

The role of NATO in the Peace Agreement for Bosnia and Herzegovina

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I. General

The Agreement on the Military Aspects of the Peace Settlement, signed in Paris on 14 December 1995 as Annex 1–A to the General Framework Agreement for Peace in Bosnia and Herzegovina¹, invites the United Nations Security Council ‘to adopt a resolution by which it will authorise Member States or regional organisations and arrangements to establish a multinational military Implementation Force (hereinafter “IFOR”).’² The multinational force would ‘assist in [the] implementation of the territorial and other military related provisions³ of the agreement’,⁴ and notably undertake ‘such enforcement action by the IFOR as may be necessary to ensure implementation’.⁵

The ‘regional organisation or arrangement’ entrusted with the establishment of IFOR is immediately identified in Article I of Annex I-A⁶ as NATO, even though it is made clear that IFOR would be ‘composed of ground, air and maritime units from NATO and

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¹ Hereinafter referred to as ‘Annex 1–A’ and ‘Peace Agreement’ respectively. Collectively UN Doc. S/1995/999/annex.

² Article I,1(a) of Annex 1–A.

³ In particular Annex 1-A itself and Annex 2, relating to the ‘Military Aspects of the Peace Settlement’ and to the ‘Inter-Entity Boundary Line and Related Issues’.

⁴ Article I,1 of Annex 1–A.

⁵ Article I,3 of Annex 1–A.

⁶ Article I,1(b) of Annex 1–A, which reads, in the relevant part: ‘[i]t is understood and agreed that NATO may establish such a force, which will operate under the authority and subject to the direction and political control of the North Atlantic Council (“NAC”) through the NATO chain of command.’

non-NATO nations'.⁷ The willingness of NATO to play such a fundamental part in the implementation of the Peace Agreement shows that the member States have been able to adapt their political understanding of the role of the Alliance in the international order to the new security priorities of the post-cold war era. The IFOR experience not only will provide practical experience of co-operation between the Alliance and the armed forces of other States, (notably those taking part in the Partnership for Peace program), but it has provided the Alliance with a model for future multinational deployments on a medium to large scale. However, the new role for NATO envisaged by the member States and reflected in the Peace Agreement raises many legal questions.

This paper is an attempt to raise issues for discussion on the legal implications of the role of NATO in the Peace Agreement. The argument which it will support is that NATO *qua* NATO was not, subsequent to the Peace Agreement, authorised by the Security Council to undertake or organise peace-enforcement –or even peace-keeping– actions in Bosnia and Herzegovina. Rather, NATO is merely providing Command, Control, Communication and Intelligence (C³I) infrastructure and co-ordination between United Nations Member States contributing to IFOR without thereby affecting the legal status of their contribution, nor the status of NATO itself as a self-defence agreement. The authority under which the implementation is supervised and, if necessary, enforced, is the United Nations, and in particular the Security Council.⁸ While this distinction may seem merely academic, it may have important implications for State responsibility and the legal status of troops contributed to IFOR, for instance in respect of States obligations to co-operate with the International Criminal Tribunal for the Former

⁷ Article I,1(a) of Annex 1–A.

⁸ cf. also M.Holly MacDougall, 'United Nations Operations: Who Should Be In Charge' in 33 *Revue de Droit Militaire Et De Droit De La Guerre*, (1994), 21 ff.

Yugoslavia.⁹ Other possible important implications of this distinction which will not be discussed here are in respect of the applicable *jus in bello* should armed clashes occur between IFOR troops and local military or paramilitary groups, and in respect of possible disputes in the control and direction of the forces contributed by States.

II. The United Nations Charter and NATO Practice in the Area of Peace and Security

The first and most evident legal problem raised by Annex 1-A is that although Article 53 of the United Nations Charter provides that '[t]he Security Council shall, where appropriate, utilise such regional arrangements or agencies for enforcement action under its authority', and although Article I,1a of Annex 1-A invites the Security Council to do precisely that, NATO is not a regional organisation¹⁰ designed to undertake peace-enforcement or peace-keeping operations, however consensual these may be. The North Atlantic Treaty of 1949¹¹ was firmly based on the provisions of Article 51 of the United Nations Charter, which recognises the 'inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to

⁹ Established under Security Council resolution 827, UN Doc. S/RES/827, hereinafter SCR 827

¹⁰ For the academic debate on the status of NATO in the UN Charter, cf. e.g. N.D.White, *Keeping the Peace, The United Nations and the maintenance of international peace and security*, (1993) 21 ff. ; E.W.Beckett, *The North Atlantic Treaty, the Brussels Treaty and the Charter of the United Nations*, (1950); Kelsen, 'Is the North Atlantic Treaty a regional arrangement', 45 *A.J.I.L.* (1951), 187; Goodhart, 'The North Atlantic Treaty of 1949', 88 *Recueil des Cours* (1951).

¹¹ In particular its operative Article 5. cf. the North Atlantic Treaty, Washington DC, April 4, 1949, 34 UNTS 243, or URL: <http://www.nato.int/docu/basicxt/Treaty.htm>.

maintain international peace and security'. On the face of it, the North Atlantic Treaty, therefore, comes into effect when the Security Council *has not* exercised its primary responsibility to maintain (or –more properly– to restore) international peace and security, and even then exclusively until the Security Council does so.

Regional organisations, on the other hand, do have the authority of 'dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action'.¹² These measures may include consensual peace-keeping operations undertaken independently from the authority of the Security Council. In fact, States members of such regional organisations are required to 'make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies *before* referring them to the Security Council'.¹³ It is an open question whether even peace-keeping operations by genuine regional organisations would be a legitimate measure for the maintenance of international peace and security when the State receiving peace-keeping forces is not a member of such organisation. Of course there is nothing to prevent States from doing jointly what they are allowed to do individually under international law. But in any case, the implementation of Annexes 1–A and 2 is not entirely a peace-keeping operation within the technical meaning of the term in international law. The Peace Agreement is perhaps the prime example of what the United Nations Secretary-General has labelled 'multi-functional peacekeeping operations',¹⁴ which are based on the political commitment to peace at the highest level of authority of the parties to the dispute, but which may not have the full support of local authorities or forces, and therefore may need a more robust mandate to implement the undertakings of the parties.

¹² UN Charter, Article 52(1).

¹³ *Ibid.*, Article 52(2), [my emphasis].

¹⁴ 'Supplement to An Agenda for Peace', UN Doc. A/50/60 (1995).

In fact, although the Peace Agreement is based on the consent of the Parties, it may involve military enforcement of some provisions, including the use of necessary force to ensure compliance. Hence the need of a Security Council resolution authorising Member States to ‘take all necessary measures to effect the implementation of and to ensure compliance with Annex 1–A of the Peace Agreement’.¹⁵ The Security Council, conscious –one would assume– of the inappropriateness of the reference to regional organisations in Annex 1–A, does not take up the suggestion implied in Annex 1–A of using Article 53 (Chapter VIII) of the United Nations Charter by authorising NATO to act as a regional organisation to implement Annex 1–A. Rather, the Security Council resolution 1031 generically refers to Chapter VII and authorises Member States ‘through or in co-operation with the organisation referred to in Annex 1–A of the Peace Agreement to establish a multinational implementation force’.¹⁶ The Security Council therefore recognises the role of NATO –even though it omits referring to it by name– as leader of IFOR, but stops short of granting it the attributes of a regional organisation. What does this leadership consist of, and how is it reconcilable with the North Atlantic Treaty?

As early as June 1992, at the Ministerial Meeting of the North Atlantic Council (‘NAC’) in Oslo, NATO announced its readiness to support peacekeeping activities under the responsibility of the NATO-sponsored Conference on Security and Co-operation in Europe (later renamed Organisation for Security and Co-operation in Europe).¹⁷ This means that NATO, on a case by case basis, declared itself prepared to place at the OSCE’s disposal standing forces from all States in the Alliance, together with their C³I capabilities for peace-keeping operations. The

¹⁵ Security Council resolution 1031, UN Doc. S/RES/1031 (1995), hereinafter SCR 1031, Operative Paragraph 15.

¹⁶ Ibid. Operative Paragraph 14.

¹⁷ Hereinafter CSCE and OSCE, respectively.

same offer of co-operation was reiterated in December 1992 to the United Nations Security Council and Secretary-General. NATO forces had, in fact, already been involved in peace-keeping and peace-enforcement missions in the former Yugoslavia since November 1992 with Operation ‘Sharp Guard’ undertaken jointly with the Western European Union under unified command and control to implement Security Council resolution 713,¹⁸ which established an arms embargo against all the Republics of the former Yugoslavia and resolution 757,¹⁹ which applied sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro). On 12 April 1993 NATO also undertook the enforcement of the so-called ‘No-Fly Zone’ pursuant to Security Council resolution 816 of 31 March 1993. This was clearly an enforcement operation and it was the occasion for the first ever military engagement undertaken by the Alliance: on 28 February 1994 four warplanes violating the no-fly zone over Bosnia and Herzegovina were shot down by NATO aircraft. Finally, at the request of the United Nations military commanders, under United Nations Security Council resolution 836, initiated the operation code-named ‘Deliberate Force’, which involved targeting Bosnian-Serb artillery surrounding Sarajevo and other United Nations-designated ‘Safe Areas’ and to deter further attacks. These military operations were undertaken under the authority of the Security Council, which authorised member States ‘acting nationally or through regional organisations or arrangements ... to take all necessary measures’²⁰ to enforce the respective resolutions. NATO member States that have responded to the Security Council resolutions have chosen to do so under the NATO chain of command, regarding the operations as NATO operations.

¹⁸ UN Doc S/RES/713 (1991) of 25 September 1991.

¹⁹ UN Doc S/RES/757 (1992) of 30 May 1992.

²⁰ cf. e.g. Operative Paragraph 4 or RES 816 or Operative Paragraph 10 of RES 836

III. The Peace Agreement and NATO

The implementation of the Peace Agreement, therefore, is not the first peace-enforcement action of NATO as an Alliance under the authority of the Security Council. However, the sheer scale of operation undertaken pursuant to SCR 1031, as well as the fact that NATO will provide political and military leadership to IFOR as a whole, rather than co-operating with existing (multi-functional or traditional) United Nations peace-keeping forces such as UNPROFOR, warrants a closer examination of the legal nature of the role of NATO within IFOR and how this may affect the obligations of member States contributing to IFOR.

Resolution 1031 of the Security Council authorised Member States of the United Nations to ‘take all necessary measures to effect the implementation of and to ensure compliance with Annex 1–A of the Peace Agreement’²¹ under unified command and control.²² It is necessary to stress that SCR 1031 assigns the unified command and control of contributing States to IFOR, a coalition force established ‘through or in co-operation with’ NATO, but not identical to it.²³ Under SCR 1031 NATO is responsible for establishing IFOR, while Annex

²¹ UN Doc S/RES/757 (1992) Paragraph 15.

²² SCR 1031. Operative Paragraph 14.

²³ In June 1993, the North Atlantic Co-operation Council (NCC) adopted a Report on Co-operation in Peacekeeping, which defined NATO’s policy on peace-keeping operations, including multi-functional peace-keeping as authorised by the Security Council. It transpires quite clearly from this document that NATO as an organisation is aware of the legal limitations on peace-keeping operations, and that NATO accepted a subordinate position in matters of peace-keeping and peace-enforcement by identifying the UN and the CSCE (later re-named OSCE) as the organisations entitled to mandate and undertake peace-keeping operations in Europe.

1–A²⁴ goes much further by envisaging that ‘IFOR will operate under the authority and subject to the direction and political control of the North Atlantic Council ... through the NATO chain of command’.

Unified command, however, is a standard feature of many multinational military operations and does not depend necessarily on the direction or political guidance of a particular organisation. Even if the Security Council had relinquished part of its political control of the IFOR operation to the North Atlantic Council, by entrusting NATO with the responsibility of establishing IFOR in co-operation with other member States, such an abdication would not relieve member States participating in the operation from the primary accountability to the Security Council as the body authorising and mandating the operation.²⁵ For example the coalition force authorised under Security Council resolution 678²⁶ operated under unified command to liberate Kuwait following the Iraqi invasion of August 1990. Although 29 States co-operated in ‘Operation Desert-Storm’, as it was code-named, and the vast majority of those were from NATO countries, there was no suggestion that the coalition operated any other authority but the Security Council’s. Is there any difference in international law between the two coalitions?

Aside from the obvious differences of purpose of the two coalitions, from the point of view of the Security Council resolution authorising the use of necessary force, the main difference seems to be that in resolution 678, the contributing States were ‘co-operating with the Government of

²⁴ Annex 1-A, Article I,1b.

²⁵ MacDougall states that ‘[e]nforcement measures taken by the Security Council under Chapter VII of the Charter, as collective measures, must be under the political control and strategic direction of the UN’; cf. ‘United Nations Operations: Who Should Be In Charge’ in 33 *Revue de Droit Militaire Et De Droit De La Guerre*, (1994), at 42.

²⁶ UN Doc. S/RES/678 (1990), of November 1990.

Kuwait'²⁷, while in resolution 1031 they are asked to co-ordinate with NATO rather than with the Government of the Republic of Bosnia and Herzegovina. The Republic of Bosnia and Herzegovina, in fact, had already negotiated before IFOR's deployment –indeed before SCR 1031 was approved– a Status of Forces Agreement (SOFA) with NATO.²⁸ The SOFA grants NATO personnel unprecedented privileges and immunities, including 'the right of bivouac, manoeuvre, billet, and utilisation of any areas or facilities as required for support, training, and operation'.²⁹ However, the SOFA also quite explicitly accords 'non-NATO states and their personnel participating in the Operation the same privileges and immunities as those accorded under [the] agreement to NATO states and personnel.'³⁰ The Status of Forces Agreement and the Transit Agreement negotiated at the same time with the Republic of Croatia³¹ and with the Federal Republic of Yugoslavia³² respectively are in this respect identical: NATO and non-NATO troops, are precisely in the same legal position in respect of the countries of the former Yugoslavia in which they may be posted. The fact that NATO has negotiated the Status of Forces and Transit Agreements on IFOR's behalf does not affect the status of contributing States in respect of their

²⁷ Ibid. Operative Paragraph 2.

²⁸ Agreement Between the Republic of Bosnia and Herzegovina and the North Atlantic Organisation Concerning the Status of NATO and its Personnel, done at Wright-Patterson Air Force Base, Ohio (USA) on November 21, 1995; hereinafter SOFA.

²⁹ SOFA, Operative Paragraph 9.

³⁰ *ibidem*, Operative Paragraph 21.

³¹ Agreement Between the Republic of Croatia and the North Atlantic Organisation Concerning the Status of NATO and its Personnel, done at Wright-Patterson Air Force Base, Ohio (USA) on November 21, 1995, Operative Paragraph 21.

³² Agreement Between the Federal Republic of Yugoslavia and the North Atlantic treaty Organisation Concerning Transit Arrangements for peace Plan Operations done at Wright-Patterson Air Force Base, Ohio (USA) on November 21, 1995, Operative Paragraph 18.

sovereign authority to control their troops, nor the obligations States have in respect of them.

Each contributing State is under the same obligations and has the same rights as if it were acting individually in accordance with the Security Council resolution. In short, IFOR troops are in Bosnia and Herzegovina under United Nations Security Council authority, and they are accountable only to the United Nations for their actions or omissions. However, the Security Council did make an important concession to the view of the diplomats in Dayton by requesting contributing States to act ‘through or in co-operation with’ NATO.

This request is a concession to the political requirements of the negotiators in Dayton, and it is a direct consequence of the failure of the international community, including NATO countries, to react effectively to the crisis in Bosnia and Herzegovina thereby discrediting the United Nations in the eyes of both international public opinion and, more importantly, the opinion of the people of Bosnia and Herzegovina. In fact, the monitoring and enforcement actions undertaken by NATO described above have been perceived as one of the very few tangible reactions of the international community to the deliberate policies of destruction of some of the parties to the conflict. Even though these actions were undertaken under the authority and at the request of the United Nations Security Council and the United Nations military commanders on the ground, NATO became, in the eyes of the negotiators, the only possible guarantor of a territorial and military settlement which would last. Given the unfortunate track record of UNPF, maybe the most important contribution of NATO to the peace settlement was given well before the transfer of authority from UNPROFOR to IFOR: the confidence that any agreement could be

enforced, with military force if necessary.³³ The purpose of NATO involvement seems to be at least in part that of giving credibility to the Peace Agreement, and reassuring the parties that necessary force can and will be used to enforce it. The other possible reason is that United States policy makers, having decided to commit a considerable number of US troops to enforce the settlement, needed a formula which would appease the strong isolationist section of their public opinion. They found it in NATO which acts as an umbrella and so avoids the risks, for the United States, of leading a coalition single-handedly, as it did effectively in Kuwait, thereby assuming responsibility for any possible shortcomings.

Aside from political considerations, however, NATO involvement is restricted to the co-ordination of United Nations Member States for the establishment of IFOR under unified command and control.³⁴ The fact that members of NATO are choosing to provide their troops and equipment under the NATO insigniae should not be confused with an intervention of NATO as an Alliance. NATO member States may be under an additional obligation to operate under NAC political control, independent of the Security Council resolution and of the Dayton Agreement. However any obligation owed to NATO as an organisation by any of its member States cannot take precedence over the obligations owed to the international community as a whole, or to the Security Council acting in its name. Both *de jure* and *de facto* NATO is a mere provider of C³I to IFOR, and each member State maintains individually its accountability to the Security Council as the mandating authority of the operation.

³³ This one of the reasons why so much emphasis has been placed on the 'robust' Rules of Engagement under which IFOR operate.

³⁴ However, the Secretary-General of NATO has also considered it part of NATO's (and not IFOR's) duty to report to the UN Secretary-General on the operations of IFOR). cf. S/1996/49 and annex thereof.

The *de facto* application of this principle is even clearer for troops contributed by non-NATO States, which are not represented at the strategic and political level of the organisation, and notably in the NAC. In fact, while NATO member States may choose to delegate completely control of their troops to NATO's Supreme Allied Commander Europe (SAUCER), non-Nato forces can remain under the operational control of their own countries. For example, Russian troops are under the control of General Joulwan, through Col.General Leontii Shevtsov as his Russian deputy, even if the tactical control is delegated to IFOR's (not NATO's) multinational division commander in Tuzla. Other non-NATO troops, especially from those countries involved in NATO's 'Partnership for Peace' programme may opt to take their orders directly from the IFOR Commander through one of the multinational divisional commanders, but they would still maintain liaison officers at SHAPE and the IFOR Headquarters in Sarajevo, as well as in Brussels, where they will monitor the decisions of NAC. Legally, any order would be in the name and under the authority of IFOR, as established by the Security Council.

The important prerogative that NATO has *de facto* retained, in addition to providing C³I support to IFOR, is in the field of 'external relations' and consequently of political ascendancy. NATO has deliberately set out to make of this occasion a public relation success.³⁵

³⁵ NATO press conferences are held in Sarajevo daily and the transcripts are automatically generated and distributed throughout the world to press agencies and newspapers via the internet in a matter of hours. Every conference reports on the day by day progress of the operation, and the press officers seem to have been instructed to report as frankly as possible the difficulties as well as the success encountered during the day to day implementation of the Peace Agreement, including details of 'human interest' stories which attract the popular press. This generates such a volume of news that implementation is seen to be carried out whatever the actual state of affairs on the ground may be.

IV. NATO and the Question of Co-operation with the ICTY

Perceptions contribute to reality even in international law. However, the obligations of Member States contributing to IFOR are not altered by either the Peace Agreement or the interpretation of it by NATO or the media. The issue of co-operation with the International Criminal Tribunal for the former Yugoslavia³⁶ is an example of where the pre-existing obligations under international law of each contributing State to IFOR take precedence over NATO's perception of its role in the implementation of the Peace Agreement, and even NATO member States obligations towards the Organisation. The Peace Agreement grants to IFOR contributing States the right to use military force in the implementation of the Peace Agreement.³⁷ This has been interpreted by NATO itself as to include the power to arrest persons indicted by the ICTY.³⁸ Moreover, any questions of an arrest being a violation the sovereignty of Bosnia and Herzegovina does not arise, as Bosnia and Herzegovina has explicitly waived this prerogative together with many more important others, and because its Government has consistently and willingly co-operated with the ICTY. A different paper in this same volume deals with the implications of the Peace Agreement for the ICTY,³⁹ but it is important to emphasise here that the obligation of individual States to comply with the requests for assistance or orders issued by the Tribunal is independent of the Peace Agreement and derives directly from Security Council resolution 827.⁴⁰ The fact that the Peace Agreement places the primary responsibility on the Parties to co-operate with the Tribunal is often cited by NATO⁴¹ and, remarkably,

³⁶ Hereinafter ICTY.

³⁷ cf. e.g. Annex 1-A Article I(2b)

³⁸ [cite John Jones's Paper]

³⁹ [cite John Jones's paper].

⁴⁰ UN Doc. S/RES/827, hereinafter SCR 827.

⁴¹ The New York Times, January 20, 1996, Saturday, Page 6; Column 1.

by ICTY sources⁴² as the reason why IFOR troops, while retaining the right, in certain circumstances, to arrest persons indicted by the ICTY, do not have the duty to do so. However, as SCR 1031 itself reiterates, the duty to co-operate is incumbent on *all* States, not only on State parties to the Agreements, or on the Government of Bosnia and Herzegovina.

As pointed out by the United Nations Secretary-General, ‘an order by a Trial Chamber ... shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations’.⁴³ It may be argued that the obligation of States is limited to the territories over which they can apply implementing legislation as foreseen in SCR 827 itself, which requires all States to ‘take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute’.⁴⁴ The requirement of implementing legislation, however, is not a limitation of the scope of the obligation to co-operate, but rather a restatement that –as for any obligations under international law– States cannot escape them

⁴² Cf. e.g. The ICTY Bulletin, N.2, 22 January 1996, P01. ‘[T]he Tribunal stresses that the burden of co-operation rests upon the governments which are parties to the Peace Agreement. This is their obligation to create and maintain a suitable environment for the investigators’ work, and to apprehend and turn over the accused sought by the Tribunal. This is their duty, and not IFOR’s’; cf. also Weekly Press Briefing of the Spokesman for the ICTY of 9 January 1996, in which the Tribunal criticises journalists following persons indicted by the Tribunal and photographing them next to IFOR officers. ‘I think it is easy and unfair. Easy because as a matter of fact it is very well known that the accused are still at large.... Unfair also because this game is based on the wrong expectation: IFOR soldiers have no authority for chasing, hunting down the accused’, transcript available from the ICTY Press and Information Office.

⁴³ Cf. Report of the Secretary-General pursuant to SCR 808 (1993), UN Doc. S/25704, para. 126

⁴⁴ SCR 827, Operative Paragraph 4.

by relying on provisions of their own domestic law.⁴⁵ Nor can States escape their obligations under SCR 827 by relying on NATO's or IFOR's Rules of Engagement, or on the Peace Agreement itself. Even if the Peace Agreement did, in fact, place the signatories in a different position in respect of the ICTY by enhancing their obligation to co-operate, this can not relieve IFOR contributing States from their own obligations in respect of Tribunal orders.

IFOR contributing States who are subject to the NATO chain of command, there may be an interesting conflict of obligations, if NAC—despite the agreements—was to deliberately refuse to authorise any active steps that may lead to the arrest of persons indicted by the Tribunal. On the one hand, in fact, they would be expected to follow the policy decided by NAC, as foreseen in the Peace Agreement,⁴⁶ on the other hand they would be under the international obligation to abide by SCR 827. However, it is clear that compliance with Security Council resolution 827 takes precedence over any obligations owed by member States to a particular Organisation.

Hence, it could be contended that, *in so far as* a contributing State is legitimately *in control* of the territory where an accused is known to reside, and is *in practice able* to arrest him or her, provided --of course-- that it has received a warrant of arrest and order for surrender of that accused, the State is under the obligation to arrest the accused and transfer them to the Tribunal, irrespective of the terms of the Peace Agreement, and irrespective of the scope of its implementing legislation,

Of course, legal obligations can only be proportionate to the ability to comply with them. Hence, when the same arrest warrants were sent to

⁴⁵ This is a well established principle of International Law; cf. e.g. *Fisheries Case*, ICJ Reports (1951) 116 at 132 or, more generally, Article 27 of the Vienna Convention on the Law of Treaties, 1969

⁴⁶ Annex 1-A, Article I-1b, cf. also above section III

the Republic of Bosnia and Herzegovina, that Government could not have been held responsible for the failure to comply,⁴⁷ as they were not in the practical position to do so. Inability to comply with an obligation, however, should not be mistaken for an absence of obligation. At the time of writing, the ICTY has issued one international order of arrest, addressed to all States Members and non-members of the United Nations.⁴⁸ In addition, it has issued specific warrants of arrest for two accused to Switzerland, France, the United Kingdom and the United States.⁴⁹ These arrest warrants impart an obligation on the recipient State to ‘promptly arrest and transfer’⁵⁰ an accused. This obligation is incumbent on States acting individually, but may be difficult to attribute to NATO as an organisation. While States have the right to do collectively what they can do individually, NATO as an organisation does not acquire necessarily the obligations of each of its Member States. This is why it is important that it be made clear that, from the point of view of international law, it is IFOR contributing States that are authorised to take military action in the territory of Bosnia and Herzegovina under SCR 1031, not NATO as an organisation, despite the fact that NATO has negotiated, in IFOR’s name, the Agreements on the Status of Forces in Bosnia and Herzegovina and the Agreement on Transit in the Federal republic of Yugoslavia. Hence, the obligation to co-operate with the Tribunal is not conditional upon NATO’s Rules of Engagement, in the same way that it is not conditional to States’

⁴⁷ Cf. Letter from the President of the ICTY to the President of the Security Council of 31 October 1995, UN Doc. S/1995/910.

⁴⁸ ICTY Doc. IT-94-2-R61 , 20 October 1995. More International Arrest Warrants may be issued following the forthcoming ‘Rule 61 Hearings’ of the Tribunal, announced by the ICTY on 30 January 1996 at its Weekly Press Briefing. Transcript available from the ICTY Press and Information Office.

⁴⁹ ICTY Doc. IT-95-5-I, 11 October 1995.

⁵⁰ Cf. e.g. ‘International Warrant of Arrest and Order of Surrender’ against Dragan Nikolic, a.k.a. “Jenki” Nikolic, issued by the ICTY in Case No. IT-94-2-R61, UN Doc. S/1995/910 Annex II.

domestic legislation. It is suggested that all States that are *physically capable* of doing so and, in particular, IFOR contributing States who control the territory where the accused lives, are under a *duty* to search for accused, apprehend them and transfer them to the Tribunal. The only legitimate negative reply by IFOR contributing States to an arrest warrant addressed to them would be their physical inability to comply, due, for example, to lack of the necessary military control over the relevant territory.

It is important that the obligation be perceived as such, in order for it not to remain dormant, and that any inability to comply reflects practical obstacles, not erroneous legal arguments based on domestic legislation or on the Peace Agreement or on NATO Rules of Engagement, none of which can derogate from orders of the International Tribunal. This is the essence of the universal jurisdiction of the Tribunal in respect of serious violations of international humanitarian law. It may well be argued that States' obligation to do their utmost to arrest accused persons arises independent of SCR 827 itself, and is based on the customary duty on all members of the international community to *seek out and arrest*⁵¹ and consecutively *aut dedere aut judicare*⁵² persons accused of serious violations of international humanitarian law.

The recent negotiations between NATO and the International Tribunal raise some hopes that IFOR will indeed co-operate with the Tribunal by guarding evidence, notably suspected mass-grave sites.⁵³ However, perhaps fearful of what the US journalists have already labelled 'mission

⁵¹ Cf. also to John Jones' paper, with reference to obligations under the Geneva Convention.

⁵² Cf. inter alia J.S.Pichet (ed.), *Les Conventions de Genève: Commentaries*, Vol. I (1952) 27.

⁵³ Cf. e.g. *The Washington Post*, January 23, 1996, Tuesday, Final Edition, A09.

creep',⁵⁴ NATO has not acknowledged that the duty of Member States to comply with arrest warrants or other orders of the Tribunal does not need to be included in the Peace Agreement but is incumbent upon them under SCR 827 and international law.

It may be that the state of the negotiations between the ICTY and IFOR is such that the Tribunal has decided not to remind NATO members of their obligations, or to do so confidentially, in order to obtain a better negotiating environment when discussing procedures for the transfer of persons that may be arrested in the future or logistic co-operation on the field for investigators. However, it is important to recognise that a specific order to IFOR contributing States for the arrest of an accused in the territory of Bosnia and Herzegovina under their control is a legitimate and legally valid option for the Tribunal. Such orders would be properly addressed to the national authorities of each contributing State, being the subject of the obligations under SCR 827.

NATO as an organisation and as a C³I contractor of its member States is not strictly responsible for the execution of ICTY arrest warrants, but all States are. They should not rely on collective action to forego their individual obligations.

⁵⁴ Cf. e.g. The Washington Post, January 14, 1996, Sunday, Final Edition, A30; or The New York Times, January 13, 1996, Saturday, Page 1; Column 1; or The Washington Post, January 03, 1996, A17.