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Is NATO Authorized or Obligated to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia?

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Abstract

This paper considers whether the NATO-led multinational force in Bosnia and Herzegovina is authorized to arrest persons indicted by the International Criminal Tribunal for the Former Yugoslavia and, if so, whether it is also obliged to carry out arrests. After critically scrutinizing views put forward on this topic in the legal literature, the author concludes that the multinational force is legally entitled to execute arrest warrants in the territory of Bosnia and Herzegovina, on the strength of Article VI, para. 4, of Annex 1-A to the Dayton Peace Accord, as implemented by the North Atlantic Council through a resolution adopted on 16 December 1995. The author argues that two consequences follow from this view. Firstly, the power of arrest may be exercised concurrently with that of Bosnia and Herzegovina and the two Entities making up this state. Secondly, regarding cooperation with the Tribunal, the Nato-led force has so far only been empowered to execute arrest warrants, while it has not yet been authorized to execute other Tribunal orders. The author submits that, by contrast, the NATO-led force is not obliged to arrest persons indicted by the ICTY, nor is such an obligation incumbent upon individual troop-contributing states qua states.

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1 Introduction

In a recent speech to the General Assembly of the United Nations the Russian Federation's representative maintained that the NATO-led multinational force stationed in the territory of Bosnia-Herzegovina ('IFOR/SFOR')¹ lacked the power to arrest persons indicted by the International Criminal Tribunal for the Former Yugoslavia (the Tribunal). He stated that planned operations leading to those arrests could not be described as 'cooperation' with the Tribunal, nor could they be considered 'support' for the Tribunal's activities. He further asserted that these operations were not within the remit of the multinational force.²

The purpose of this paper is to determine whether the Russian Federation's view is legally sound or whether, instead, it is at odds with the relevant international instruments. Clearly, should the Russian position prove to be the correct one, the recent arrests by SFOR troops in Bosnia and Herzegovina must be regarded as legally unwarranted.³

¹ In accordance with Annex 1-A to the General Framework Agreement for Peace in Bosnia and Herzegovina, the Security Council of the United Nations, acting under Chapter VII, authorized the Member States to send for a period of approximately one year a multinational implementation force (IFOR) in order to fulfil the role specified in Annex 1-A and Annex 2 of the Peace Agreement (SC Res. 1031, adopted on 15 December 1995). In Resolution 1088 of 12 December 1996 the Security Council, again acting under Chapter VII of the United Nations Charter, authorized the Member States to continue deploying a multinational implementation force in the territory of Bosnia and Herzegovina and to establish for a period of 18 months a multinational stabilization force (SFOR) as the legal successor to IFOR.

The multinational force includes NATO and non-NATO states and operates under the authority and subject to the direction and political control of the North Atlantic Council through the NATO chain of command (see Article I, para. 1(b), of Annex 1-A to the General Framework Agreement for Peace in Bosnia and Herzegovina).

² The Russian Federation's representative held that 'planned actions for the armed capture of suspects' cannot be described 'as "cooperation" with the Tribunal or as "support" for the Tribunal's activities, particularly within the framework of the international peace-making operation which is being carried out in Bosnia and Herzegovina'. He also stated that 'such deliberate actions are not in the mandate of the multinational stabilisation forces, as defined by the peace agreement' and that '[e]ven during the talks on the conditions for Russia's participation, [Russia] objected to an interpretation of the mandate that would endow the multinational forces with police functions'. See Speech of the Representative of the Russian Federation to the Plenary Session of the United Nations Assembly on the Report of the International Tribunal for the Former Yugoslavia (Item 49 on the Agenda), 4 November 1997 (unofficial translation).

³ On 10 July 1997, for the first time, SFOR carried out an operation leading to the arrest of Milan Kovacević, charged with complicity in the commission of genocide. According to press reports, on 17 December 1997 SFOR troops arrested two other indictees in Bosnia and Herzegovina.

2 The Possible Source of the Power of the Multinational Force to Arrest Persons Indicted by the International Tribunal

The multinational force has been deployed to ensure, *inter alia*, the implementation of Annex 1-A to the General Framework Agreement for Peace in Bosnia-Herzegovina.⁴ The Annex constitutes an agreement concluded by the Republic of Bosnia and Herzegovina, Republika Srpska and the Federation of Bosnia and Herzegovina, and covers the military aspects of the peace settlement. It grants the multinational force extensive powers, which, however, do not explicitly include the right to execute arrest warrants issued by the Tribunal. Some commentators have argued that the right of IFOR/SFOR troops to arrest persons accused by the Tribunal can be inferred from the mandate given to IFOR/SFOR to take 'such actions as required, including the use of necessary force, to ensure compliance' with Annex 1-A.⁵ Article X of this Annex provides that:

*[t]he Parties shall cooperate fully with all entities involved in implementation of this peace settlement, as described in the General Framework Agreement, or which are otherwise authorized by the United Nations Security Council, including the International Tribunal for the former Yugoslavia.*⁶

According to these commentators, by arresting persons indicted by the Tribunal, IFOR/SFOR would simply be taking actions necessary to ensure compliance with Article X of the Annex.⁷

⁴ The multinational force also fulfils the role specified in Annex 2 to the General Framework Agreement for Peace in Bosnia and Herzegovina.

⁵ Under Article I, para. 2(b), of Annex 1-A, the parties '... authorise the IFOR to take such actions as required, including the use of necessary force, to ensure compliance with this Annex ...'

⁶ Emphasis added.

⁷ See Jones, 'The Implications of the Peace Agreement for the International Criminal Tribunal for the Former Yugoslavia', 7 *EJIL* (1996) 226, at 238. After stressing that '[a]nnex I-A does not explicitly confer on IFOR the authority to execute the Tribunal's arrest warrants', this author states: 'The Parties to Annex 1-A cannot gainsay their duty to arrest accused persons. If they do not make the arrests themselves, they may be deemed to have granted IFOR the authority to do so on their behalf, since those arrests are "actions ... required ... to ensure compliance" with Annex 1-A.'

See also Ambos, 'Zur Rechtsgrundlage der Festnahme mutmaßlicher Kriegsverbrecher durch die SFOR im ehemaligen Jugoslawien', 18 *Juristenzeitung* (1997) 886, at 887–888. According to this author, '[s]chon im Dayton-Abkommen verpflichten sich die Vertragsstaaten, die Einrichtung einer vor der Nato geführten multinationalen Eingreiftruppe zu dulden und gestehen dieser Truppe die Vornahme bestimmter Zwangsmaßnahmen zur Durchsetzung des Abkommens zu. Gemäß Article I (2) (b) von Annex 1-A ist es gerade der Zweck dieser Duldungspflicht (die ja gleichzeitig einen Souveränitätsverzicht der Vertragsstaaten darstellt), die Ifor bzw. Sfor zu unterstützen und insbesondere zu ermächtigen, "solche Handlungen, einschließlich der Anwendung des notwendigen Zwangs, vorzunehmen, die erforderlich sind, um die Erfüllung dieses Annex (1-A) sicherzustellen ...". Daraus ergibt sich, daß die Ifor und damit auch die Sfor als ihre Rechtsnachfolgerin ... berechtigt ... sind, die Einhaltung des Dayton-Abkommens, notfalls auch unter Gewaltanwendung, sicherzustellen. Weigern sich die Vertragsstaaten, die ihnen obliegenden Verpflichtungen, insbesondere die Überstellung per Haftbefehl ausgeschriebener oder schon angeklagter mutmaßlicher Kriegsverbrecher an das ICTY zu erfüllen, so

This argument is not altogether convincing. The multinational force has been granted the authority to ensure that the *parties to the Annex comply with* their duty to cooperate with the Tribunal. This does not mean that the multinational force has the right to *replace* the parties whenever they fail to undertake an action required for them to cooperate with the Tribunal. Arguably, if one of the parties failed to arrest an accused, the action carried out by the multinational force leading to the arrest of this person would not ensure compliance with Article X of Annex 1-A *by the party* concerned. Instead, it would be an action carried out by the multinational force *to substitute* for the recalcitrant state or Entity.

Be that as it may, two important implications of the argument under discussion deserve close attention. The first implication follows from the content of the sweeping obligation laid down in Article X of Annex 1-A: the parties are duty-bound not only to execute the arrest warrants issued by the Tribunal, but also to put into effect any order or request advanced by the Tribunal. Consequently, the argument at issue would justify not only the authority of the multinational force to execute arrest warrants; it would also justify the right of the multinational force to substitute for the parties in the execution of *any other order or request* issued by the Tribunal. For example, if one of the parties refused to comply with an order concerning the production of specific evidentiary documents, the multinational force would be legitimized to carry out actions leading to the acquisition of those documents, even by resorting to armed force.

The second implication of the argument is that any action by the multinational force aimed at ensuring compliance with an order of the Tribunal would be subject to a condition: namely, the failure of the party concerned to execute that order. In other words, IFOR/SFOR would not be endowed with a *general power* to enforce compliance with a Tribunal order; it would be entitled to execute an arrest warrant or any other order *only* if faced with a breach, by Bosnia and Herzegovina or one of the two Entities, of their obligation to cooperate with the Tribunal.

It is submitted that a more persuasive legal basis for the exercise, by the multinational force, of the power of arrest may be found in Article VI, paragraph 4, of Annex 1-A. This Article provides:

The Parties understand and agree that further directives from the NAC [North Atlantic Council] may establish *additional* duties and responsibilities for the IFOR *in implementing this Annex.*⁸

Paragraph 5 of the same Article further provides:

The Parties understand and agree that the IFOR Commander shall have the authority, without interference or permission of any Party, to do all that the Commander judges

verletzen sie das Abkommen und die Ifor bzw. Sfor ist berechtigt diesem zur Durchsetzung zu verhelfen'.

⁸ Emphasis added.

necessary and proper, including the use of military force, to protect the IFOR and to carry out the responsibilities listed above in paragraphs 2, 3 and 4, and they shall comply in all respects with the IFOR requirements.⁹

Arguably, Article VI, para. 4, grants the North Atlantic Council (and consequently the multinational force) sweeping powers which, in accordance with para. 5, can be exercised by resort to military force. However, the 'additional duties and responsibilities' that the North Atlantic Council may grant to the multinational force *ex* Article VI, para. 4 are not unfettered. They find a significant limitation in the *content* of the obligations undertaken by the parties in Annex 1-A. These obligations cover matters such as the cessation of hostilities (Article II), the withdrawal of foreign forces (Article III), the redeployment of the forces of the Republic of Bosnia and Herzegovina and of the two Entities (Article IV), and so on. It follows that, for example, the North Atlantic Council could not authorize IFOR/SFOR to arrest common criminals or to organize political elections in Bosnia and Herzegovina.

On 16 December 1995 the North Atlantic Council adopted a resolution which *inter alia* provided that

having regard to the United Nations Security Council Resolution 827, the United Nations Security Council Resolution 1031, and Annex 1-A of the General Framework Agreement for Peace in Bosnia and Herzegovina, IFOR *should detain any persons indicted by the International Criminal Tribunal who come into contact with IFOR in its execution of assigned tasks, in order to assure the transfer of these persons to the International Criminal Tribunal.*¹⁰

It is submitted that the decision at issue is consistent with the two aforementioned provisions and is therefore *intra vires* the Annex. Clearly, the power of arrest represents an *additional* responsibility which may be exercised by resort to force. In addition, the execution of arrest warrants constitutes a task which is *within the purview of the obligations* assumed by the parties under Article X of Annex 1-A.

The suggested legal construction leads to conclusions which are radically different from the implications of the legal view considered above. First of all, the power of arrest could be exercised by IFOR/SFOR *concurrently* with that of the Republic of Bosnia and Herzegovina and the two Entities making up this state. To put it differently, the multinational force would be entitled to execute arrest warrants even if the parties were willing to comply with their obligation to cooperate with the Tribunal.

Secondly, the range of 'additional duties and responsibilities' accruing to the multinational force in relation to cooperation with the Tribunal would need to be specified on an *ad hoc* basis by the North Atlantic Council. In other words, the multinational force would be entitled to fulfil only those 'additional responsibilities' which are explicitly provided for in a resolution of the North Atlantic Council. With regard to cooperation with the Tribunal, so far the North Atlantic Council seems to have established only the power of arrest as an additional responsibility of

⁹ Emphasis added.

¹⁰ Emphasis added. It is worth noting that the North Atlantic Council did not state that IFOR 'shall' or 'may' detain indictees. The choice of the word 'should' seems to indicate both the absence of an obligation proper and a strong invitation to IFOR to execute arrest warrants.

IFOR/SFOR. Thus, for the time being the multinational force would not be authorized to execute orders of the Tribunal other than arrest warrants: for instance, it would not be authorized to collect evidentiary material at the Tribunal's request.

3 Is the Multinational Force Obligated to Execute Arrest Warrants Issued by the International Tribunal?

Some commentators have argued that the NATO-led multinational force is not only authorized but is *also obliged* to arrest persons indicted by the Tribunal. The main argument is that Security Council Resolution 827 (1993) imposes on states the obligation to comply with any order or request issued by the Tribunal, including arrest warrants.¹¹ Emphasis is laid by one of the commentators on Rule 55(B) of the Tribunal's Rules of Procedure and Evidence, which provides that:

a warrant for the arrest of the accused . . . shall be transmitted by the Registrar to the person or authorities to which it is addressed, including *national authorities of the State* in whose territory or *under whose jurisdiction or control* the accused resides . . .¹²

Also on the basis of this Rule it is argued that, in an area of Bosnia and Herzegovina under the 'jurisdiction or control' of the multinational force, the particular member state of IFOR/SFOR having armed forces in control of that area would be obliged to execute the arrest warrant transmitted by the Tribunal to the multinational force under Rule 55(B).¹³ This argument is open to two objections. First of all, under a fundamental principle of international law, restated in the 1969 Vienna Convention on the Law of Treaties, an international obligation is binding upon a state *within the state's own territory*, including the territory over which the state may *de facto* exercise exclusive jurisdiction.¹⁴ This principle also applies to the obligation to cooperate with the Tribunal imposed by Security Council Resolution 827 (1993) and undertaken by the parties to Annex 1-A through Article X. Consequently, this argument would be

¹¹ See Jones, *supra* note 7, at 239; Figà-Talamanca, 'The Role of NATO in the Peace Agreement for Bosnia and Herzegovina', 7 *EJIL* (1996) 164, esp. at 171-175; Ambos, *supra* note 7, at 888.

¹² Emphasis added.

¹³ See the authors cited *supra* note 11. In particular, see Jones, *supra* note 7, at 239, who argues that the duty of IFOR to execute arrest warrants 'derives from the Tribunal's Rules and the overriding obligation of all States to comply with the Tribunal's orders pursuant to Resolution 827 (1993). If an accused "resides, or was last known to be, or is believed by the Registrar to be likely to be found" in an area of Bosnia and Herzegovina under IFOR's "jurisdiction or control", then an arrest warrant may be transmitted under Rule 55 of the Rules to the national authorities of the State in control of that sector, which are then under a duty to execute it. For example, the United States contingent of the IFOR currently has responsibility for the operational area which includes Srebrenica. If the Registrar believed an accused to be in Srebrenica, she could send an arrest warrant to the appropriate authorities of the United States, which would then have the duty to execute the arrest warrant' (notes not reported).

¹⁴ Article 29 of the Vienna Convention on the Law of Treaties provides that when there is no indication of the parties' intentions as to the territorial scope of a treaty, the general rule is that the application of the treaty extends to the entire territory of each party.

admissible only if it were to be assumed that the states participating in the multinational force exercised such a degree of control over the territory of Bosnia and Herzegovina as to set aside and replace the sovereign authority of that state and the jurisdiction of the two Entities. This assumption, however, is highly questionable. Were the assumption correct, it would follow that Bosnia and Herzegovina and the two Entities would be in actual fact unable to fulfil their obligation to cooperate with the Tribunal for lack of control over their territory. A better view is that the multinational force does not exercise *de facto* exclusive jurisdiction over the territory of Bosnia and Herzegovina, even if it has been granted extensive powers. Therefore, states contributing troops to IFOR/SFOR are not bound to comply with the obligation to cooperate with the Tribunal beyond the limit of their territory, in particular in the territory of Bosnia Herzegovina.¹⁵

A second reason for rejecting the argument at issue is that, in any case, control over the territory of Bosnia and Herzegovina is not exercised by individual troop-contributing states *qua* states. Rather, this control is exercised by the multinational force as such, pursuant both to the treaty obligations undertaken by the parties in Annex 1-A and to the relevant resolutions of the Security Council. Neither treaty provisions nor Security Council resolutions impose upon IFOR/SFOR the obligation to execute arrest warrants.¹⁶ Without such an express obligation one can hardly contend that the multinational force has a duty to arrest persons indicted by the Tribunal.

4 Final remarks

In the light of the above, the contention is warranted that the legal view propounded by the Russian Federation's representative in the General Assembly of the United Nations is flawed. The multinational force has undoubtedly the authority to arrest persons indicted by the Tribunal. This authority stems from a resolution of the North Atlantic Council of 16 December 1995, which in turn is arguably grounded on a treaty provision, namely Article VI, paragraphs 4 and 5, of Annex 1-A to the General

¹⁵ For the same reason it cannot be contended that the obligation established by each of the four Geneva Conventions of 1949 'to search for persons alleged to have committed, or have ordered to be committed ... grave breaches, and [to] bring such persons, regardless of their nationality, before [their] own courts' is binding upon the troop-contributing states with regard to the territory of Bosnia and Herzegovina. As a result, the argument according to which the aforementioned conventional undertakings oblige the states participating in the multinational force to arrest persons charged with grave breaches of the Geneva Conventions must be rejected. This argument has been elaborated upon by Jones, *supra* note 7, at 239–240.

¹⁶ The obligation to cooperate with the Tribunal, which includes the obligation to execute arrest warrants, has been imposed upon the United Nations Transitional Administration for Eastern Slavonia (UNTAES) by SC Res. 1037 (1996). Under para. 21 of this Resolution 'UNTAES shall co-operate with the International Tribunal in the performance of its mandate, including with regard to the protection of the sites identified by the Prosecutor and persons conducting investigations for the International Tribunal'.

Framework Agreement for Peace in Bosnia and Herzegovina.¹⁷ Under these Articles, the North Atlantic Council is entitled to confer upon the multinational force additional powers aimed at ensuring cooperation with the Tribunal.

Whilst it has the authority to arrest persons accused by the Tribunal, neither IFOR/SFOR nor states participating in the multinational force appear to be obliged to execute arrest warrants. Such a duty can only be imposed by a Security Council resolution; alternatively, it can derive from a conventional undertaking between NATO and the competent authorities of Bosnia and Herzegovina.

It is submitted that the legal view advanced in this paper is based on a proper interpretation of the relevant international instruments. These instruments reflect the position of the major powers involved in the efforts to restore peace in the former Yugoslavia. The states which brokered the Dayton Peace Agreement and played a major role in its negotiation and drafting intended to grant NATO forces very extensive powers. However, they did not immediately confer on them a wide range of specific powers, including the power to arrest indictees. They preferred to lay down a blanket provision by virtue of which in future the North Atlantic Council, in light of the relevant factual circumstances, could grant additional and specific powers to the multinational force, as soon as the need for such powers arose. On 16 December 1995 the North Atlantic Council provided for the attribution to the multinational force of the power of arrest of persons indicted by the Tribunal. It did so with circumspection, both by using non-mandatory language ('*should detain . . . person who come into contact with IFOR*') and by limiting to the arrest of indictees the enforcement authority of the multinational force in matters relating to cooperation with the Tribunal.

This decision of the North Atlantic Council may of course be strengthened in future, should the Council deem it advisable to extend SFOR powers concerning cooperation with the Tribunal to other matters, or even to grant SFOR troops the power to seek out indictees for the purpose of arresting them.

¹⁷ It is worth emphasizing that the Security Council, acting under Chapter VII, formally endorsed Annex 1-A. This endorsement clearly embraces Article VI, paras. 4 and 5, of Annex 1-A. It can therefore be contended that the Security Council gave an *ex ante* approval to any decision of IFOR/SFOR to assume additional duties and responsibilities in implementing Annex 1-A. This approval includes the use of military force by IFOR/SFOR in carrying out additional responsibilities. The assumption by IFOR/SFOR of the power of arrest is therefore legitimized not only by a *conventional* undertaking by the parties, but also by a *decision* of the Security Council.