NATO as the UN Security Council's Instrument: Question Marks From the Perspective of International Law?

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In the previous contribution, Dekker and Myjer maintain that, from the viewpoint of international law, there are at least two problematic issues with regard to NATO's actions in Bosnia-Herzegovina.[1] The first issue concerns the way in which the Security Council has, in a legal sense, shaped its authority over NATO's actions. The second issue is the question of whether NATO is entitled, under its own constitution, to execute such actions. The contribution of Dekker and Myjer was prompted by NATO's air strikes in defence of Sarajevo, which took place in August and September 1995. Their criticism also applies to the current actions that NATO is undertaking in the implementation of the Dayton Agreement,[2] as they later elaborated in the periodical *Transaktie*.[3] First and foremost, it must be noted that Dekker and Myjer deserve full credit for pointing out these legal aspects of these recent NATO actions. That being said, their two main points of criticism are debatable and, in our opinion, paint a less than consistent picture of the possibilities that the UN and NATO have to offer, in particular the possibilities that may or may not be provided by those organizations' constitutions to flexibly respond to the demands posed at the present time, as well as the room to manoeuvre that is available under the changed international balance of power.

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1. For a more elaborate response to the Dutch version of the previous contribution, *see* N. Blokker & S. Muller, *De NAVO als Instrument van de VN Veiligheidsraad: Internationaalrechtelijke Vraagtekens*, 25 Transaktie 90 (1996).
2. Dayton Agreement, reproduced *in* 35 ILM 223 (1996); *see also* 2 International Peacekeeping 138-167 (1995).
3. 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). *Cf. also* the recent contribution by E.P.M.W. Domsdorf, *Wijziging van het Noord-Atlantisch Verdrag: Noodzakelijk en Urgent*, 50 Internationale Spectator 107-108 (1996), and the subsequent criticism by A. Bloed, *Commentaar, in id.*, at 109.

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First, they are of the opinion that the Security Council is under the obligation, more so than is the case for the current actions executed by the Implementation Force (IFOR), to actually supervise the execution of the enforcement measures it has authorized regional organizations to undertake. This amounts to a very *dynamic* interpretation of the UN Charter. The Security Council's obligation to supervise such measures is based on the primary responsibility for the maintenance of international peace and security, given to the Council under Article 24(2) of the UN Charter. Article 53(1) of the Charter offers the Security Council the possibility to employ 'regional arrangements' if it decides to take 'enforcement action'. In this respect, the Charter makes it quite clear that such enforcement action may not be taken without the consent of the Security Council. At the same time, the Charter leaves completely open the way in which this consent may be given in any specific case. It may be 'open-ended', both with regard to the duration and to the goal and extent of the enforcement measures, but the Council can also decide to give its consent only if the measures to be executed are strictly defined. In this context, the only obligation on the UN member states is to fully inform the Council on the execution of the enforcement action carried out by the regional arrangement concerned (Article 54 UN Charter).

How have these rules been put into practical effect by the Security Council? In the first place, it concerns authorizations given to the NATO member states to execute military enforcement actions in the former Yugoslavia. Earlier, the Security Council had adopted similar resolutions (not in the context of regional organizations, but rather with regard to Iraq, Somalia, Rwanda, and Haiti). In essence, the Council has each time fulfilled its supervisory obligation under the Charter in three ways: the precision with which the goals of the delegated enforcement measures are described, the duration given for the authorization, and the requirements for the reports that are to be delivered by the regional organization. With regard to all three aspects, it can be concluded that, with a few exceptions, the Security Council has given the member states significant room to manoeuvre and has chosen to execute its supervisory task from a great distance. In the case of the current NATO operation, IFOR, Resolution 1031, in particular, authorizes IFOR "to take all necessary measures to effect the implementation of and to ensure compliance with Annex 1-A of

the Peace Agreement".[4] In principle, this authorization has been given for the duration of one year. The member states concerned have to report back to the Council at least once a month. One may, of course, be disappointed about the way in which the Security Council uses its powers, but that does not mean that the way the Council has shaped its authority over NATO's attacks is insufficient against the background of the relevant provisions of the UN Charter. There is no argument that authorization by the Security Council is needed in order to take enforcement measures, but it is wholly within the Council's discretionary powers to determine the exact way in which this Charter obligation is shaped in any given case.

Second, Dekker and Myjer are of the opinion that NATO cannot simply undergo a fundamental transformation if the "significant expansion of its functions would [not] at least be founded on an explicit legal basis in its constitutive instrument."[5] This, however, presents an unnecessarily *static* image of the possibilities offered by the constitution of an international organization. At the time NATO was founded, it was established as a regional defence organization of a group of states, aimed at attacks coming from outside NATO territory. In Bosnia, NATO has operated outside of that territory, without any prior attack on NATO countries. Is that possible without an explicit change in its constitution?

The constitutive instrument of an international organization is a living instrument that must be rigid enough to enable the organization to reach its goals, but not so rigid that it becomes impossible to adapt to changes occurring in practice. International organizations are established for a certain *purpose*. To effect that purpose, organizations are given a number of means. However, even the founders of international organizations cannot see into the future. Circumstances may change, and it may thus be necessary to change the means to attain that higher purpose. Sometimes that happens explicitly, by way of a treaty adaptation, and sometimes implicitly, simply by following a certain interpretation in practice. What is at issue here is the grey area between, on the one hand, the acceptability of an interpretation and practice as it has evolved and, on the other, the necessity of changing the constitutive instrument of the organization and

4. UN Doc. S/RES/1031, para. 15 (1995).
5. I.F. Dekker & E.P.J. Myjer, *Air Strikes on Bosnian Positions - Is NATO Also in Legal Terms the Proper Instrument of the UN?*, 9 LJIL 411 (1996).

adapting it to that practice.

When it was founded, NATO was primarily a collective self-defence organization. However, as Kelsen already maintained in 1951,[6] that does not mean that the organization could not *also* possibly fulfil a function such as the one foreseen in Chapter VIII of the UN Charter: that of a 'regional arrangement'. And today, NATO *is* being seen as such by its member states, as is apparent from the 1991 Declaration of Rome in particular.[7] Is it, then, still necessary to change NATO's constitution, in spite of the unaltered purpose of NATO and in spite of the fact that all parties to the NATO Treaty[8] have agreed to the change in the 'strategic concept' of the organization?

Such a necessity is by no means apparent from legal practice. Most organizations in the UN family have significantly altered the way in which they fulfil their purposes upon the insistence of the newly admitted developing countries, which quickly gained a majority position within the UN. Another example is the practical functioning of the UN peace-keeping forces, for which there is absolutely no explicit basis in the UN Charter. Still other examples of organizations that have undergone major changes without accordingly adapting their constitutions are the Western European Union and the International Monetary Fund.[9]

Placing limits on the possibilities for international organizations to change is important for reasons of legal certainty. These limits must not, however, be defined so strictly that the organization becomes unable to quickly and adequately adapt to changing circumstances. It is difficult to define exactly where this so sought-after middle ground lies. We are, nonetheless, of the opinion that in the case of NATO's actions in Bosnia-Herzegovina, Dekker and Myjer define these limits too narrowly. In most cases, the interpretation of the function and purposes of international organizations is a task that falls primarily to the member states themselves. In the case of NATO, the member states, within the changed international context, have chosen an adapted strategy for the organization. The position that this adaptation must, eventually, lead to a change in NATO's

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6. H. Kelsen, *Is the North Atlantic Treaty a Regional Arrangement?*, 45 AJIL 165 (1951).
7. NATO Handbook - Partnership and Cooperation (NATO Office of Information and Press) 235-248 (1995).
8. 34 UNTS 243 (1949).
9. 19 UNTS 51 (1948) and 211 UNTS 342 (1948) respectively.

constitution can easily be defended. But demanding that the NATO Treaty should have been changed *first* is stretching it too far.

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