges to the officials covered in Article 20. He suggested that the present wording be replaced by the words "in accordance with international practice”. The Chairman thought that this would lead to complications, since *nobody could define accurately what was international practice*”: Snee (n. 330), at 254 (emphasis added). [↑](#footnote-ref-960)
961. See n. 959. [↑](#footnote-ref-961)
962. “The remarks by SHAPE refer only to paragraph (b) of Article 9 of the draft Protocol in connection with which SHAPE requests complete liberty in the conversion of currency. In practice, the French Government grants SHAPE the facilities in requests in this respect. In its specific Agreement with SHAPE, it undertakes to give SHAPE freedom of arbitration in respect of currency within the framework of the European Payments Union”: Snee (n. 330), 598 (emphasis added). [↑](#footnote-ref-962)
963. Extract from the Yearbook of the International Law Commission 1989 (n. 675), 167 [ 115]. See also the difficulties in reaching this common understanding by the states in N. Chalanouli, ‘Foreign Exchange Regulations’, in: Fleck (ed.) *The Handbook of The Law of Visiting Forces* *(2nd Ed.)* (Oxford University Press: Oxford, 2018), at 370-385. [↑](#footnote-ref-963)
964. “The United States does not consider that the Agreement (particularly Article XI, paragraph 4) affects in any way, directly or indirectly, present or future operations of service PX's, commissaries or similar establishments. The United States wishes to continue the existing arrangements with most countries and to reserve the right to deal directly with individual NATO member States on this subject. *We do not consider that the absence of specific reference to post exchanges constitutes a renunciation of present understandings or the right to negotiate in the future on this subject*”: Snee (n. 330), at 118, 614 (emphasis added). [↑](#footnote-ref-964)
965. “In the case of damage caused to the property of the receiving State in its own territory, it would be the procedure laid down by the draft Agreement; in the case of damage caused outside the territory of the receiving State, it would be *common international practice*”, in: Snee (n. 330), at 320-321 (emphasis added). [↑](#footnote-ref-965)
966. Verhoeven (n. 646), at 333. [↑](#footnote-ref-966)
967. See n. 805, at 344-348. [↑](#footnote-ref-967)
968. International Law Commission (Report of the International Law Commission) (n. 950), at 97. [↑](#footnote-ref-968)
969. “[E]arly this year, a Dutch court recognized that North Atlantic Treaty Organization (‘NATO’) entities enjoy immunity from jurisdiction on the basis of customary international law, in a case involving a private claim of hundreds of millions of US dollars. It is also increasingly accepted that international organizations are bound by obligations under customary international law”, in N. Blokker, ‘International Organizations and Customary International Law. Is the International Law Commission Taking International Organizations Seriously?’ (2017) 14 *International Organizations Law Review* 1, 1-2. Note the tribunal should not have used the argument of customary law if it had referred to the *travaux préparatoires* (‘paragraph 26’). Also note that Blokker refers to SHAPE, one of the international organizations that forms NATO. On this question *see* *infra* n. 975 (D-D (52) 2). [↑](#footnote-ref-969)
970. M. Wood, ‘Do International Organizations Enjoy Immunity Under Customary International Law?’ (2013) 10 *International Organizations Law Review* 287, at 316-317. [↑](#footnote-ref-970)
971. International Law Commission, *Fifth report on identification of customary international law (New York, 30 April–1 June 2018 and Geneva, 2 July–10 August 2018)*, UN Doc. A/CN.4/717 (2018), 21-22:

     “The question of how to establish *acceptance as law (*opinio juris*) on the part of international organizations does not seem to raise special difficulties*. The forms of evidence referred to in conclusion 10 may well apply, *mutatis mutandis*, to international organizations. Statements of senior officials of the organization, legal opinions by the general counsel of the organization, correspondence of the organization with its member States (or others), acceptance by the organization of treaty provisions explicitly incorporating rules of customary international law, or official publications of an organization, may attest to the opinio juris of the organization. A recent example may be found in the Joint Statement submitted to the United Nations Legal Counsel on 31 January 2017 by some 24 international organizations, in which the signatories expressed their view, *inter alia*, on the legal status of the rules contained in the Commission’s draft articles on the responsibility of international organizations.

     …/…

     The commentary could then explain that while international organizations often serve as arenas, or catalysts, for State practice, at times it is their own practice, in fulfilment of their mandates from States, which could be of relevance. *This may be the case when they exercise on the international plane exclusive competences or other powers conferred upon them*. It would be clarified that the conclusion does not suggest that every analysis of the existence of a rule of customary international law necessitates an examination of the practice of international organizations; it is only where the practice of particular organizations may be directly relevant, mostly by virtue of their mandate and constituent instrument, that it should be considered. It would also be explained that *the weight to be given to the practice on an international organization should depend on a number of factors, including the extent of the organization’s membership and the input and reaction of the member States to that practice.* The commentary may further explain that the practice of international organizations *may be of particular relevance when determining the existence and content of customary rules applying to the organizations themselves*. It should also include a general sentence, similar to the one found in the draft commentary at present, explaining that references in *the conclusions and commentaries to the practice (and opinio juris) of States should be read as including, in those cases where it is relevant, the practice (and opinio juris) of international organizations*. In this way, the conclusions themselves, by referring mostly to States, will reflect the predominance of State practice in the present context, but at the same time leave room for consideration of practice of international organizations in those fields and cases where it may be relevant” (emphasis added). [↑](#footnote-ref-971)
972. Verhoeven (n. 646), at 327. [↑](#footnote-ref-972)
973. Note that the in the original D-D(52)2 there is not numbering of the paragraphs, which was done a posteriori in Snee’s compendium. Also, it is essay to notice from the text that the intent is that the Paris Protocol be informed by both NATO SOFA and Ottawa Agreement, which gives the Paris Protocol a hybrid nature. [↑](#footnote-ref-973)
974. North Atlantic Treaty Organization (Protocol on the Status of Allied Headquarters) (n. 581), in: Snee (n. 330), at 596 (emphasis added). Note that the question of the possibility of having a specific agreement (Paris Protocol) for international military headquarters was already discussed by the nations on 16 and 26 April 1951 (documents MS-D(51)24 and MS-R(51)16 respectively). Both documents can be found in Snee (n. 330), at 183 (MS-R(51)16 ), 475 (MS-D(51)24). Document D-D(52)2 was based on the report presented by France and SHAPE and summarizes all the previous Allies’ discussions on the Paris Protocol. Note that Since 7 May 1951, France, as NATO bodies’ host state, led the Working Group charged by the Council Deputies with the examination of the application of the NATO SOFA to Allied Headquarters and to make proposals to a potential Protocol to be attached to the NATO SOFA. One of the conclusions was that the Ottawa Agreement had to complement, together with the NATO SOFA, the Paris Protocol. [↑](#footnote-ref-974)
975. Judgment of the Kaiserlautern Labour Court in Case No. 843/17 *Klag v. Supreme Headquarters Allied Powers Europe (SHAPE)*, 7, 11. The same individual [a former spy sentenced to seven years of imprisonment by the Koblenz Higher Regional Court in Case No. StE 1/13-2] engaged the same court (Reference Number 1 Ca 1074/20) which did not rule in his favor. Mr Klag appealed to the Regional Labour Court of Rhineland-Palatinate. This court’s final judgment referred in its paragraph 2.1 to NATO document D-D(52)2 and, without further consideration, stated: “at the least, a decision taken by only a committee of the North Atlantic Treaty is not a decision of the North Atlantic Council”: Judgment of the Regional Labour Court of Rhineland-Palatinate in Case No. 6 Sa 175/21, 1 Ca 1074/20 *Klag v. Supreme Headquarters Allied Powers Europe (SHAPE),* 7,11. While the judgment was still in favor of SHAPE, the court disregarded the highest status of the Deputies Council at the time. [↑](#footnote-ref-975)
976. International Law Commission, (Report of the International Law Commission) (n. 950), at 106-107. [↑](#footnote-ref-976)
977. Ibid., at 97. [↑](#footnote-ref-977)
978. Ibid., at 100. [↑](#footnote-ref-978)
979. In this case it would be ‘concurrence d’immunités’ both conventional and customary. Schroer argues that “[e]tant donné qu’une Organisation Internationale peut bénéficier d’immunités concurrentes, les rapports de ces concurrences sont à déterminer … Lorsqu’il y a concurrence des immunités de juridiction, l’immunité conventionnelle prime, en tant que *lex specialis*, l’immunité coutumière” : F. Schroer, ‘De l’application de l’immunité juridictionnelle des états étrangers aux organisations internationales’, (1971) 75 *Revue General de Droit International Public* 712, at 741. For Allied Headquarters’ conventional immunity from jurisdiction,see Snee (n. 330), 596 [26] and confirmation by *Klag v. Supreme Headquarters Allied Powers (SHAPE)* (n. 979), at 7, 11. For Allied Headquarters’ customary immunity from jurisdiction, see *Supreme Site Services GMBH, Supreme Fuels GMBH & Co KG, and Supreme Trading FZE v. SHAPE (Supreme v. SHAPE)* (n. 841). [↑](#footnote-ref-979)
980. Kunz (n. 708), at 836. *See also* M. Dixon, *Textbook on international law (6th Ed.)*, (Oxford University Press: Oxford, 2007), at 204. [↑](#footnote-ref-980)
981. Bowett (n. 929), at 287-288. [↑](#footnote-ref-981)
982. “Almost all the governments … privileges and immunities to international organisations should be related in future to the concept of functional need. No criticism of this view was expressed”. Council of Europe (n. 799), at 90. [↑](#footnote-ref-982)
983. G.H. Glenn, M.M. Kearney and D.J. Padilla, ‘Immunities of International Organizations’ (1982) 22 *Va.J.Int’l L*. 247, at 266. [↑](#footnote-ref-983)
984. J.G. Lammers, ‘Immunity of International Organizations. The Work of the International Law Commission’ (2013) 10 *International Organizations Law Review* 276, at 281. [↑](#footnote-ref-984)
985. Jenks (n. 799), at xxxvii. [↑](#footnote-ref-985)
986. Jenks (n. 799), at xxxvii. [↑](#footnote-ref-986)
987. For a more detailed account of the history of privileges and immunities, see Bederman (n. 90), at 106-120, and Kunz (n. 708), at 4; for the ‘emergence of the international functionary’, see Michaels (n. 803), at 11-16. *See also* Bederman (n. 30). [↑](#footnote-ref-987)
988. G. Langrod, *The International Civil Service* (Oceana Publications, Inc.: New York, 1968), at 74. quoted in Michaels (n. 803), at 15. [↑](#footnote-ref-988)
989. C. van Vollenhoven, ‘Diplomatic prerogatives of non-diplomats’ (1925) 19 *AJIL* 469; S. Basdevant, *Les fonctionnaires internationaux* (Sirey: Paris, 1931); L. Preuss, ‘Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest’ (1931) 25 *AJIL* 695; J. Gascon y Marin, ‘Fonctionnaires Internationaux’ (1932) 41 *Recueil de cours de l’Académie de droit international*; P.C. Jessup, ‘Status of International Organizations: Privileges and Immunities of their Officials’ (1944), 38 *AJIL* 658; L. Preuss, ‘Immunity of Officers and Employees of the United Nations for Official Acts: The Renallo Case’ (1947), 41 *AJIL* 555*;* Kunz (n. 708); F. Honig, ‘The International Civil Service: Basic Problems and Contemporary Difficulties’ (1954) 30 *International Affairs* 175; P. Lengyel, ‘Some Trends in the International Civil Service’ (1959) 13 International Organization 520; Hammarskjöld (n. 796); Jordan (n. 55); A. Downs, *Inside Bureaucracy* (Little Brown: New York, 1967); D. Ruzié, *Les fonctionnaires Internationaux* (Armand Colin: Paris, 1970); Y. Beigbeder, *La représentation du personnel a l’OMS e dans les principales institutions spécialisées des Nations Unies ayant leur siège en Europe* (LGDJ: Paris, 1975); T. Meron, ‘In RE Rosescu and the Independence of the International Civil Service’ (1981) 75 *AJIL* 4; T.G. Weiss, ‘International Bureaucracy: The Myth and Reality of the International Civil Service’ (1982) 58 *International Affairs* 287; W. Zyss, ‘La Caisse Commune des Pensions du Personnel des Nations Unies’, in Société Française sur le Droit International, *Colloque d’Aix Provence: Les Agents Internationaux* (Pédone : Paris, 1984); L. Dubois, ‘La Condition Juridique des Agents Internationaux’, in Société Française sur le Droit International, *Colloque d’Aix Provence: Les Agents Internationaux* (Pédone : Paris, 1984); A. Pellet ‘La Carrière des Fonctionnaires Internationaux’, in Société Française sur le Droit International, *Colloque d’Aix Provence: Les Agents Internationaux* (Pédone : Paris, 1984); H. Reymond and S. Mailick, *International Personnel Policies and Practices* (Praeger Publishers : New York, 1985); D.J. Goossen, ‘The International Civil Service Commission’, in C. de Cooker (ed.) *International Administration. Law and Management Practices in International Organizations* (Martinus Nijhoff Publishers : Leiden, 1989); D. Ruzié, ‘La Protection des Agents Internationaux’, in Société Française sur le Droit International, *Colloque d’Aix Provence: Les Agents Internationaux* (Pédone : Paris, 1984); C.F. Amerasinghe, *The Law of the International Civil Service, Vol I and II* (Clarendon Press : Oxford, 1994); H. Mauritzen, *The International Civil Service. A Study of Bureaucracy: International Organization* (Dartmouth Publishing Company Ltd: Adlershot, 1990); R. Oosterlinck, ‘Staff Management in International Organization: The Example of the European Space Agency’, in C. de Cooker (ed.) *International Administration. Law and Management Practices in International Organizations* (Martinus Nijhoff Publishers: Leiden, 2009); A.J. Miller, ‘Privileges and Immunities of United Nations Officials’ (2007) 4 *International Organizations Law Review* 169; R. Dhinakaran, ‘Law of the International Civil service: A Venture into Legal Theory’ (2011) 8 *International Organizations Law Review* 137; A. Munoz Mosquera, ‘On the Notion of Precarious Employment in International Organizations’ (2014) 11 *International Organizations Law Review* 294. [↑](#footnote-ref-989)
990. C. de Visscher, *Institut de Droit International, 31eme volume, session de Vienne – Aout 1924* (Pédone : Paris, 1924), at 98-99. For the *agents subalternes*, in page 99 de Visscher submits : “*Le rapporteur insiste ensuite sur la nécessité d'établir, entre les agents visés à l'article 7, une distinction. Le texte de cet article est absolument général et cependant il serait illogique de reconnaître aux agents subalternes n'exerçant pas des actes de fonction, le droit de se prévaloir d'immunités dont la base ne réside que dans la nécessité de sauvegarder l'indépendance de la Société. Peut-être ces personnages subalternes pourraient-ils bénéficier de certaines faveurs en matière de taxe et d'impôt, d'exemptions douanières par exemple, mais le droit de se prévaloir des immunités diplomatiques ne peut leur être reconnu. L'accord intervenu entre le Conseil fédéral suisse et le Secrétaire général de la S. D. N. adopte cette distinction*”. [↑](#footnote-ref-990)
991. Ruzié (n. 989), at 310-311. Ruzié refers also to J. Duffar, *Contribution à l’étude des privileges et immunités des Organisations Internationales* (LGDJ : Paris, 1982), at 18. Contrary to this argument, see the League of Nations Secretariat, *Memorandum from Swiss Federal Political Department on the Privileges and Immunities of the League from the League of Nations Secretariat*, c. 92 1926 (v) (1926): “[P]rivileges and immunities are today limited in law to personal inviolability and immunity from jurisdiction; the other immunities and facilities … are purely matters of courtesy; they belong to the domain of “comitas gentium,” and in the absence of an express treaty clause they cannot be claimed as a right”. *See also* the reference to this new body of law by Jenks (n. 799), at 30. [↑](#footnote-ref-991)
992. Snee (n. 330), 596 [26]. [↑](#footnote-ref-992)
993. *See* *e.g*. NATO Civilian Personnel Regulations, IV-1, Art 12: “Members of the staff of NATO bodies exercise functions of an international character *in the common interest of the NATO countries*. They are subject to the authority of the Head of the NATO body employing them and are assigned to their duties by that individual: they are answerable to the Head of the NATO body for the performance of these functions and for compliance with all applicable NATO rules and regulations” (emphasis added). See North Atlantic Treaty Organization, n. 936. [↑](#footnote-ref-993)
994. M. Piquemal, *The International Civil Service. Current Problems. The NATO Case* (Editions du Papyrus: Montreuil, 2000), 102-103. [↑](#footnote-ref-994)
995. Jenks (n. 799), at 30. [↑](#footnote-ref-995)
996. Judgment of the Court of Justice of the EC in Case No. 6/60 *Jean-E. Humblet v. Belgian State.* [↑](#footnote-ref-996)
997. There was also a view that international immunities had to cover also the private life of international staff. In this regard, de Visscher argues “*D'autre part, le texte de l'article 7 porte : « agents dans l'exercice de leurs fonctions»; on ne peut cependant admettre que cela implique, en ce qui concerne les actes de la vie privée, une impossibilité pour les agents de se prévaloir des immunités établies par le Pacte. En effet, le privilège s'attache à la personne quels que soient les actes accomplis pendant le temps de l'exercice des fonctions qui y donnent droit. D'autre part, en pratique, toute vexation même pour un acte de la vie privée, peut porter atteinte au libre exercice de la mission qui serait confiée à un agent, dans une région troublée par exemple. Il faut d'ailleurs observer qu'un État peut exiger qu'un traitement convenable soit réservé à ses ressortissants en usant de moyens de contrainte dont la S. D. N. ne dispose pas : l'importance des immunités établies par le Pacte est d'autant plus grande*”, in De Visscher (n. 990), at 99. [↑](#footnote-ref-997)
998. Piquemal develops arguments in favor of subjective rights and acquired rights, see n. 994, 104-106. [↑](#footnote-ref-998)
999. NATO Civilian Personnel Regulations (n. 936), 4 (emphasis added). *See also* Ottawa Agreement (n. 58), Art 22. [↑](#footnote-ref-999)
1000. E.H. Fedder, ‘Functional Basis of International Privileges and Immunities: A New Concept in International Law and Organization’ (1960) *9 American University International Law Review* 60*,* 66. Fedder mentions: “6. Privileges of free convertibility and transfer of funds. 7. Privilege for repatriation facilities in time of international crisis”, however, they may not be considered necessarily immunities, but privileges. [↑](#footnote-ref-1000)
1001. Snee (n. 330), 37-40. *See also* Ottawa Agreement Arts 13-14, and 21 and 23. [↑](#footnote-ref-1001)
1002. “[T]he basis for his draft [NATO SOFA] the earlier Agreement Relative to the Status of Members of the Armed Forces of the Brussels Treaty Powers 8 which had already been agreed to by five of the twelve NATO countries — Belgium, France, Luxembourg, the Netherlands and the United Kingdom — although it had never been ratified”: Snee (n. 330), at 3. [↑](#footnote-ref-1002)
1003. Lazareff (n. 671). [↑](#footnote-ref-1003)
1004. Snee (n. 330), at 5. [↑](#footnote-ref-1004)
1005. Michaels (n. 803), at 148-149. [↑](#footnote-ref-1005)
1006. These are the exceptions in favor of nationals, while they cannot enjoy the rest of privileges and immunities set up in Articles XVIII, XX, and XXI. [↑](#footnote-ref-1006)
1007. *Applicability of Article VI section 22 of the. Convention on Privileges and Immunities of the United Nations (Mazilu Case),* Advisory Opinion, *ICJ Reports* 1989, at 196; and *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Cumaraswamy* *Case*), Advisory Opinion, ICJ Reports 1999, at 86. [↑](#footnote-ref-1007)
1008. On ‘national discrimination’ see Kunz (n. 708), at 860.“The accords of the Ottawa Agreement depart from those of the Convention on the Privileges and Immunities of the United Nations in respect of the caveat regarding a member’s own nationals and in the following significant provisions: inviolability for papers and documents in the possession of experts on missions is restricted to those relating to the work of the individual’s current mission and not to official papers of other kinds; additionally, the immunity from legal process to be enjoyed by these experts is not specified as continuing subsequent to the end of their missions”, in Michaels (n. 803), at 149. [↑](#footnote-ref-1008)
1009. “The Protocol applies automatically to "Supreme Headquarters Allied Powers in Europe (SHAPE), Headquarters of the Supreme Allied Commander Atlantic [SACLANT] and any equivalent international military Headquarters set up pursuant to the North Atlantic Treaty", (Article 1), as well as to international military headquarters immediately subordinate to a Supreme Headquarters (Articles 1-2). The Council may decide to extend it to other headquarters as well (Article 14). With regard to such headquarters and their personnel, civilian and military, the Protocol has two purposes. First, it adapts to the headquarters and personnel the provisions laid down in the Status of Forces Agreement in regard to sending States and their personnel (Articles 3-8). Secondly, it creates a special status for such headquarters which is analogous to that created for the Council and its subsidiary civilian bodies by the Agreement of 20 September 1951. In the latter category fall provisions for the relief of headquarters from taxation (Article 8), the disposal of assets or installations no longer needed (Article 9), the grant to Supreme Headquarters of juridical personality and other legal capacities (Articles 10-11), freedom from currency restrictions (Article 12) and inviolability of archives and documents (Article 13)”: Snee (n. 330), at 5-6. [↑](#footnote-ref-1009)
1010. The analysis below relies mainly on Munoz Mosquera and Hartov (n. 946). This chapter offers detailed information of international immunities in Allied Headquarters. On the one hand, Article 11.1 only refers to Article VIII of the NATO SOFA, i.e., ‘non-contractual claims’: “Subject to the provisions of Article VIII of the Agreement, a Supreme Headquarters may engage in legal proceedings as claimant or defendant”. On the other hand, Article 11.1 of the Paris Protocol does not refer either to locally recruited employees – Supreme Headquarters are subject to hosting states’ labour legislation per Article IX.4, which per default sends these headquarters and their subordinate ones to national courts in local labour cases - nor to any claims outside Article VIII, i.e, contractual employees are not covered by Article 11.1, the reason is that Supreme Headquarters enjoy customary immunity from jurisdiction, as well as conventional, per the Ottawa Agreement, as set up by the *travaux* – D-D(52)2, as part of their functional immunities. [↑](#footnote-ref-1010)
1011. Bekker (n. 941), at 513. [↑](#footnote-ref-1011)
1012. Ibid., at 514. [↑](#footnote-ref-1012)
1013. “The second part of para. 2 in Art. 7 is interesting and is part of the narrative of the Paris Protocol. The background and application is detailed in the first edition of this Handbook by Mr. Max Johnson, and suffice to identify that the 1983 Tax Reimbursement Agreement between the Secretary General of NATO and the US Ambassador to NATO remains in force and that this is not unique to NATO and US relations, as the US has concluded similar agreements with other international organizations”. [footnote 283: “See e.g. Tax Reimbursement Agreement between the United States and the Permanent Court of Arbitration (2007), Tax Reimbursement Agreement Between the United States of America and the International Renewable Energy Agency (2013), Tax Reimbursement Agreement Between the Government of The United States of America and the United Nations Educational, Scientific and Cultural Organization (2010)”.], in Ibid., at 519. [↑](#footnote-ref-1013)
1014. Ibid., at 521. [↑](#footnote-ref-1014)
1015. Lazareff (n. 671), at 75. This is what Munoz Mosquera and Hartov refer to as ‘limited privileges’. [↑](#footnote-ref-1015)
1016. Snee (n. 330), at 660. [↑](#footnote-ref-1016)
1017. Allied Headquarters’ members of Spanish nationality can buy tax-free furniture and electric appliances as a consequence of the *IMHQ tax exemption for nationals assigned assigned to that IMHQ,* Judgment of the Spanish Supreme Court [T.S. (Sala 3)], in Case STS 4370/2011, other similar judgments, and their implementation by the Ministerio de Hacienda. [↑](#footnote-ref-1017)
1018. “*La quatrième résolution proposée à l'Institut concerne l'immunité de juridiction dont il faut prévenir les abus*”, C. de Visscher (n. 990), at 100. On abuse of organizational immunities, see Jenks (n. 799), at 21-26. [↑](#footnote-ref-1018)
1019. This particularity refers to Allied Headquarters. [↑](#footnote-ref-1019)
1020. 1986 Yearbook of the International Law Commission (Vol. II), (n. 318), at 167 [31]. See also Rapporteur of Committee IV/2 of the Conference of the United Nations at San Francisco, *Report*, UNCIO Doc. PC/LEG/22 (1945), 3-4. Note the report was approved by the Committee. *See* Schermers and Blokker (n. 446), at 1030-1032. [↑](#footnote-ref-1020)
1021. For a detailed analysis of these privileges and immunities see Munoz Mosquera and Hartov (n. 946). [↑](#footnote-ref-1021)
1022. Jenks (n. 799), at 53. [↑](#footnote-ref-1022)
1023. Muller (n. 854), at 196-197. *See also* Jenks (n. 802), at 48. [↑](#footnote-ref-1023)
1024. Ottawa Agreement (n. 58), Art 6: “The premises of the Organization shall be inviolable. Its property and assets, wheresoever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of interference”. [↑](#footnote-ref-1024)
1025. NATO SOFA (n. 58), Art. VII.11: “Each Contracting Party shall seek such legislation as it deems necessary to ensure the adequate security and protection within its territory of installations, equipment, property, records and official information of other Contracting Parties, and the punishment of persons who may contravene laws enacted for that purpose”. For an analysis of this article, see Lazareff (n. 671), at 250. [↑](#footnote-ref-1025)
1026. Snee (n. 330), at 596. [↑](#footnote-ref-1026)
1027. Ottawa Agreement (n. 58), Art. 7: “The archives of the Organization and all documents belonging to it or held by it shall be inviolable, wherever located”. Article 13 of the Paris Protocol: “The archives and other official documents of an Allied Headquarters kept in premises used by those Headquarters or in the possession of any properly authorized member of the Headquarters shall be inviolable, unless the Headquarters has waived this immunity. The Headquarters shall, at the request of the receiving State and in the presence of a representative of that State, verify the nature of any documents to confirm that they are entitled to immunity under this Article”. [↑](#footnote-ref-1027)
1028. G.L. Burci, ‘Inviolability of Archives (Article II Section 4 General Convention)’, in: Reinisch (n. 860), at 157. [↑](#footnote-ref-1028)
1029. 1991 Yearbook of the International Law Commission (Vol. II), *Fifth Report of the Special Rapporteur, Mr. Leonardo Diaz Gonzalez on Relations between States and International Organizations (second of the topic) (42nd session of the ILC*, UN Doc. A/CN.4/SER.A/432 (1991), 4. [↑](#footnote-ref-1029)
1030. Concerns relating to including the inviolability of archives among privileges and immunities, while they may exist, have no basis in ILC reports. “The United Nations itself has interpreted section 4 of the Convention on the Privileges and Immunities of the United Nations as necessarily implying the inviolability of information contained in archives and documents as well as the actual archives and documents themselves”: Ibid., at 7. Additionally, Bekker lists inviolability as part of non-fiscal privileges and immunities and bases his research conclusion on the ILC: Bekker (n. 59), at 119; International Law Commission *Draft Articles on Diplomatic Relations with commentaries*, A/CN4/SEILA/1958 (1958), 101-102 and 135-137, on Diplomatic intercourse and immunities (A/3623, A / CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75); Along these lines and also based on the work of the ILC, Duquet and Wouters argue that an ambassador's secretary or an archivist as repository of secret or confidential knowledge equally need protection against possible pressure by the receiving State. they submit that the rationale to grant immunities and privileges to the diplomatic agent, as well as to administrative and technical staff of a mission, is that the latter perform confidential tasks which, for the purposes of the mission’s function, may be even more important than the tasks entrusted to some members of the diplomatic staff: S. Duquet and J. Wouters, ‘Diplomacy, Secrecy and the Law’ (2015) 151 *KU Leuven, Institute for International Law: Working Paper (Series)*, 5-6. In this vein, Akl refers to the inviolability of archives as privileges and immunities: J. Akl, ‘The legal status, privileges and immunities of the International Tribunal for the Law of the Sea’ (1998) 2 *Max Planck Yearbook of United Nations Law* 341, 353. [↑](#footnote-ref-1030)
1031. Jenks (n. 799), at 67. [↑](#footnote-ref-1031)
1032. “Article XI

      No censorship shall be applied to the official correspondence and other official communications of the Organization.

      The Organization shall have the right to use codes and to despatch and receive correspondence by courier or in sealed bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

      Nothing in this Article shall be construed to preclude the adoption of appropriate security precautions to be determined by agreement between a Member State and the Council acting on behalf of the Organization”. [↑](#footnote-ref-1032)
1033. Snee (n. 330), at 140-141. [↑](#footnote-ref-1033)
1034. Ibid., at 141. [↑](#footnote-ref-1034)
1035. Ibid., at 140. [↑](#footnote-ref-1035)
1036. Ibid., at 292. [↑](#footnote-ref-1036)
1037. Ibid. at 591. [↑](#footnote-ref-1037)
1038. For a detailed analysis of these privileges and immunities, see Batstone (n. 671), at 502-506. *See also* N. Chalanouli, *The Treatment of International Organizations within the European Union* (Dissertation presented on 11 September 2018 to the faculty of the Institut d’Études Européennes*,* Université Libre de Bruxelles (on file with the author): Bruxelles, 2018). On this matter see J. Wouters ‘The tormented relationship between international law and EU law’, in P. Bekker, R. Dolzer and M. Waible (eds.), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge: Cambridge University Press, 2010), at 119-220; and J. Wouters, C. Ryngaert, T. Ruys et al., *International Law, A European Perspective* (Hart Publishing: Oxfordshire, 2018). [↑](#footnote-ref-1038)
1039. Snee (n. 330), at 596 [27-29], 657-661. [↑](#footnote-ref-1039)
1040. Ibid., at 596, [27-29], 661. [↑](#footnote-ref-1040)
1041. Ibid. [↑](#footnote-ref-1041)
1042. Ibid., at 325. [↑](#footnote-ref-1042)
1043. Ibid., at 658 (emphasis added). [↑](#footnote-ref-1043)
1044. “[A] ‘direct tax’ is one that cannot be shifted by the organization to someone else. To hold otherwise would mean that it would not only enable enrichment of one member State at the expense of all others but (even as a power not exercised but only held in reserve) it would also give the taxing authority a measure of indirect control over the workings of the organization”: Martha (n. 860), at 222. [↑](#footnote-ref-1044)
1045. Ibid. [↑](#footnote-ref-1045)
1046. Munoz Mosquera and Hartov (n. 946), at 500. [↑](#footnote-ref-1046)
1047. Chalanouli (n. 963), at 370-385. [↑](#footnote-ref-1047)
1048. Ibid., at 370. [↑](#footnote-ref-1048)
1049. Snee (n. 330), at 619. [↑](#footnote-ref-1049)
1050. Nort Atlantic Treaty, *The NATO Financial Regulations (NFR), and Financial Rules and procedures (FRP) (2016)*, available at:. <[www.nato.int/nato\_static\_fl2014/assets/pdf/pdf\_2016\_03/20160316\_2016-nfr-nfp.PDF](http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2016_03/20160316_2016-nfr-nfp.PDF)>, (accessed 4 August 2023). [↑](#footnote-ref-1050)
1051. EU Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing. [↑](#footnote-ref-1051)
1052. *See generally,* several articles on NATO and EU relations in (2014) 33 *NATO Legal Gazette* and Reichard(n. 21). *See also* J. Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press: Cambridge, 2009). [↑](#footnote-ref-1052)
1053. European Union, *La primauté du droit européen*, available at : <eur-lex.europa.eu/legal-content/FR/TXT/?uri=LEGISSUM%3Al14548>, (accessed 4 August 2023). [↑](#footnote-ref-1053)
1054. On NATO [international law] primacy, see Reichard (n. 21), at 148. [↑](#footnote-ref-1054)
1055. Lenaerts and Tizzano argue that the North Atlantic Treaty is among the origins of the EU, in K. Lenaerts and A. Tizzano, *Code de l’Union européenne* (Bruylant: Bruxelles, 2014), at XXV, 814. [↑](#footnote-ref-1055)
1056. A. Pellet, ‘Les interactions normatives. Droit de L’Union Européenne et Droit International’ (2012) 2 *IREDIES* *Cahiers Européens*, Préface (III). [↑](#footnote-ref-1056)
1057. Reichard (n. 21), at 148. North Atlantic Treaty (n. 5), Art 8: “Each Party declares that none of the international engagements now in force between it and any other of the Parties or any third State is in conflict with the provisions of this Treaty, and undertakes not to enter into any international engagement in conflict with this Treaty”. [↑](#footnote-ref-1057)
1058. Reid (n. 6), at 212. Reid refers to United States Department of State, *Memorandum of 3 February 1949 (Acheson)*, File No. 840.20/2-349 (1949). [↑](#footnote-ref-1058)
1059. Reichard (n. 21), at 148. Reichard cites K. Ipsen, Rechtsgrundlagen (1963), at 24. Note that an error may be in Reichard’s citation, sinceIpsen’s book appears tob e dated in 1967. [↑](#footnote-ref-1059)
1060. R.H. Heindel, T.V. Kalijarvi and F.O. Wilcox, ‘The North Atlantic Treaty in the United States Senate’ (1949) 43 *AJIL* 633. [↑](#footnote-ref-1060)
1061. Treaty of the European Union, signed on 13 December 2007. [↑](#footnote-ref-1061)
1062. Ibid., Case law from the CJEU explicitly recognizes “the growing importance of international cooperation and of the consequent need to secure the proper functioning of international organizations”. (Judgment of the CJEU in Case C-84/95 *Bosphorus*; Note that the Judgment of the Court of Justice of the EC in Case 181/73, *R. & V. Haegeman v. Belgium* recognized international law as “an integral part of Community law”). [↑](#footnote-ref-1062)
1063. Judgment of the District Court of Limburg in Case No. C/03/217614/ HA ZA 16/130 (n. 839); Judgment of the Court of Appeal of ‘s-Hertogenbosch in Case No. 2000.217.388/01 (n. 840)*.* [↑](#footnote-ref-1063)
1064. Judgment of the District Court of Limburg in Case No. C/03/217614/ HA ZA 16/130 (n. 839), [4.10]; Judgment of the Court of Appeal of ‘s-Hertogenbosch in Case No. 2000.217.388/01 (n. 840), [312]: “The Court of Appeal therefore presumes that said monies had a public use.” [↑](#footnote-ref-1064)
1065. Judgment of the first instance tribunal of Brussels (9th chamber) in Case 17/1902/B *Exequator SHAPE v. Supreme*, 2. See also Judgment of the first instance tribunal of Brussels (9th Chamber) in Case No. 17/2141/B *Exequator SHAPE v. Supreme*, 2. [↑](#footnote-ref-1065)
1066. C. Graure, ‘*Ignorantia Juris non Excusat*: Analysis of the Compatibility of the NATO and EU Legal Regimes’ (2014) 33 *NATO Legal Gazette,* 23 [footnote 37]. [↑](#footnote-ref-1066)
1067. Munoz Mosquera and Hartov (n. 946), at 503 (emphasis added). [↑](#footnote-ref-1067)
1068. Judgment of the Court (Eighth Chamber)in Case No.-225/11 *The Commissioners for Her Majesty’s Revenue and Customs v. Able UK Ltd* (Reference for a preliminary ruling, Upper Tribunal (Tax and Chancery Chamber) - United Kingdom). [↑](#footnote-ref-1068)
1069. Munoz Mosquera and Hartov (n. 946), at 497. [↑](#footnote-ref-1069)
1070. Jenks quotes the ILO memorandum to remind the principle behind his submission: “The property of remitting the funds of the International Labour Organizations to any particular place, or of using them, within the limits set by the approved budget, for any particular purpose, at any particular time, is one which only the Governing Body, or the Director acting on his behalf, is in a position to determine. It should not be subject to question by national officials administering embargo or freezing orders framed without any reference to the position or requirements of international institutions, since the practical effect of regarding such orders as applicable is to make decisions taken on behalf of a number of Governments subject to review by a specialised and sometimes subordinate official of one of them”, Jenks (n. 799), at 58. [↑](#footnote-ref-1070)
1071. Lalive (n. 796), at 299-300. *See also* Jenks (n. 802), at 40-41. [↑](#footnote-ref-1071)
1072. See subsections above: United Nations privileges and immunities in NATO’s institutions; The peculiar hybrid nature of the Paris Protocol; and The ‘Paragraph 26’. *See also* Olson (n. 599), at 422. [↑](#footnote-ref-1072)
1073. Jenks (n. 799), at 102. Jenks when referring to ‘international military command’ speaks of Allied Headquarters. Actually, status of forces agreements pose complex questions on military justice and claims for war or military exercise damage, as well as the import and export of military materiel and huge amounts of fuel and oil for military vehicles, vessels and aircraft. However, Jenks understands that Allied Headquarters are international organizations. [↑](#footnote-ref-1073)
1074. A. Reinisch, ‘Immunity of Property, Funds, and Assets (Article II Section 2 General Convention), in: Reinisch (n. 860), 85 [footnotes 148-152]. [↑](#footnote-ref-1074)
1075. The inspiration of the Ottawa Agreement on the 1946 Convention on the Privileges and Immunities of the United Nations is obvious: Juridical personality (Article IV of the Ottawa Agreement) of the Organization on Article I of the Convention, inviolability of premises and archives (Articles VI and VII) on Article II, no censorship on communications (Article 11) on Article III, representatives of members (Articles XII to XVI) on Article IV, Officials and Experts (Articles XVII to XXIII) on Articles V and VI, and settlement of disputes (Article XXIV) on Article VIII. [↑](#footnote-ref-1075)
1076. Dupuy and Kerbrat (n. 563), at 226. The immunities of international organizations have an analogical origin with respect to the diplomatic ones. On this question see Kunz (n. 708), at 842. *See also* Schermers and Blokker (n. 446), at 1034. [↑](#footnote-ref-1076)
1077. Seidl-Hohenveldern cites: Judgment of the Court of Appeal of Rheinland-Pfalz (Landesarbeitsgericht Rheinland-Pfalz) in Case No. 1 Sa 133/59, of which he posits that *“[c]’est suffirait à lui seul à démontrer l’erreur d’un tribunal allemand qui avait voulu déduire l’immunité de l’O.T.A.N. du fait que les Etats membres de l’O.T.A.N. jouissent chacun de l’immunité de juridiction*”, in Seidl-Hohenveldern (n. 798), at 160. See, in support of the concept of derivative immunity, the Judgment of the Municipal court of the District of Columbia of 27 November 1925 in Schermers and Blokker (n. 446), at 1033-1034. [↑](#footnote-ref-1077)
1078. See above subsection: NATO treaties identify customary law privileges and immunities. *See also* Schermers and Blokker (n. 446), at 1033-1034 [footnote 234]: “in the absence of a specific treaty providing for the immunity of an international organization in tis host state, it could be assumed that customary international law conferred the same level of immunity as that provided for under treaty law” in Judgment of the Supreme Court of the Netherlands (Hoge Raad) in Case No. 12627 *Spaans v Iran-United States Claims Tribunal*, at 321-330. [↑](#footnote-ref-1078)
1079. C. Ryngaert, ‘The Immunity of International Organizations Before Domestic Courts: Recent Trends’, (2010) 7 *International Organizations Law Review* 121, 123-129. R. Higgins *Problems and Process – International Law and How We Use it*, (Oxford University Press: Oxford, 1994), at 93; and M. Shaw, *International Law (8th Ed.)* (Cambridge University Press: Cambridge, 2017), at 1007. All of them submit that the distinction between transactions *iure imperii* and *iure gestionins* is inappropriate in the case of international organizations. [↑](#footnote-ref-1079)
1080. E. Osieke, ‘*Ultra Vires* Acts in International Organizations – The Experience of the International Labour Organization’ (1977) 48 *British Yearbook of International Law* 259. *See also* C. Ryngaert, I.F. Dekker, R.A. Wessel et al. (eds.), *Judicial Decisions on the Law of International Organizations* (Oxford University Press: Oxford, 2016), at 361. [↑](#footnote-ref-1080)
1081. Judgment of the United States’ Third Circuit Court in Case Nos. 09-3640 - 617 F.3d 756 *OSS Nokalva, Inc. v European Space Agency*. [↑](#footnote-ref-1081)
1082. Ahluwalia (n. 873), at 66. [↑](#footnote-ref-1082)
1083. A deep analysis on official and commercial activities of international organizations can be found in Bekker (n. 59), at 160-178. [↑](#footnote-ref-1083)
1084. Seidl-Hohenveldern (n. 798), at 161-162. *See also* Lalive (n. 796), at 296. [↑](#footnote-ref-1084)
1085. Bekker (n. 59), at 163-164. [↑](#footnote-ref-1085)
1086. Ibid., at 163-164. [↑](#footnote-ref-1086)
1087. P. Paone, ‘Giurisprudenza Italiana’ (1955) *Rivista de diritto internazionale*, 352. Paone refers to *Branno v Ministry of War and Allied Forces Headquarters*, (n. 557). [↑](#footnote-ref-1087)
1088. Ibid, at 353. [↑](#footnote-ref-1088)
1089. Allied Headquarters’ canteens are not equivalent to cafeterias or catering services in other international organizations. These operational canteens work around the clock in order to provide catering services to civil and military staff conducting NATO-led operations around the world, which are the core functions and purposes of NATO and its bodies. This was not the case of EPO in 2011 in the *European Patent Office v Stichting Restaurant De La Tour* case. The dispute was related to the EPO’s rejection of the bid of Stichting Restaurant de la Tour to provide catering services. The Court set that the EPO’s tasks are limited to the grant of European patents, and, therefore, catering services are not ‘strictly necessary’ for the implementation of the mission of EPO: Judgment of the Hague Court of Appeal in Case No. BR0188 *European Patent Office v Stichting Restaurant De La Tour*. [↑](#footnote-ref-1089)
1090. D. Hug, *Die Rechtsstellung der in der Schweiz niedergelassenen internationalen Organisationen* (Peter Lang AG: Bern, 1984), at 85. *See also* Ahluwalia (n. 873), at 200; C.W. Jenks (n. 799), at 39; Dominicé (n. 955), at 183; and Muller (n. 854), at 163. [↑](#footnote-ref-1090)
1091. Advisory Committee on Issues of Public International Law (CAVV) (n. 813), 15 [3.1]. Although it refers to the 1946 Convention on the Privileges and Immunities of the United Nations, it has a general application. Moreover, since NATO’s privileges and immunities come from the Convention, per NATO treaties’ *travaux préparatoires*, the same rationale applies to NATO. [↑](#footnote-ref-1091)
1092. B.I. Bonafè, ‘Italian Courts and the Immunity of International Organizations’ (2013) 10 *International Organizations Law Review* 505, at 516. *See also* A. Cassese, ‘L’immunité de juridiction civile des organisations internationales dans la jurisprudence italienne’ (1984) 1 *Annuaire français de droit international* 556, 560. [↑](#footnote-ref-1092)
1093. Johnson (n. 579)*,* at 278-279. *See also* De Brabandere (n. 838), at 504. [↑](#footnote-ref-1093)
1094. Judgment of the Labour Court of Mons in Case Nos. 16/879/A-16/880/A-16/881/A-16/882/A, *La Fédération Générale du Travail de Belgique and Le Syndicat des Employés Techniciens et Cadres v. SHAPE*. [↑](#footnote-ref-1094)
1095. De Brabandere (n. 838), at 504. Also, Brabandere refers to Belgian courts and submits that “it does not seem correct, as matter of law, to consider that labour disputes do not form part of the exercise by the organization of its official public functions”, in E. De Brabandere (n. 838), at 497. [↑](#footnote-ref-1095)
1096. *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (n. 712). [↑](#footnote-ref-1096)
1097. Judgment of the Civil Tribunal of Belgium in *Manderlier v Organisation des Nations Unies and Etat Belge (Ministre des Affaires Etrangères)*. [↑](#footnote-ref-1097)
1098. Kunz (n. 708), at 839, Lalive (n. 796), at 3, Dominicé (n. 955), at 217, Bekker (n. 59), at 192-202, Muller (n. 854), at 163, 176-182, Schermers and Blokker (n. 446), at 1037-1038, and Advisory Committee on Issues of Public International Law (‘CAVV’), (n. 813), [15]. [↑](#footnote-ref-1098)
1099. “*La renonciation à l’immunité de juridiction, nous l’avons vu, apparaît parfois comme une bonne solution en matière contractuelle, dans le cas de certaines organisations et à l’égard de certains types de contrats. Il nous paraît cependant que c’est relativement exceptionnel, car cela suppose tout de même la réunion de plusieurs conditions: contrat gouverné par le droit local et exécuté au siège. Organisation judiciaire satisfaisante et offrant toute garantie d’impartialité, de rapidité aussi*” : Dominicé (n. 955), at 217. Dominicé’s argument shows that the waiver of immunity form jurisdiction would not apply to execution of contracts outside of the institution’s site. This would be the case of contacts executed areas of operations by organizations in charge of the maintenance of international peace and security. [↑](#footnote-ref-1099)
1100. Arbitral tribunals: International Court of Arbitration, International Chamber of Commerce (‘ICC’), London Court of International Arbitration (‘LCIA’), International Centre for Settlement of Investment Disputes (‘ICSID’), International Centre for Dispute Resolution (‘ICDR’), Organization for the Harmonization of Business Law in Africa (‘OHADA’), or in-house independent and impartial courts/tribunals/boards like CJEU (for commercial contracts and staff) and administrative tribunals/appeals boards (for staff). The possibility to bring the dispute through the established quasi-judicial institutions when they exist should not be forgotten. See the European Space Agency (‘ESA’) Ombudsman institution. The *tribunal de première instance de Bruxelles* considers the Ombudsman institution does “not constitute a judicial or administrative remedy *sensu stricto*, but appears to be a ‘reasonable alternative means’ as understood by the ECtHR, in light of its case-law”, in Judgment of the First Instance Tribunal of Brussels (4th Chamber) in *ENE v ESA*. [↑](#footnote-ref-1100)
1101. Judgment of the European Court of Human Rights (Grand Chamber) in Case No. 26083/94 *Waite and Kennedy v.* *Germany*. [↑](#footnote-ref-1101)
1102. Judgment of the European Court of Human Rights (Grand Chamber) in Case no. 28934/95 *Beer and Regan v. Germany*; Decision of the European Court of Human Rights (Third Section) in Case no. 22617/07 (Admissibility) *Stanislav Galić v. The Netherlands*, [28–29]. On state immunity: Judgment of the European Court of Human Rights (Grand Chamber) inCase No. 35763/97 *Al-Adsani v*. *The United Kingdom*, [54]; Judgment of the European Court of Human Rights (Grand Chamber) inCase No. 31253/96 *McElhinney v Ireland*, [38]; Judgment of the European Court of Human Rights (Grand Chamber) inCase No. 37112/97 *Fogarty v. The United Kingdom*, [38]. [↑](#footnote-ref-1102)
1103. *Waite and Kennedy v.* *Germany* (n. 1101), [63]. [↑](#footnote-ref-1103)
1104. Ibid.*,* [68-69]. [↑](#footnote-ref-1104)
1105. De Brabandere (n. 838), at 480 (emphasis added). [↑](#footnote-ref-1105)
1106. Judgment of the European Court of Human Rights (Third Section) in Case No. 65542/12 *Stichting Mothers of Srebrenica and Others v The Netherlands*, [164]. [↑](#footnote-ref-1106)
1107. Olson (n. 599), at 430. [↑](#footnote-ref-1107)
1108. De Brabandere (n. 838), at 497. [↑](#footnote-ref-1108)
1109. Ibid., Brabandere analyzes three cases: Judgment of the Belgian Court of Cassation (3rd Chamber) in Case No. C.07.0407.F *Secrétariat du Groupe acp v. B.D*.; Judgment of the Belgian Court of Cassation (3rd Chamber) in Case No. C.03.0328.F *Secrétariat du Groupe acp v. Lutchmaya (L. M. A.)*; Judgment of the Belgian Court of Cassation (3rd Chamber) in Case No. S.04.0129 *Siedler (S.M.) v. Union de l’Europe Occidentale*. He concludes that the Court of Cassation confirmed the Court of Appeal’s factual determinations. Both discarded the immunity. Brabandere highlights the following from the three cases the Court of Cassation. The right of access to courts is not absolute, but any limitation is only compatible with Article 6.1 of the ECHR if there is means employed-aim sought proportionality. The proportionality requires courts and tribunals to enquire *in concreto* the applicability of theimmunity from jurisdiction and extends to that from execution. Also, the technique is to resolve the questions according to the rules applicable to conflicts between two international legal norms. If the immunity is discarded, it should not be due to primacy, neither should Belgium engage its international legal responsibility. The Court of Cassation evaluates if the immunity constitutes a disproportionate limitation of the right of access to court, and not the availability of reasonable alternative means for dispute settlement. The test taken by the Court of Appeals of verifying whether the alternative mechanism provides all the guarantees of Article 6.1, is incorrect, since it is only one element for determining the proportionality. This creates an artificial hierarchy between the two norms. Finally, Brabandere the Court of Cassation applied *Waite and Kennedy* to the immunity from execution. This is not identical to the immunity from jurisdiction, since setting aside immunity from execution is setting aside all functional immunities of international organizations: De Brabandere (n. 838), 482-490. [↑](#footnote-ref-1109)
1110. Reinisch (n. 1074), at 78. [↑](#footnote-ref-1110)
1111. For a detailed history, description and functioning of the NATO Administrative Tribunal, see A. Muñoz Mosquera and B. Montes Toscano, 'Administrative Tribunal: North Atlantic Treaty Organization', (2020) *Max Planck Encyclopedia of International Procedural Law*. [↑](#footnote-ref-1111)
1112. See subsections above: The peculiar hybrid nature of the Paris Protocol, and The ‘paragraph 26’. *See also* North Atlantic Treaty Organization (NATO Civilian Personnel Regulations) (n. 936), at 1-2. “A. Applicability (i) These Civilian Personnel Regulations are applicable throughout the North Atlantic Treaty Organization and shall govern personnel administration in each NATO body for personnel of the following classes: international civilian personnel, consultants [and] temporary (civilian) personnel ... B. Definitions (v) For purposes of these Regulations, the following phrases have the meanings indicated: (a) NATO bodies - means all civilian and military headquarters, agencies and other organizational units established pursuant to the North Atlantic Treaty and fully financed through international budgets … c) International civilian personnel, staff, or members of the staff - means personnel of a NATO body recruited from among the nationals of members of the Alliance and appointed to the Organization and assigned to international posts appearing on the approved establishment of that NATO body.” [↑](#footnote-ref-1112)
1113. North Atlantic Treaty Organization, *2013 Annual Report of the NATO Administrative Tribunal*, AT(TRI)(2014)0001 (2014), at 5. [↑](#footnote-ref-1113)
1114. North Atlantic Treaty Organization, *NATO Administrative Tribunal* (2023), available at <www.nato.int/cps/en/natohq/topics\_114072.htm>, (accessed 4 August 2023). [↑](#footnote-ref-1114)
1115. Decision of the European Court of Human Rights (Grand Chamber) in Case No. 0750/03 (Admissibility) *Gasparini v Italy and Belgium*; *See also* Olson (n. 599), at 429-430: “The Court’s seemingly rather casual approach to NATO’s immunities is in this light surprising. This is in no way to question the Court’s jurisprudence under which ECHR Parties must, in their voluntary actions within or implementing decisions of an international organization, act consistently with their obligations under the Convention, and that they can be held accountable under the Convention for not doing so. The degree of State action required seems to have shrunk dramatically, however, to the point that, in its 2009 ruling in Gasparini the Court apparently abandoned even the pretense of requiring some State action as a precondition to holding an ECHR Party accountable for actions of NATO.

      Rather, in that case it [the ECtHR] took it on itself to judge the quality of NATO’s internal appeals tribunal on the basis that allegations of its insufficiency raised the possibility of a ‘structural lacuna’ in the Organization, for which it considered ECHR Parties still directly accountable almost a half-century after the original transfer of sovereign powers to NATO.

      It must again be underscored that the NATO founding documents and the European Convention on Human Rights were adopted essentially simultaneously and largely by the same parties. The understanding of the original parties to the NATO founding documents and the ECHR therefore requires some consideration. In Gasparini itself, the Court described its task as ascertaining

      [w]hether the respondent States, *at the time they joined NATO and transferred to it some of their sovereign powers*, had been in a position, in good faith, to determine that NATO’s internal dispute resolution mechanism did not *flagrantly breach* the provisions of the Convention (emphasis added.)

      It can hardly be doubted that, at the time they adopted them, the original parties to Ottawa and the *ECHR considered, in good faith, that their terms — including the grant of absolute juridical immunities — were fully consonant with each other*. Indeed, it is likely that the original parties saw these treaties as parts of an integrated, coherent and mutually-reinforcing post-war institutional structure. It is difficult therefore to square the test just quoted with the Court’s readiness in the self-same case to consider invalidating NATO structures deriving from a grant of immunity made at the same time as the European Convention of Human Rights itself was adopted” (emphasis added). [↑](#footnote-ref-1115)
1116. First Instance Tribunal of Brussels in Case No. 12/1586/C *Sevens v.* *NATO and Belgium*. [↑](#footnote-ref-1116)
1117. Olson (n. 599), at 427 and 430. [↑](#footnote-ref-1117)
1118. UN Doc. A/66/10 (n. 28). [↑](#footnote-ref-1118)
1119. Some examples: SHAPE, *NSPA Procurement Operating Instruction,* OI 4200-01 09 (2014); SHAPE, *Acquisition Standard Operating Instruction (Arbitration Clauses)*, (ASOI) 127 (2017); North Atlantic Treaty Organization, *Charter of the NATO Communications and Information Organisation (NCIO*), C-M(2012)0049 (2012). [↑](#footnote-ref-1119)
1120. A/CN.4/637 (n. 442), at 11-13. [↑](#footnote-ref-1120)
1121. “These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.” [↑](#footnote-ref-1121)
1122. The Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace regarding the Status of Their Forces of 19 June 1995 incorporates by reference the NATO SOFA, which has expanded the NATO’ *lex specialis* to all states participating in the Partnership for Peace programme. [↑](#footnote-ref-1122)
1123. EU SOFA – Not yet ratified. 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. For an analysis of the EU SOFA see A. Sari, ‘The EU Status of Forces Agreement: Continuity and Change in the Law of Visiting Forces’ (2007) 46 *Military Law and the Law of War Review* 9. [↑](#footnote-ref-1123)
1124. *Belgian State v.* *International Hotels Worldwide* (n. 620), at 4. [↑](#footnote-ref-1124)
1125. Judgment of the Brussels Tribunal of First Instance in *s.a. International Hotels Worldwide v*. *s.a. Grandvision Belgium*. [↑](#footnote-ref-1125)
1126. *Belgian State v.* *International Hotels Worldwide* (n. 620). [↑](#footnote-ref-1126)
1127. Ibid. at 15-16 (emphasis added). [↑](#footnote-ref-1127)
1128. Díaz González, (n. 675). [↑](#footnote-ref-1128)
1129. Judgment of the Brussels First Instance Tribunal in Case No. 11/9647/A *El Hamidi & Chlih v. NATO*. [↑](#footnote-ref-1129)
1130. Judgment of the Brussels Court of Appeals (18th Chamber) in Case No. 2017/9240 *El Hamidi v NATO.* [↑](#footnote-ref-1130)
1131. *Beer and Regan v. Germany* (n. 1102). [↑](#footnote-ref-1131)
1132. “3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law”. [↑](#footnote-ref-1132)
1133. The author of this dissertation has been the main lawyer in the present case, representing SHAPE as the Director of the Office of Legal Affairs. This case pertains to fuel supplied to Troop Contributing Nations (‘TCN’) to the United Nations mandated operation ISAF. This United Nations Charter Chapter VII -operations was led by NATO. The case started as a claim of hundreds of millions of USD against NATO but ended confirming both immunity from jurisdiction and immunity from execution. References to the different proceedings are provided below. [↑](#footnote-ref-1133)
1134. Professor Pablo Antonio Fernández Sánchez, from the Universidad de Sevilla, argues that this case contains many elements of a good manual of the law of international organizations. Interview in February 2017. [↑](#footnote-ref-1134)
1135. “A BOA is a two-stage contracting procedure. First, the NCI Agency and the company establish a framework contract, specifying all basic contract provisions. This stage also includes the signing of a preferred-customer declaration. Potential suppliers also indicate a range of goods and services against which retail quantities can be ordered. Before signing a BOA, national authorities must issue a Declaration of Eligibility for the company”. See NCIA definition, at: <<https://www.ncia.nato.int/business/do-business-with-us/basic-ordering-agreement-programme.html>>, (accessed 4 August 2023). [↑](#footnote-ref-1135)
1136. “Separately, Supreme Site Services GmbH, a Supreme Group subsidiary, agreed to pay $20 million to settle allegations that they overbilled for fuel purchased by the Defense Logistics Agency (DLA) for Kandahar Air Field (KAF) in Afghanistan under a NATO Basic Ordering Agreement. The government alleged that Supreme Site Services’ drivers were stealing fuel destined for KAF generators while en route for which the company falsely billed DLA”. See United States Department of Justice, *Defense Contractor Pleads Guilty to Major Fraud in Provision of Supplies to U.S. Troops in Afghanistan Agrees To Pay $434 Million in Criminal Penalties and to Settle False Claims Act Allegations* (2014), [‘civil settlements’], available at: <[www.justice.gov/opa/pr/defense-contractor-pleads-guilty-major-fraud-provision-supplies-us-troops-afghanistan](http://www.justice.gov/opa/pr/defense-contractor-pleads-guilty-major-fraud-provision-supplies-us-troops-afghanistan)>, (accessed 4 August 2023). [↑](#footnote-ref-1136)
1137. ““These companies chose to commit their fraud in connection with a contract to supply food and water to our nation’s fighting men and women serving in Afghanistan,” said U.S. Attorney Zane David Memeger for the Eastern District of Pennsylvania. “That kind of conduct is repugnant, and we will use every available resource to punish such illegal war profiteering”: See United States Department of Justice (n. 1136), [‘the criminal fraud’]. [↑](#footnote-ref-1137)
1138. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, available at: <eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215>, (accessed 3 August 2023). [↑](#footnote-ref-1138)
1139. First Instance Tribunal (Mons Division) in Case No. 16/1329/A *L’Organisation internationale SUPREME HEADQUARTERS ALLIED POWERS EUROPE (SHAPE) v. La société de droit suisse SUPREME SITE SERVICE GMBH, la société de droit allemande SUPREME FUELS GMBH & CO KG, la société de droit des Emirats Arabes Unis SUPREME TRADING FZE, en présence de l’Etat Belge*. [↑](#footnote-ref-1139)
1140. *Supreme Site Services GMBH, Supreme Fuels GMBH & Co KG, and Supreme Trading FZE v SHAPE v (Supreme v SHAPE),* (n. 839), at [4.23]. [↑](#footnote-ref-1140)
1141. Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (Bonn Agreement), signed 5 December 2001, available at: <peacemaker.un.org/afghanistan-bonnagreement2001> , (accessed 4 August 2023). [↑](#footnote-ref-1141)
1142. *Supreme Site Services GMBH* (n. 839), [4.8]. [↑](#footnote-ref-1142)
1143. Ibid., [ 4.9]. [↑](#footnote-ref-1143)
1144. Muller (n. 854), at 158; C.W. Jenks (n. 799), at 104. However, this was a precipitated conclusion since neither the court nor SHAPE presented the argument on the hybridity of the Paris Protocol supported by the *travaux* *préparatoires* and practice. It has already been submitted that the Paris Protocol provisions find their completeness by referring to the NATO SOFA and the Ottawa Agreement. The interaction of these treaties permits a thorough and swift implementation of the functions and purposes set up by the NAT and the rules of the organization. Some have denied the immunity from jurisdiction of Allied Headquarters based on that silence, without examining the *travaux*, others have looked into them in an incorrect manner. Supreme looked up the *travaux*, but based its argument on the following paragraphs:

      “27. The French Representative stated that SHAPE enjoyed immunity in respect of measures of execution of court decisions, but that it did not enjoy immunity from the obligation to appear before the court. 28. The Representatives as a whole were agreed in recognizing that SHAPE should not enjoy the latter immunity. As the United States Representative had no instructions on this point, however, he reserved his position”: Snee (n. 330), at 273. [↑](#footnote-ref-1144)
1145. *Klag v. Supreme Headquarters Allied Powers (SHAPE)* (n. 975)*,* at 7 and 11. [↑](#footnote-ref-1145)
1146. See above subsections: 6.3.4 ‘The peculiar hybrid nature of the Paris Protocol’, and 6.3.7 ‘The paragraph 26’. [↑](#footnote-ref-1146)
1147. See Blokker (n. 969), at 1-2. [↑](#footnote-ref-1147)
1148. *Supreme Site Services GMBH* (n. 839), [ 4.23]. [↑](#footnote-ref-1148)
1149. Ibid., [ 4.21]. [↑](#footnote-ref-1149)
1150. Ibid.*,* [ 4.21]. [↑](#footnote-ref-1150)
1151. Ibid., [ 4.24-4.41]. [↑](#footnote-ref-1151)
1152. Ibid., [ 4.33]. [↑](#footnote-ref-1152)
1153. Ibid., [ 4.37]. [↑](#footnote-ref-1153)
1154. Ibid., [ 4.36]. [↑](#footnote-ref-1154)
1155. Ibid., [ 4.42] (emphasis added). [↑](#footnote-ref-1155)
1156. Judgment of the Court of Appeal of ‘s-Hertogenbosch in Case No. 2000.217.388/01 (n. 840), [ 6.8]. [↑](#footnote-ref-1156)
1157. Judgment of the Supreme Court of the Netherlands in Case No. 20/00937 (n. 841). [↑](#footnote-ref-1157)
1158. Judgment of the Court of Appeal of ‘s-Hertogenbosch in Case No. 2000.217.388/01 (n. 840). [↑](#footnote-ref-1158)
1159. Judgment of the District Court of Limburg in Case No. C/03/217614/ HA ZA 16/130 (n. 839), [4.5]. [↑](#footnote-ref-1159)
1160. Ibid., [4.8]. [↑](#footnote-ref-1160)
1161. Ibid., [4.9]. [↑](#footnote-ref-1161)
1162. Ibid., [4.10]. [↑](#footnote-ref-1162)
1163. Ibid., [4.14]. [↑](#footnote-ref-1163)
1164. Ibid., [4.16]. [↑](#footnote-ref-1164)
1165. Ibid., [4.18-4.19]. [↑](#footnote-ref-1165)
1166. Judgment of the Court of Appeal of ‘s-Hertogenbosch in Case No. 2000.217.388/01 (n. 840). [↑](#footnote-ref-1166)
1167. Judgment of the first instance tribunal of Brussels (9th chamber) in Case 17/1902/B ; Judgment of the first instance tribunal of Brussels (9th Chamber) in Case No. 17/2141/B (n. 1065). [↑](#footnote-ref-1167)
1168. Judgement of the Supreme Court of the Netherlands in Case C‑186/19 (Request for Preliminary Ruling) *Supreme Group v. SHAPE*, [61]. [↑](#footnote-ref-1168)
1169. Ibid., [66]. [↑](#footnote-ref-1169)
1170. The author of this dissertation disagrees with Nauta’s position, which Klabbers explains: “Still, in the end Nauta reaches sensible conclusions and, what is more, he does not treat NATO with velvet gloves or otherwise toe the party line, as could have been feared: he is perfectly willing to hold his employer responsible for possible (and actual) violations of humanitarian law and human rights law. J. Klabbers , ‘The International Responsibility of NATO and Its Personnel during Military Operations’ (2020) 17, *International Organizations Law Review,* 683, 685. [↑](#footnote-ref-1170)
1171. *Reparation for Injuries Suffered in the Service of the United Nations* (n. 553), at 178, 180. [↑](#footnote-ref-1171)
1172. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), in: International Law Commission, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10*, UN Doc. A/56/10 (2001). [↑](#footnote-ref-1172)
1173. UN Doc. A/66/10 (n. 28). [↑](#footnote-ref-1173)
1174. See a detailed explanation in Schermers and Blokker (n. 446), at 1007-1020. [↑](#footnote-ref-1174)
1175. “Accountability is not a notion which, for the sake of its operationability, is or has to be viewed as monolithic, calling for uniform and indiscriminate application. Such rigidity would not survive the complexities of international reality”: International Law Association Committee on Accountability of International Organizations, *ILA Report of the Sixty-Eighth Conference, Taipei, May 24-30, 1998* (1998)*,* at 5. [↑](#footnote-ref-1175)
1176. E. Suzuki and S. Nanwani, ‘Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks’ (2005) 27 Michigan *Journal of International Law* 177, at 180. [↑](#footnote-ref-1176)
1177. N. Blokker, ‘NATO as an International Organization: Ten Brief Observations’ (2019) 34 *Emory International Law Review* 29, 32. [↑](#footnote-ref-1177)
1178. 2006 Yearbook of the International Law Commission (Vol. I), *Responsibility of international organizations (continued)– Report of the Special Rapporteur,* UN Doc. AC/CN.4/564 and Add. 1-2 (2006). [↑](#footnote-ref-1178)
1179. International Law Commission, *Second report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur*, UN Doc. A/CN.4/541 (2004), 3, [7]. [↑](#footnote-ref-1179)
1180. “*En la práctica se ha esbozado la tendencia a considerar que si la organización internacional incurre en responsabilidad material, esta recae simultáneamente sobre los Estados miembros de la organización*”: G. Tunkin, *Curso de derecho internacional, Tomo I* (Editorial Progreso: Moscú, 1980), at 222. [↑](#footnote-ref-1180)
1181. M. Zwanenburg ‘North Atlantic Treaty Organization-Led Operations’ in: Nollkaemper and Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press: Cambridge, 2017), at 639. [↑](#footnote-ref-1181)
1182. C. Ryngaert, ‘The Responsibility of Member States of International Organizations’ in: Barros, Ryngaert and Wouters (eds.), *International Organizations and Member state Responsibility* (Brill Nijhoff: Leiden, 2017), at 215. [↑](#footnote-ref-1182)
1183. United Nations Office of Legal Affairs, *Memorandum of the UN Office of Legal Affairs of 15 June 1972*, UNJY 1972 (1972), at 153, as cited by Schermers and Blokker (n. 446), at 1142. [↑](#footnote-ref-1183)
1184. K. Wellens, *Remedies Against International Organisations* (Cambridge University Press: Cambridge, 2002), at 22 and 44. [↑](#footnote-ref-1184)
1185. See Chapter 4. [↑](#footnote-ref-1185)
1186. Zwanenburg (n. 1181), at 639. [↑](#footnote-ref-1186)
1187. Ryngaert (n. 1182), at 224. [↑](#footnote-ref-1187)
1188. UN Doc. A/CN.4/637 (n. 442), at 139-140. “*Each member State retains full responsibility for its decisions*, and is expected to take those measures necessary to ensure that it has the domestic legal and other authority required to implement the decisions which the Council, with its participation and support, has adopted. The principle of consensus decision-making is applied throughout the Alliance, reflecting the fact that *it is the member States that decide and that each of them is or has full opportunity to be involved at every stage of the decision-making process*. This principle is *applied at every level of the organization*; all member States may, and as a matter of practice do, *participate on an equal basis in all committees and other subordinate bodies* within NATO” (emphasis added). [↑](#footnote-ref-1188)
1189. Zwanenburg (n. 1181), at 646. [↑](#footnote-ref-1189)
1190. R.A. Wessel and I.F. Dekker, ‘Identities of States in International Organizations’, in: Barros, Ryngaert and Wouters (eds.), *International Organizations and Member state Responsibility* (Brill Nijhoff: Leiden, 2017), at 14. *See also* Cassese (n. 453), at 211-212. [↑](#footnote-ref-1190)
1191. Actually, Blokker submits that the International Court of Justice has already addressed this question by stating that states are required to display a constructive attitude with respect to international organizations to which they belong even if the objective of these organizations is considered less essential than those of the United Nations and relate to areas less important than human rights. Actually, although Blokker does not mention it, this would not be the case for NATO since the NAT shows in its frontispiece the keystone of the UN Charter, i.e., the obligation to maintain the international peace and security. See Blokker (n. 446), at 150. [↑](#footnote-ref-1191)
1192. Jordan (n. 55), at 17. [↑](#footnote-ref-1192)
1193. Ibid., at 17. [↑](#footnote-ref-1193)
1194. North Atlantic Treaty Organization, (n. 271), c. 5. [↑](#footnote-ref-1194)
1195. Ibid., [22]: “Thus, in February, 1953, Lord Ismay had the impression that certain member countries tended to consider the Organization as a purely statistical body whose unique purpose was to gather data and figures on the defence efforts of the member countries. He, on the contrary, believed that the Secretariat could and should assume a task of broader scope - that of maintaining political unity between the allies”. [↑](#footnote-ref-1195)
1196. A. Nollkaemper, ‘Constitutionalization and the Unity of the Law of International Responsibility’ (2009) 16 *Indiana Journal of Global Legal Studies* 535, at 563. [↑](#footnote-ref-1196)
1197. For example: Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (Marine Dumping), UNTS 1046, entered into force 30 August 1975; International Convention for the Safety of Life at Sea (SOLAS), 1184 UNTS 3, adopted 1 November 1974, entered into force 25 May 1980. [↑](#footnote-ref-1197)
1198. North Atlantic Treaty Organization. *Damage caused to a Swedish Boat during Exercise MAINBRACE*, LOM 3/54 (1954). [↑](#footnote-ref-1198)
1199. The International Court of Justice, in its advisory opinion on *Certain Expenses* admitted the possibility of attributing to an international organization acts that an organ takes *ultra vires*: “Both national or international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an ultra vires act of an agent”, *Certain Expenses of the United Nations* (n. 712). [↑](#footnote-ref-1199)
1200. International Law Commission (Draft Articles on Responsibility of States for Internationally Wrongful Acts) (n. 1172), at 142. [↑](#footnote-ref-1200)
1201. UN Doc. A/66/10 (n. 28), at 98. [↑](#footnote-ref-1201)
1202. *Application of the Interim Accord of 13 September 1995* (n. 514). [↑](#footnote-ref-1202)
1203. Interim Accord between Greece and former Yugoslav Republic of Macedonia (Interim Accord), 4 UNTS 1995, signed 13 September 1995, entered into force 13 October 1995. [↑](#footnote-ref-1203)
1204. Ibid., [70]. [↑](#footnote-ref-1204)
1205. This case sets the *Monetary Gold* principle by which a court cannot exercise its jurisdiction on a dispute when the legal interests of a third party, not before that court, are the subject matter of the decision. Within the invocation of the responsibility of member states of an international organization is the fact that the responsibility claimed might be shared by other member states and the organization itself: *Monetary Gold Removed from Rome in 1943 (Italy v. France),* Judgment, *ICJ Reports* 1954, 19. [↑](#footnote-ref-1205)
1206. *Application of the Interim Accord of 13 September 1995* (n. 514), [43]. [↑](#footnote-ref-1206)
1207. n. 1197, at 54. [↑](#footnote-ref-1207)
1208. Ibid. [↑](#footnote-ref-1208)
1209. Y. Ronen, ‘Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict’ (2009) 42 *Vanderbilt Journal of Transnational Law* 181, 189. Ronen footnotes [footnote 30] her argument with: “Cf. CA 507/79 Raundenaf v. Hakim, [1982] SC 36(2) 757, 770. Compensation to a soldier, rather than a civilian, was at issue.” [↑](#footnote-ref-1209)
1210. Ibid., at 224. [↑](#footnote-ref-1210)
1211. Schermers and Blokker (n. 446), at 1013. [↑](#footnote-ref-1211)
1212. R. Synovitz, ‘Afghanistan: NATO Begins Fund For Civilian War Victims’, *Radio Free Europe. Radio Liberty*, 26 January 2007, at: <www.rferl.org/content/article/1074305.html>, (accessed 4 August 2023). [↑](#footnote-ref-1212)
1213. North Atlantic Treaty Organization, *Complaints and Appeals Procedures*, PO/64/696 (1964), 1 [3] [↑](#footnote-ref-1213)
1214. Ibid., 1 [2, 3]. [↑](#footnote-ref-1214)
1215. North Atlantic Treaty Organization, *Complaints and Appeals Procedures*, C-M(65)76. [↑](#footnote-ref-1215)
1216. Ibid., 2 [6]. [↑](#footnote-ref-1216)
1217. Ibid., 2 [5]. [↑](#footnote-ref-1217)
1218. Ibid., 1 [2]. *See also* G. Vandersanden, ‘La Commission de Recours de l´Organisation du Traité de l´Atlantique Nord, son fonctionnement à la lumière de sa jurisprudence’ (1974) 1 *Revue Belge de Droit International* 91, 95. [↑](#footnote-ref-1218)
1219. North Atlantic Treaty Organization, (n. 1215). The date of this document is 24 September 1965. It is to be noted that C-M(65)44 which is posterior to this one is dated 26 October 1965. The last number does not reflect the chronological order of the documents. [↑](#footnote-ref-1219)
1220. North Atlantic Treaty Organization, *NAC Meeting 20 October 1965*, C-M(65)44 (1965), 4-6. Document AT(TRI)(2014)0001 however states that the date was 20 October 1965. [↑](#footnote-ref-1220)
1221. North Atlantic Treaty Organization (Civil Budget Committee), Fees of Members of the NATO Appeals Board, BC+D(66)28 (1966), 1. [↑](#footnote-ref-1221)
1222. ‘[L]a Commission de Recours de l'Organisation du Traité de l'Atlantique Nord (OTAN) a été créée par le Conseil de l'Atlantique Nord le 16 mars 1966’ : G. Gilbert, ‘La jurisprudence de la Commission de recours de l'Organisation du Traité de l'Atlantique Nord de 1968 à 1972’ (1972) 18 *Annuaire français de droit international* 392. Other authors argue that the NAB entered into force on 20 October 1965: see G. Vandersanden (n. 1218), at 95. [↑](#footnote-ref-1222)
1223. North Atlantic Treaty Organization (2013 Annual Report of the Administrative Tribunal) (n. 1113), at 5. [↑](#footnote-ref-1223)
1224. North Atlantic Treaty Organization (NATO Administrative Tribunal) (n. 1114). [↑](#footnote-ref-1224)
1225. Allied Joint Force Command Naples, ‘Mission Appeals Tribunal’, available at: < <https://jfcnaples.nato.int/about-us/mission-appeals-tribunal>> (accessed 4 August 2023). [↑](#footnote-ref-1225)
1226. References made to ‘due diligence’ in A. Barros, ‘Member States and the International Legal (Dis)order’ (2015) 12 *International Organizations Law Review* 333, 356. Barros refers in footnote 98 to the ICJ *Genocide* case where “the breach of due diligence results from a “failure to adopt and implement suitable measure to prevent””, and the “violation of the obligation to prevent results from omission”. [↑](#footnote-ref-1226)
1227. Ibid.,at 350. [↑](#footnote-ref-1227)
1228. Claude (n. 85), at 267. [↑](#footnote-ref-1228)
1229. J. d’Aspremont, ‘Abuse of the Legal Personality of International Organizations and the Responsibility of Member States’ (2007)4 *International Organizations Law Review* 91*,* 106-107. He refers to international organizations in general. [↑](#footnote-ref-1229)
1230. Ruffert and Walter (n. 502), [229]. Note that the order of the quote is not as in the original text. [↑](#footnote-ref-1230)
1231. A. Barros and C. Ryngaert, ‘The Position of Member States in (autonomous) Institutional Decision-Making. Implications for the Establishment of Responsibility’ (2014) 11 *International Organizations Law Review* 53, at 81. [↑](#footnote-ref-1231)
1232. Barros (n. 1226), at 357. [↑](#footnote-ref-1232)
1233. Reid (n. 6), at 247. [↑](#footnote-ref-1233)
1234. Note the contradiction between the U.S. version, as presented by Reid (at 248), and that of the U.K. as presented by Insall and Salmon (at 434-435). Reid refers to the Foreign Relations of the United States 1949, Volume IV, pages 222-223. Minutes of the Ambassador’ Committee, March 15, 1949. Insall and Salmon refer to the Foreign Office’s document The National Archives, *Defence of Western Europe:*

      *proposed North Atlantic Pact*, FO/79236, Z2355/1074/72/G (1949), which is a telegram from Franks to Bevin, dated 15 March 1949. Differences:

      1. U.S. document interprets Article 5. The U.K. document does not.
      2. The U.S. document uses the following words ‘North Atlantic area north of the Tropic of Cancer’.
      3. The U.K. document does not. U.S. document misses something that appears in the United Kingdom’s archives: “(4) (A) for the purpose of *Article 5 and 6, an armed attack* is understood to mean one of a sufficient gravity to endanger the maintenance of international peace and security” (emphasis added). The text in the Foreign Relations of the United States is: “the words, ‘North Atlantic area north of the Tropic of Cancer’ in Article 6 means the general area of the North Atlantic Ocean north of that line, including adjacent sea and air spaces between the territories covered by that Article”.

      SeeReid (n. 6), at 247; Insall and Salmon (n.136), at 434-435. [↑](#footnote-ref-1234)
1235. Insall and Salmon (n. 136), at 434-435. [↑](#footnote-ref-1235)
1236. Note the contradiction between the U.S. version, as presented by Reid (n. 6), at 247. [↑](#footnote-ref-1236)