Air Strikes on Bosnian Positions: Is NATO Also Legally the Proper Instrument of the UN?

Editorial Note: In August and September 1995, NATO executed air strikes on certain Bosnian-Serb positions in defence of the 'safe area' of Sarajevo. Following these strikes, lecturers from both the University of Utrecht and the Leiden University engaged in a polemic - in Dutch - on the lawfulness under international law of such a use of force by NATO air forces. In learning of this polemic, the Board of Editors of the *Leiden Journal of International Law* was of the opinion that to keep access to this exchange of views confined to those international lawyers in command of the Dutch language would deprive a large number of interested parties of a valid and interesting legal discussion. Therefore, as an explicit exception to the *Journal*'s editorial policy, the Board of Editors of the *Journal* has decided to offer translations of the views as appeared earlier in the *Nederlands Juristenblad* as the three next contributions.

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For weeks, the air strikes that NATO executed in defence of the 'safe area' of Sarajevo were 'hot news'. The fact that NATO would, eventually, execute these strikes had seemed inevitable for some time. The well-informed observer had sufficient indications to this effect via television and the newspapers. However, the media, and all of the debates in national parliaments, have never, or have scarcely, addressed the legal basis for these strikes. At first sight, this appeared to be a relatively simple question, since NATO repeatedly stressed that it was acting on a mandate from the UN Security Council. At a second glance, however, the legal basis of the NATO actions gives rise to a number of questions for which the answers are less easy to ascertain.

The civil servants involved in the political decision-making will, when the train of intergovernmental decision-making is finally on track, be less inclined to test the legal reasoning underlying their own decision. In parliament, knowledge of international law does not seem to be specifically well developed, and international law is used rather sparingly as a touchstone for the validity of policies. On matters involving an international dimension, political self-scrutiny usually limits itself to manageable internal-political questions, such as discussions on chains of command within the Ministry of Defence and misplaced films.

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With regard to NATO's air strikes on Bosnian positions, at least two issues are problematic from the point of view of international law. The first issue concerns the way in which the UN Security Council has, in legal terms, shaped its authority over NATO's actions in Bosnia-Herzegovina; this is a question that has been actualized by recent Russian protests. The second issue concerns the question of whether NATO, based on its own 'constitution', is legally entitled to execute these actions. Before entering into a discussion of these issues, a few legally relevant aspects concerning the background against which NATO's actions were taken will be highlighted.

It is well known that the primary goal of the UN's military involvement in the conflict in the former Yugoslavia was, initially, to ensure the safety of the humanitarian convoys in the area. To this end, the Security Council authorized a number of peace-keeping forces, such as the UN Protection Force (UNPROFOR) for Bosnia-Herzegovina. Such peace-keeping forces are stationed exclusively on the territory and with the consent of the parties involved in the conflict, since they are expressly not intended to be an enforcement measure under Chapter VII of the UN Charter. In addition, these peace-keeping forces are, in principle, only allowed to use force in personal self-defence, i.e., only to repel an armed attack aimed at them, and they are required to maintain impartiality with regard to the conflict.

However, in the course of the conflict, the tasks of the UNPROFOR units have been expanded considerably, specifically with regard to the establishment of so-called 'safe areas'. In April and May 1993, the Security Council designated a number of locations and the surrounding areas as such, amongst them Sarajevo, in order to alleviate the distress of the civilian population that resided there. No armed attacks or other hostile actions were allowed within or against these safe areas, and 'guarding' these areas was entrusted to UNPROFOR units.

When the situation did not improve, the Security Council adopted Resolution 836, on 4 June 1993, which is remarkable for at least two reasons. First, it authorizes UNPROFOR, in executing its mandate, to respond by force if necessary to bombardments of, or armed incursions into, the safe areas and to the deliberate obstruction of the freedom of movement of UNPROFOR or protected humanitarian convoys in and

around those areas.[1] In other words, the resolution considerably stretches the traditionally strict interpretation of the right of self-defence of peace-keeping forces, by also sanctioning the use of force in the defence of territory.

Second, the resolution of 1993(!) provides the direct legal basis for NATO's air strikes, since the Security Council authorizes the UN member states, acting nationally or through regional organizations or arrangements, to take all necessary measures, through the use of air power, to support UNPROFOR in performing its mandate in and around the safe areas.[2] According to the resolution, these actions must take place under the authority of the Security Council and in close cooperation with the UN Secretary General and UNPROFOR.[3] The Security Council bases this authorization on its powers under Chapter VII of the UN Charter, but fails - as usual - to indicate the specific legal basis therefor. It cannot be based on the right of self-defence under Article 51 of the UN Charter, the final article in Chapter VII. The only option in this context is Article 42 of the UN Charter, which provides for the Council's competence to take military enforcement measures.

In the implementation of such measures, the Council can, under Article 53 of the UN Charter, utilize 'regional arrangements or agencies'. That seems to be the aim of the Council's authorization under consideration here. The question, therefore, is whether NATO is a 'regional organization' in the sense of Chapter VIII of the UN Charter, of which the above-mentioned Article 53 forms a part. The Charter does not define this notion itself. What can be deduced from the Charter is that such an organization has the task of taking care of the peaceful settlement of disputes within its own region, and, if and when necessary, that it can be utilized by the Security Council for the maintenance of 'internal' peace and security. Thereby a regional organization distinguishes itself from a regional defence organization as such, which has as its sole purpose the offering of protection against external aggression.

It is worth noting in this context that when NATO was established in 1949, it was made clear by the United States and the United Kingdom,

1. UN Doc. S/RES/836, para. 9 (1993).
2. *Id.*, para. 10.
3. *Id.*

as well as by The Netherlands, that NATO would strictly be a collective defence organization in the sense of Article 51 of the UN Charter and not (also) a regional organization under Chapter VIII. During the debates for approval of the North Atlantic Treaty in the United States and the United Kingdom, the Secretary of State, Dean Acheson, and the Foreign Secretary, Ernst Bevin, clearly took this point of view.[4] The Dutch Government also stated that NATO is a collective defence organization "based on Article 51 of the Charter", and that "the idea of turning the North-Atlantic Treaty into an arrangement under Chapter VIII of the Charter has been rejected".[5] In support of its position, the Dutch Government put forward the argument that under Chapter VIII of the Charter, an organization may not take action "to repel an attack" without prior consent of the Security Council. That, however, is incorrect. As put forward by the American and British Governments, the Charter does not prohibit a regional organization from (collectively) defending itself, entirely on its own authority, against an armed attack. In the event of the actual use of this right, the Security Council must, however, under Article 51, be notified immediately of the action taken.

The denial of NATO being a 'regional organization' had a different background. In contrast to a regional defence organization, a 'regional organization' is, according to Article 54 of the UN Charter, bound to keep the Security Council fully informed at all times of the actions that are taken or being considered for the maintenance of at least the 'internal' peace and security. Especially for the Americans such a consequence of NATO being defined as a regional organization was wholly unacceptable. Already on the conclusion of the Treaty they had great difficulty with the obligation to jointly respond to an external armed attack.[6]

These positions have, apparently, changed. It can be inferred from the fact that NATO is acting as an organization in Bosnia-Herzegovina - rather than the separate member states acting individually - that the member states have come to view NATO as a 'regional organization'. It seems, however, that the legal consequences of this change have hardly been recognized. In the first place, it has become apparent over the last few weeks that, because of the lack of sufficient information, the Security

4. *See* A.L. Goodhart, *The North Atlantic Treaty*, 79-2 HR 220 (1951); and 464 Hansard 2018.
5. 1948-1949 Handelingen Kamer II, Bijlagen No. 1237, No. 3, at 6; *id.* No. 6, at 6.
6. *See* T.P. Ireland, Creating the Entangling Alliance 100-112 (1981).

Council cannot sufficiently maintain its 'authority' over the NATO actions. That applies, of course, primarily to those members that are not also member states of NATO. Upon approval of Resolution 836, those members, themselves, neglected to insist that, should NATO be called into action, the agreements between the UN and NATO would then be subjected to the approval of the Security Council. This would, in any case, follow from the above-mentioned obligation for regional organizations to inform the Security Council. It is also apparent from a NATO press release, dated 7 September 1995,[7] that an agreement about the execution of the air strikes in protection of the safe areas was concluded on 10 August 1995, between the military command of UNPROFOR and its NATO counterpart. However, this agreement is secret, apparently to members of the Security Council as well, as can be gleaned from the Russian protests in this context. Undoubtedly, arrangements of a military-tactical nature have been included in this agreement, and naturally these must remain secret. Nonetheless, what is at issue here is that for now, it is totally unclear how and under what conditions the Security Council can execute its political control over NATO actions. Making arrangements to that effect in advance is all the more important, since three of NATO's members are also permanent members of the Council and can block any new decision of the Council by using their veto power.

Not only the Security Council showed little consideration for the legal (and political) consequences of NATO's 'new' role as a 'regional organization', but also NATO itself, as well as its own members, are to blame for this oversight. This reproach does not lie in the fact that the NATO actions are in violation of the NATO Treaty. Even though that Treaty does not provide for an explicit legal basis for actions such as the ones undertaken against the Bosnian Serb positions surrounding Sarajevo, it can be maintained that the Treaty does not expressly prohibit such actions. The reproach is mostly of a legal-political nature: what is at issue is the fact that the completely informal manner in which this considerable expansion of NATO's mandate has taken place is hard to reconcile with elementary principles of democratic governance. These principles gain

7. NATO Press Release on 'Operation Deny Flight', 7 September 1995: "On 10 August 1995, NATO and UN Commanders signed a memorandum of understanding on the execution of NATO air operations for the protection of UN-designated 'safe areas' in Bosnia-Herzegovina."

importance when the administrative activities of international organizations increase, as the discussions surrounding the reform of the European Union so clearly demonstrate. There is no reason why these demands cannot also be made from NATO. On the contrary, in view of the way in which this particular organization came into being, as well as its great political importance - and its military power - it can reasonably be expected that any significant expansion of its functions would at least be founded on an explicit legal basis in its constitutive instrument.

This reproach is directed at both the governments of the NATO member states and their national parliaments. From the perspective of legitimacy, the Dutch Government - in view of the fact that it earlier had taken the explicit position that NATO is *not* a 'regional organization' - should again put this question before parliament. In addition, the matter of democratic control of international organizations should be a primary concern of national parliaments. They do not, however, seem to be aware of the 'creeping' reform of the functions of NATO and the related consequences. This could already be ascertained when, a few years ago, NATO took on its first 'out of area' operation in the former Yugoslavia. Now that NATO seems in search of a new identity, the least that can be expected is that that identity will have a clear legal basis. For this, a review of the NATO Treaty seems indispensible.

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