

NON-CLASSIFIED INFORMATION INTENDED FOR PUBLIC DISSEMINATION



SUPREME HEADQUARTERS ALLIED POWERS EUROPE
 GRAND QUARTIER GÉNÉRAL DES PUISSANCES ALLIÉES EN EUROPE
 Mons - Belgium



SH/OLA/PP/128/24-016579

29 April 2024

Ms Anu Talus
 Chair of the European Data Protection Board
 European Data Protection Board
 Rue Wiertz 60, B-1047
 Brussels
 Belgium

Dear Ms Talus,

NORTH ATLANTIC TREATY ORGANIZATION (NATO)/ SUPREME HEADQUARTERS ALLIED POWERS EUROPE (SHAPE) PERSONAL DATA PROTECTION FRAMEWORK

On behalf of the Supreme Allied Commander Europe (SACEUR), the Supreme Headquarters Allied Powers Europe (SHAPE), SHAPE’s subordinate commands, the Allied Command Operations (ACO), ACO-led missions/operations/activities, and as the ACO’s [redacted] of the Office of Legal Affairs, I would like to congratulate you on your appointment as Chair of the European Data Protection Board (EDPB).

Next, I want to call your attention to SHAPE’s [and its multiple subordinate commands in European Union (EU) territory] unique legal position as an International Organization (IO) seated and registered in the Host Nation of Belgium.¹ As such, SHAPE has its own legal position and legal personality. I also want to touch on SHAPE’s interaction with European secondary law in general, and specifically, to the General Data Protection Regulation (GDPR). As an IO, SHAPE is not bound by the GDPR, nor by any other EU regulation.

To that end, I would like to echo the concerns raised by the UN Organization system,² regarding the GDPR’s disregard of the position, privileges and immunities (P&I) of IOs. Pursuant to these privileges, data held by SHAPE is to be considered part of the archives, official records, property and assets of the Organization, protected as such and hence immune from any type of interference. Even so, SHAPE has not been invited by the EDPB to discuss any of the guidelines issued, nor has it had the chance to obtain a clarification by the EDPB on the application of GDPR to IOs in general and to SHAPE (and NATO bodies and organizations) in particular. Such application should carefully consider the special mandate and mission given to the SACEUR by the NATO Nations, many of which also

¹ List of Intergovernmental Organizations with Seat or Representation in Belgium, as [published](#) by the Foreign Affairs, Foreign Trade and Development Cooperation Ministry, Kingdom of Belgium.

² Letter ref. RE: Impact of the European Union’s Data Protection Regulations on the Activities of UN System Organizations, dated 14 May 2020; letter ref. RE: Impact of European Union Data Protection Law on the Activities of UN System Organizations, dated 06 February 2024.

SHAPE [redacted]
 7010 Mons, Belgium Fax: +32 65 443545 (Registry)
 Office: [redacted] aco.dpo@shape.nato.int

NON-CLASSIFIED INFORMATION INTENDED FOR PUBLIC DISSEMINATION

happen to be European Union Members.³ This is of particular importance considering the fact that SHAPE's footprint on the European continent is likely second to only the EU, based on personnel, appointees, and even physical presence.⁴ After all, status as SHAPE and its subordinate headquarters seats in at least twenty European countries, eighteen of which are EU members.⁵

Accordingly, I endorse the United Nation's petition⁶ to engage with the EDPB, and would welcome EDPB guidelines that specifically refer to NATO, generally, and to SHAPE in particular. These guidelines should provide clarification on the relationship between P&I with regard to the implementation of the GDPR and the seat agreements of the IO.

NATO core purpose is to guarantee the freedom and security of its members through political and military means, and the promotion of democratic values and fundamental human rights, including the right to privacy and personal data protection. In fact, the protection of fundamental rights has been engrained in NATO's guiding principles since SHAPE's creation by the Paris Protocol⁷ in 1951, in pursuance of the North Atlantic Treaty's⁸ recognition that NATO Nations are obligated to safeguard the freedom of their peoples through democracy and the rule of law.

SHAPE therefore applauds and recognizes the EU's effort to enhance the right to personal data protection. While SHAPE activities vastly involve processing personal data, it is done solely within the scope of the duties necessary to fulfil the mission entrusted to NATO by the Nations. SHAPE does not process, collect or transfer personal data in the pursuit of profit or with the intention to make lucrative ends.

SHAPE developed and published its first personal data protection directive in 2018,⁹ and has continuously refine and improve, but even prior to the publication of this directive, the treatment of all NATO information, containing personal details or not, regardless of the possibility to identify an individual, was protected under the multiple NATO (classified and unclassified) information management rules (and still is). Management of NATO information is subject to the strictest code of conduct, protected by the P&I set forth by the governing treaties and accessible only on a need-to-know basis to those individuals who are granted a Security Clearance by their governments/nations, thereby guaranteeing the security environment.

SHAPE respects the independence and sovereignty of all NATO Members to develop their own internal regulations, but nevertheless reiterates that those same Nations cannot jeopardize pre-existing commitments to NATO and to other NATO Nations with domestic legislative measures. The implementation, even by proxy, of a third party (EU) regulation

³ Not limited to EU membership: European Economic Area (EEA) also includes Iceland, a NATO (founding) Member.

⁴ As of today, more than 27.000 people (civilian and military personnel, local workers, contractors, consultants, service providers, dependents, etc.) hold a SHAPE identification card that links them with the International Organization.

⁵ Belgium, Bulgaria, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia and Spain are all hosts to SHAPE and/or SHAPE subordinate headquarters in the NATO Command and Force Structures.

⁶ Letters from the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel to the Chair of the European Data Protection Board, dated 14 May 2020, and 06 February 2024.

⁷ Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty signed on 28 August 1952 in Paris

⁸ The North Atlantic Treaty signed on 04 April 1949 in Washington D.C.

⁹ Allied Command Operations Directive 015-026, ACO Personal Data Protection Policy, and last updated 11 December 2023.

NON-CLASSIFIED INFORMATION INTENDED FOR PUBLIC DISSEMINATION

would therefore be incompatible with the autonomy required to function independently from external legal interference as is required for SHAPE to fulfil its NATO mission.

SHAPE is interested in the GDPR because it is an EU instrument that directly addresses fundamental rights, namely the right to privacy and the right to secure processing of personal data, and because the implementation of the GDPR has created an excessive burden in the relationships between SHAPE, its Member States, and third parties that engage or may engage with SHAPE (from public administrations to private service providers).

Unfortunately, the nature and expanded scope of the GDPR have hindered SHAPE's ability to properly function and to perform its international mandate. The GDPR has created several bureaucratic barriers, and there has not been an adequate resolution of the Regulation's applicability to international organizations.

The current geostrategic environment and the importance of crisis-response all demand that SHAPE's readiness and operational capacity be unrestricted. It is not a SHAPE task to change or interpret EU secondary law.

It is up to EU to decide how to interpret the GDPR in conformity with the obligations of its Member States under public international law, whilst respecting the SHAPE legal position, P&I and the commitments made by the NATO Member Nations.

Therefore, I kindly ask that our institutions collaborate to identify a mutually-beneficial solution that will allow us both to protect the rights of data subjects whose data we process and to ensure that SHAPE may continue to transfer and receive personal information to fulfil its mission. By developing a dedicated set of guidelines, we hope to reassure European institutions and third parties that they can lawfully exchange data with SHAPE and respect SHAPE's P&I, and applicable legal framework.

Attached please find an annex with the main legal points for discussion, structured in four sections, which: 1) briefly explain NATO's legal structure; 2) discuss SHAPE's unique legal position; 3) outline SHAPE's interaction with external regulations; and finally, 4) detail the current challenges SHAPE faces in implementing such regulations.

In summary, SHAPE's main points are that:

- SHAPE is an IO recognized and registered in Belgium, the Host Nation, with a presence in twenty countries of the European continent. It has its own legal position, legal personality, P&I and international mission.
- As an IO, SHAPE is not bound by the GDPR, nor by any other EU regulation.
- Data held by SHAPE is to be considered as part of the archives, official records, property and assets of the Organization, and hence immune from any type of (legal) interference.
- SHAPE (and other NATO bodies and organizations) has raised its standards on Personal Data Protection and developed its own Data Protection Regulation, tailored for its mission and needs, which can be shared with the EDPB for its awareness.
- Taking into consideration the P&I of SHAPE provided by the NATO Governing Treaties, interpreted in conjunction with the EU governing and the GDPR, SHAPE shall be able to continue its processing of personal data, including transferring to non-SHAPE bodies and receiving personal information from third parties, bound by the GDPR or not, based on the special status of NATO and their governing treaties, which precede 24 May 2016.

NON-CLASSIFIED INFORMATION INTENDED FOR PUBLIC DISSEMINATION

- SHAPE requests a meeting (which can be expanded to other NATO bodies and organizations' representatives) to discuss possible ways ahead that would ensure the continuity and feasibility of its mission and the interaction with external legal regimes.
- SHAPE would kindly request the EDPB to issue specific guidelines confirming this interpretation that SHAPE could use in their business with third parties. EBDP and SHAPE can work jointly, together with other NATO bodies if they deem fit, in order to develop such guidelines.
- Furthermore, SHAPE would also encourage other NATO bodies and organizations to engage with the EDPB, as having NATO-wide applicable guidelines will ease and facilitate the NATO mission.

The SHAPE point of contact for this matter is [REDACTED], [REDACTED], email: [REDACTED], and aco.dpo@shape.nato.int, or [REDACTED].

Sincerely,

Originally signed

[REDACTED]
[REDACTED]

ACO Office of Legal Affairs, [REDACTED]

NON-CLASSIFIED INFORMATION INTENDED FOR PUBLIC DISSEMINATION

COPY TO:

ACO/SHAPE DPO
SHAPE OACM
ACT LEGAD
IS OLA
IMS OLA
NSPA LEGAD
NCIA LEGAD

ANNEX:

ANNEX A TO
SH/OLA/PP/128/24-016579
DATED 29 APR 24

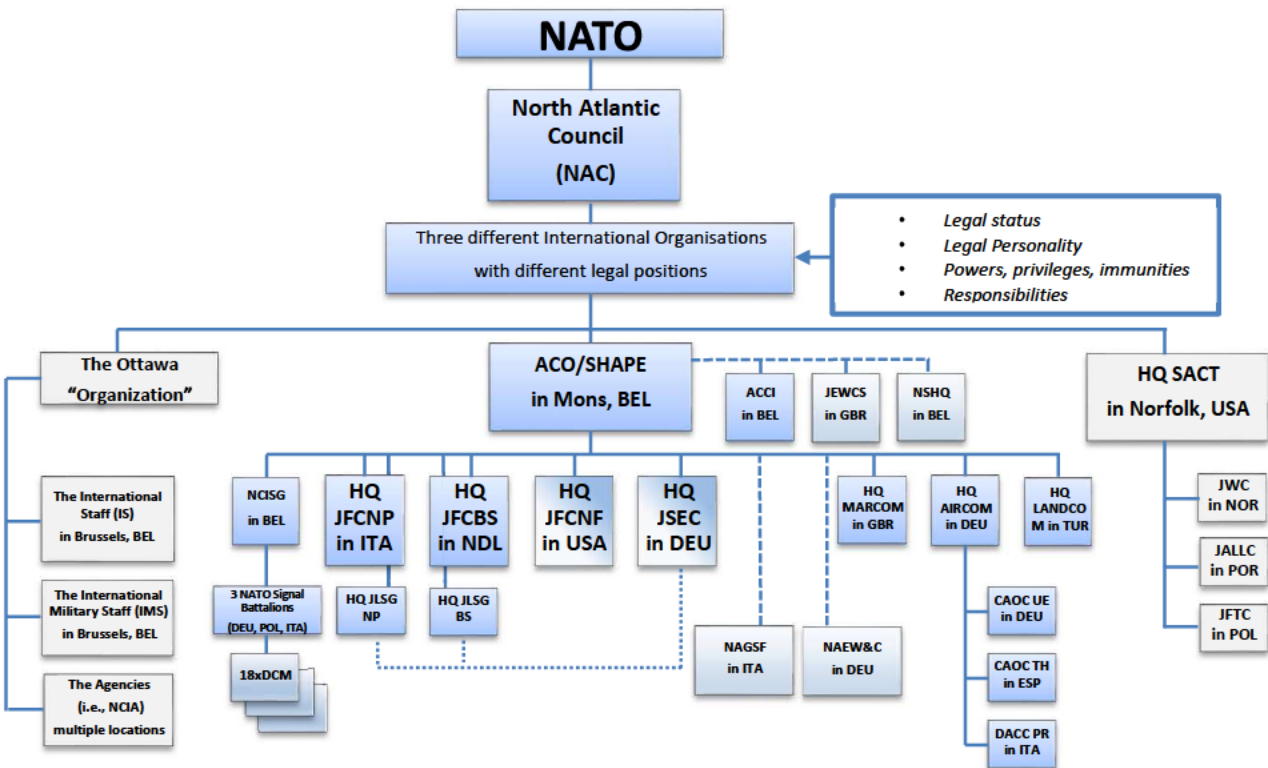
1. NATO'S LEGAL STRUCTURE

NATO is an IO founded by the Washington Treaty (also known as the North Atlantic Treaty) in 1949. Even if NATO is sometimes perceived as a monolithic entity, the reality is far more complex.

NATO is composed of three distinct IOs under the North Atlantic Council, namely:

- the 'civilian headquarters' (usually referred to as 'NATO Headquarters', headed by the Secretary General and internally composed of International Staff, International Military Staff and the NATO Agencies), seated in Brussels, Belgium;
- the Supreme Headquarters Allied Powers Europe (SHAPE), seated in Mons, Belgium; and
- Headquarters Supreme Allied Command Transformation (HQ SACT), seated in Norfolk, USA.

Each of them has their own, unique, legal position (which implies, depending on their mission, that they have different legal status, legal personality, legal capacity, powers, privileges and immunities and diverse responsibilities).



NATO Organigram

The 'civilian headquarters', SHAPE and HQ SACT act *pari passu* under the North Atlantic Council, the governing body of NATO.

NON-CLASSIFIED INFORMATION INTENDED FOR PUBLIC DISSEMINATION

Since each of these NATO bodies act as different IOs with their own legal position, this annex will focus only on SHAPE and its interaction with other legal regimes. The other organizations/bodies may join later to this SHAPE's initiative to provide more clarity on their specific challenges and stations that are not shared by SHAPE.

2. SHAPE' LEGAL POSITION

Beyond the North Atlantic Treaty whose only institutional provision is Article 9, which created the North Atlantic Council, the legal position of SHAPE is to be found in the three NATO “treaties on status”. These are the NATO SOFA,¹⁰ regarding the status of forces present in other Allied States; the Ottawa Agreement,¹¹ determining the status of North Atlantic Council and its committees, staff members, and national representatives; and the Paris Protocol, aiming to cover the category of NATO military headquarters, which were not ‘visiting forces’ in the strict NATO SOFA sense; with the latter drawing from the provisions of the first two in order to complete the legal foundation of SHAPE.¹²

NATO military headquarters fulfil military functions, and therefore require specific provisions, and are IOs directly accountable to the North Atlantic Council, have an international budget, have legal personality and take on obligations independently: in that sense, therefore, they are not national ‘visiting forces’.

SHAPE has also concluded numerous bilateral ‘supplementary agreements’ (in truth, seat agreements) in order to tailor the implementation of the treaties on status to the Host Nations where it is based. The most important supplementary agreement is perhaps that with Belgium, as the Host Nation of SHAPE’s main seat in Mons. Such agreements also exist with the other NATO Nations hosting the myriad of subordinate headquarters who share SHAPE’s international legal personality.

2.1 Privileges and Immunities of SHAPE:

The P&I of SHAPE are to be found in this ‘galaxy’ of treaties, which together grant it with immunity from jurisdiction, immunity from execution and inviolability of its premises, archives and official documents, among other.

The Washington Treaty and more specifically, Art. 8, forbids NATO Nations from engaging in any international agreement that may hamper or conflict with the obligations undertaken by them when creating NATO: “*Each Party declares that none of the international agreements now in force between it and any other Parties of 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*”.

The spirit of the protection (granted to SHAPE and other NATO bodies) and the duties (binding the NATO Members) ingrained in this Article is especially relevant in the context of soft implementation and protection against domestic law interference, as it will be further develop in Section 3.

¹⁰ Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, signed in London on 19 June 1951.

¹¹ Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, signed in Ottawa on 20 September 1951.

¹² See J.M. Snee (ed.), NATO Agreements on Status: *Travaux Préparatoires* (Naval War College – International Law Studies Vol. 54), 1961, p. 596, para. 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 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*”.

Article 2 of the Ottawa Agreement must be understood against the same backdrop. The intention of the drafters, as can be inferred from the historical context and the *Travaux Préparatoires*, was not to exclude the potential application of Ottawa Agreement provisions to NATO military headquarters, but rather to define the scope of that Convention.

NON-CLASSIFIED INFORMATION INTENDED FOR PUBLIC DISSEMINATION

This obligation is also mirrored in Article 351 of the Treaty on the Functioning of the European Union, a pledge of EU Member States not to interfere with prior treaty obligations; and P&I of NATO should be interpreted in light of these provisions.

Under the wide umbrella of the Ottawa Agreement, the inviolability of NATO archives and premises is granted. Art. V establishes that “[t]he Organization, its property and assets, wheresoever located and by whomsoever held, shall enjoy immunity from every form of legal process”, and Art. VI that “[t]he premises of the Organization shall be inviolable [...] and its property and assets, wheresoever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of interference”.

The NATO SOFA imposes upon SHAPE (and other International Military Headquarters) the duty to *respect* but not *obey* the Host Nation Law. Art. II of the NATO SOFA dictates that SHAPE must “*respect the law of the Receiving State*”. Discussions over the exact meaning of *respect* have been settled (by the state practice of NATO’s member Nations as well as the interaction between SHAPE and its different Host Nations) in the sense that the obligation set by Art. II of the NATO SOFA, i.e. the duty to *respect* the law of the receiving State, is not equivalent to being legally bound by, or to the obligation to *obey*, the law of the receiving State. In other words, SHAPE fulfils its mission behaving in accordance with the general principles of the domestic law. This aligns with the spirit of NATO governing treaties, international practice and the need for the international organization to fulfil their mission (assigned by the founding members) unhindered by the details of domestic law.¹³

The Paris Protocol provides for explicit immunity from execution in its Art. XI.2: “[n]o measure of execution or measure directed to the seizure or attachment of its property or funds shall be taken against any Allied Headquarters”; and reiterates the inviolability of SHAPE’s archives in its Art. XIII: “[t]he archives and other official documents of an Allied Headquarters [...] shall be inviolable”.

In line with the above, data held by SHAPE is to be understood as “*archives and other official documents*”, in the sense of the Paris Protocol, and as “*property and assets*” in the sense of both the Paris Protocol and the Ottawa Agreement. Consequently, data held by SHAPE is both inviolable and immune from execution, search, requisition, confiscation, expropriation or any other form of interference. Any attempt at regulating how this data is stored or handled would represent an interference against the P&I granted by the NATO member States to SHAPE.

¹³ See S. Lazareff, Status of Military Forces under Current International Law, Sijthoff, Leiden, 1971, Chapter III.

3. SHAPE interaction with external regulations:

3.1 Interaction with Host Nation Law:

Host Nation laws and internal domestic legislations do not bind SHAPE. The extent to which Belgian law applies as the minimum standard, it is to be understood as a voluntary waiver of SHAPE's P&I by virtue of bilateral agreement; and not as an imposition by the Host nation.¹⁴

The NATO SOFA obligation to *respect* the Host Nation law, read in conjunction with Art. 8 of the Washington Treaty, implies a need to align SHAPE's internal rules and policies as much as possible with the domestic law of the Host Nation, and to avoid implication of NATO staff in political activities in the Host Nation. This alignment cannot prejudice or jeopardize the NATO mission.

3.2 Interaction with EU Law:

It would be against the provisions and the spirit of the founding and governing treaties of both organizations (NATO and EU) to seek to apply EU secondary law to NATO activities. In this sense, it is interesting to note that the Belgian Courts, on at least two occasions, have ruled that EU regime does not apply to SHAPE, and chose to apply alternative applicable legal regimes based on public international law.¹⁵

The relation between the EU and other IOs is complex. Support and cooperation among them often aligns with the EU's strategic objectives, because EU members have a significant share of membership in multiple IOs and contribute to them financially. However, it is not possible for the EU to go beyond its mandate, particularly by imposing internal regulations to external entities that are not bound by the founding treaties and agreements that have created and shaped the European Union.

And most importantly, not all of the current thirty-two NATO Members are EU States. Seeking to apply EU rules to NATO would undermine state sovereignty and extend the applicability of the EU legislation beyond its lawful scope. This is consistent with accepted principles of international law: *“every sovereign state is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory”*,¹⁶ which can be, to a certain extent, analogously applied to international organizations relationships.

Taking into consideration the general principles of international public law on international treaties and agreements; the already mentioned Art. 8 of the Washington Treaty; the direct reference to NATO included in Art. 42 Lisbon Treaty;¹⁷ and the commitments and

¹⁴ For instance, SHAPE has agreed to consider the law and regulations of Belgium with regard to health and safety as minimum standards via the bilateral supplementary agreements of 1967 establishes that the Belgian rules with regard to Health and Safety are to be understood as the minimum requirements to be applicable by SHAPE, but there is no prohibition against imposing more severe measures, as long as they comply with the minimum guarantees designed by Belgium.

¹⁵ Tribunal de Première Instance Francophone de Bruxelles, Section Civile –ordonnance 9eme chambre affaires civiles (16/06/2017); Tribunal de Première Instance Francophone de Bruxelles, Section Civile – ordonnance Exequatur Sentence Arbitrale – Requête Unilatérale (Art. 1719 à 1721 C.J.) affaires civiles (12/07/2017).

¹⁶ Underhill v Hernandez, 168 US 250, 252 (1897).

¹⁷ Art. 42 Lisbon Treaty [emphasis added]: [...] The 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 Members States**, which see their **common defence realised in the North Atlantic Treaty**

NON-CLASSIFIED INFORMATION INTENDED FOR PUBLIC DISSEMINATION

cooperation related to common defence of Article 51 of the United Nations Charter (collective self-defence), NATO obligations shall take priority and the EU policy shall not prejudice them.

Consequently, if the exchange of personal information was necessary to comply with obligations of certain EU Member States with NATO and/or Article 51 of the United Nations Charter, no European legislation could endanger the already acquired commitments and collective defence agreement by preventing the Alliance and EU Members States to share information among them and with NATO.

As a final note, some could argue that, in the absence of relevant host nation law applicable to a specific situation, the relevant EU secondary law could be applied (if only in the interests of filling a legal vacuum when so required). However, this would be subject to the same existing NATO SOFA limitation with regard to host nation law, i.e. SHAPE would have the obligation to *respect*, not to comply, and to the limitation established by the Vienna Convention on the Law of Treaties: “a party may not invoke the provision of its internal law as a justification for its failure to perform a treaty”.¹⁸

3.3 Interaction with the GDPR:

SHAPE, as an IO, is not subject to the GDPR.

SHAPE's legal status as an IO, is not only in line with the definition provided by the GDPR,¹⁹ but also in accordance with the rules of the Host Nation.²⁰

Organization (NATO) under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework. [...]

7. [...] Commitments and cooperation in this area [*aid and assistance if a Member State is the victim of armed aggression on its territory*] shall be consistent with the commitments under the **North Atlantic Treaty Organization**, which, for those States which are member of it, remains the foundation of their collective defence and the forum for its implementation.

¹⁸ See Art. 27, Internal law and observance of treaties, Vienna Convention of the Law of the Treaties, done 23 May 1969, entered into force 27 January 1980.

¹⁹ GDPR Art. 5 para 26: “an organization and its subordinate bodies governed by public international law, or any other body which is set up by, or on the basis of, an agreement between two or more countries”. NATO was created under public international law, by the original agreement of the twelve founding members of the Alliance, namely Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom and the United States, through the signature of the Washington Treaty 1949. In 1952, with the Paris Protocol, SHAPE and its sister Supreme Headquarters, HQ SACT, were established as international organizations recognized as NATO bodies “*pursuant to the North Atlantic Treaty*”.

²⁰ As explained above, SHAPE is registered as an international organization in Belgium. It is included in the list the Belgian government published with all the international organizations based on Belgian soil, but also has been established by case law since 1997 (Jean-Pierre Viseur, Vice-Premier Ministre et Ministre des Finances et du Commerce extérieur Finances reply to one fiscal question on the 18 March 1997: “*L'Organisation du Traité de l'Atlantique Nord et le Quartier Suprême des Forces Alliées en Europe (SHAPE) sont des organisations internationales*”, “the North Atlantic Treaty Organization and the Supreme Headquarters Allied Powers in Europe (SHAPE) are international organizations).

4. CURRENT CHALLENGES:

SHAPE, due to its footprint and geographical location, is facing similar issues as those described by the UN Legal Office,²¹ and likewise lacks a suitable solution to harmonise the P&I and international mandate of SHAPE in view of the expansive scope of the GDPR. While SHAPE welcomed the opportunity to participate and be heard in the Taskforce on international transfers to IOs, SHAPE is similarly disappointed with the solutions discussed (mainly the Model template arrangement for data transfers from EU institutions and bodies to International Organisations and the draft model clauses).

These proposals may work for EU organizations and agencies, but do not mitigate the risk of the legal interference created by the GDPR. Since its entry into force, and as a direct consequence of not having clear guidelines on how to reconcile it with the legal nature and status of IOs, SHAPE's position has become much more vulnerable in administrative and judicial procedures; and its international mission of collective defence and deterrence, more difficult to execute and achieve.

In addition, the troubles that SHAPE (and other NATO Bodies) face in their interaction with third parties are only one side of the problem. NATO mission may be compromised if NATO Nations are not able to properly and speedily exchange information among themselves and their Allies. Recalling the previous discussion on the meaning and spirit of Article 8 of the Washington Treaty, impeding or excessively hindering the exchange of information between NATO and the EU Member States that also happen to be NATO members would mean that the NATO Members have breached the obligations created by the Washington Treaty and subsequent NATO agreements.

It is within the sovereignty and powers of the Nations to harmonise both sets of obligations, with NATO and with the EU regulation, for instance, determining that the NATO treaties will fit the spirit of Art. 96 of the GDPR. Similarly, they may determine any communication with NATO is to be considered in the frame of national security and therefore outside of the scope of applicability of EU regulations. Even so, the EU still needs to provide an adequate solution that allows SHAPE to continue engaging third parties bound directly or indirectly by the GDPR, such as non-NATO nations and individuals and organizations not linked to a public authority or with whom SHAPE interacts on a contractual basis.

SHAPE takes the protection of personal data seriously. SHAPE's response to the EU's praiseworthy initiative to protect personal data has been to raise its own personal data processing criteria to match the highest international standards. It has done so by developing its own directive on Data Protection, integrating the NATO's pre-existing privacy and information management and protection principles and regulations already in place.

The SHAPE Personal Data Protection Policy²² is to be taken in conjunction with the rest of SHAPE's protective measures, such as the principle of need-to-know, the classification of NATO information, the protection and immunities drawn from the treaties, the need to have a national security clearance, and others. This is furthermore supported by the existing grievance procedures that include administrative and judicial review as per Article XXIV of the Ottawa Agreement.²³

²¹ *Loc. cit.* footnote 2

²² *Loc. cit.* footnote 8.

²³ Article XXIV of the Ottawa Agreement: The [North Atlantic] Council shall make provision for appropriate modes of settlement of:

NON-CLASSIFIED INFORMATION INTENDED FOR PUBLIC DISSEMINATION

However, these internal SHAPE rules (and other NATO regulations being currently under development), while they may mitigate them, they do not address the problems created by the GDPR and their impact on the execution of SHAPE's mission and activities.

Moreover, as explained above with regard to P&I, data held by SHAPE is both inviolable and immune from execution, search, requisition, confiscation, expropriation or *any other form of interference*. Any attempt at regulating how this data is stored or handled would represent interference against the privileges and immunities granted by the NATO Member States to SHAPE.

4.1 Issues arising out of the entry into force of the GDPR:

The expanded scope of the EU in applying European Regulations, i.e. the GDPR, beyond the EU realm, has created multiple difficulties for SHAPE: hampering exchanges of information, haltering relationships with third parties that do business with SHAPE, and the creating high risks of potential litigation initiated by EU citizens before national courts.

From a military strategic perspective, NATO relies on the exchange of information between NATO members, most of which are also EU Member States. Those EU Member States that, in principle, must comply with and implement the GDPR, (meaning that they cannot transfer personal data freely to third parties, understood as third countries, non-EU member states and IOs), remain bound by previous NATO obligations with regard to common security and defence. This has created legal uncertainty as to which legal regime is to be applied.

But these difficulties also affect day to day operational readiness, like suppliers, caterers, vendors and other contractors based in EU soil that interact daily with SHAPE and are instrumental in the maintenance of the business continuity.

4.2 SHAPE and the GDPR:

The GDPR recognises that it is not within the powers and authorities vested in the EU to legislate the activities of Third Countries and International Organizations, but has not taken into consideration the complexity of interacting with vendors, third parties and other EU Nations.

Non-NATO bodies that fall within the material, territorial and personal scope of the GDPR are not provided a suitable solution or proper guidance on how to interact with IOs. While some articles and recitals in the GDPR may be used, this has not ease their concerns about breaching their obligations with regard to the GDPR:

4.2.1 Neither an adequacy decision nor standard contractual clauses are a solution SHAPE deems feasible, as they would be agreeing to the implementation by proxy of the GDPR to a third party and/or IO (in breach with the immunity from interference granted to IOs). This would be incompatible with SHAPE's legal position, mission, P&I.

4.2.2 Likewise, derogations as per Art. 49 of the GDPR can only be applied

-
- (a) Disputes arising out of contracts or other disputes of a private character to which the Organization is a party;
 - (b) Disputes involving any official or expert of the Organization to whom Part IV of this Agreement applies who by reason of his official position enjoys immunity; if immunity has not been waived in accordance with the provisions of Article XXII.

NON-CLASSIFIED INFORMATION INTENDED FOR PUBLIC DISSEMINATION

occasionally and on a non-recurrent basis, therefore rendering it unusable for this discussion. Even examining if the Recipient of the information aligns with the GDPR requirements would constitute a soft implementation of the European Regulations, incompatible with the obligations that the same NATO Members have to respect the status P&I of SHAPE.

4.2.3 Recital 16 of the GDPR establishes that the Regulation does not apply to activities concerning national security. The exchange of crucial information with an IO dedicated to self-defence and the maintenance and promotion of international peace and security²⁴ falls squarely within the definition of “national security”. The content and details provided in the information exchanged between NATO and their State Members is, in general terms, decided by the sovereign Nations. It would be up to them to make the assessment of whether or not this information could fall within the national security and common defence and the previously acquired responsibilities within the Alliance.

4.2.4 Lastly, it can be argued that the NATO governing treaties fall under the scope of Article 96 of the GDPR, Relationship with Previously Concluded Agreements. This article recognises that international agreements involving the transfers of personal data to IOs concluded prior to 24 May 2016, which comply with the applicable Union law prior to that date, shall remain in force until amended, replaced or revoked. Guidance on this clause²⁵ have not clarified the possible interaction with the NATO governing treaties, especially taken into consideration the language used and technological means available when these treaties were negotiated and signed (Washington Treaty and the NATO SOFA in 1949, 1951, and 1952).

²⁴ Arts. 1 Washington Treaty [emphasis added]: “*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*” and Art. [emphasis added]: “*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*”.

²⁵ Statement 04/2021 on international agreements including transfers Adopted on 13 April 2021.