Postscript

We are grateful to our Leiden colleagues Blokker and Muller for their comments on our contribution in the *Nederlands Juristen Blad;* just as their response in *Transaktie* to the elaborated version of our opinion, it is in many ways a well thought-out addition to what we maintained there.[1] Insofar as the purpose of their contribution was to refute our positions, it has (again) failed to convince us.

Blokker and Muller hold against us that we are not consistent in our interpretation of the UN Charter and the NATO Treaty; the former, we are supposed to have interpreted very dynamically, and the latter unnecessarily statically. Neither is the case insofar as we do interpret these treaties, this interpretation could - in *both* cases - sooner be called strict. As far as the UN Charter is concerned, our position is that the Security Council, in *its* very dynamic interpretation of the power to take enforcement measures, neglects to build in sufficient guarantees to be able to effectively undertake the obligation, also to be found in the Charter, to exert political and legal control over the enforcement measures concerned. Contrary to Blokker and Muller's opinion, under the terms of the Charter, it is *not* wholly within the discretion of the Security Council to determine the exact way in which it fulfils its 'supervisory obligation' in any given case. Although, under the Charter, the Security Council does have wide discretionary powers, this does not mean that the Council is not obliged to take into account the obligations posed by the Charter as such. The fact that, within the UN's system, the Council's decisions cannot, as a rule, be tested for their legality by other UN organs such as the International Court of Justice, does not relieve the Council of this legal obligation.

Indeed, we believe it can be expected that any significant expansion of NATO's tasks must be founded on at least an explicit legal basis in the

1. *See*, respectively, N. Blokker & S. Muller, *De NAVO als Instrument van de VN Veiligheidsraad: Internationaalrechtelijke Vraagtekens*, 71 Nederlands Juristen Blad 802 (1996); I.F. Dekker & E.P.J. Myjer, *Luchtaanvallen op Bosnische Stellingen - Is de NAVO ook Juridisch het Geëigende Instrument van de NAVO?*, 70 Nederlands Juristen Blad 1275 (1995); N. Blokker & S. Muller, *De NAVO als Instrument van de VN Veiligheidsraad: Internationaalrechtelijke Vraagtekens*, 25 Transaktie 90 (1996); and I. Dekker & E. Myjer, *Het NAVO-optreden in Bosnië - Een Juridische Analyse van de NAVO als Instrument van de VN-Veiligheidsraad*, 24 Transaktie 487 (1995).

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NATO Treaty, and that this explicit legal basis is, in any case, lacking as far as NATO's actions as a regional organization in Bosnia are concerned. The same applies to the actions that NATO is currently undertaking in the context of the Implementation Force in Bosnia (IFOR). Given this lacuna, it is, in our opinion, of crucial importance that the NATO member states, themselves, have always (unanimously) maintained that NATO is not a regional organization in the sense of the UN Charter. That this interpretation of the NATO Treaty by its member states is disputed in international legal doctrine - see, in this respect, Kelsen[2] - does not detract from this conclusion. The same applies to the actual actions of NATO as a regional organization. In taking these actions, NATO exceeds the legal parameters it has, itself, set for its actions and thus comes into conflict with elementary principles of international good governance. In principle, the lack of such a legal basis only has consequences for the relations between NATO and its member states, i.e., between the member states themselves, and possibly also within the member states. For the sake of these relations, we find an amendment of the Treaty to be essential. In amending the Treaty, the member states should also determine in which region they would want to be able to act as a regional organization. Even according to Kelsen, this region, within which the organization seeks to serve the 'common interests' of its members, must be limited to a specific area that is determined in advance.[3] In case NATO limits itself to a mere reference to Article 6 of the Treaty, in which the NATO area for collective self-defence is clearly defined, the actions in Bosnia remain legally problematic.

The principles of international good governance apply to all international organizations. The fact that these principles have also sometimes been used rather freely with regard to other international organizations does not mean that NATO can do as it pleases with them. The example of the Western European Union (WEU), as given by Blokker and Muller in this context, is not a strong one. Apart from the one fundamental amendment of that treaty, which led to the Modified Brussels Treaty of 1954,[4] it can at least be noted that it was possible for the other changes to

2. H. Kelsen, The Law of the United Nations 920 (1954).
3. *Id.*, at 920.
4. Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence of 17

be discussed in the national parliaments of all member states in the context of the debates concerning the ratification of the Maastricht Treaty.[5] After all, in Article J.4 of that Treaty, as well as in the declaration of the WEU-member states of December 1991 which was attached to it,[6] a new role for the WEU is explicitly discussed.

Thus, on the main issues, we continue to hold a different opinion from Blokker and Muller. That does not, however, diminish the fact that their earlier response to the elaboration on our opinion which appeared in *Transaktie* was undoubtedly partially responsible for this subject not escaping the notice of the Dutch Advisory Council on Peace and Security. Unfortunately, however, the Advisory Council did not grasp the contents or the importance of the discussion. In its very recent report, entitled *Lost Innocence: The Netherlands and UN Operations*, the discussion on the legal aspects of the NATO actions is labelled "predominantly academic in nature",[7] not because the discussion mainly took place between university lecturers, but because it did "not stand in the way of actions by NATO and the WEU in the former Yugoslavia".[8] However, a normative analysis cannot, of course, be refuted by a purely factual argument. Leaving aside this elementary rule of the legal discourse plainly shows the value that is apparently attached to legal arguments by the most important general advisory body of the Dutch Government in the field of foreign policy.

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March 1948 as amended by the Protocol Modifying and Completing the Brussels Treaty of 23 October 1954, 211 UNTS 342 (1954).

5. Treaty on European Union of 7 February 1992, 31 ILM 247 (1992).
6. Declaration (ND 30) on Western European Union.
7. Adviesraad Vrede en Veiligheid, Verloren Onschuld: Nederland en VN-Operaties, Rapport No. 20, at 33-34 (1996).
8. *Id.*

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