Peace-Keeping and Peace-Enforcement in the Republic of Bosnia and Herzegovina

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The horror of the situation in the Republic of Bosnia and Herzegovina shocked the conscience of mankind. However, the magnitude of suffering in the Republic and in other parts of the former Yugoslavia stood in sharp contrast to the apparent inadequacy of the international response to this drama as it unfolded slowly and with desperate predictability before the eyes of the international community for a period of over three years.

Of course, the international community did appear to invest considerable resources in its attempt to grapple with the crisis in the former Yugoslavia, and especially the Republic of Bosnia and Herzegovina. EU monitors, UN peace-keepers, human rights *rapporteurs*, humanitarian helpers and international administrators were deployed in the region. Some of them performed their tasks with great dedication and at times heroism. And yet, despite the personal sacrifices among the tens of thou-

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sands of representatives of the international community, hundreds of thousands of civilians died in the Republic of Bosnia and Herzegovina, and millions were turned into refugees or displaced persons. This tragic dissonance between apparent effort and end result can only be explained with reference to some of the factors surrounding international operations in the 'Yugoslav' conflict. While this article is necessarily limited to an analysis of the international response to the harrowing situation in the Republic of Bosnia and Herzegovina, and especially the forcible measures that were adopted in response to the Serb campaign of territorial expansion through ethnic cleansing and probable genocide, some initial thoughts need to be devoted to the general background of the crisis. There then follows a review of the initial peace-keeping role of the UN Protection Force (UNPROFOR) in the Republic of Bosnia and Herzegovina and the subsequent move from peace-keeping to nominal peace-enforcement. Special attention will be paid to the establishment and operation of the so-called safe areas, and their eventual collapse. The creation of the Rapid Reaction Force and the final, massive aerial campaign which led to the first durable cease-fire in the Republic will also be considered. A brief analysis of the enforcement provisions contained in the Dayton agreements will lead into a general evaluation of the role of the UN, NATO and other international actors in this crisis.

It is, of course, impossible to provide a comprehensive account of the international response to the situation in the Republic of Bosnia and Herzegovina and, at the same time, provide a detailed analytical treatment of it within the space available for a single article. This contribution is meant to record important developments principally within a chronological form of presentation. A more conceptual treatment will have to await another occasion.

I. The Climate of Peace-Keeping and Enforcement in the Former Yugoslavia

The international response to the crisis in the former Yugoslavia was conditioned by the need to preserve a number of essential interests shared by most governments around the globe. Many of these interests related to the maintenance of structural principles of international order which are reflected in essential political principles and generally uncontested legal rules. These principles and rules concern the very definition of the state as the principal subject of international law, the prohibition of the threat or use of force among states, especially for the acquisition of territory, and

elementary considerations of humanity in the treatment of peoples, groups and individuals by public authorities.

Many of the legal rules involved share certain special characteristics, reflecting their essential role in the international constitution. Violations of these rules trigger consequences for the offending states, the victim state and all members of the international constitutional system. These consequences flow automatically, as a direct result of the breach, and may be mirrored or amplified by decisions of international organs, such as the United Nations Security Council.

The rules relating to the territorial unity, the use of force and fundamental breaches of humanitarian law which were at issue in the Republic of Bosnia and Herzegovina have an *erga omnes* effect.[1] Hence, if such rules are violated by a state or effective authority, then all other states have a valid legal interest in addressing this violation.[2] Thus, states acting individually, competent international organizations and other organs of the international community have a legal right to involve themselves in the situation which has obtained as a result of the violation.

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[1] E.g., *Barcelona Traction*: 2nd Phase, 1970 ICJ 4, 32:

"When a State admits into its territory foreign investment or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law ...; others are conferred by international instruments of a universal or quasi universal character".

[2] ILC Draft Articles of Part Two of the Draft on State Responsibility provisionally adopted by the International Law Commission, Article 5: "1. For the purposes of the present articles, 'injured State' means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One of the Present Articles an internationally wrongful act of that State.

2. In particular, 'injured State' means: ...

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that: ...

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

Closely related to the *erga omnes* effect of the rules is their *jus cogens* character. That is to say, a violation of these rules cannot result in a situation which enjoys the protection of the international legal order.[3] In this connection, the response of states and other organs of the international community is declaratory of the existence of a breach of a *jus cogens* obligation. The response can, and in this instance did, also authoritatively identify the violator and victim, and can define with some precision the steps that must be taken in order to reverse the violation.

The rules also fall into the category of crimes of states.[4] Although the concept and legal consequences of crimes of states in international law are still subject to much debate, it seems clear that all states have an obligation not to recognize a situation brought about as a result of an international crime of state, they must not assist the perpetrator of the crime in keeping in place the situation created through the criminal act, and they are encouraged to assist the victim of the crime in seeking to overturn the

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(iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

(f) if the right infringed by the act of a State arises from a multilateral treaty, or any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, 'injured State' means, if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under Articles 14 and 15], all other States", 1982 II (2), YBILC 25.

[3] According to Article 53 of the Vienna Convention on the Law of Treaties, a rule of *jus cogens* is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. State practice confirms that no legal consequences to the benefit of the violator can flow from situations which have resulted from breaches of *jus cogens* rules.

[4] Draft Articles on State Responsibility Adopted So Far by the International Law Commission, Part I, Article 19:

"1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

(a) a serious breach of an international obligation of essential importance of the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

consequences of the crime.[5] Once again, the organs of the international community can play an important role in determining the existence of a crime and putting in concrete terms the obligations that arise from it for third states. In addition to identifying obligations, such as the obligation not to recognize the result of the violation of essential rules that has occurred, the organs of the international community can also clarify what other counter-measures may be adopted in general international law. In addition, the invocation of the enforcement powers of the United Nations Security Council can create legal authority to engage in responses which would not be in accordance with general international law in the absence of such an authorization.

Finally, this instance also highlighted the possibility of action that may be taken by the organs of the international community to defend compliance with these rules by enforcing individual responsibility of their violation, in parallel with state responsibility. While individual responsibility had hitherto been mostly administered by state organs, the Yugoslav case was of such a grave nature that it led to a revival of the international administration of this process.[6]

The response of the international community to the events in the Republic of Bosnia and Herzegovina was initially consistent with these mechanisms of the international constitution, aimed at defending the fundamental political principles and legal rules which had been challenged in this instance.

A. Territorial Unity and Secession

The successful campaign for statehood of Croatia and Slovenia in 1991 had threatened the political doctrine of the territorial unity of states. Ac-

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(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict."

1980 II (2) YBILC 30 et seq.

[5] Report of the International Law Commission on the Work of its 47th Session, A/50/10, 1995, Draft Article 18, at 98, note 86, and at 118, 119, for a précis of the relevant discussion. Also Arangio Ruiz's excellent Seventh Report on State Responsibility, A/CN.4/469, 9 May 1995.

[6] *Infra*, at note 66.

cording to this doctrine, which is rightly questioned by scholars but fiercely defended by governments, "any attempt aimed at the partial or total disruption of the national unity and territorial integrity" of states is impermissible.[7] The only exceptions to this doctine relate to secession by agreement with the central authorities, and to claims to self-determination.[8] Traditional United Nations and state practice would hold that colonial entities can invoke the right to self-determination as a title to secession,[9] which can be exercised only once, at the point of decolonization, and only within the boundaries that were established by the colonizing states.[10] According to this principle, a central government under threat of unilateral secession in other than colonial circumstances would be legally entitled to use force in order to repress the secessionists.[11]

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[7] UN General Assembly Resolution 1514 (XV), 15 December 1960. Also, e.g., General Assembly Resolution 2625 (XXV). With respect to Europe, this purported principle was restated in the Helsinki Final Act of 1975, which once more protects the territorial integrity, political independence, and unity of the states participating in the Conference on Security and Co-operation in Europe. CSCE Final Act, 1 August 1975, 73 Department of State Bulletin 323 (1975).

[8] UN General Assembly Resolutions 1514 (XV) and 1541 (XV).

[9] Analogous situations include Palestine, internal colonialism (the situation formerly obtaining in South Africa), and possibly secondary colonialism, as in the cases of the Western Sahara and Eastern Timor.

[10] This traditional view is evidenced, for example, in the following legal submission by the Government of Sri Lanka, which has been experiencing a secessionist campaign for several decades:

"Sri Lanka regained her independence from colonial rule in 1948 and became a member of the United Nations in 1955, subscribing to the purposes and principles of the Charter of the United Nations. It is the position of the Government of Sri Lanka that the words 'the right to self-determination' appearing in this article apply only to people under alien and foreign domination and these words do not apply to sovereign independent states or to a section of a people or nation. It is well recognized in international law that the principle of self-determination cannot be construed as authorizing any action which would dismember or impair totally or in part the territorial integrity or political unity of sovereign and independent States. This article of the Covenant cannot therefore be interpreted to connote the recognition of the dismemberment and fragmentation on ethnic and religious grounds. Such an interpretation would clearly be contrary, inter alia, to General Assembly Resolution 2526 (XXV) on the Declaration of Principles of International Law and incompatible with the purposes and principles of the Charter", International Covenant on Civil and Political Rights, Third periodic reports of States parties due in 1991, Addendum, Report Submitted by Sri Lanka, 18 July 1994, CCPR/C/70/Add.6, 27 September 1994.

[11] E.g., the instances of Biafra and Katanga, and, more recently, the response of the EU to the forcible reincorporation of Chechnya into the Russian Federation, calling for respect of the territorial integrity of the Russian Federation, Declaration by the Presidency on Behalf of the European Union Concerning Chechnya, 18 January 1995. See also the EU response to the large-scale fighting between the Tamil Tigers and the governments of Sri Lanka, condemning violations of human rights but calling for "devolution" as the basis of

By the end of 1991, Croatia and Slovenia had managed to gain independence through unilateral action which had been vigorously, and even forcibly opposed by the central government in Belgrade, or what remained of it.[12] In order to avoid a precedent which would have broadened the scope of application of the claim to self-determination, this result was justified with reference to the Socialist Federal Republic of Yugoslavia constitution, which at least nominally placed the source of sovereignty in the individual republics and established a positive right to secede.[13] As the entire Federal structure had collapsed and dissolved during this episode, the claim of secession could be implemented in the absence of consent from

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settlement. Declaration by the Presidency on behalf of the European Union on Sri Lanka, 15 November 1995, 11441/95 (Presse 323). P. 100/95. The struggle of the Baltic republics to regain full independence in 1990/1 did not really undermine the limited doctrine of self-determination. The Baltic republics could claim to have been forcibly incorporated into the then USSR and were therefore a somewhat special case. However, the Western states which had consistently maintained that the legal personality of the Baltic republics had somehow survived the period of Soviet administration, only treated the republics as states after the USSR as a whole had collapsed in the wake of the abortive coup against the Gorbachev government in autumn 1991.

[12] Shortly after their declaration of independence, and some five months before recognition of the two republics by the EC and its member states, the EC and its member states had already confirmed the right of the republics to their territorial integrity and condemned the forcible attempt of the Belgrade authorities to re-integrate them into the Socialist Federal Republic. Hence, the international community, led by the EC, treated the republics as if they were genuine self-determination entities entitled to international protection while progressing towards full independence. E.g., EPC Statement on Yugoslavia, 27 August 1991: "The European Community and its member States are dismayed at the increasing violence in Croatia. They remind those responsible for the violence of their determination never to recognize changes of frontiers which have not been brought about by peaceful means and by agreement. ... The Community and its member States call on the Federal Presidency to put an immediate end to this illegal use of the forces under its command." See Weller, The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia, 86 AJIL 569 (1992).

[13] Socialist Federal Republic of Yugoslavia, Constitution, Basic Principles, Section I: "The nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession, on the basis of their will freely expressed in the common struggle of all nations and nationalities in the National Liberation War and Socialist Revolution, and in conformity with their historic aspirations, aware that further consolidation of their brotherhood and unity is in the common interest, have, together with the nationalities with which they live, united in a federal republic of free and equal nations and nationalities and founders of a socialist federal community of working people – the Socialist Federal Republic of Yugoslavia, ... ", emphasis added. See the Position Paper on Recognition of the Yugoslav Successor States, issued by the Foreign Ministry of the Federal Republic of Germany in March 1993.

the central authorities in Belgrade, which were no longer functioning.[14] Hence, it could be argued, no claim to secession based on a right to self-determination in general international law was necessarily involved.

However, the Belgrade authorities attempted to argue that if the Slovenes, Croats and Muslims in Slovenia, Croatia and Bosnia and Herzegovina had exercised what appeared to be a right to secession, then so could the Serbs who inhabited more or less distinct areas of Croatia and the Republic of Bosnia and Herzegovina. This argument was rejected by the Badinter Arbitration Commission, the legal advisory body attached to the EC peace conference for Yugoslavia. The Commission confirmed that the individual republics, by virtue of having been territorially and constitutionally defined republics, did have a right to obtain full sovereignty within the boundaries that had been established within the Socialist Federal Republic of Yugoslavia. These boundaries now defined the territorial integrity of sovereign states and could not be disrupted in any way other than with the agreement of the government of the respective Republic.[15] Therefore, the minorities which now found themselves within the boundaries of the newly independent republics could not secede from secession.[16]

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[14] Conference on Yugoslavia, Arbitration Commission, Opinion No. 1, 31 ILM 1495, 1497 (1992).

[15] Conference on Yugoslavia, Arbitration Commission, Opinion No. 2, 31 ILM 1497, 1498 (1992). The international commitment to the territorial integrity of the republics that were emerging into statehood was a direct result of the perceived necessity to ensure that self-determination would not be invoked in a way which would create a precedent for unilateral secession for entities below the threshold of a Federal Republic. As one delegate to the UN Security Council stated when discussing the situation in the former Yugoslavia: "It is indispensable that the rights of ethnic minorities be respected. It is indispensable that the principle of the self-determination of peoples be respected. That right should be accorded to the political entities that can assert self-determination rather than to minorities in those political entities", S/PV.3082, 30 May 1992, at 18–20.

[16] The rights of such minorities were instead supposed to be protected by the granting of autonomy and minority rights. This attempt to balance the claims of minorities with the claim of the Republic to territorial integrity manifested itself in the creation of the UNPAs in Croatia. Through a considerable investment in the presence of peace-keepers in Serb occupied areas of Croatia, the factual, and eventual legal, autonomy of these territories was to be ensured, in accordance with the findings of the Badinter commission and the proposals made by UN mediator Cyrus Vance. See the Report of the Secretary Pursuant to Resolution 721 (1991), S/23280, 11 December 1991, Annex III. However, this was done without questioning the appurtenance of these areas to Croatia. Indeed, when UNPROFOR had manifestly failed to fulfil the terms of its mandate and Croatia regained control over the Serb occupied territories by force in August 1995, this action was not seriously challenged. See, e.g., Report of the Secretary-General, A/50/648, 18 October 1995, and the Statement of the President of the Council, PRST/1995/38 of 4 August 1995, initially only deploring the military offensive without demanding its reversal.

When the Republic of Bosnia and Herzegovina was widely recognized in April 1992, the doctrine of territorial unity was immediately at stake. The claims to self-determination and statehood of the self-proclaimed Serb and Croat entities within it had to be rejected, if the doctrine was not to be exposed as lacking in substance.[17] Hence, international organs consistently confirmed the obligation to respect her territorial integrity throughout the conflict.[18] The so-called Srpska Republic and her attempt to disrupt the territorial unity of the Republic was considered a legal nullity.[19] Instead, the right of the Republic of Bosnia and Herzegovina to "live in peace and security within its borders",[20] was to be vindicated. In principle, the government in Sarajevo was entitled to use force to this end.[21] In practical terms, however, the assumption that the arms embargo which had been imposed with respect to the defunct Socialist Federal Republic of Yugoslavia would continue to apply deprived the Republic of Bosnia and Herzegovina of the means to ensure that its territorial unity would not be disrupted. Instead, the organs of the international community, acting through UN and EC/EU mediators, attempted to mediate an outcome which would somehow preserve the Republic within her boundaries. Hence, attempts were made to pressure the Republic into a "voluntary" acceptance of an effective division of its territory, possibly even allowing for an eventual merger of certain Serb occupied territories with the rump Yugoslavia. Due to the "voluntary" nature of such a solution, the myth would be maintained that the territorial unity of the repub-

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[17] On 9 January 1992, Serb populated areas within the Republic of Bosnia and Herzegovina declared themselves sovereign. On 27 March 1992 followed the proclamation of a Serb independent state within the Republic of Bosnia and Herzegovina.

[18] E.g., UN Security Council Resolution 770 (1992), 13 August 1992: "Reaffirming the need to respect the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina."

[19] The issue of the so-called Croat Republic of Herzeg Bosnia lost in relevance when a Federation Agreement was achieved through United States mediation. Letter from the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations, addressed to the Secretary-General, S/1994/255, 4 March 1994, Annex.

[20] *Supra*, note 18, emphasis added.

[21] See, e.g., the indirect endorsement of the right of the Government of the Republic of Bosnia and Herzegovina to deploy armed forces, even in the so-called safe areas, *supra* note 139. The right to use force in the face of unilateral secession appeared to have been vindicated in the case of Chechnya, *supra* note 11, and the forcible re-taking of Jafna by the armed forces of Sri Lanka, e.g., Thomas, Victorious Troops Raise Sri Lankan Flag over Jafna, The [London] Times, 6 December 1995, at 11.

lic had not been disrupted through unilateral, opposed secession by the so-called Srpska Republic.[22]

B. Non-Use of Force

Before the Republic of Bosnia and Herzegovina held its referendum on independence on 29 February/1 March 1992, the rump Yugoslavia had strengthened the deployments of JNA troops in the Republic. In accordance with a campaign plan known as operation RAM, military hardware and consumables were pre-deployed in areas which were to be incorporated into "Greater Serbia", in case the Republic of Bosnia and Herzegovina were to attain effective independence.[23]

Hostilities erupted even before recognition of the Republic on 8 April by the European Communities and its member states. The military campaign was led by JNA regular forces and other armed formations which had been created by the Belgrade authorities in anticipation of this event. This pre-planned offensive resulted in the rapid occupation of large parts of the territory of the Republic of Bosnia and Herzegovina.[24]

Thus, the so-called Srpska Republic had come into being as a result of armed operations by the Yugoslav National Army (JNA) and associated forces. Despite the effective control exercised by it over territory and population, it could, legally speaking, never mature into a state, as its creation had been tainted due to the violation of the prohibition of the use of force in international law which is undisputedly part of *jus cogens*. Similarly, the attempt to integrate Serb occupied territory into "Greater Serbia" would have violated the prohibition of the forcible incorporation of territory. An acceptance of such a move would have been tantamount to

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[22] This result was achieved in the Dayton Agreements which provided for a solution which preserved the legal personality of the Republic of Bosnia and Herzegovina, while nevertheless admitting the existence of two state-like entities within it. Dayton Agreements, Annex 4, Constitution.

[23] E.g., Gremek/Gjidara/Simac (eds.), Le nettoyage ethnique: Documents historiques sur une ideologie serbe 299 et seq. (1993); Glenny, The Fall of Yugoslavia 150 (1993); Cigar, Genocide in Bosnia (1995), Chapter 3.

[24] In the words of the most respected analyst of Bosnian affairs: "Using the advantages of surprise and overwhelming superiority, the federal army and its paramilitary adjuncts carved out within the first five to six weeks an area of conquest covering more than 60 per cent of the entire Bosnian territory", Malcolm, Bosnia – a Short History 238 (1994). Also, Gow, One Year of War in Bosnia and Herzegovina, 2 RFE/RL Research Report 8 (June 1993).

accepting the acquisition of over half of the territory of one sovereign state by another through the use of force.[25]

Even before the Republic of Bosnia and Herzegovina had obtained membership in the United Nations Organization, the UN Security Council adopted a resolution concerning the situation in the Republic, demanding respect "for the principle that any change of borders by force is not acceptable". More particularly, the Council demanded that all forms of interference, including by units of the JNA as well as elements of the Croatian Army, cease immediately.[26] Subsequently, the Council stated expressly "that any taking of territory by force [is] unlawful ... and will not be permitted to affect the outcome of negotiations on constitutional arrangements for the Republic of Bosnia and Herzegovina, ... "[27].

In addition to identifying the use of force as unlawful and denying that it could bring about legally protected consequences, the Council also identified the author of the illegality, authorized collective counter-measures and even administered them, together with, or through, NATO and the WEU. When the Council found that the Belgrade authorities had not complied with its demands to cease armed interference and withdraw the JNA, or have it disbanded and disarmed and its arms placed under UN or Bosnian government control, the Security Council imposed economic sanctions against the rump Yugoslavia. Those sanctions were similar in severity and comprehensiveness to those which had been adopted after Iraq had invaded Kuwait in August 1990.[28]

When adopting sanctions Resolution 757 (1992), delegations to the Security Council referred expressly to the need to condemn and take prompt and appropriate measures against the "aggressor",[29] in the light of the fact that "the aggression against Bosnia and Herzegovina is raging on",[30] that the expansion of strife involved "groups and forces from re-

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[25] Again, at the various peace conferences, attempts were made to pressure the Government of the Republic of Bosnia and Herzegovina into accepting a solution which would result in the *de facto* division of its territory, and possibly the eventual merger of Serb occupied territories with the rump Yugoslavia. Through this means, it would be possible to claim that territorial change had not come about by force, but in accordance with an agreement to which the Government of the Republic of Bosnia and Herzegovina had freely assented. In the eventual agreements reached in Dayton, Ohio, this was achieved, *supra* note 22.

[26] Resolution 752 (1992), 15 May 1992.

[27] Resolution 787 (1992), 16 November 1992.

[28] Resolution 757 (1992), 30 May 1992.

[29] Cape Verde, S/PV.3082, 30 May 1992, at 7.

[30] Hungary, id. at 15.

publics bordering on Bosnia and Herzegovina"[31] and that "the leaders in Belgrade have flouted international opinion and widened the scope of their attacks on Bosnia and Herzegovina"[32].

The President of the Council, speaking in his capacity as representative of Austria, added that sanctions had become necessary "because of the stubborn and irresponsible attitude of the Belgrade authorities, both military and civilian. Their policies and practices have caused suffering and destruction on a scale that in this day and age almost defies our imagination"[33].

The continuing nature of Belgrade's "aggresssion" was also confirmed by the UN.[34] After the initial use of force by the JNA, the UN-Secretary-General authoritatively confirmed that some 80 per cent of its troops and weapons had been handed over to the Serb entity within the Republic of Bosnia and Herzegovina.[35] It was also determined that this support was maintained throughout the conflict.[36] A small proportion of sanctions was only lifted after Belgrade had finally formally committed itself in a more or less verifiable way to cease supplying the Bosnian Serbs at least

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[31] Russian Federation, id., at 88.

[32] Venezuela, id., at 28. Belgium considered "Belgrade's responsibility in the Bosnian crisis to be overwhelming", id., at 31. The United Kingdom, interestingly, stated clearly that there is really no doubt at all where the principal responsibility now lies: "with the authorities, civil and military in Belgrade. And that cannot be ducked; it is simply no good suggesting that they have nothing to do with the events that are going on in Bosnia and Herzegovina. Multiple-rocket launchers are not found in Serbian peasants' barns. They are provided from the supplies of the Yugoslav National Army. They are munitioned from their supplies of ammunition. They are fuelled; they are paid for. That is where they come from. If the authorities in Belgrade really wanted us to believe their protestations of innocence, I doubt if they would be bombarding Dubrovnik today. They must think we are very stupid people indeed. That is what has brought this Council to the matter of sanctions", id., at 43.

[33] Id., at 44.

[34] States continued to consider the situation in the Republic of Bosnia and Herzegovina a case of an "aggression" throughout the conflict. See Bethlehem/Weller (eds.), The "Yugoslav" Crisis in International Law (1996), Chapter 3, *passim*.

[35] Secretary-General's Report, S/23844, para 16, 24 April 1992. The authorities in Belgrade themselves confirmed the continued role of the JNA in the conflict, stating that "in practice, the JNA is not moving out, but is being transferred to Serb territory. The Army which up to now has been mainly Serb, will remain." Tanjug, 7 May 1992, 1221 gmt, FBIS transcript.

[36] Also see, e.g., General Assembly Resolution 48/88 of 20 December 1993, demanding that action be taken to ensure that the rump Yugoslavia "immediately cease the supply of military arms, equipment and services to Bosnian Serb paramilitary units". See also Resolution 49/10 of 3 November 1994, para 13. It was only in July 1993 that the rump Yugoslavia threatened to restrict its aid to the so-called Srpska Republic to food and medical supplies. Nevertheless, the Belgrade authorities continued to supply the Serb armed forces in

with military hardware.[37] Even then, the initial armed involvement on the part of the rump Yugoslavia was sufficient to ensure that as long as the consequences of this unlawful use of force persisted, the rump Yugoslavia was required to collaborate in reversing them. Hence, the bulk of international sanctions against the rump Yugoslavia were kept in place even after the purported cessation of continued intervention in the Republic of Bosnia and Herzegovina, indicating that this international element in the situation in the Republic of Bosnia and Herzegovina remained of legal and political relevance to the very end.[38]

The United Nations thus confirmed the existence of the violation of the prohibition of the threat or use of force, and of the prohibition of armed intervention, identified its author and declared that it could not result in legally protected gains for the violator or its client. In adopting comprehensive sanctions, monitored by a UN Sanctions Committee, it also imposed, and involved itself in the administration of, counter-measures.

In taking these actions, the Council did not proceed from a position of "neutrality" *vis-à-vis* the parties to the conflict. Indeed, the Security Council adopted military enforcement measures which, again, mirrored the response to the Iraqi invasion of Kuwait. In Resolutions 787 (1992) and 820 (1993), the Council authorized the use of force to ensure compliance with the embargo against the rump Yugoslavia, even permitting the use of naval power in the territorial sea of that state. Between 22 November 1992 and 4 October 1995, NATO and WEU armed forces challenged 60,479 merchant vessels, boarded and inspected 4,648 of them, and diverted and inspected in port 1,281 of them.[39]

When it transpired that the Belgrade regime continued to make available its air power in support of the Serb entity in the Republic of Bosnia

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the Republic of Bosnia and Herzegovina. Even when the rump Yugoslavia finally accepted international monitoring of her border with the Republic of Bosnia and Herzegovina, Belgrade continued to participate in the strategic guidance and in the command and control of their operations. This was evidenced, for example, by the fact that the Bosnian Serbs remained part of the integrated air defence system run from Belgrade. E.g., Block, Weapons Supply Bolsters Serbs in Bosnia, The Independent, 17 January 1994, at 10; Block, Bosnian Serbs Deploy Anti Aircraft Missiles, The Independent, 2 February 1994, at 10.

[37] In fact, sanctions were tightened further in April 1993. See Resolution 820 (1993) and the debate in S/PV.3200, 18 April 1993.

[38] Sanctions against the Federal Republic of Yugoslavia were lifted immediately upon the initialling of the Dayton Agreements, with the proviso that they would be immediately re-imposed should the rump Yugoslavia fail to sign the agreement. Security Council Resolution 1022, 22 November 1995. Sanctions against the Srpska Republic were kept in place for a further three months.

[39] NATO/WEU Operation Sharp Guard Update, 5 October 1995.

and Herzegovina, the Council adopted a no fly zone covering the air space of the Republic.[40] Again, the use of force was authorized to enforce this measure.[41] This operation "Deny Flight" was carried out by NATO, in close coordination with the UN Secretariat.[42] NATO launched some 22,201 sorties for this mission which involved some 4,500 personnel from 12 NATO states.[43] Nevertheless, the UN Secretary-General had to issue regular reports on the violation of the no fly zone, which also numbered in the thousands.[44]

In February 1994, NATO engaged for the first time in its history in a combat mission, using offensive force when United States "Deny Flight" jets engaged and destroyed four Serb fighters over Bosnia.[45]

Despite this eventual use of force, there did not exist sufficient political will to take further military measures to enforce the rights of the Republic of Bosnia and Herzegovina at this stage of the conflict. Instead, a strategy of containing the conflict was adopted, coupled with diplomatic attempts to reverse the consequences of the use of force and/or armed intervention and with measures designed to suppress the gross breaches of humanitarian law that were occurring.

C. Humanitarian Principles

The so-called Republic of Srpska appeared to base its legitimacy on the effective control it purported to exercise over large parts of the territory of Bosnia and Herzegovina as a result of its armed campaign, and on a related claim to self-determination. A strategy of ethnic cleansing was em-

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[40] Resolution 781 (1992) of 9 October 1992 did place this action into a humanitarian context, indicating that "the establishment of a ban on military flights in the airspace of Bosnia and Herzegovina constitutes an essential element for the safety of the delivery of humanitarian assistance". However, it also noted that such a measure would constitute "a decisive step for the cessation of hostilities in Bosnia and Herzegovina".

[41] Resolution 816 (1992), 31 March 1993. This measure can only have been targetted at the Serb side, as the Bosnian Government did not possess an air force.

[42] The UN commander at the time, General Wahlgren, indicated that the proposed enforcement action would have negative consequences for the viability of UNPROFOR, in particular the delivery of humanitarian aid and the safety of UN and other personnel. Letter from the Secretary-General to the President of the Security Council, S/25457, 22 March 1993.

[43] NATO Operation Deny Flight Update, 5 October 1995.

[44] E.g., Note verbale from the Secretary-General to the President of the Security Council, S 1995/5/Add.53, 29 August 1995, identifying 6,648 apparent violations as of that date.

[45] NATO Operation Deny Flight Data, May 1995.

ployed, perhaps to bolster this claim.[46] The International Commission of Experts established pursuant to Security Council Resolution 780 (1992) defined this practice in its final report as follows:

> "a purposeful policy designed by one ethnic or religious group to remove by violent or terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas. To a large extent, it is carried out in the name of misguided nationalism, historic grievances and a powerful driving sense of revenge. The purpose appears to be the occupation of territory to the exclusion of the purged group or groups"[47].

The gruesome nature and extent of the campaign of ethnic cleansing and probable genocide cannot be reviewed in great detail here. It consisted of the deportation of civilians, destruction or seizure of their property, the systematic, physical destruction of non-Serbs, through systematic rape, torture, mass killings, the shelling of civilian concentrations and the denial of humanitarian aid necessary for the survival of the threatened population. Such violations constitute the gravest of breaches of the most elementary rules of international humanitarian law, applicable both in internal and international conflicts, including the prohibition of crimes against humanity and genocide.[48] Once again, the international community sought to prevent a precedent by which an aggression carried out through such means could have yielded benefits for the aggressor.

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[46] This "new" phenomenon was addressed and condemned as "totally incompatible" with human rights and fundamental freedoms in General Assembly Resolution 47/80 of 16 December 1992. See also Resolution 46/242 of 25 August 1992, which already stated that the abhorrent practice of ethnic cleansing constitutes a grave and serious violation of international humanitarian law.

[47] S/1994/674, 24 May 1994, para 130.

[48] The International Tribunal was given jurisdiction to address grave breaches of the Geneva Conventions of 1949, including wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a civilian to serve in the forces of a hostile power; wilfully depriving a prisoner of war or a civilian of the rights to a fair and regular trial; unlawful deportation or transfer or unlawful confinement of a civilian; and the taking of civilians as hostages. The Tribunal was also given powers to address violations of the laws or customs of war, including the employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; wanton destruction of cities, towns or villages, or devastation not justified by military necessity; attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; seizing of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; the plunder of private property. Furthermore, the Tribunal was given power to prosecute genocide, that is, the commissioning of the following acts with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing of members of the

The UN Secretary-General, the Security Council, the UN General Assembly, UN human rights bodies and regional organizations clearly and unambiguously identified and rejected the campaign of ethnic cleansing and probable genocide and condemned the means of warfare that were being employed to that end as gross breaches of the most fundamental rules of international law. Only two weeks after the adoption of Resolution 752 (1992), the UN Secretary-General reported that even the most basic humanitarian rules for the protection of civilian populations in armed conflict were being violated, adding that "displacement of the civilian population from its towns and villages ... on a scale not seen in Europe since the Second World War" was occurring as a result.[49] He confirmed the "grievous deterioration in the plight of civilians trapped in the cities besieged by various irregular forces and in some cases also by the Yugoslav People's Army [*sic.*] (JNA)".[50] The Council responded by condemning, *inter alia*, the massive, organized and systematic detention and rape of women, in particular Muslim women,[51] the practice of establishing concentration camps where torture and arbitrary killings of mainly Muslim civilians were conducted,[52] the occurrence of organized "mass killings",[53] the obstruction of humanitarian aid deliveries and the "continued deliberate armed attacks and shelling of the innocent civilian population".[54] The Council not only condemned such activities of "ethnic cleansing"[55] undertaken by the Bosnian Serbs, but, in this context, denounced the activities carried out "between the territory of the Federal Republic of Yugoslavia (Serbia and Montenegro) and Serb controlled areas in ... the Republic of Bosnia and Herzegovina".[56] The Council specifically referred to

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group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group. Finally, the tribunal was also empowered to prosecute crimes against humanity which are crimes directed against any civilian population, including murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, and other inhumane acts. Statute of the International Tribunal, Articles 2–5, S/25704, 3 May 1993, Annex.

[49] Secretary-General's Report, S/2400, para 5, 26 May 1992.

[50] Id., para 6.

[51] Resolution 798 (1992), 21 December 1992.

[52] E.g., Security Council Presidential Statement, S/24378, 4 August 1992, Resolution 770 (1992), 13 August 1992; Resolution 771 (1992), 13 August 1992, etc.

[53] Resolution 808 (1993), 22 February 1993.

[54] Resolution 819 (1993), 3 April 1993; Resolution 824 (1993), 6 May 1993.

[55] E.g., Resolution 771 (1992), 13 August 1992.

[56] Resolution 820 (1993), 17 April 1993.

the Interim Order of the International Court of Justice which had confirmed that there existed a *prima facie* case of international responsibility for the conduct of a campaign of genocide on the part of the Belgrade government.[57]

The UN General Assembly also authoritatively confirmed the existence of a campaign of "killings, torture, beatings, rape, disappearances, destruction of houses and other acts or threats of violence aimed at forcing individuals to leave their homes, ... the indiscriminate shelling of cities and civilian areas, the systematic terrorization and murder of non-combatants, the destruction of vital services, the besieging of cities and the use of force against civilian populations and relief operations." As a result of these practices "the Muslim population [is] threatened with virtual extermination" for which the Bosnia Serbs and "the Yugoslav Army and the political leadership of the Republic of Serbia bear primary responsibility...".[58] The Assembly specifically stated, in the context of "the continuation of aggression in Bosnia and Herzegovina," that this "abhorrent policy of ethnic cleansing [is] a form of genocide".[59] Similar findings were made by the UN Commission on Human Rights and its Special Rapporteur.[60] The Special Rapporteur, confirming again that the Muslim population was "virtually threatened with extermination", indicated that the principal objective of the military conflict was the establishment of ethnically-homogeneous regions, a goal which had, to a large extent, been achieved through killings, beatings, rape, etc.[61]

The war crimes investigators of the United Nations Commission of Experts concluded that these "practices constitute crimes against humanity."[62] The United Nations World Conference on Human Rights assembled in Vienna during the summer of 1993 appealed to the Security Council "to take the necessary measures to end the genocide taking place in Bosnia and Herzegovina ...".[63]

While not immediately taking such necessary measures, the Council at least insisted that "any practice of 'ethnic cleansing' is unlawful and unacceptable, and will not be permitted to affect the outcome of the negotia-

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[57] Resolution 819, 3 April 1993.

[58] Resolution 47/147, 18 December 1992.

[59] Resolutions 48/143 and 48/88, 20 December 1993.

[60] E.g., Resolution 1992/S-1, 14 August 1992; 1992/S-2/1, 1 December 1992, 1993/8, 23 February 1993.

[61] E/CN.4/1992/S-1/10, 27 October 1992.

[62] S/25274, para 56, 10 February 1993.

[63] A/Conf.157/24 (part 1), p. 47.

tions on constitutional arrangements for the Republic of Bosnia and Herzegovina, and insist[ed] that all displaced persons be enabled to return in peace to their former homes."[64] The General Assembly reaffirmed that the consequences of ethnic cleansing shall not be accepted by the international community and that those who have seized land and other property by ethnic cleansing and the use of force must relinquish those lands, in conformity with norms of international law.[65]

In addition to identifying violations and denying the violators the fruits of their activities, further avenues were pursued in authorizing international counter-measures and partially administering them. On the one hand, individuals involved in the conflict were threatened with war crimes trials. It was hoped that the prospect of individual responsibility being created for both the political commanders and the foot-soldiers on the ground would constrain their behaviour in a campaign which employed genocide and grave breaches of humanitarian law as a matter of course. In an unprecedented move, the UN Security Council even established an International Criminal Tribunal for the former Yugoslavia, to prosecute the authors of these breaches.[66]

Second, the organized international community, acting through the United Nations, undertook to ensure that the use of starvation of civilians, or direct attacks against them, and the related practice of ethnic cleansing or genocide as a means of warfare would be suppressed and would not succeed. This was the role gradually assigned to UNPROFOR.[67]

D. Containment of the Conflict: The Arms Embargo

The Security Council had recognized that the situation in the Republic of Bosnia and Herzegovina was the result of an external use of force. That use of force was continued through an on-going armed intervention on the part of the Belgrade authorities. However, in attempting to prevent a spreading of the bloodshed beyond the borders of the former Yugoslav Republics, the arms embargo, which had originally been imposed against

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[64] Resolution 787 (1992), 16 November 1992.

[65] Resolution 19/10, 8 November 1994; also Resolution 48/88, 20 December 1993.

[66] Resolution 827 (1993), 25 May 19/93. At the time of writing, the Tribunal had indicted 52, mostly Bosnian Serb individuals, including Dr. Radovan Karadzic and General Mladic.

[67] As noted above, the imposition of the no-fly zone and its military enforcement was also partially justified with reference to humanitarian motives.

the Socialist Federal Republic of Yugoslavia, was kept in place.[68] The lawfulness of Security Council action in this respect was subject to some doubt. Resolution 713 (1991) had been adopted in September 1991, at a time when, in the view of the United Nations, the Republic of Bosnia and Herzegovina did apparently not yet exist as a state and when the emerging conflict was still considered principally an internal affair of the Socialist Federal Republic. In fact, the embargo had been adopted in accordance with a request of the Belgrade government.[69]

The Council itself accepted, by adopting Resolution 727 (1992), that the embargo would not automatically apply to the new states in the territory of the former Socialist Federal Republic. That resolution decided (rather than confirmed) that the arms embargo would also apply to the Republics upon independence. However, it did so in a rather circumspect way, by merely endorsing a suggestion of the UN Secretary-General's Special Representative to this effect.[70] Resolution 727 (1992) was not adopted under Chapter VII.

The Republic of Bosnia and Herzegovina could legitimately argue that the Council would at least have had to comply with its own procedures in depriving it of the right to obtain the armaments necessary for the effective exercise of the right of self-defence. That would have required a formal decision under Chapter VII. Instead, the Council purported to extend the embargo to the Republic through a mere administrative act which somewhat contradicted the other measures it had taken. In effect, the Council kept in place a legal regime intended to cover the previous situation of internal conflict, despite its own, subsequent finding that the Republic of Bosnia and Herzegovina was faced with the external use of force and armed intervention. This finding should have either triggered effective measures to restore international peace and security, or the application of the right to self-defence. Throughout the conflict, a very large number of states argued in the Security Council and the General Assembly that in the absence of effective international action to safeguard the rights of the Republic of Bosnia and Herzegovina, her right to self-defence had to be supported, rather than restricted.[71]

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[68] Security Council Resolution 713 (1991), 25 September 1991.

[69] Resolution 713 (1991), 25 September 1991, preambular paragraphs 2 and 3.

[70] Resolution 727 (1992), 8 January 1992, para 6: "decides that the embargo applies in accordance with paragraph 33 of the Secretary-General's report (S/23363)".

[71] E.g., S/PV.3247, 29 June 1993, *passim.* At the meeting, draft Resolution S/25997 of the same date, which would have exempted the Republic of Bosnia and Herzegovina from the arms embargo, failed to be adopted, having obtained 6 votes in favour, none against,

In addition, it was also alleged that the maintenance of the embargo was legally null and void, because it violated provisions of *jus cogens*. It was asserted that the embargo had placed the Republic in a position where it could not effectively discharge its international obligation to prevent the commissioning of genocide by Serb forces on its territory.[72]

On the other hand, one of the main arguments for the keeping in place of the arms embargo was that, in its absence, the international efforts to ameliorate the consequences of the conflict and suppress unlawful means of warfare could no longer be carried out. The humanitarian mission conducted by the UN therefore played a key role in justifying the policy of preventing a spreading of the conflict through the arms embargo, even if that meant that the Government of the Republic of Bosnia was to be deprived of the right to receive international military assistance which, according to the UN's own findings, should have appertained to it. The evolution of the UN's humanitarian mission must be considered in the light of this background.

II. Peace-Keeping

The United Nations humanitarian mission in the Republic of Bosnia and Herzegovina grew out of the peace-keeping mission for Croatia. Conflict in that Republic had erupted in July 1991 and had resulted in the occupation of nearly a third of its territory by Yugoslav National Army forces and local Serb militias. Plans for a UN peace-keeping force were drawn up towards the end of the year, but in the light of a dispute about the role and function of the force and the unstable situation on the ground, concrete steps towards deployment were delayed until February 1992.[73]

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and 9 abstentions. At subsequent meetings of the Council, the demand for the lifting of the embargo was a consistent theme. The General Assembly supported this demand, Resolution 48/88 of 20 December 1993, adopted by 109 votes to none, with 57 abstentions; Resolution 49/10 of 3 November 1994, adopted by 97 votes to none, with 61 abstentions.

[72] See Scott [et al.], A Memorial for Bosnia, 16 Michigan Journal of International Law 7 (1994), and Williams, The Crippling of Bosnia: Is the Embargo Legal?, The Tablet, 25 February/1 April 1995, at 244; together with a detailed counter-argument presented by the then British Foreign Secretary Douglas Hurd, entitled "The Long Hard Slog to a Bosnian Peace", id. See also the Separate Opinion of Judge Lauterpacht in the Application of the Genocide Convention Case, ICJ, Order of 13 September 1993, paras 84–107.

[73] See Weller (note 12). Nominally, the function of the force was to create conditions within its areas of operation (so-called UN Protected Areas) for the safe return of refugees and the displaced and, at least in the view of the Croatian government, for the restoration of its control over the areas. In reality, UNPROFOR froze the situation on the ground and permitted the Serbs to complete the process of ethnic cleansing, as it were, under UN protection.

A. The Inception of UNPROFOR

In February 1992, the UN Security Council authorized the deployment of a military liaison mission to the former Yugoslavia, consisting of 75 officers, and requested the Secretary-General to prepare for the deployment of a peace-keeping operation as soon as all parties had accepted his plan for operations, especially relating to the so-called UN Protected Areas which were to be created in Croatia.[74] On 21 February, recalling the provisions of Article 25 and Chapter VIII of the Charter, but not acting under Chapters VII or VIII, the Council authorized the deployment of the United Nations Protection Force.[75] In a move intended to serve as preventative crisis management, a headquarters contingent of UNPROFOR was stationed in Sarajevo.

When hostilities erupted in the Republic of Bosnia and Herzegovina, the Council welcomed the decision of the Secretary-General to accelerate the deployment of 100 military observers from UNPROFOR to the Mostar region. The military observers were intended to assist the parties in monitoring an initial cease-fire which had been concluded on 23 April. The Council also demanded that all forms of external intervention must cease, and called upon all parties and others concerned to facilitate humanitarian assistance and cooperate so that deliveries of humanitarian assistance reach their destination.[76] On 15 May, the Council adopted Resolution 752 (1992), reiterating these demands and also requesting the Secretary-General to keep under active review the feasibility of protecting international humanitarian relief programmes and of ensuring safe and secure access to Sarajevo airport.[77]

When it transpired some two weeks later that these demands were not being met, the Security Council, acting for the first time in this context expressly under Chapter VII, demanded that all parties and others concerned immediately create the necessary conditions for an unimpeded delivery of humanitarian supplies to Sarajevo and other destinations in Bosnia and Herzegovina, including the establishment of a security zone en-

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[74] Resolution 740 (1992), 7 February 1992.

[75] Resolution 743 (1992), 21 February 1992. The reference to Article 25 was intended to dissuade the Government of the Republic of Croatia from revoking its consent, and hence depriving the UN Protected Areas from the benefit of the UN presence. However, throughout the troubled history of peace-keeping in Croatia, it was clear that UNPROFOR's presence was dependent on such consent, and UNPROFOR prepared to withdraw, and finally substantially withdrew, when the Republic of Croatia so demanded.

[76] Security Council Presidential Statement, S/23842, 24 April 1992.

[77] Resolution 752 (1992), 15 May 1992.

compassing Sarajevo and its airport.[78] The Council also recognized "that the provision of humanitarian assistance in Bosnia and Herzegovina is an important element in the Council's effort to restore international peace and security in the area", thus formally bringing the humanitarian concerns within the ambit of Article 39 of the Charter, the invocation of which facilitates the adoption of Chapter VII enforcement measures.[79] However, UNPROFOR itself was not, at that stage, endowed with an enforcement mandate.

B. The Sarajevo Airport Agreement

The Secretary-General reported to the Council on 6 June, indicating that in pursuit of Resolution 757 (1992) it had been possible to achieve an Agreement between the Presidency of the Government of the Republic of Bosnia and Herzegovina and the Serb party to re-open Sarajevo airport. According to the Agreement, UNPROFOR would ensure the immediate security of the airport and its operation, facilitate the unloading of humanitarian cargo and ensure the safe movement of humanitarian aid and related personnel. UNPROFOR would also verify the withdrawal of anti-aircraft weapons systems from within range of the airport and its approaches and monitor the concentration of artillery, mortar, and ground-to-ground missile systems in specified areas which were to be agreed. Given that heavy weapons would remain in the hills overlooking Sarajevo and its airport, albeit supervised by UNPROFOR, the viability of the Agreement would depend on the good faith of the parties, and especially the Bosnian Serb party, in scrupulously honouring their commitments.[80]

According to the Agreement, humanitarian aid would be delivered to Sarajevo and beyond, under the supervision of the United Nations, in a non-discriminatory manner on the sole basis of need. Security corridors between the airport and the city would be established under the control of UNPROFOR to ensure the safe movement of humanitarian aid.[81] The Council approved this plan on 8 June.[82] A small UNPROFOR advance party under General Lewis MacKenzie arrived in Sarajevo three days later, but was initially precluded from commencing the implementation of

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[78] Resolution 757 (1992), para 17, 30 May 1992.

[79] Resolution 770 (1992), 13 August 1992.

[80] Report of the Secretary-General Pursuant to Security Council Resolution 757 (1992), S/24075, 6 June 1992, *passim*.

[81] Id., Annex, paras 7, 8.

[82] Resolution 758 (1992), 8 June 1992.

the mandate.[83] The Council responded by appealing to the parties to cooperate fully with UNPROFOR in reopening the airport and authorized the deployment of additional elements of UNPROFOR to implement the Agreement. The Council also threatened "other measures to deliver humanitarian assistance to Sarajevo and its environs", should the parties fail to cooperate fully with UNPROFOR and international humanitarian agencies and take all necessary steps to ensure the safety of their personnel.[84]

Despite a failure to achieve full co-operation, and in the absence of a durable cease-fire, UNPROFOR managed to reopen the airport, although the operation continued to "hang by a slender thread", especially inasmuch as the complete concentration of heavy weapons in agreed areas and the establishment of secure corridors had not been achieved.[85] The Council further increased UNPROFOR's troop strength and requested the Secretary-General to keep under continuous review any further measures that may be required to ensure unimpeded delivery of humanitarian assistance.[86]

C. The London Conference Episode

At an EC-sponsored Conference on Yugoslavia held in London in July 1992, another cease-fire was agreed by representatives of the Government of the Republic of Bosnia and Herzegovina and the Bosnian Serbs and Croats. The agreement again provided for the placing of all heavy weapons under UNPROFOR supervision.[87] The Council immediately issued a Presidential statement, deciding in principle to respond positively to the request made in London to make arrangements to this end.[88] The UN Secretary-General replied to this request in an extraordinary way. He noted that he had not been invited to participate in the London Meeting, that UNPROFOR was already stretched and that the parties had hitherto not created the conditions necessary for a successful peace-keeping operation. Most fundamentally, he indicated that the Meeting could perhaps be

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[83] Mackenzie, Peacekeeper, Chapters 21–27 (1993).

[84] Resolution 761 (1992), 29 June 1992.

[85] Letter from the Secretary-General to the President of the Security Council, S/24222, 2 July 1992, para 13.

[86] Resolution 764 (1992), 13 July 1992.

[87] Letter from the Permanent Representatives of Belgium, France and the United Kingdom, S/24305, 17 July 1992.

[88] S/24307, 17 July 1992.

considered an independent exercise of preventative diplomacy by regional organizations or arrangements. However, he affirmed that the UN Charter underlines the primary responsibility of the Security Council in such matters, providing, for instance, that in certain circumstances it can 'utilize' such regional organizations or arrangements. "There is no provision for the reverse to occur. In other instances when the United Nations and a regional organization have both been involved in an international peace and security situation, care has to be taken that the primacy of the world organization has not been compromised".[89]

This statement was simply baffling. The Security Council had consistently supported and praised the work of regional organizations and arrangements in the Yugoslav crisis. Only days before the commencement of the London Meeting, it had called upon the parties to respond positively to the project of the Conference, and it had requested the Secretary-General to keep in close contact with the developments that were expected there.[90] Furthermore, it was not the London Meeting which had decided upon the use of UNPROFOR, but the Council itself, in its Presidential statement of 17 July. In that statement, the Council had also indicated that it was aware of the "resource" implications of this decision, apparently envisaging a further strengthening of UNPROFOR. The London plan, it seems, had been to seize the initiative rapidly, at the moment when the parties at an international conference had expressly committed themselves to the achievement of clear goals, including the placing of heavy weapons under UN supervision. Of course, this initiative depended upon rapid implementation.

However, in the light of the Secretary-General's report, the Council responded by backtracking from its original decision, now determining that the conditions did not yet exist for UNPROFOR supervision of heavy weapons in the Republic of Bosnia and Herzegovina as envisaged in the London agreement.[91] Hence, the momentum of the initial initiative was lost and the London agreement was never implemented as were the much more detailed agreements concluded at the London international conference of 26 August 1992. The failure to establish control over heavy weapons was to haunt UNPROFOR in the months and years to follow.

In fact, UNPROFOR did not even insist on implementing the mandate it had received, in accordance with the earlier agreement relating to Sara-

[89] Report of the Secretary-General, S/24333, 21 July 1992, para 8.
[90] Resolution 764 (1992), 13 July 1992, paras 8, 9.
[91] Statement by the President of the Security Council, S/24346, 24 July 1992.

jevo airport, to establish control over anti-aircraft weapons and heavy weapons in the vicinity of the airport. Humanitarian deliveries by air therefore remained subject to constant threats from the Serb forces, which led to frequent suspensions of relief flights.[92]

D. The Delivery of Humanitarian Aid

UNPROFOR also exercised caution with respect to the delivery of humanitarian aid. When the Secretary-General was formally authorized towards the end of June to deploy additional elements of UNPROFOR to ensure the security and functioning of Sarajevo airport, this included a specific mandate to "ensure the delivery of humanitarian assistance".[93] Before having been authorized to take on this role, the Secretary-General had noted that "it has to be remembered that for some of the parties the infliction of hardship on civilians is actually a war aim, as it leads to the desired movements of population from certain areas. Therefore there appears to be a predisposition to use force to obstruct relief supplies."[94] In spite of this discouraging finding, the Secretary-General concluded that the most promising course would be to make a determined effort to persuade the warring parties to conclude and honour agreements permitting the unimpeded delivery of relief supplies to all suffering civilians in the Republic of Bosnia and Herzegovina.[95]

UNHCR, the lead agency in rendering humanitarian relief in the Republic of Bosnia and Herzegovina, had already commenced humanitarian deliveries to the Republic in May 1992.[96] However, the agency reported that its overland convoys were suffering from obstruction.[97] In the light of these difficulties, the Security Council authorized the use of UNPROFOR for the protection of UNHCR-organized humanitarian convoys.[98]

Even at that early stage, the UN forces came equipped with a tough mandate. In accordance with standard peace-keeping practice, UN troops

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[92] For example, flight operations had been suspended after an Italian relief plane was shot down on 3 September. UNHCR Update, 21 July 1992, 16 September 1992.

[93] Resolution 761 (1992), 29 June 1992, emphasis added.

[94] Report of the Secretary-General Pursuant to Security Council Resolution 752 (1992), para 18, S/24000, 25 May 1992.

[95] Id., para 23.

[96] UNHCR Update, 19 May 1992.

[97] UNHCR Update, 7 July 1992.

[98] Resolution 776 (1992), 14 September 1992.

were authorized to use force if they were forcibly inhibited in the implementation of their humanitarian mandate.[99] In this connection, the UN Secretary-General concluded that, although UNPROFOR was pioneering a new dimension of peace-keeping by engaging in armed convoy protection, this would not require a deviation from these standard rules of engagement. Still, "in convoy protection duties, United Nations troops may have to move beyond the usual peace-keeping mode of impartiality between the two parties to a conflict who have both agreed to the United Nations role. They themselves may become a party to a conflict with whoever tries to block, rob or destroy the convoy which they are protecting."[100] The Secretary-General promised to watch carefully this aspect of the new operation in the Republic of Bosnia and Herzegovina.

Despite the views of the Secretary-General that a Chapter VI mandate would be sufficient, the Council actually indirectly invoked broad Chapter VII authority when endorsing UNPROFOR's role in protecting humanitarian relief supplies in Resolution 776 (1992) of 14 September 1992. Resolution 776 (1992) was not adopted under Chapter VII, but it referred to the enlargement of UNPROFOR's mandate and strength "in implementation of paragraph 2 of Resolution 770 (1992)". Resolution 770 (1992), which will be discussed at greater length in the section which follows, had been adopted under Chapter VII and provided for the use of force by states and regional organizations (not UNPROFOR), if necessary to facilitate the delivery of humanitarian aid.[101] India criticised the wording of Resolution 776 (1992), arguing that it deviated from the Secretary-General's report which could have taken "us away from the complications created by Resolution 770 (1992)".[102] But India's objections related to process, rather than substance, indicating that it would have been preferable if Resolution 776 (1992) would have been adopted directly under Chapter VII.[103] China, on the other hand, objected to any action

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[99] "In providing protective support to UNHCR-organized convoys, the UNPROFOR troops concerned would follow normal peace-keeping rules of engagement. They would thus be authorized to use force in self-defence. It is to be noted that, in this context, self-defence is deemed to include situations in which armed persons attempt by force to prevent United Nations troops from carrying out their mandate. These considerations are particularly relevant in the current tense situation in the proposed area of operation". Report of the Secretary-General, para 9, S/24540, 10 September 1992.

[100] Report of the Secretary-General Pursuant to Security Council Resolution 743 (1992), para 49, S/24848, 9 November 1992.

[101] See below, at section III.A.

[102] S/PV.3114, 14 September 1992, at 7.

[103] Id.

which would remove UNPROFOR from a peace-keeping mandate, recognizing, however, that the resolution as adopted "approves the use of force in self-defence when troops are blocked by armed forces".[104]

However, UNPROFOR did not apply this mandate with great vigour. Instead of insisting, through the use of force if necessary, on the freedom of movement necessary to ensure the delivery of humanitarian aid, UN protected convoys often capitulated to local troops forcibly inhibiting their progress, and turned back to their bases, preferring to attempt to negotiate their way through.[105] Even when attacked while on convoy protection duty, UNPROFOR rarely returned fire, although this attitude changed somewhat as the years went by. UNPROFOR even failed to resist the murder of Hakija Turajlic, Deputy Prime Minister for Economic Affairs of the Republic of Bosnia and Herzegovina. He was dragged out of an UNPROFOR armoured personnel carrier while under UNPROFOR protection and killed by Bosnian Serb forces.[106] In the light of these failings, the United Nations Security Council soon abandoned the legal framework of traditional peace-keeping and opted for the formal invocation of Chapter VII measures.

III. From Peace-Keeping to Peace-Enforcement and "Safe Areas"

As was noted above, the Security Council had already demanded in May 1992 that all parties and others concerned create immediately the necessary conditions for unimpeded delivery of humanitarian supplies to Sarajevo and other destinations in Bosnia and Herzegovina. This demand had been adopted formally under Chapter VII of the Charter. UNPROFOR had nevertheless been engaging in the somewhat inconsistent strategy of attempting to persuade the parties to comply with Security Council demands that were supposed to be mandatory and not subject to negotiation. As early as August 1992, a first attempt was made to circumvent UNPROFOR and take action principally outside of the control of UN headquarters.

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[104] Id., at 12. Also Zimbabwe, id., at 4.
[105] E.g., UNHCR Update, 25 November 1992, 28 November 1992, 12 February 1993.
[106] E.g., Statement by the President of the Security Council S/25079, 8 January 1993.

A. Enforcement under Resolution 770 (1992)

On 13 August 1992, the Security Council formally recognized in accordance with the procedural requirements of Article 39 of the UN Charter "that the situation in Bosnia and Herzegovina constitutes a threat to international peace and security and that the provision of humanitarian assistance in Bosnia and Herzegovina is an important element in the Council's effort to restore international peace and security in the area." Acting under Chapter VII of the Charter, it called upon:

> "States to take nationally or through regional agencies or arrangements all measures necessary to facilitate in coordination with the United Nations the delivery by relevant United Nations humanitarian organizations and others of humanitarian assistance to Sarajevo and wherever needed in other parts of Bosnia and Herzegovina; ... ."[107]

This mandate was extraordinarily wide, permitting the use of force by states and regional agencies to ensure the delivery of humanitarian aid throughout all of the Republic of Bosnia and Herzegovina. It was not meant to apply to UNPROFOR, but was instead only available to states and regional organizations and agencies. These were merely requested to coordinate their activities with the UN. The rationale for this dramatic action on the part of the Council was left beyond doubt. As the Austrian delegate to the Council explained:

> "Whether we allow the Serbian forces effectively to block food and humanitarian deliveries is a test to our moral standards. This intolerable practice is being applied not only to Sarajevo, but also to Gorazde, Bihac and many other places in Bosnia and Herzegovina. Blocking food and humanitarian deliveries is, in fact, regarded by the aggressor as a highly efficient means of forcing the non-Serbian population to flee and give up their property, for this is precisely the Serbian aim of the conflict: to 'cleanse' part of this country of the non-Serbian population."[108]

While it was generally hoped by the members of the Council that it would not be necessary to use force, "the Council did not wish to overlook the possibility that circumstances might make the use of coercive measures necessary, and in that light, has resolved to authorize States to proceed to take even measures of that nature to ensure the delivery of humanitarian assistance".[109] India, although voicing concern about the possibility of exercising international control over such operations, had "no

[107] Resolution 770 (1992), 13 August 1992.
[108] Austria, S/PV.3106, 13 August 1992, at 22, 23.
[109] Ecuador, id., at 8, 9. See also the statement of the Russian Federation, id., at 27.

doubt whatever that the critical and desperate plight of the population demands an urgent and effective response on the part of the international community and that such a response cannot and must not exclude the use of force. There should be no misunderstanding on this score".[110] Zimbabwe, when voicing criticism of the resolution, confirmed that its wording would "empower any State which feels able and so inclined to use military force in any part of Bosnia and Herzegovina in the name of the United Nations, but without any control from or accountability to the United Nations".[111] The extraordinarily broad terms of the mandate and the right to administer it independently from the UN were also noted by China, which considered it being "tantamount to issuing a blank check".[112]

B. Frustrating the Aim of Resolution 770 (1992)

Apparently, what was envisaged by the supporters of Resolution 770 (1992) was a relief operation "to supplement and expand the existing humanitarian operations",[113] carried out "by those States that have the resources to do so to ensure, finally, the distribution of humanitarian assistance"[114] in recognition of the fact that "the international community is duty bound to take action to allow humanitarian assistance to reach those for whom it is intended".[115] While coordination with the United Nations was promised, this operation was to be run by a coalition of states acting principally independently. France indicated that the Western European Union had already begun to consider how this concept could be implemented.[116] The aim of this manoeuvre was quite clearly to transfer enforcement tasks away from the UN Secretariat to organizations which would be less hesitant in using force, if necessary.

In fact, a number of states made offers to make available military personnel to facilitate the delivery by relevant United Nations humanitarian organizations and others of humanitarian assistance, following upon the adoption of Resolution 770 (1992).[117] However, in accordance with the

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[110] Id., at 11, 12.
[111] Id., at 16.
[112] Id., at 51.
[113] United Kingdom, id., at 34, 35.
[114] Belgium, id., at 45.
[115] France, id., at 47.
[116] Id.
[117] Resolution 776 (1992), preamble.

wishes of certain states on the Council, these offers were then integrated by the UN Secretariat into the context of Resolution 776 (1992) relating to UNPROFOR, rather than individual states or regional organizations and arrangements, and possibly providing for a peace-keeping, rather than a peace-enforcement mandate.[118] As was noted above, Resolution 776 (1992) extended UNPROFOR's mandate to armed convoy protection "in implementation of paragraph 2 of Resolution 770 (1992)". Hence, UNPROFOR appeared to take over the function that had originally been assigned to states or regional organizations or arrangements. In this way, the perceived danger of permitting individual states, especially Islamic states, to intervene on their own in order to achieve what UNPROFOR had failed to achieve, through military means if necessary, was avoided. As the Secretary-General put it, this assured "the Security Council's control of the operation".[119]

The fears of some delegations that the link between Resolutions 770 (1992) and 776 (1992) would endow UNPROFOR with military enforcement powers which went beyond the extensive interpretation of the right of self-defence in overcoming a forcible disruption of the implementation of a peace-keeping mandate were unfounded.[120] In fact, the opposite occurred. Not only did Resolution 776 (1992) remove the possibility of operations run more or less independently from UNPROFOR, but the authority to use "all necessary measures" contained in Resolution 770 (1992) was reduced to the "normal peace-keeping rules of engagement. They would thus be authorized to use force in self-defence [which] ... is deemed to include situations in which armed persons attempt by force to prevent United Nations troops from carrying out their mandate."[121] Hence, the dramatic move made by the Council in adopting Resolution 770 (1992) was effectively robbed of its content. It was therefore not surprising that UNPROFOR's authority continued to be flouted and further changes to its mandate were proposed in the Security Council.

C. The Self-Protection Enforcement Mandate

In February 1993, UNPROFOR's apparent peace-keeping mandate was formally changed to a Chapter VII mandate to ensure the security of

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[118] Id. See Report of the Secretary-General, S/24540, 10 September 1992, para 1.
[119] Id., para 18.
[120] *Supra*, at notes 110–112.
[121] Note 118, at para 9.

UNPROFOR, demanding in this context full respect for UNPROFOR's unimpeded movement.[122] This action had been taken principally in the light of UNPROFOR's difficulties in Croatia, but was also to apply with respect to its mandate and operations in the Republic of Bosnia and Herzegovina. In subsequent resolutions relating to UNPROFOR, this Chapter VII mandate was consistently restated.[123]

If one accepts the extended definition of the Secretary-General of the right to self-defence of UN peace-keeping forces, then this change did not make much difference in terms of the legal authority of UNPROFOR to use force. Self-defence and the right to enforce the implementation of the mandate if obstructed had been available from the very beginning of the operation. This authority was now simply recast in the terms of military enforcement. It seems that this change was intended as a political threat, indicating to the Serb side that the Council was increasing its commitment to UNPROFOR's role. Yet, on the ground UNPROFOR continued to avoid exposing itself to the risk of insisting on the full implementation of this mandate. Instead of unambiguously demanding humanitarian access, authorization for passage was sought and negotiations for convoy clearances were conducted. Even cleared convoys were sometimes plundered by Serb forces and demands were made that they should receive, by way of equivalence, the same supplies that were being transported to starving civilians.[124]

D. The Establishment of So-Called Safe-Havens

Partially to make up for the failings of UNPROFOR, and the resulting widespread suffering of encircled civilian populations that were left without humanitarian support, and were, in addition, subjected to direct mili-

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[122] Resolution 807 (1993), 19 February 1993.

[123] E.g., Resolution 815 (1993), 30 March 1993.

[124] UNHCR Update, 18 March 1993, 1 June 1993, UNHCR Information Notes, No. 5, 25 April 1993, at 2; No. 10, October 1993, at 3; No. 11, November 1993, at 2; No. 1, January 1994; No. 2, February 1994, at *iii;* No. 12, December 1994, at *ii;* No. 1, 1991, at *ii*, etc. Some exceptions to this practice were occasionally reported. Thus, newly arrived UNPROFOR commander Rose was reported to have managed to achieve the opening of a Serb checkpoint through the threat of force on 3 February 1994. Barber, UN Threat Forces Serbs to Open Road, The Independent, 4 Febraury 1994, at 10. The fact that this tactic worked in this instance makes it even more difficult to understand why, despite the UN mandate, it was not utilized more widely. At any rate, General Rose soon changed his approach and became most accommodating to the Serb side, e.g., Rose Considered Showing Airstrike Plans to Serbs, The [London] Times, 16 January 1995, at 12.

tary attack, the Council had called upon the Secretary-General "to study the possibility of and the requirements for the promotion of safe areas for humanitarian purposes", as early as November 1992.[125] However, instead of pursuing this proposal with urgency, the Security Council admitted the defeat of UNPROFOR's attempts to render effective humanitarian aid through overland convoys by authorizing air drops of humanitarian supplies.[126]

By March 1993, the situation in certain isolated enclaves, mostly in East Bosnia, had worsened even further.[127] The UN High Commissioner for Refugees reported to the UN Secretary-General that in Srebrenica alone 30 or 40 persons were dying per day from direct military attacks by the surrounding Serb forces, and from starvation, exposure or lack of medical treatment.[128] The UN Secretary-General found that "it is becoming starkly evident that a massive humanitarian tragedy may be unfolding in Eastern Bosnia and Herzegovina, as the result of defiance by Serb elements of the resolutions of the Security Council".[129]

It was not until a month later that the Council responded with action to the reports of the ever worsening Serb campaign of strangulating and bombarding enclaves filled with displaced persons.[130] However, even that response was initially hesitant. On 16 April, the Council declared, in Resolution 819 (1993), that the town of Srebrenica and its surroundings constituted forthwith a "safe area", demanding that it should be free from any armed attack or hostile acts, that Serb units surrounding Srebrenica should withdraw and that humanitarian aid should be allowed into the enclave. The resolution and the speeches of delegations at its adoption, and

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[125] Resolution 787 (1992), 16 November 1992. As noted above, the placing of Sarajevo airport under UNPROFOR control had already been intended as a first step in the creation of a so-called safe area in that region.

[126] Statement by the President of the Security Council, S/25334, 25 February 1993.

[127] Already on 11 March 1993, General Morillon had entered Srebrenica and perhaps somewhat reluctantly vowed to ensure its protection, after the population had refused to let him and his party leave. This action led to great consternation on the part of some of the more prudent members of the Security Council, especially the United Kingdom.

[128] Letter from the Secretary-General to the President of the Security Council, S/25456, 22 March 1993.

[129] Id. The UN High Commissioner for Refugees also called for "more drastic action [that] needs to be taken to ensure the survival of the population of Srebrenica", Letter from the Secretary-General to the President of the Security Council, S/25519, 2 April 1993.

[130] In fact, some six weeks earlier, the Council had recorded its awareness and condemnation of the desperate situation in Eastern Bosnia in a number of Presidential statements which indicated its readiness "to meet at any moment to consider further action", S/25361, 3 March 1993.

subsequent thereto, confirmed that this was to be a temporary measure, in no way intended to endorse the near completion of ethnic cleansing by permanently penning large numbers of displaced persons into a small enclave. The resolution also did not provide for the disarming of the remaining defenders of the enclave. However, by the time of the adoption of the resolution, the Government of the Republic of Bosnia and Herzegovina had already been forced by the Serb offensive to conclude an agreement with General Mladic's Serb forces to disarm its own troops in the enclave.

Resolution 819 (1993) had been adopted under Chapter VII, but in the context of the previous resolutions which concerned the protection of UNPROFOR and its freedom of movement. A small unit of UNPROFOR troops was to be deployed in the so-called safe area to monitor the situation.

The Council also decided to dispatch a delegation of its own representatives to Srebrenica, to report on the situation on the ground. This decision manifested a growing rift between a significant number of Council members and the Secretariat. While the Council had pursued the idea of so-called safe areas for several months, the Secretariat had resisted such moves, indicating informally that it was not equipped to implement the concept. Great upset was caused when the Secretary-General had apparently failed to update the Council in a timely fashion on the rapidly deteriorating situation in Srebrenica and the imminent fall of the city. Resolution 819 (1993) therefore had to be adopted in a great rush, without significant debate, and at a point in time when the defenders of the enclave had effectively surrendered.

The Security Council Mission found that the enclave held some 70,000 people, of whom approximately 10,000 were locals. It found that the "prevailing conditions of overcrowding, lack of drinking water, sanitation and basic medical assistance represented an extraordinarily dramatic and cruel situation for the people of Srebrenica".[131] The Mission described the enclave as an "open jail in which its people can wander around but are controlled and terrorized by the increasing presence of Serb tanks and other heavy weapons in its immediate surroundings".[132]

The Security Council Mission appeared surprised by the fact that the Srebrenica authorities had been forced to negotiate their virtual surrender to the surrounding Serb forces and to accept disarmament while the civil-

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[131] Report of the Secretary-General Pursuant to Security Council Resolution 819 (1993), para 8, S/25700, 30 April 1993.

[132] Id., para 18.

ians crowded into the city had been under constant attack in defiance of mandatory orders of the Council. These negotiations, conducted under UNPROFOR supervision, had been initiated at least a month before the Security Council was informed of the imminent fall of the city. The Mission noted that when the Council discussed Resolution 819 (1993), it did not know that negotiations involving the Force Commander of UNPROFOR had been taking place and that UNPROFOR had participated actively in the drafting and "in the process of convincing a Bosnian Commander to sign the agreement". As the alternative could have been a massacre of 25,000 people, the Mission expressed some understanding for the action of UNPROFOR. Nevertheless, the Mission had to report that the Bosnian government had been reminded by UNPROFOR officers that no outside support would be forthcoming and they were evidently defenceless. "They had to sign the agreement under duress".[133]

E. The Expansion of the So-Called Safe Areas

The Security Council Mission proposed the establishment of further safe areas. However, this time preventative action was recommended, instead of having to await the final moment before the eradication of enclaves filled with displaced persons. The Mission also reported the anguish and deep frustration of UNPROFOR soldiers in the field "with regard to the restrictions under which they operate". The then Force Commander General Wahlgren informed the mission that "more intensive" peacekeeping by his force in Bosnia should be possible.[134] It is interesting to note that the report of the Mission appears to represent one of the very few instances in which the views of those operating on the ground were actually brought to the attention of the Council in a formal way.

In response to the report of the Mission, the Council declared in Resolution 824 (1993) that the capital city of the Republic of Bosnia and Herzegovina, Sarajevo, and other such threatened areas, in particular the towns of Tuzla, Zepa, Gorazde and Bihac, as well as Srebrenica, and their surroundings, should be treated as safe areas by all the parties concerned and should be free from armed attacks and any other hostile act.[135] It might be argued that the resolution established so-called safe area status

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[133] Id., para 13.

[134] Id., para 44. General Wahlgren was soon replaced as commander, after he had attempted to use UNPROFOR to protect threatened populations in the Bihac area.

[135] Resolution 824 (1993), 6 May 1993.

also for "other such threatened areas", and not merely for the towns and cities which were actually listed by name. This view would certainly have been consistent with the aim of the sponsors of the safe areas concept in the Council to ensure gradually that civilian populations throughout the territory of the Republic would not be subjected to direct attack or starvation.[136] The UN Secretary-General initially invoked this broader approach to justify UNPROFOR mediatory action with respect to Mostar, which had not been declared a so-called safe area.[137] However, subsequent efforts to strengthen this interpretation by formally extending so-called safe area status were not crowned with success.[138]

In Resolution 824 (1993), the Council declared that in these safe areas the following should be observed:

> "(a) The immediate cessation of armed attacks or any hostile act against the safe areas, and the withdrawal of all Bosnian Serb military or paramilitary units from these towns to a distance wherefrom they cease to constitute a menace to their security and that of their inhabitants to be monitored by United Nations military observers;
>
> (b) Full respect by all parties of the rights of the United Nations Protection Force (UNPROFOR) and the international humanitarian agencies to free and unimpeded access to all safe-areas in the Republic of Bosnia and Herzegovina and full respect for the safety of the personnel engaged in these operations; ...".[139]

The task of the 150 UNPROFOR troops which were to be deployed in the "safe areas" was, initially, not to defend the enclaves, but rather to "monitor" the situation.[140] Again, Chapter VII was formally invoked, but only in the context of the protection of UNPROFOR and its freedom of movement. However, the Council declared its readiness, in the event of the failure by any party to comply with the resolution, to consider immediately the adoption of any additional measures necessary with a view to its full implementation, including to ensure respect for the safety of United Nations personnel.[141]

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[136] E.g., Venezuela, S/PV.3208, 6 May 1993, at 22: "Nor is there any doubt that the Council will have to exert every possible effort to make all of the former Yugoslavia a safe area".

[137] Letter dated 14 May 1993 from the Secretary-General Addressed to the President of the Security Council, S/25624, 22 May 1993.

[138] *Infra*, notes 185, 193.

[139] Resolution 824 (1992), 6 May 1993.

[140] Id., para 6.

[141] Id., para 7. The word "including" would suggest that other violations of the "safe area" concept would also trigger further measures.

F. Resolution 836 (1993)

When further atrocities were being committed against the so-called safe areas, the Council moved towards the adoption of the additional measures it had threatened. On 19 May, France made a detailed proposal for the implementation of the so-called safe area concept. It defined a "safe area" as "a besieged area, with a precisely defined perimeter, placed under the protection of the United Nations, in which the delivery of humanitarian assistance is ensured and all acts of aggression [are] banned. ... The general aim of the scheme should be to stop territorial gains by the Serbian forces in Bosnia and Herzegovina and to achieve a negotiated settlement by the parties concerned."[142] The mandate of UNPROFOR was to be modified in order to give it the task of ensuring, more clearly than in Resolution 824 (1993), the security of the "safe areas". To this end, a new resolution should provide explicitly for the possibility of recourse to force, by all necessary means. The French proposal identified three options:

An ultra light option consisting of several dozen observer teams for each of the areas, to

- deter aggression
- observe the cease-fire
- facilitate relief operations to the populations.

A medium light option requiring for the monitoring of limited perimeters the deployment of 5,000 men in Sarajevo, and four battalions of about 900 men for the other areas, to

- deter aggression
- monitor the cease-fire
- occupy some key points on the ground
- participate in relief operations to the population.

Finally, there could be a heavy option, requiring for the establishment of a larger perimeter and the prevention of any "enemy aggression", particularly artillery attacks, some 15,000 to 20,000 troops for Sarajevo and four brigades of about 5,000 each for the other areas, to

- oppose any aggression
- monitor the cease-fire
- occupy key points on the ground
- participate in relief operations to the population

[142] Note verbale from the Permanent Representative of France to the United Nations addressed to the President of the Security Council, S/25800, 19 May 1993.

– keep open one or more logistic corridors through Serb areas
– if necessary collect heavy weapons and carry out demilitarization.

Provision was also made for an "intervention unit" consisting of a 3,000 strong light brigade, and the use of air power in order to be able to confront potential major aggression. The criteria for triggering the use of force, apparently for all three options, would be shelling of the areas by the forces of "one of the factions", armed incursions into safe areas, and the impediment of free movement of UNPROFOR and humanitarian convoys under protection. France recommended US and Russian participation in the plan to add credibility to the concept of "safe areas", which, in the French view, might make the light options sufficient. In addition, the UN Secretary-General was invited to establish a political authority and a command organization capable of ensuring coordination between ground and air forces.

The Security Council considered this plan in private consultations. During those discussions, the UN Secretary-General is said to have presented an oral report, expressing scepticism about the possibility of actually enforcing the so-called safe areas concept. The Secretary-General, while endorsing the aim of attempting to protect civilians, resisted the French idea of committing UNPROFOR to the apparent defence of the territory on which they were crowded together. He reportedly indicated that, in the absence of a cease-fire, which was an unlikely contingency, the UN would have to establish a military "protectorate" in each of the areas.[143] In the absence of such a clear cut arrangement, it would remain unresolved what would happen if the aggressors were to accept the establishment of safe areas but refused to withdraw from their surroundings. Would the Security Council be prepared to authorize military action in order to meet this objective, the Secretary-General reportedly enquired.[144]

This critical report of the Secretary-General, which would have required the Council to define the so-called safe areas concept with some clarity, and to reach clear decisions as to its military enforcement, was suppressed.[145] In fact, there was no formal Secretary-General's report defining the proposed implementation of the so-called safe areas concept before the adoption of Resolution 836 (1993) on 4 June. Instead, the resolution invoked the French proposal in its preambular paragraph.

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[143] Reported by Venezuela, S/PV. 2338, 4 June 1993, at 16 et seq.
[144] Id.
[145] Id.

Resolution 836 (1993) must be quoted in some detail, due to its crucial importance for the discussion which follows. Acting formally under Chapter VII of the Charter of the United Nations, the Council:

"3. Reaffirms the unacceptability of the acquisition of territory by the use of force and the need to restore the full sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina;

4. Decides to ensure full respect for the safe areas referred to in resolution 824 (1993);

5. Decides to extend to that end the mandate of UNPROFOR in order to enable it, in the safe areas referred to in resolution 824 (1993), to deter attacks against the safe areas, to monitor the cease-fire, to promote the withdrawal of military or paramilitary units other than those of the Government of the Republic of Bosnia and Herzegovina and to occupy some key points on the ground, in addition to participating in the delivery of humanitarian relief to the population as provided for in resolution 776 (1992) of 14 September 1992;

6. Affirms that these safe areas are a temporary measure and that the primary objective remains to reverse the consequences of the use of force and to allow all persons displaced from their homes in the Republic of Bosnia and Herzegovina to return to their homes in peace ...

...

9. Authorizes UNPROFOR, in addition to the mandate defined in resolutions 770 (1992) of 13 August 1992 and 776 (1992), in carrying out the mandate defined in paragraph 5 above, acting in self-defence, to take the necessary measures, including the use of force, in reply to bombardments against the safe areas by any of the parties or to armed incursion into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected humanitarian convoys;

10. Decides that, notwithstanding paragraph 1 of resolution 816 (1993), member states, acting nationally or through regional organizations or arrangements, may take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures, through the use of air power, in and around the safe areas in the Republic of Bosnia and Herzegovina, to support UNPROFOR in the performance of its mandate set out in paragraphs 5 and 9 above;

11. Requests the Member States concerned, the Secretary-General and UNPROFOR to coordinate closely on the measures they are taking to implement paragraph 10 above and to report to the Council through the Secretary-General; ...".[146]

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[146] Resolution 836 (1993), 4 June 1993.

This mandate consists of two main parts, one relating to UNPROFOR and one to NATO. Both mandates are framed in confusing terms which might admit to differing interpretations relating to the authority to use force. Before addressing this confusion, it must be pointed out, however, that the mandate contained in Resolution 836 (1993) was supplementary to, and did not detract from, the mandates that had been established in previous resolutions (paragraph 9).

UNPROFOR was authorized to use all necessary means, explicitly including armed force. This use of force was described as the exercise of the right to self-defence. Hence, it might be argued that in essence Resolution 836 (1993) did not add any further authority for UNPROFOR, because it merely restated the right of self-protection should UNPROFOR itself come under direct armed attack.

However, the substance of the Chapter VII authorization to use force contained in the resolution clearly extended beyond the bounds of the traditional definition of the right of self-defence for UNPROFOR in general international law or under the more expansive UN definition of self-defence in peace-keeping situations. Thus, according to this second interpretation, UNPROFOR received additional authority to use force in reply to bombardments against the so-called safe areas and in reply to armed incursions. That is to say, UNPROFOR was authorized to act not only in its own defence, but also in defence of the so-called safe areas should those be subjected to bombardment or incursion.[147] According to this interpretation, the reference to self-defence was perhaps intended to present this mandate as one which would still be consistent with the "neutrality" that some demanded of UNPROFOR. In addition, it was a necessary gesture to allow China, which generally opposes all UN mandates involving the use of force other than in self-defence, to permit passage of the resolution. However, the specific language used in the resolution would leave no doubt as to the substance of the threat of the use of force, relating explicitly to the defence of the so-called safe areas and humanitarian convoys. At least this is what the record of the Council's debate would indicate.[148] Even Mr Vorontsov, the Permanent Representative of the Russian Federation to the United Nations, stated upon the adoption of Resolution 836:

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[147] The authorization to use force in the event of any deliberate obstruction in or around the so-called safe areas and to protect humanitarian convoys did not add substantively to the authority already given.

[148] This was the view eventually taken by the UN Secretary-General. Report of the Secretary-General Pursuant to Resolution 844 (1993), para 4, S/1994/555, 9 May 1994.

"Henceforth, any attempted military attacks, shooting and shelling of safe areas, any armed incursions into those areas, and any hindrance of delivery of humanitarian assistance will be stopped by United Nations forces by using all necessary measures, including the use of armed force."[149]

Of course, ultimately, the aim of the use of force was to ensure respect for the "safe areas". This was to be achieved through deterrence against attacks, monitoring, promotion of the withdrawal of military or paramilitary units other than those of the Government, the taking up of key positions on the ground, and participation in the delivery of humanitarian relief to the population. It might be argued in a third interpretation of the resolution that the use of force would be available for the achievement of all of these functions which are enunciated in paragraph 5. After all, according to paragraph 9, the authority to use force was granted "in carrying out the mandate defined in paragraph 5". However, such an expansive interpretation, going beyond Russia's statement made upon the adoption of Resolution 836 (1993), was apparently not intended.

Following upon the adoption of the resolution, the UN Secretary-General, on the advice of the UNPROFOR Force Commander and remarkably in line with heavy option identified in the initial French proposal, estimated that it would require approximately 34,000 extra troops to implement the mandate contained in Resolution 836 (1993). He then concluded, in line with the second French option, that a "light option" providing for 7,600 more UNPROFOR troops might also be sufficient.[150] The Council, in Resolution 844 (1993) of 18 June 1993, then authorized this light option which, according to the Secretary-General, assumed "the consent and cooperation of the parties and provides a basic level of deterrence .... It does, however, maintain provision of the use of close air support for self-defence and as a supplementary deterrent to attacks on the safe areas".[151]

It appears that the published Secretary-General's report put forward after the adoption of Resolution 836 (1993) restated some of the conclusions put to the Council during the consultation phase which preceded its adoption, and which may have influenced the crafting of its somewhat confusing terms. Paragraph 5 of Resolution 836 (1993) appears to combine various elements of the functions foreseen for UN troops in all three

[149] S/PV. 3228, 4 June 1993, at 46. The resolution was adopted by 13 votes in favour, none against and two abstentions (Pakistan and Venezuela).

[150] Report of the UN Secretary-General, S/25939, 14 June 1993.

[151] Id., para 6.

of the options that had been proposed by France, including those reserved for the heavy option. According to the French proposal and to the Secretary-General's report, this would have required the additional deployment of some 34,000 troops, which, it was known at the time, would not be made available. In recognition of this fact, paragraph 9 relating to the use of force appeared to restate merely the functions which had been envisaged in the French light options, and was separated from paragraph 5, describing the overall task of UNPROFOR which matched the French mode of operations for the heavy option. The force that was actually committed in Resolution 844 (1993) to the so-called safe areas also corresponded to the French proposal for a medium light option. It could therefore be suggested that an informal agreement may have been reached in consultations among key members of the Council to the effect that a resolution demonstrating international resolve would be adopted with respect to the broader aims of the so-called safe areas concept, as is evidenced in paragraph 5 of the resolution. At the same time, the resolution, in paragraph 9, really only committed the UN to the actual enforcement of the more limited functions which had been identified in the French proposals for the light options. These options relied less on the defence of the so-called safe areas, and more on deterrence based on the mere presence of a more or less symbolic UN force. In order to make that deterrence work, however, it was necessary to commit that light force, along with NATO air power, at least to the defence of the so-called safe areas against the main threats of bombardment, incursion or enforced starvation.

The second part of the mandate, concerning the authority of NATO, might also be subject to some dispute. NATO was authorized to use air power in support of UNPROFOR's mandate established in Resolution 836 (1993). More specifically, NATO airpower was to be made available to support UNPROFOR in the performance of its mandate "set out in paragraphs 5 and 9" of the resolution. Hence, UNPROFOR itself may only have been authorized to use force in the implementation of paragraph 9, or even only in self-defence, whereas NATO air power was also available to enforce the achievement of UNPROFOR's functions under paragraph 5, that is, to deter attacks in a wider sense, to achieve the withdrawal of heavy weapons other than those of the Government of the Republic of Bosnia and Herzegovina, to assist UNPROFOR in occupying key positions on the ground and to monitor the situation, in addition to participating in the delivery of humanitarian aid. This division of functions might have been intended to ensure that UNPROFOR on the ground could continue to claim so-called neutrality, inasmuch as its en-

forcement powers were limited to ensuring the very integrity of the so-called safe areas. Unrealistically, it was assumed that UNPROFOR would not be held accountable for air action that might be carried out by NATO in pursuit of its broader military enforcement mandate, which coincided with UNPROFOR's broader role under paragraph 5 of Resolution 836 (1993).

Of course, the application of air power was intended for the support of UNPROFOR and would not come into play unless UNPROFOR actually fulfilled these wider functions. And as NATO operations were to be conducted in close coordination with UN authorities (effectively under UN control), the distinction between UNPROFOR and NATO was difficult to maintain. Hence, the NATO mandate was to be exercised with the same caution as that of UNPROFOR.[152] Russia, in particular, interpreted the requirement of NATO action to be taken "under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR" to mean that no forcible action involving NATO could be undertaken in the absence of a decision from the UN Secretary-General. The Secretary-General, in turn, would be obliged to consult with the Security Council.[153] Hence, Russia would retain its influence in the implementation of the mandate, and would be able to prevent the use of force in individual instances.[154] The clear cut threat apparently endorsing an almost automatic use of force in certain circumstances made by the Russian delegate at the time of the adoption of Resolution 836 (1993) was thus robbed of much of its substance.[155]

Thus, it could be argued that the complex terms of Resolution 836 (1993), apparently clarified by the strong threats made by states, including Russia, merely disguised the fact that, at least in the view of some members of the Council, no real change in the mandate for UNPROFOR had occurred at all, even in the limited context of the protection of the so-called safe areas.

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[152] It is interesting to note that this resolution, as opposed to many others with less relevance to regional security arrangements and their role in the crisis, did not refer to Chapter VIII in its preambular paragraph.

[153] *Infra*, notes 169, 177, 223, 305.

[154] *Ibid.*

[155] The Russian understanding on this issue was however already challenged when Resolution 836 (1993) was adopted. New Zealand argued that "the draft resolution does not require any further study by the Council, or an additional report from the Secretary-General, or, strictly, even a further meeting of the Security Council." S/PV. 2338, 4 June 1993, at 31.

This somewhat cynical analysis appears to have been shared by some delegations at the time of the adoption of Resolution 836 (1993). Venezuela, in particular, had been active in the pursuit of the so-called safe areas concept ever since it had led the Security Council Mission to Srebrenica. However, it abstained, along with Pakistan, from the vote on Resolution 836 (1993) which supposedly implemented the very concept it had promoted earlier. The delegate from Venezuela explained:

> "... safe areas ... should be temporary, intermediate steps in the peace process. They should not be a substitute for peace or a solution to the problems faced by threatened peoples. They should provide a minimum of safety for the 'normal' life of their inhabitants, and they should be open areas where respect for human rights can be verified and humanitarian assistance can be received unimpeded. They should not confine people as if they were in prison. ...
>
> In addition to being provided security against military attack, which would only be possible by seizing or neutralizing the heavy armaments of the Serbs, and humanitarian assistance, these areas should be able to restore their civil government, local police, schools, productive activities and social services.
>
> The conditions I have described are almost the exact opposite of those existing today in the so-called safe areas, and the draft resolution before us does not address their main points. We should call them what they are: ghettos, refugee camps, open jails, areas under threat; but we should never be so brazen as to call them 'safe areas'."[156]

The Republic of Bosnia and Herzegovina herself also appears to have been aware of the understanding which may have underpinned Resolution 836 (1993). Opening the debate that led to its adoption, Ambassador Sacirbey sharply criticised the proposed "safe area" regime, indicating that they were being administered like "an open concentration camp, where disease, hunger and despair have replaced shells and bullets as the tools of genocide." He added that there was little confidence to be placed in the resolve of UN mandated forces to defend the areas. Instead, he predicted that the UN forces would eventually decide that the areas were too costly and risky to maintain and eventually cooperate in their elimination.[157]

The practice of the Council with respect to the so-called safe areas appears to have validated such scepticism.

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[156] S/PV. 2338, 4 June 1993, at 22–24, emphasis added.

[157] Id., at 5–5a.

IV. The Implementation of the "Safe Areas" Concept

NATO initially responded to the adoption of Resolution 836 (1992) in a way which appeared to mirror a restrictive understanding of its terms.

A. Close Air Support

At its Ministerial Meeting of 10 June 1993 the North Atlantic Council offered "protective airpower in case of attack against UNPROFOR in the performance of its overall mandate, if it so requests."[158] This declaration related exclusively to the protection of UNPROFOR forces and did not reflect the apparent mandate granted in Resolution 836 (1993). In a further statement NATO stressed however the "humanitarian nature" of its mandate, and added on 2 August:

> "3. The Allies regard the dire humanitarian situation in Bosnia-Herzegovina and particularly in Sarajevo, including repeated violations of cease-fires, as unacceptable. They warn the parties to the conflict of their determination to take effective action in support of UN Security Council decisions. Since 22 July the Alliance has been ready to provide protective air power in case of attack against UNPROFOR in the performance of its overall mandate, on the basis of UN Security Council resolution 836. The Alliance has now decided to make immediate preparations for undertaking, in the event that the strangulation of Sarajevo and other areas continues, including wide-scale interference with humanitarian assistance, stronger measures including air-strikes against those responsible, Bosnian Serbs and others, in Bosnia-Herzegovina."[159]

On 9 August NATO took a further decision, again confirming that "the air strikes foreseen by the Council decision of August 2 are limited to the support of humanitarian relief, and must not be interpreted as a decision to intervene militarily in the conflict". The North Atlantic Council also noted the position set out by the UN Secretary-General in a letter of 4 August and, accordingly, confirmed that NATO's actions would take place under the authority of the United Nations Security Council, within the framework of the relevant UNSC Resolutions, including UNSC Resolutions 770 (1992), 776 (1992) and 836 (1993), and in support of

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[158] NATO, Ministerial Meeting of the North Atlantic Council in Athens, Greece, 10 June 1993, Press Communiqué M-NAC-1 (93) 38, 10 June 1993.

[159] NATO, Press Statement by the Secretary-General Following the Special Meeting of the North Atlantic Council in Brussels on 2 August 1993, [no Press Release Reference] 2 August 1993.

UNPROFOR as it carries out its overall mandate.[160] The Council also decided:

> "1. To approve, recalling the assessments set forth in the covering memorandum, the 'Operational Options for Air Strikes in Bosnia-Herzegovina' forwarded by the Military Committee pursuant to the Council's 2 August decision, including the targeting identification process and NATO/UN command and control arrangements for air strikes. In particular, the Council agrees with the position of the UN Secretary-General that the first use of air power in the theatre shall be authorized by him. With respect to NATO, the NAC shall be the political authority that will decide on the conduct of air strikes, which will be carried out in coordination with the UN."[161]

Later that month, the Secretary-General reported to the Council that the necessary training exercises in coordination with NATO had been undertaken, and that there now existed the initial operational capability for the use of air power in support of UNPROFOR in the Republic of Bosnia and Herzegovina.[162] However, despite the continuing campaign of shelling and starvation directed against civilians, especially in the so-called safe areas, no action was taken. Hence, on 11 January 1994, the North Atlantic Council re-affirmed NATO's readiness, under the authority of the United Nations Security Council and in accordance with the Alliance decisions of 2 and 9 August 1993, to carry out air strikes in order to prevent the strangulation of Sarajevo, the safe areas and other threatened areas in Bosnia-Herzegovina. In this context, it urged the UNPROFOR authorities to draw up urgently plans to ensure that the blocked rotation of the UNPROFOR contingent in Srebrenica can take place and to examine how the airport at Tuzla could be opened for humanitarian relief purposes.[163]

The UN Secretary-General responded to the proposition of using air power to support a military operation with regard to Srebrenica and Tuzla on 18 January 1994. He indicated that such an idea would give rise "to issues which do not arise in the context of air support for the defence of

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[160] By referring to Resolutions 770 (1992) and 776 (1992), the use of NATO air power might have also been made available to humanitarian operations of UNPROFOR that were not connected to the so-called safe areas.

[161] Decisions Taken at the Meeting of the North Atlantic Council on 9th August 1993, Press Release (93) 52, 9 August 1993.

[162] Letter from the Secretary-General to the President of the Security Council, S/26335, 20 August 1993.

[163] NATO, Declaration of the Heads of State and Government Participating in the Meeting of the North Atlantic Council held at NATO Headquarters, Brussels, 10–11 January 1994, Press Communiqué M-1 (94) 3, 11 January 1994.

United Nations personnel."[164] Disregarding the fact that, according to his own interpretation, self-defence included the use of force against those forcibly inhibiting the implementation of the humanitarian mandate, he added "the crucial difference is that the use of air power in the former case implies that UNPROFOR can launch offensive action against Bosnian Serb elements which obstructed – or threatened to obstruct – UNPROFOR military operations, as opposed to purely defensive action."[165] Initially appearing to be undaunted by this finding, the Secretary-General announced that he had instructed his Special Representative to prepare plans for the use of offensive force to open Tuzla airport and ensure the rotation of the Srebrenica UNPROFOR contingent. When the Secretary-General reported on the emerging plans ten days later, on 28 January, it was indicated that air power would be used, if necessary "in self-defence against a deliberate attack upon UNPROFOR by any party. Should UNPROFOR be attacked in the implementation of the plans, I would not hesitate to initiate the use of close air-support in cases of self-defence".[166] That is to say, UNPROFOR intended to proceed in its mission to relieve the enclave and open Tuzla airport, either with the consent of the parties, or, in the absence of consent, in the expectation that they were unlikely to use military force to prevent the achievement of UNPROFOR's aims. The initial idea expressed ten days earlier and involving, if necessary, offensive action to break the siege of the enclaves, had apparently been abandoned, nominally in the light of the fact that it would require significant troop reinforcements. In fact, the Secretary-General had repackaged his proposal in a way in which the possible use of force could be presented as self-defence.

The implementation of this plan would have finally brought UNPROFOR close to fulfilling at least the mandate which it had nominally enjoyed from the very start of the operation, when it was still acting exclusively in peace-keeping mode. Even then, it had claimed legal authority to use force when forcibly inhibited from carrying out its mandate.

The abandoning of the offensive option was also justified by the Secretary-General in the light of the fact that NATO air power would not be available to help implement it. He reported that NATO had merely indicated that its decisions had established authority for close air support,

[164] Letter from the Secretary-General to the Security Council, S/1994/50, 18 January 1994.

[165] Id.

[166] Letter from the Secretary-General to the Security Council, S/1994/94, 28 January 1994.

"which is an element of self-defence". The Secretary-General distinguished "air strikes which involve the use of air power for pre-emptive or punitive purposes" from close air support, stating that:[167]

> "Whereas the North Atlantic Council has already authorized close air support, I have been informed by the Secretary-General of NATO that NATO forces are not authorized to launch air strikes, which would require a further decision of the North Atlantic Council."

Of course, since 2 August 1993, NATO had been preparing for air-strikes in circumstances other than close air support, and in its decision of 11 January, the North Atlantic Council had essentially requested the UN Secretary-General to request NATO to decide on air strikes in the context of the strangulation of the so-called safe areas, especially Sarajevo, Srebrenica and Tuzla. However, no such request had apparently been forthcoming from the UN Secretary-General. In fact, the Secretary-General was, at the time, under some pressure from the Russian Federation to refrain from making such a request. Her Foreign Minister indicated that "we ... do not rule out the provision of direct air support for the peacekeeping force in Bosnia and Herzegovina in the event of an attack on it. However, it should be clearly taken into account that any strikes, even limited ones, within the framework of air support would have the gravest consequences ... ".[168] Hence, Russia acknowledged that air support in self-defence of UNPROFOR troops might be permissible, but such limited action was to be discouraged in the light of the grave consequences that might result. Russia also emphasized that "we continue to think that the taking of such decision should be the exclusive prerogative of the Secretary-General in consultation with the Security Council. We believe that we reached a clear understanding with you on this matter."[169] Russia therefore sought to reduce the influence of NATO and, instead, subordinate the management even of the self-defence of UNPROFOR to Security Council consultation, rather than the decision-making of the Secretary-General in accordance with a mandate that had been clearly granted.

The hesitancy of the UN Secretary-General to implement his ideas had the undeniable benefit of avoiding a rather bizarre result in relation to Tuzla. Tuzla airport was under Bosnian Government control, as was the city, and so-called safe area of Tuzla. The use of the airport for humani-

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[167] Id.

[168] Letter from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, S/1994/138, 8 February, enclosing a letter from the Minister for Foreign Affairs of the Russian Federation of 5 February.

[169] Id.

tarian supplies had been consistently denied by the surrounding Serb forces, which were threatening the safety of incoming planes in violation of the demands of the Security Council and General Assembly.[170] Instead of proposing the use of military power to suppress this threat, be it under the offensive or defensive option, and thus ensure the supply of the so-called safe area, the Secretary-General now threatened to invoke the Chapter VII mandate contained in Resolutions 836 (1993) and 844 (1993) against the Bosnian Government. It was the Government, of course, which was desperately agitating in favour of the lifting of the humanitarian siege by the surrounding Serb forces.

The rationale for this proposal was as follows: The Bosnian Serbs had justified their refusal to permit the use of Tuzla airport with reference to the fact that it was controlled by Government forces. Hence, the plan for Tuzla was based on the idea of taking control of the airport from the forces of the Government, in order to ensure that its facilities would not be used for purposes other than the delivery of humanitarian assistance. Should the Government fail to agree to such an arrangement, UNPROFOR "would be obliged to resort to the second scenario ... [drawing] on military assets available not only in the Tuzla area of deployment but also from elsewhere in Bosnia and Herzegovina".[171] That is to say, the enforcement mandate was to be used to implement the demands of the Serbs who were surrounding the so-called safe area and preventing the delivery of humanitarian aid by land or air.[172]

B. The Sarajevo Massacre and NATO's Ultimatum

International attention was diverted from Tuzla and Srebrenica on 5 February 1994, when a mortar attack on Sarajevo killed at least 68 civilians and injured some 200. The attack was widely condemned and an inquiry was launched to determine responsibility for it. On 6 February, the UN Secretary-General wrote to the United Nations Security Council, in-

[170] Report of the Secretary-General Submitted Pursuant to Paragraph 29 of General Assembly Resolution 48/88, para 670, A/48/847, 7 January 1994.

[171] Letter from the Secretary-General to the Security Council, S/1994/94, 28 January 1994.

[172] In the event, Bosnian Government forces withdrew from the airport on 8 March 1994 and were replaced by a Nordic UNPROFOR batallion. Report of the Secretary-General Pursuant to Security Council Resolution 844 (1993), 836 (1993) and 776 (1993), para 12, S/1994/333, 24 March 1994. Tuzla airport was nevertheless only opened briefly, and remained generally unavailable for humanitarian aid flights, due to the threat of surrounding Serb anti-air deployments.

dicating that he had now sought NATO's support in preparing urgently for the use of air strikes against artillery or mortar positions in or around Sarajevo which were determined by UNPROFOR to be responsible for attacks against civilian targets in that city.[173] Hence, he was proposing to step out of the self-defence role, and appeared to apply the mandate granted in Resolution 836 (1993) in its wider sense for the defence of the so-called safe areas and the deterrence of attacks through punitive air strikes. NATO responded on 9 February in the following way:

"The [North Atlantic] Council ...

(6) condemns the continuing siege of Sarajevo and, with a view to ending it, calls for the withdrawal, or regrouping and placing under UNPROFOR control, within ten days, of heavy weapons (including tanks, artillery pieces, mortars, multiple rocket launchers, missiles and anti-air craft weapons) of the Bosnian Serb forces located in an area within 20 kilometres of the centre of Sarajevo, and excluding an area within two kilometres of the centre of Pale;

(7) calls upon the Government of Bosnia-Herzegovina, within the same period, to place the heavy weapons in its possession within the Sarajevo exclusion zone described above under UNPROFOR control, and to refrain from attacks launched from within the current confrontation lines in the city;

(8) authorizes the NATO Military Authorities to support UNPROFOR in carrying out its task of identifying heavy weapons that have not been withdrawn or regrouped in conformity with these decisions;

...

(10) decides that, ten days from 2400 GMT 10th February 1994, heavy weapons of any of the parties found within the Sarajevo exclusion zone, unless controlled by UNPROFOR, will, along with their direct and essential military support facilities, be subjected to NATO air strikes which will be conducted in close coordination with the UN Secretary-General and will be consistent with the North Atlantic Council's decisions of 2nd and 9th August 1993;

(11) accepts, effective today, the request of the UN Secretary-General of 6th February and accordingly authorizes the Commander-in-Chief, Allied Forces Southern Europe to launch air strikes, at the request of the United Nations, against artillery or mortar positions in or around Sarajevo (including any outside the exclusion zone) which are determined by UNPROFOR to be responsible for attacks against civilian targets in that city; ... ."[174]

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[173] Letter from the Secretary-General to the Security Council, S/1994/131, 6 February 1994.

[174] NATO, Decision Taken at the Meeting of the North Atlantic Council on 9 February 1994, Press Release (94) 15, 9 February 1994. Greece dissociated her position from that adopted by NATO.

The NATO ultimatum had apparently not been fully coordinated with the UN Secretariat and had been issued before the report of an UNPROFOR investigation team composed of officers from Canada, France, Pakistan, Russia and Spain, on the attack against Sarajevo marketplace was available. The report, issued by the UN Secretary-General, was, in fact, inconclusive as to responsibility, stating that "the mortar bomb in question could, therefore, have been fired by either side".[175] The decision also followed some hours after it had been announced that UN mediation had actually resulted in an agreement by the Bosnian Serbs on specific measures relating to the withdrawal of heavy weapons around Sarajevo.[176] Of course, there had been previous agreements on this point which had come about under UNPROFOR auspices. But this time, NATO established clear conditions in its ultimatum and appeared ready to use force to ensure compliance. However, the use of NATO force remained, in the end, still subject to a decision of the UN Secretariat, which was doing its utmost to prevent the implementation of NATO's threat.

NATO's decision was attacked by the Russian Federation as "one-sided" and taken by an organ which "has no authority to take decisions on the substance of a settlement in Bosnia. Earlier, the United Nations Secretary-General has proposed that NATO should submit information on the Alliance's readiness to use air power if that was requested by the United Nations. A decision on such a request must be taken by the Secretary-General after consultation with the members of the Security Council. This procedure, established by the Security Council, must be followed unswervingly".[177] Most members of the Security Council, however, supported the action taken by NATO.[178]

A NATO bombardment in response to a violation of the zone would not have been justified by self-defence on the part of NATO or, indeed, UNPROFOR. It would also not be easily covered by the Chapter VII mandate of UNPROFOR to insist on its freedom of movement. Neither did Resolution 836 (1993) provide explicitly for weapons exclusion zones. However, it did refer to the promotion of the withdrawal of heavy weapons other than those of the forces of the Government of the Republic of

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[175] Letter from the Secretary-General to the President of the Security Council, S/1994/182, 15 February 1994.

[176] For an illuminating account of this episode see Owen, Balkan Odyssey 262 (1995).

[177] Letter dated 10 February 1994 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, S/1994/152. See also S/PV.3336, 14 February 1994, at 39.

[178] Id., and S/PV.3344, 4 March 1994.

Bosnia and Herzegovina and to the deterrence of attacks against the so-called safe areas. In terms of substance, the ultimatum could therefore be justified under the wider interpretation of paragraph 10 of the resolution, perhaps read in conjunction with Resolution 824 (1993), which envisaged the withdrawal of weapons to a distance where they would no longer constitute a threat to the so-called safe areas. That resolution had, however, not established a Chapter VII enforcement mandate for NATO in this respect.[179] At any rate, the task of promoting the withdrawal of heavy weapons and deterring attacks had of course been assigned to UNPROFOR. Even if NATO was authorized to assist UNPROFOR in this task by threatening or using force, this would not necessarily permit direct action to this end undertaken by NATO in place of the UN. Hence, the NATO decision referred to close consultation with the UN Secretary-General in the matter.

In addition, NATO had not only demanded the withdrawal or placing under UNPROFOR control of heavy weapons threatening the so-called safe area, but also of those of the Government. A failure to comply would, according to its ultimatum, also be met with air strikes. It is difficult to conceive of a legal argument which might be deployed in defence of this action, especially in the light of the fact that this demand was inconsistent with the specific decisions of the Security Council in the matter. Instead, NATO had unilaterally changed the meaning of the so-called safe area concept for Sarajevo in accordance with its political decision to establish equivalence between the attackers and the defenders of the besieged city.

In the event, the UN Secretary-General, while recognizing "a certain ambiguity about the use of air power with regard to the exclusion zones" around Sarajevo and, subsequently, Gorazde, later welcomed the relevant decisions taken by the North Atlantic Council as being in accordance with paragraph 10 of Resolution 836 (1993).[180]

On 11 February, the Secretary-General reported that he had received, on the evening of 9 February, the text of the decision which NATO had adopted that day. Without referring to the ultimatum, the Secretary-General indicated that "one of these decisions" was to authorize the NATO CIC, Allied Forces Southern Europe, to launch air strikes, at the request of the United Nations, as proposed in his letter of 6 February. In ac-

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[179] *Supra*, note 139.

[180] Report of the Secretary-General Pursuant to Security Council Resolutions 982 (1995) and 987 (1995), para 49, S/1995/444, 30 May 1995.

knowledging receipt of these decisions, he expressed gratitude to NATO and instructed his Special Representative Yasushi Akashi to finalize with the NATO Commander in Chief detailed procedures for the initiation and conduct of air strikes. He indicated that he had instructed his Special Representative to "ensure that these procedures, like those already in place for close air support, take adequately into account my responsibilities *vis à vis* the Security Council, as well as his responsibilities for the humanitarian operations and for the security of United Nations military and civilian personnel on the ground." On this basis, he delegated the necessary authority to his Special Representative, including authority to approve a request from the Force Commander of UNPROFOR for close air support for the defence of United Nations personnel anywhere in Bosnia and Herzegovina.[181]

Hence, even tactical decision-making relating to self-defence (close air support) was vested in the UN Secretariat, represented by Mr Akashi. He would respond to requests from UNPROFOR headquarters in Sarajevo, which in turn had to approve the requests from the Force Commander for the Republic of Bosnia and Herzegovina in Bosnia, who would himself have had to endorse requests from his officers in the field. Mr Akashi, at the end of that very long chain, would make his decisions dependent not only on the demands of the situation on the ground, but also on his responsibilities for the humanitarian operation as a whole.

While the UN Secretary-General's statement is not clear about whether his Special Representative had also been granted authority to approve NATO action other than close air support (air strikes), subsequent practice confirms that there remained an expectation that the Secretary-General himself would be involved and that he would, in turn, consult members of the Security Council.[182]

The UN Secretary-General also indicated to the NATO Secretary-General that he had instructed his Special Representative and the military authorities of UNPROFOR to make every effort to negotiate urgently arrangements under which there would be an effective cease-fire in and around Sarajevo. Under such an arrangement, heavy weapons of the Bosnian Serb forces would be regrouped and placed under UNPROFOR control, and heavy weapons of the Government of Bosnia and Herzegovina would also be placed under UNPROFOR control.

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[181] Letter from the Secretary-General to the President of the Security Council, S/1994/159, 11 February 1994.

[182] *Infra*, note 305.

The efforts of his negotiators, coupled with Russian mediation, did appear to result in an undertaking to honour the agreement reached on 9 February to withdraw or surrender to UN control heavy weapons in and around Sarajevo. However, the terms of this agreement, or the demands for its implementation, were somewhat more flexible than the demands contained in the NATO ultimatum. The Government of the Republic of Bosnia and Herzegovina complained that it had agreed, as a gesture of good-will, to withdraw or place under UN control its heavy weapons in Sarajevo, even though explicitly exempt from doing so under the terms of Resolutions 824 (1993) and 836 (1994). At the same time, it was becoming apparent that the Serb side was being afforded a definition of "control" and "withdrawal" that was so permissive as to be inconsistent with the terms of these resolutions, the NATO ultimatum and the cease-fire agreement which had been signed at Sarajevo airport on 9 February 1994.[183]

The UN Secretary-General claimed that this episode evidenced the close collaboration between the UN Secretariat and the regional organization acting on its behalf under a UN mandate. In fact, it somewhat resembled a trial of strength between the UN Secretariat and NATO. Having been pre-empted by NATO's decision to impose an ultimatum, the UN Secretary-General successfully re-asserted the primacy of his control over all aspects of the Bosnia operation, including possible NATO air strikes. However, when accepting that compliance with the UN-brokered agreement for Sarajevo fulfilled the Alliance's conditions enunciated in the ultimatum and therefore made air-strikes unnecessary, NATO's Secretary-General attempted to maintain the threat his organization had made:

> "Let me make one thing clear: NATO's resolve to prevent the shelling of Sarajevo does not end today. We shall continue to verify compliance and will want to make a rapid assessment of this in the coming hours. We will remain vigilant. If weapons return to the 20 km zone to threaten Sarajevo – or if weapons outside that zone fire on the city, they will be subjected to air strikes. We will also maintain our close air support to UNPROFOR to protect them in carrying out their mission. If they are threatened, we are ready to respond immediately with our air power. All our other activities in support of the United Nations, such as our implementation of the NO FLY Zone and of the embargo in the Adriatic, will continue."[184]

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[183] Letter from the Permanent Representative of Bosnia and Herzegovina to the United Nations addressed to the President of the Security Council, S/1994, 16 February 1994.

[184] Statement by NATO Secretary-General, Mr Manfred Woerner, to the Press Following Expiry of Deadline for Withdrawal of Heavy Weapons from In and Around Sarajevo, Press Release 94 (21), 21 February 1994, emphasis added.

C. The Evolving "Safe-Areas" Concept: Gorazde

When welcoming the Sarajevo agreement in the light of the apparent success of the combination of NATO threats and UN mediation, the UN Security Council called upon the UN Secretary-General to report on the feasibility and modalities for the application of the "safe area" principle to three further cities, in addition to those designated in Resolution 824 (1993).[185] In response, the Secretary-General recounted that it had not even been possible to deploy the 7,600 extra troops which the Council had authorized after having created the so-called safe areas.[186] In addition to the forces originally foreseen, he indicated that a further 2,200 troops would be necessary to establish weapons collection sites and monitor the newly established 20km weapons exclusion zone around Sarajevo. The acceptance of further responsibilities on the part of UNPROFOR would necessitate another 7,550 troops.

With respect to the so-called safe areas concept as a whole, the Secretary-General remarked that its effectiveness depended on the resolve of the international community as perceived by the parties. This, in turn, was dependent on the military assets deployed by UNPROFOR. Hitherto, minimal assets had been sufficient to ensure the basic survival of Gorazde, Srebrenica and Zepa. However, living conditions had remained appalling in the areas. In addition, Bosnian Government forces had used the areas as locations in which to rest, train and equip themselves, provoking Serb retaliation. He concluded that, before creating more so-called safe areas, the concept might require redefinition in that those troops exempt from demilitarization would have to be effectively prevented from taking tactical advantage of the situation. In addition, the presence of UNPROFOR in the areas would have to be of a sufficient level not only to deter attack but also to permit the development of normal conditions of life.[187]

The Secretary-General concluded that if the Security Council was unwilling to authorize the expansion of UNPROFOR, or member states were unable to make the necessary troops available, he would be obliged to return to the Council to seek an appropriate modification of the mandates of the force.[188]

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[185] Resolution 900 (1994), 4 March 1994.

[186] Instead, 5,200 extra troops had been deployed by that time. Report of the UN Secretary-General, para 9, S/1994/291, 11 March 1994.

[187] Id., paras 16, 17.

[188] Id., para 30.

However, there were neither significant increases in troops ready for immediate deployment, nor was there a formal modification of the mandate relating to the so-called safe areas by the Security Council.[189] Hence, the Secretary-General concluded in a further report of 16 March 1994, that, "in the absence of a substantial number of troops, equipped adequately to counter the besieging forces and defend UNPROFOR positions", it would be "impossible to defend the safe areas". In this context, he did not refer to the possible impact of NATO air power which was available to him through NATO, had he wished to request it. He concluded instead that, "the active co-operation of the parties is indispensable to the viability of the safe areas".[190] It is, of course, not easy to see how the co-operation of parties that are supposed to be the subject of a strategy of military dissuasion can be obtained. The creation of "safe areas", which are at least notionally based on the ideas of enforcement and deterrence, and the hope for cooperation of the party intent on destroying the so-called safe areas appear incompatible.

The Secretary-General added that "UNPROFOR could work towards a concept of a gradually expanding demilitarized zone even in the absence of such co-operation". This admission that it might indeed be possible to secure the safety of the "safe areas", and, indeed, to expand the areas, was followed by the finding that "this would place it [UNPROFOR] in a peace enforcement mode while failing to address the larger issue of an overall settlement to the crisis".[191] Of course, UNPROFOR was, at least according to the formal decisions of the Security Council, already supposed to be in an enforcement mode. Yet, the Secretary-General concluded:

> "Several of the newer tasks have placed UNPROFOR in a position of thwarting the military objectives of one party and therefore compromising its impartiality, which remains the key to its effectiveness in fulfilling its humanitarian responsibilities; ...".[192]

This statement, too, appears to be somewhat illogical. Having failed to achieve the co-operation of the Bosnian Serbs in implementing its humanitarian responsibilities, UNPROFOR was equipped with a formal enforcement mandate to ensure implementation in the absence of co-opera-

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[189] The Council authorized additional deployments on 27 April 1994, in Resolution 914 (1994).

[190] Report of the Secretary-General Pursuant to Security Council Resolution 871 (1993), para 32, S/1994/300 16 March 1994.

[191] Id.

[192] Id., para 34.

tion. However, it appears, that mandate could not be applied, because it would jeopardize the co-operation of the Serb party to the conflict, the absence of which necessitated the granting of the mandate in the first place.

The statement is not merely illogical, it is also profoundly shocking. In stating that carrying out a humanitarian mandate would thwart the military objectives of one party and hence violate the principle of impartiality, the Secretary-General accepted that a military campaign based on the denial of elementary humanitarian principles is somehow legitimate.

When UNPROFOR's mandate was to be extended in time at the end of March 1994, the Council stressed the need for a strong and visible presence of UNPROFOR in Sarajevo and other areas and expressed its determination to put to an end the suffering of the civilian population in and around Maglaj. It did, however, not confer so-called safe area status to that besieged town. Instead, in line with previous resolutions, it "reiterated its determination to ensure the security of UNPROFOR and its freedom of movement for all its missions, and to these ends acted under Chapter VII of the Charter" in continuing the UNPROFOR mandate.[193] It might be argued that this wording was inconsistent with the broad enforcement authorization given in Resolution 836 (1993) and other relevant resolutions, restricting the use of force by UNPROFOR to self-defence and the achievement of freedom of movement.[194] However, a formal revision of the terms of Resolution 836 (1993) would have required more unambiguous Council action. That such action was not intended by the members of the Council is evidenced in the debates leading up to the adoption of this resolution.[195] Instead, the text merely reiterated the customary wording which had been adopted previously, when UNPROFOR's mandate was extended in time.[196] Still, the continued

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[193] Resolution 908 (1994), 31 March 1994.

[194] The statement of China, referring to "certain limitations" to the Chapter VII mandate in the resolution might have been meant in this way, S/PV.3356, 31 March 1994, at 10.

[195] E.g., New Zealand, id., at 13: "In fact, it was argued that it was worthwhile recalling that this progress [in relation to Sarajevo] flowed from the decision of the United Nations to activate the authority conferred in Security Council Resolution 835 (1993) to use airpower in defence of UNPROFOR's mandate. It is the view of my delegation that the appropriate and measured willingness to use force in Bosnia was essential if the fundamental inequities in the situation were to be redressed." Even Russia did not assert that the mandate had been reduced, but instead voiced its belief that UNPROFOR should act "strictly in accordance with, and in the framework of, the existing mandate of UNPROFOR." Id., at 12.

[196] *Supra*, note 122.

references to a Chapter VII mandate for UNPROFOR in the context only of its self-defence and freedom of movement might be taken by some to confirm the alleged understanding which may have been reached at the time when Resolution 836 (1993) was adopted.

The UN position with respect to the defence of the so-called safe areas was put to the test when Serb forces proceeded to shell the civilian population of Gorazde in March/April 1994.

After repeated calls from the Government of Bosnia and Herzegovina and from other governments to save the people of Gorazde had gone unheeded for several weeks,[197] two NATO missions were flown on 10 and 11 April. However, these missions were not presented as actions designed to protect the civilians within the so-called safe area. Instead, they represented "close air support" designed to alleviate the situation of the UN personnel trapped in the town who were indeed in "acute danger" from renewed Serb shelling of Gorazde.[198] The attacks had been requested by General Rose, the UNPROFOR commander in Sarajevo.

On 13 April the North Atlantic Council reviewed the results of the close air support mission conducted by NATO aircraft at UNPROFOR request and expressed general satisfaction with the conduct of the missions, "which took place under the authority of UN Security Council Resolution 836 [(1993)] and in accordance with procedures set up with UNPROFOR last year". NATO indicated that it remained prepared to provide "close air support" in case of any further attacks against UNPROFOR in the performance of its overall mandate.[199]

On 18 April, the UN Secretary-General wrote to NATO, requesting it, at the earliest possible date, to authorize the CIC of NATO's Southern Command to launch air strikes, at the request of the United Nations, against artillery, mortar positions or tanks in or around safe areas in addition to Sarajevo, which were determined by UNPROFOR to be responsible for attacks against civilian targets within those areas (i.e., not merely in response to attacks against UNPROFOR within the areas). On

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[197] On 6 April the Council adopted a Presidential Statement, expressing its concern and condemning "the shelling and infantry and artillery attacks by the besieging Bosnian Serb forces against the 'safe area' of Gorazde in which many civilians have lost their lives and several hundreds have been wounded", S/PRST/1994, 6 April 1994.

[198] NATO Press Note PL 218, 13 April 1994. The rump Yugoslavia objected to these attacks, claiming that Serb forces had been obliged to respond to provocations from within the so-called safe area. Letters from the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General, S/1994/418, 12 April 1994, S/1994/449, 15 April 1994.

[199] Id.

21 April, the Security Council met to consider the situation in Gorazde. It adopted Resolution 913, condemning the attacks against the civilian population of Gorazde and reaffirming UNPROFOR's mandate, although, again, acting under Chapter VII only in the context of the security of UNPROFOR and its freedom of movement. The Council demanded a withdrawal of Serb forces and their weapons to a distance to be agreed by UNPROFOR "wherefrom they cease to constitute a threat to the status of Gorazde as a safe area". While the Council noted the Secretary-General's previous recommendations concerning the definition and implementation of the concept of safe areas, it emphasized that "UNPROFOR will continue to make full use" of its mandate relating to the so-called safe areas.[200]

The resolution was adopted unanimously, and was co-sponsored by the Russian Federation. A large number of speakers supported the UN Secretary-General's request for NATO to move towards a more definite military enforcement of the so-called safe areas concept, there was no doubt expressed that there existed a Security Council mandate to this end, and no significant objections were made to this policy.[201] Throughout the debate, it was made clear that the resolution was seen as explicit authorization for NATO air action to enforce a weapons exclusion zone around Gorazde.

Several delegations strongly condemned the failure of UN and NATO to act decisively within the "clear legal framework for the use of all necessary means, including air strikes against the aggressors for the defence of all safe areas",[202] in compliance with the Council's commitment to "providing protection and security",[203] to "Gorazde, the zone of peace [which] has been violated, sacked and destroyed in an ultimate gesture of humiliation and defiance".[204] Hungary saw in the Serb action a challenge which, if it were to go unanswered, would be likely to plunge the United Nations and other international organizations concerned into paralysis, inconsistency and ignominy.[205] Austria adopted a similar view, demanding that the concept of "safe areas" must finally be implemented through

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[200] Resolution 913, 21 April 1994.

[201] S/PV.3367, 21 April 1994, *passim*, China, as always, expressing concern at the possible use of force as a matter of principle.

[202] Turkey, id., at 8.

[203] Egypt, id, at 15.

[204] Morocco, id., at 16.

[205] Id., at 17.

concrete actions.[206] These, and several other statements, indicate that a significant number of governments were indeed expecting UNPROFOR and NATO action going beyond close air support, whatever the complexities and understandings surrounding Resolution 836 (1993).[207] The observer for the Organization of the Islamic Conference also tackled the justification for inactivity put forward by the UN Secretary-General, condemning the argument "that NATO should not 'take sides' and must remain 'neutral' as its effective involvement could 'tilt' the military situation. These expressions are the ultimate in the appeasement of the Serb aggressor and a source of humiliation of the powerful and prestigious institutions concerned."[208] Sweden added that air power was "the international community's last resort against heinous attacks on defenceless civilians. It would not signify that the United Nations has taken sides. Judicious use of air power should be seen as the response of the international community to those who mercilessly flout humanitarian law."[209]

The North Atlantic Council responded to these views in the council by adopting the following decision:

"The Council,

...

demanded strict respect of the safety of UNPROFOR and other UN and relief agency personnel throughout Bosnia-Herzegovina and for the right of free access of all these personnel to UN-designated safe areas, and reaffirmed NATO's readiness to provide close air support in the event Bosnian Serb forces attack UNPROFOR or other UN and relief agency personnel throughout Bosnia-Herzegovina or forcibly interfere with the conduct of their mandate;

...

agreed that Bosnian Serb action in and around the city of Gorazde meet the conditions in relation to civilian centres identified by NATO on 2nd August 1993 as grounds for air strikes;

agreed that unless:

Bosnian Serb attacks against the Safe Area of Gorazde immediately cease;

Bosnian Serb forces pull back three km from the centre ... of the city by 0001 GMT on 24th April 1994 and;

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[206] Id., at 32.

[207] The entire record of this debate which can not be fully summarized here is replete with evidence of such expectations. The Islamic states were directly connecting the failure to defend the so-called safe areas with the demand that, in the absence of effective international action, the arms embargo must be lifted.

[208] Id., at 25.

[209] Id., at 30.

from 0001 GMT on 24th April 1994, United Nations forces, humanitarian relief convoys, and medical assistance teams are free to enter Gorazde unimpeded, and medical evacuations are permitted,

CINCSOUTH is authorized to conduct air strikes against Bosnian Serb heavy weapons and other military targets within a 20 km radius of the centre of Gorazde (but inside the territory of Bosnia and Herzegovina) in accordance with the procedural arrangements worked out between NATO and UNPROFOR following the Council's decisions of 2nd and 9th August 1993; ...".[210]

That day, the North Atlantic Council adopted a further decision, imposing a military exclusion zone for 20 kilometres around Gorazde, and demanding that all Bosnian Serb heavy weapons (including tanks, artillery pieces, mortars, multiple rocket launchers, missiles and anti-aircraft weapons) be withdrawn by 0001 GMT on 27 April 1994. The NATO Council also decided that if the safe areas of Bihac, Srebrenica, Tuzla or Zepa were to be attacked by heavy weapons from any range or if, in the common judgement of the NATO military Commanders and UN Military Commanders, there was a concentration or movement of heavy weapons within a radius of 20 kilometres of these areas (within Bosnia-Herzegovina) which threatened those areas they would without further action of the NATO Council, be designated, individually or collectively, military exclusion zones. Due public notice to governments and to the parties would be given if and when this occurred. The exact line of the perimeter of these areas was to be established jointly by UNPROFOR and CINCSOUTH. Furthermore, in pursuit of these objectives, and in response to the request of the UN Secretary-General of 18 April 1994, NATO agreed:

"that, with immediate effect, if any Bosnian Serb attacks involving heavy weapons are carried out on the UN designated safe areas of Gorazde, Bihac, Srebrenica, Tuzla and Zepa, these weapons and other Bosnian Serb military assets, as well as their direct and essential military support facilities, including but not limited to fuel installations and munitions sites, will be subjected to NATO air strikes, in accordance with the procedural arrangements worked out between NATO and UNPROFOR following the Council's decisions of 2nd and 9th August 1993;

that, after 0001 GMT on 27th April 1994, if any Bosnian Serb heavy weapons are within any designated military exclusion zone as described above, these weapons and other Bosnian Serb military assets, as well as their direct and essential military support facilities, including but not limited to fuel installations

[210] NATO, Decisions Taken at the Meeting of the North Atlantic Council on 22nd April 1994, Press Release (94) 31, 22 April 1994 [Greece adopting a separate position].

and munitions sites, will be subject to NATO air strikes, in accordance with the procedural arrangements worked out between NATO and UNPROFOR following the Council's decisions of 2nd and 9th August 1993;

that consistent with its decisions of 2nd and 9th August 1993, any violation of these above provisions of this decision will, without further action by the Council, constitute grounds for the NATO Military Authorities to initiate air attacks .... Such attacks will be carried out in coordination with UNPROFOR;

that the NATO Military Authorities, if they judge it necessary to respond effectively to a particular violation of the above provisions of this decision, may recommend the initiation of additional air attacks to be carried out in coordination with UNPROFOR. Such recommendations will be conveyed to the Secretary-General through the NATO chain of command for Council decision;

that, once air attacks have been carried out against a specific target set pursuant to these decisions, the NATO Military Authorities may continue to carry out, in coordination with UNPROFOR, the attacks against that target set until NATO Military Authorities judge the mission to be accomplished; ...".[211]

NATO also called upon the government of Bosnia-Herzegovina not to undertake offensive military action from within the safe areas and, to this end, to cooperate with any UNPROFOR monitoring of their heavy weapons.[212]

The NATO decisions confirmed the expansion of NATO authority to strike, not only in close air support, but in defence of so-called safe areas or in support of deterrence against them, in particular by enforcing weapons exclusion zones, and even to ensure unimpeded humanitarian access to them. Furthermore, NATO threatened to broaden the range of targets, from the very weapons involved in attacks or deployed in violation of weapons exclusion zones, to their direct support structure. Once further weapons exclusion zones had been designated, strikes could be conducted without further warning to the parties concerned. Finally, strikes were to be conducted until NATO judged that they had accomplished their aim. All of the above provisions remained, however, subject to close coordination with UNPROFOR. In fact, they remained subject to control by UNPROFOR and their implementation was duly frustrated.

As opposed to the episode involving Sarajevo, this time the UN Secretary-General had requested NATO action largely consistent with the ultimatum that was to follow, and the Security Council itself had demanded a specific withdrawal of weapons from around Gorazde. However,

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[211] Decision on the Protection of Safe Areas Taken at the Meeting of the North Atlantic Council on 22nd April 1994 [Greece adopting a separate position].

[212] Id.

NATO's decision may also have gone somewhat beyond what the UN had specifically requested, although its action was warmly welcomed and endorsed by Security Council members when it met a few days later, after a cease-fire had been arranged for Gorazde.[213] NATO's imposition of weapons exclusion zones was therefore now placed on a firmer legal basis. However, despite the consolidation of the legal framework, the UN Secretary-General proceeded actively to undermine the concept he was supposed to be implementing.

D. Further Erosion of the "Safe Areas" Concept

In the light of the developments relating to Gorazde, the Secretary-General was invited by the Security Council to refine his thoughts concerning the so-called safe areas concept further.[214] In response, the Secretary-General reiterated some of the difficulties thus far encountered. These included the fact that UNPROFOR was not sufficiently strong, even with air support, to defend safe areas or to hold ground. Secondly, due to the restriction of the freedom of movement of UNPROFOR troops, once they were in a safe area they could not be freely deployed elsewhere if needed. Thirdly, the exact boundaries of most safe areas had not been agreed. Fourthly, the need to maintain weapons collection points tied down valuable UNPROFOR resources. And in spite of the investment of manpower in policing the collection sites, the parties had frequently, during periods of tension, simply taken control over these weapons. Finally, the use of air power in support of the safe areas had interrupted the delivery of humanitarian assistance through areas controlled by the Bosnian Serbs.[215] The Secretary-General went on to complain:

> "The failure of the warring parties to understand or fully respect the safe area concept is a particularly serious problem that has become starkly evident in Gorazde. The Bosnian Government expected UNPROFOR to intervene and protect as much of the territory under its control as possible, and called for the early employment of large-scale air strikes in order the break the offensive capability of Serb forces. Government forces armed themselves and conducted military activities from within the safe area. The Bosnian Serbs, on the other hand, regarded UNPROFOR's very limited use of close air support as an inter-

[213] S/PV.3369, S/PV.3370, 27 April 1994.

[214] Letter from the President of the Security Council to the Secretary-General, S/1994/521, 29 April 1994.

[215] Report of the Secretary-General Pursuant to Resolution 844 (1993), para 13, S/1994/555, 9 May 1994.

vention on behalf of their opponents, and did not hesitate to attack a populated area. UNPROFOR's neutrality and credibility were strongly challenged by the different attitudes and expectations of each party ...".[216]

Once again, the Secretary-General evidenced a strange kind of even-handedness in his approach. He seemed to create an equivalence between the attitude of the Bosnian Government and the Serb side. This equivalence appeared to consist, on the Bosnian Government's side, of the expectation that UNPROFOR would protect the so-called safe areas and of her failure to demilitarize the areas, despite the fact that demilitarization had been ruled out by the terms of the so-called safe areas resolutions. In addition, the Government appeared to be charged with having attempted to mount a defence of the areas once they came under attack and once UNPROFOR had failed to fulfil its explicit Chapter VII mandate to protect them from incursion of bombardment. These purported failings were balanced, it seems, by Serb attacks on concentrations on civilians, by the Serb perception that close air support constituted an intervention and the resulting unlawful Serb obstruction of UNPROFOR's humanitarian mandate throughout the Republic. Somehow, the insistance by the Government on implementation of the mandate, and the blatant violation of the so-called safe areas amounted to an equivalent failure of "the parties" to understand or respect the so-called safe areas concept.

The Secretary-General added that UNPROFOR found itself in a situation where many "safe areas" were not safe, where their existence appeared to thwart only one army in the conflict, thus jeopardizing UNPROFOR's impartiality, and where UNPROFOR's role needed to be adequately defined in a manner that would be compatible with the rest of its mandate.[217] To remedy this situation, he proposed a revision, or rather re-definition, of the safe areas concept.

Instead of pledging to defend the territory of the so-called safe areas, UNPROFOR would instead focus on giving "effective and credible protection to the population within the area". Somewhat inconsistently with this proposition, he then identified the need for clearly delineating the so-called safe areas, referred to as "towns and surroundings" in Resolution 824 (1993). Hence, he appeared to be saying that in order to overcome the territorial approach to the safe areas, one had to delineate territory clearly and thus adopt a territorial approach. This confusion reflects the impos-

[216] Id., para 14.
[217] Id., para 15.

sibility of separating the protection of the population from the protection of the territory on which it was crowded together.

The proposed re-definition of the mandate was therefore intended to reduce the geographic scope of the safe areas concept, from towns and their surroundings as envisaged by the Council, to areas to be delineated "with due regard to the densely populated areas".[218] Hence, UNPROFOR would desert the original mandate, which included the prevention of incursions into the towns and surrounding areas, by force if necessary, and instead reduce its protection to the inhabitants and refugees where they were being most densely concentrated as a result of the attacks against the so-called safe areas. Of course, even there they were unlikely to obtain protection from UNPROFOR, which had hitherto only used force to protect itself.

These views were also somewhat contrasted by the earlier NATO decisions relating to the 3 km total exclusion zone around Gorazde and the demand for a total withdrawal of Serb forces from that zone to restore the territorial integrity of the so-called safe area through a reversal of territorial gains that had been made. Indeed, at the time, the Secretary-General's Special Representative had been charged by the Security Council with such a "disengagement of forces" with that aim in mind. This mandate was fulfilled, at least nominally, in the agreement for a cease-fire around Gorazde that was reached on 23 April 1994 by Bosnian Serb leaders and UNPROFOR at a meeting held in Belgrade.[219]

The Secretary-General's proposal was also inconsistent with the original French concept of the so-called safe areas, which was specifically aimed at stopping "territorial gains by the Serbian forces", and which had, according to France, been incorporated into Resolution 836 (1993).[220] And it was totally incompatible with the initial ideas of the sponsors of the "safe areas" concept, which had envisaged a gradual expansion of its territorial application.[221]

The Secretary-General's approach also appears to neglect his earlier finding which was that the safe areas, even when the definition of the Council based on the concept of "towns and their surroundings" had been followed, were not viable, and that therefore living conditions within

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[218] Id., para 18.

[219] Report of the Secretary-General Pursuant to Resolution 913 (1994), S/1994/600, 19 May 1994. The Secretary-General's ideas were also rejected in subsequent decisions of the Council relating to Bihac, *infra*, note 240.

[220] *Supra*, note 142.

[221] *Supra*, note 136.

them were appalling and unsustainable.[222] Instead of ensuring that the areas would be viable and capable of sustaining the populations concentrated within them with a minimum of humanity, it was now proposed to expose them to further military attack by the besieging forces, until a point when the aggressors had totally coralled the population into an even smaller area.

Coupled with that approach was the idea that, while the right of the inhabitants to self-defence was recognized, UNPROFOR's presence would be viewed as a first step towards the eventual demilitarization of the so-called safe areas, directly contradicting the view of the Security Council that the need to protect the mainly Muslim population concentrated therein from unlawful attack should not result in a disarming of the Bosnian Government.[223] In fact, the original sponsors of the safe areas concept had sharply criticised UNPROFOR for having pressured the Government of the Republic of Bosnia and Herzegovina into accepting a demilitarization of Srebrenica in exchange for an undertaking that the enclave would not be wiped out by General Mladic's forces.[224] Effectively, this meant that the Serb strategy of making civilians the main target of their armed campaign had been vindicated, rather than resisted by UNPROFOR, and this strategy was in a sense being administered by the peace-force.

The Secretary-General acknowledged that while "the narrow delineation of safe areas raises complex political and legal questions, such a definition by UNPROFOR would be the only practical and achievable one from the military point of view, given the nature of UNPROFOR as a lightly armed, impartial, international force".[225]

Just like the myth that NATO airstrikes in connection with the so-called safe areas had to be restricted to "close air support", rather than measures intended to protect the civilian population, the Secretary-General attempted through this action to isolate UNPROFOR as a whole from the implications of its enforcement mandate. In conceptually divorcing the populations and displaced persons from the territory on which they had been encircled, a further attempt was made to demonstrate the

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[222] *Supra*, note 217.

[223] Report of the Secretary-General Pursuant to Resolution 844 (1993), para 21, S/1994/555, 9 May 1994.

[224] *Supra*, note 133.

[225] Id., para 20. See the response from the Permanent Representative of Bosnia and Herzegovina to the United Nations Addressed to the President of the Security Council, S/1994/575, 16 May 1994.

impartiality of UNPROFOR. That is to say, UNPROFOR did not take a view on the Serb campaign of forcibly acquiring control over territory within the so-called safe areas. It would be permissible to drive the displaced ever closer together, making the so-called safe areas even less viable and presenting their inhabitants with the single choice of deportation or gradual destruction.

On 30 July 1994, the European Union, the Russian Federation, the United Kingdom and the United States issued a Communiqué on Bosnia and Herzegovina. Instead of endorsing the disengagement from the so-called safe areas concept proposed by the Secretary-General, they appeared to take the opposite view. They warned against any renewed effort to effect the strangulation of Sarajevo and "expressed their commitment to strengthen the regime of safe areas and requested finalization of planning to permit strict enforcement and extension of exclusion zones, including at each stage appropriate provision for the safety of UNPROFOR troops".[226]

However, air power continued to be employed very sparingly indeed. On 5 August 1994, NATO aircraft attacked a target within the Sarajevo exclusion zone. The strikes were ordered following agreement between NATO and UNPROFOR, after weapons had been seized by Bosnian Serbs from a weapons collection site near Sarajevo that morning. The action was taken in accordance with the determination by the North Atlantic Council that uncontrolled heavy weapons remaining within a 20 kilometre zone around Sarajevo after 21 February 1994 would be subjected to NATO air strikes.[227]

On 22 September 1994, following a Serb attack against a French armoured personnel carrier near Sarajevo, NATO aircraft engaged a Serb tank within the Sarajevo exclusion zone. The attack was carried out by three planes which were part of Operation Deny Flight after a decision of UNPROFOR Force Commander General de Lapresle and NATO CINCSOUTH Admiral Smith had been obtained.[228]

In November 1994, the Security Council condemned in the strongest possible terms the attack on the safe area of Bihac by aircraft belonging to the so-called Krajina Serb forces in Croatia, which, according to the Council, involved the dropping of napalm and cluster bombs in southwest

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[226] Letter from the Representatives of France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations, addressed to the President of the Security Council, S/1994/916, 1 August 1994.

[227] NATO Press Release (94) 64, 5 August 1994.

[228] NATO Press Release (94) 90, 22 September 1994.

Bihac, in clear violation of Bihac's status as a "safe area". This violation was deemed all the more grave "because of the threat posed to UNPROFOR".[229] On 18 November, Croatia transmitted to the Council its consent to NATO air operations directed against the Serb forces involved, which were operating from its territory.[230] On 19 November, the Council explicitly extended the terms of Resolution 836 (1993) to permit air action in Croatia in support of the aims of that resolution.[231] The Council expressed determination to support UNPROFOR in the performance of its mandate set out in paragraphs 5 and 9 of Resolution 836 (1993), and, to this end, acted under Chapter VII.[232] It then restated the authorization given to NATO to support UNPROFOR in the performance of its mandate set out in paragraphs 5 and 9 of Resolution 836 (1993), adding that it would apply also to such measures taken in the Republic of Croatia. Hence, whatever the underlying agreement with respect to the limited enforcement mandate of UNPROFOR (relating only to paragraph 9), the authority of NATO air power to be employed also in furtherance of the wider aims relating to safe areas contained in paragraph 5 of Resolution 836 (1993) was restated. However, almost all speakers in the Council debate made it clear that "the procedures to implement it will similarly mirror those set in place to implement that resolution".[233] Russia amplified this view, adding that "it is important that this resolution confirms that the appropriate measures will be taken under the guidance of the Security Council and in close coordination with the Secretary-General and UNPROFOR."[234]

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[229] PRST/1994/69, 18 November 1994.

[230] Letter from the Permanent Representative of Croatia to the United Nations Addressed to the President of the Security Council, S/1994/1312, 18 November 1994.

[231] Interestingly, the United States argued, along with the Government of the Republic of Bosnia and Herzegovina, that such an extension had not really been legally necessary. The United Kingdom, on the other hand, claimed authorship of the resolution and indicated that it was necessary to cover a circumstance for which Resolution 836 (1993) had made no allowance. S/PV.3461, 19 November 1994, *passim*.

[232] In Resolution 958 (1994) of 19 November 1994, the Security Council "Decides that the authorization given in paragraph 10 of its Resolution 836 (1993) to Member States, acting nationally or through regional organizations or arrangements, to take, under the authority of the Security Council and subject to close coordination with the Secretary-General and the United Nations Protection Force (UNPROFOR), all necessary measures, through the use of air power, in and around the safe areas in the Republic of Bosnia and Herzegovina referred to in Resolution 824 (1993) of 6 May 1993, to support UNPROFOR in the performance of its mandate set out in paragraphs 5 and 9 of Resolution 836 (1993) shall apply also to such measures taken in the Republic of Croatia. ...".

[233] United Kingdom, S/PV.3461, 19 November 1994, at 4.

[234] Id., at 5.

On 19 November, the Council had also adopted a second resolution, in which it took note of the reports of the Secretary-General relating to the definition and implementation of the so-called safe areas concept. The Council also noted the communiqué from the EU, Russia, the United Kingdom and the United States, in which they had committed themselves to strengthen the regime of safe areas.[235] Although the Council expressed its full support for the efforts by UNPROFOR to ensure implementation of the resolutions on "safe areas", the text was not adopted with reference to Chapter VII.

In the operative paragraphs of the resolution, the Council called upon all the Bosnian parties to respect fully the status and functions of UNPROFOR and to cooperate with it in its efforts to ensure implementation of the Security Council resolutions on "safe areas". It demanded that all the parties and others concerned show maximum restraint and put an end to all hostile action in and around the safe areas in order to ensure that UNPROFOR could carry out its mandate in this regard effectively and safely.[236] Once again, the Secretary-General was requested to update his recommendations on the modalities of the implementation of the concept of "safe areas" and to encourage UNPROFOR, in cooperation with the Bosnian parties, to continue their efforts to achieve agreements on strengthening the regimes of "safe areas" taking into account the specific situation in each case. Furthermore, the Secretary-General and UNPROFOR were requested to intensify efforts aimed at reaching agreement with the Bosnian parties on the modalities of the demilitarization of Sarajevo.

While not amending the "safe area" mandate, the Council appeared to be moving towards the acceptance of some of the proposals made by the Secretary-General. The emphasis on the agreement of the parties, rather than military enforcement, as a means to strengthen the protection of the areas is noteworthy in this context. Furthermore, in contrast to Resolution 836 (1993), there is no reference to the Government of the Republic of Bosnia and Herzegovina. Instead, the resolution appears to address "the parties" which, on the basis of equality, are to refrain from hostile action and possibly move towards demilitarization of the areas. On the other hand, on the same day the Council had adopted a resolution formally confirming the application of Resolution 836 (1993) and even extending the possibility of its enforcement through air power.

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[235] *Supra*, note 226.

[236] Resolution 959, 19 November 1994.

On 21–23 November, Udbina airfield in Serb occupied Croatia was attacked by NATO planes. The airfield had been used to stage Serb attacks against Bihac. The NATO air strike was, however, very limited, intentionally avoiding the aircraft which had been used for the attacks in the territory of Bosnia and Herzegovina.[237] The raid was followed by a further strike against two Serb anti-aircraft missile sites in Bosnia, which had "illuminated the [NATO] reconnaissance aircraft in a threatening way. As earlier announced, self-defence measures were taken immediately."[238] The strikes triggered the taking of some UN hostages by Serb forces.

The action that was taken against the Udbina airfield appeared somewhat inconsistent with the softer line apparently taken by the Council with respect to the safe areas. However, the action can also be understood in the context of the maintenance of the No Fly Zone and the desire to avoid direct Croat military action in the context of Serb attacks launched into the Republic of Bosnia and Herzegovina from her territory. Such an explanation of the air strike is consistent with subsequent events. The Security Council was constrained to continue expressing deep concern about the persistent Serb attack on the Bihac so-called safe area. In contrast to the Secretary-General's earlier suggestion that the "safe areas" should not be territorially defined,[239] the Council insisted "on the withdrawal of all Bosnian Serb forces from the Bihac safe area and on the need to ensure full respect by all parties of the safe areas, particularly for the benefit of the civilian population."[240] In this context, the Council underlined the terms of Resolution 836 (1993). But despite the increasingly desparate situation in the region, no further military action was undertaken in the defence of the so-called safe area that year.

V. The Collapse of the "Safe Areas" Concept and the Demise of UNPROFOR

A. The Hostage Crisis

In 1995, pressure on the so-called safe areas, including Bihac, continued. Although the attempts of the Secretary-General to hollow out the "safe area" concept had not been formally accepted by the Security Coun-

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237 NATO Press Release (94) 110, 21 November 1994.
238 NATO Press Release (94) 112, 23 November 1994.
239 *Supra*, note 218.
240 PRST/1994/71, 26 November 1994.

cil, representations by the Government of Bosnia and Herzegovina demanding implementation of the UNPROFOR mandate in the light of continuing violations of the terms of Resolution 836 (1993) were rejected by Special Representative Akashi, General Janvier and General Smith. The three representatives, in a meeting in Sarajevo with the Permanent Representative of the Republic of Bosnia and Herzegovina to the United Nations, reportedly claimed not only practical impotence, but "even a lack of mandate, describing their authority, rules of engagement, as being 'purely peace-keeping'".[241] The Government, in the light of the unopposed continued shelling of Sarajevo and routes leading into the city, threatened to redeploy its forces fully on strategic Mount Igman in order to be able to respond to Serbian attacks. The Organization of the Islamic Conference, communicating to the United Nations Secretary-General as well as "to specific troop contributing Governments their serious concern over the inability of UNPROFOR to protect the exclusion zones and safe areas and their readiness to contribute further in troops and equipment to ensure effective action by UNPROFOR, particularly in the event of withdrawal of UNPROFOR units", announced their decision to "mobilize assistance for Bosnia and Herzegovina to ensure its legitimate self-defence."[242] This decision was taken in the light of the finding by the Islamic States that "the arms embargo decreed by the United Nations Security Council neither legally nor morally applies to the Republic of Bosnia and Herzegovina."[243]

Soon afterwards, when heavy weapons were removed once more by Serb forces from UN supervised storage sites around Sarajevo, NATO launched, on 25 May, an air strike against ammunition dumps near the Serb headquarters at Pale. The strike had been requested by UNPROFOR and the target had been agreed mutually by UNPROFOR Deputy Force Commander, General Crabbe, and CINCSOUTH Admiral Smith.[244] A second strike against the same set of targets was launched the following day "in response to the continued Bosnian Serb aggressions af-

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[241] Letter from the Permanent Representative of Bosnia and Herzegovina to the United Nations Addressed to the Security Council, S/1995/370, 9 May 1995.

[242] Declaration of the Meeting of Foreign Ministers of the OIC Contact Group on Bosnia and Herzegovina, Rabat, 18 May 1995, enclosed in Letter from the Permanent Representative of Morocco to the United Nations Addressed to the Secretary-General, S/1995/422, 25 May 1995.

[243] Id.

[244] NATO Press Release 95–12, 25 May 1995.

ter the initial NATO strike on Pale".[245] As before, the strikes were carefully limited. However, they did signify a possible shift in the UN's attitude. All previous strikes had been directed specifically against the very target (or an equivalent target) which had been responsible for a violation of UN demands. Hence, the tanks attacking Gorazde or violating the Sarajevo exclusion zone and the very airfield used for attacks against Bihac had been subjected to strikes. In this instance, a violation of the weapons exclusion zone had triggered a strike against Serb logistics facilities at their headquarters, in line with the threats made by NATO when adopting its decisions concerning Gorazde.[246]

Serb forces responded immediately. On previous occasions, some UNPROFOR troops and EU monitors had been taken hostage in response to air strikes. After 26 May, Serb forces took large numbers of hostages, some of whom were deployed as human shields.[247] Their release was only obtained after protracted negotiations. Indeed, it was alleged that the UN Secretariat had pledged to refrain from requesting further air attacks in order to end the deeply humiliating hostage episode.

B. Justifying the End of Srebrenica and UNPROFOR's Failure

Serb forces soon exploited the perceived weakness and inactivity of UNPROFOR and thus also of NATO. In July, a massive onslaught against the so-called safe area of Srebrenica occurred. Only when, on 11 July, the enclave had virtually fallen did the UN authorize limited air strikes.[248] The fall of Srebrenica was followed by the forcible expulsion and deportation of its inhabitants and of thousands of displaced persons. According to an official report of the Netherlands Government, whose national forces had been deployed in the so-called safe area, approximately 5,000 captured men were executed by Serbs.[249]

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[245] NATO Press Release [no number], 26 May 1995.

[246] *Supra*, notes 210 et seq.

[247] See Statement on the Situation in Former Yugoslavia, North Atlantic Council Ministerial Meeting, 30 May 1995, Press Communiqué M-NAC-1 (95 51).

[248] NATO Press Release (95) 68, 11 July 1995.

[249] Introduction by the [Netherlands] Minister of Defence Voorhoeve, for the Press Conference on the Publication of the Report on Srebrenica, 30 October 1995. Also see the UN inter-agency, Report of the Secretary-General Submitted Pursuant to Security Council Resolution 1010, S/1995/755, 30 August 1995.

The following official Netherlands account sheds some light on the fulfilment of the UN mandate:

> "During the BSA siege, Dutchbat had been counting on large-scale air support. The possibility of air support was discussed with senior UN commanders as early as 6 July. However, despite repeated requests from the Dutchbat commander, close air support was not provided for a long time. In accordance with UN procedures, UN positions must be in acute danger before air support is provided. On 11 July, Dutchbat was expecting an immediate air strike on a large number of BSA targets. However, consent for close air support was not given until almost 12.30 hrs. In the event, extremely limited air support was provided only after the Serb offensive had already gone too far ... ".[250]

This account stands in sharp contrast to the formal UN mandate, which provided for the use of UNPROFOR ground force and NATO air force far in excess of mere "close air support", in reply to bombardment of the areas and incursions into them. It also stands in sharp contrast to the detailed decisions of NATO which have been reviewed above.

A number of reasons were advanced to exculpate the UN and NATO from their dramatic failing in carrying out their mandate. It was asserted that the original request for the ground forces necessary to protect the safe areas had to be paired down considerably, in the light of a reluctance of UN member states to contribute the necessary troops. While this is certainly true, it cannot explain the virtual absence of air power in defence of Srebrenica. And as subsequent events demonstrated, air power could have had a very potent effect indeed, if only it had been used with sufficient determination.

In the context of the attacks of Gorazde, it was also asserted by General Rose that the effects of the attacks against so-called safe areas had been vastly overstated by the Government of the Republic of Bosnia and Herzegovina, in order to provoke a larger degree of international involvement in the conflict. The fate of Srebrenica and, subsequently, Zepa, do not appear to bear out this assertion.

It was also asserted once more that the concept of the safe areas was violated by the Government of Bosnia and Herzegovina's failure to demilitarize them. However, Resolution 836 (1993) itself provides for the "withdrawal of military or paramilitary units other than those of the Government of Bosnia and Herzegovina".[251] The safe

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[250] Press summary, Dutchbat Debriefing Report, 30 October 1995.

[251] Resolution 836 (1993), 4 June 1993, para 5, emphasis added.

areas concept therefore specifically did not purport to oblige the Government to remove or disarm its own forces. In the light of the sustained attacks against the so-called safe areas, and UNPROFOR's singular lack of vigour in attempting to defend them, such a requirement would have been odd indeed. Again, the report of the Security Council Mission to Srebrenica itself had criticized the pressure which had been exerted on the Government of the Republic of Bosnia and Herzegovina to achieve the voluntary demilitarization of Srebrenica.[252]

It was also alleged again that the forces of the Government of Bosnia and Herzegovina were using the so-called safe areas as bases for military operations against Serb targets. This argument is difficult to maintain, at least with respect to Srebrenica, which had, in fact, been disarmed. Although it has been alleged that not all Government forces had actually been totally disarmed, they did certainly not constitute a credible fighting force which was threatening the vastly superior Serb forces surrounding them. And even if military operations had occasionally been conducted from safe areas, this could hardly justify the toleration of sustained artillery and mortar attacks against concentrations of unprotected civilians and displaced persons, and the eventual invasion of the enclave and the murder or deportation of its inhabitants.

Political analysts might argue that the timidity of the UN Secretary-General, and especially of his Special Representative Akashi, lay at the heart of the failure of UNPROFOR to fulfil its mandate. True, the UN Secretariat was hampered by a lack of forces that were available for deployment and accordingly cautious, but NATO had made itself available to offset this deficiency through air power. The fact that the Secretariat only authorized the symbolic use of air power, both with respect to Srebrenica and more generally, apparently only after advance warning was given to the target forces, and only against very specific and limited targets, might therefore support criticism against the UN Secretariat. On the other hand, this caution might also reflect the alleged understandings which were reached at the time when Resolution 836 (1993) had been adopted.

Of course, the position of the military and political commanders of UNPROFOR was driven by a desire to avoid exposing the forces to undue risk. However, by deploying them in isolated and indefensible positions, for example to monitor weapons collection points which had been conveniently located in areas controlled by Serb forces, the Serb forces

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[252] *Supra*, note 133.

were virtually invited to exploit their vulnerability through intimidation and hostage-taking.

The UN Secretary-General justified the dissonance between the mandate and the performance in the following way. With respect to the failure of UNPROFOR to ensure its freedom of movement, he drew attention to the fact that UNPROFOR had, in fact, used force in self-defence quite frequently. However, he added, the reality was "that there can be no better protection for UNPROFOR than for the parties themselves to recognize their responsibility for ensuring its security and freedom of movement".[253] This statement displays a certain lack of reality. It was by virtue of the fact that Serbs had been unwilling to "recognize their responsibility" in this respect, that resort had to be made to a Chapter VII mandate. In fact, the Secretary-General himself had found early on in the conflict that it was the war aim of the Serbs to inhibit humanitarian aid supplies as part of the ethnic cleansing strategy.[254] Thus, the very reason for equipping the UN with a Chapter VII mandate was to remedy the fact that Serb forces were not merely failing to cooperate with UNPROFOR, but, to the contrary, they were actively and violently frustrating even the most basic aims of UNPROFOR.

With respect to the implementation of UNPROFOR's other missions, especially the protection of the so-called safe areas, the Secretary-General stated that "using force against only one party, whether directly or through regional arrangements, alters that party's perception of the neutrality of UNPROFOR, with the risk that its personnel and those of other United Nations agencies come to be identified with the use of force and perceived as a party to the war."[255] This view once more reveals a profound confusion. The UN appeared to accept the possible perception on the part of Serb forces as an objective reality. True, Serb forces would not be pleased if subjected to offensive UN counter-action. But these forces had of course identified themselves as targets for such treatment in persistently committing the grave violations proscribed by international law and the UN Security Council. The fact that other forces were not subjected to similar treatment was not the result of a lack of neutrality on the part of UNPROFOR, but due to the fact that they had not resorted to a military strategy of ethnic cleansing and genocide.

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[253] Report of the Secretary-General Pursuant to Security Council Resolutions 982 (1995) and 987 (1995), S/1995/444, 30 May 1995, para 55.

[254] *Supra*, note 94.

[255] Id., para 58.

In fact, it could be argued that, in failing to respond to these challenges, UNPROFOR was acting in an un-neutral way. It permitted the Serb side to profit militarily from the atrocities which consistently characterized its military campaign, and which had been specifically outlawed by the Security Council.

Even if the attempts of the Secretary-General to denude the so-called safe areas concept from its territorial basis had been accepted by the Security Council, the fall of Srebrenica would still highlight the UN's failings. Not only did the taking of territory remain unopposed, but the wholesale slaughter of thousands of its inhabitants was carried out literally under the eyes of the UN forces.

Of course, the UN Secretariat is merely the executive arm of the Security Council. And it appears that the very Council which established at least a mandate to ensure the integrity of the so-called safe areas and the survival of threatened populations undermined them, not merely by virtue of having failed to ensure that sufficient troops were available for their protection.

This undermining of the safe areas concept, which actually started even before Resolution 836 (1993) had been adopted, was supported openly by the Russian Federation, which insisted on the role of the Council (and therefore its own) in managing, and to some extent obstructing, the operation. There was, however, also a somewhat more subtle subversion of the mandate. Thus subversion was being conducted by some of the very states which publicly praised themselves for having made a significant contribution to implementation of the UN mandates for the Republic of Bosnia and Herzegovina.

The following extract from the apparently confidential United Kingdom Campaign Plan for UN/NATO Operations in the Republic of Bosnia and Herzegovina may be instructive in this respect, bearing in mind that it was a British General who was in command of UNPROFOR in the Republic of Bosnia and Herzegovina:

> "It is ... fundamental that the UN remains a non combatant in the conflict. This crucial consideration must be recognized by NATO, particularly with regard to the possible use of airpower. This war is a peoples' war and has many complex origins and consequences, not all of which are susceptible to the threat posed by airpower. Therefore, a formula needs to be found to reconcile the belligerent parties' values with the UN's and world community's interests."[256]

[256] UK Campaign Plan for Bosnia-Herzegovina Command for UN/NATO Operations, 25 February 1994 [Restricted].

This guidance was directly reflected in the views of the British UN Commander in the Republic of Bosnia and Herzegovina, Lieutenant General Sir Michael Rose. As General Rose argued, "we managed to hold the line. There is a very clear distinction in my mind between peace-keeping and peace-making".[257] In his view "a peace-keeping force designed to assist the delivery of humanitarian aid simply cannot be used to alter the military balance of force in a civil war, modify political goals of one party or another, or even attempt to enforce the passage of a convoy – for these are pure acts of war".[258]

The view underpinning this statement appears to be once again that the UN was a neutral force in a civil war. However, the Chapter VII decisions of the Security Council, which had been supported by the United Kingdom, had clearly established the international dimension of the conflict, and the fact that the UN was involved in a situation where a state was lawfully attempting to fight against an armed intervention. But even if the UN deployment had been predicated on the assumption that the conflict was entirely an internal one, this statement would still be absolutely extraordinary.

All of the UN decisions relating to the humanitarian aspects of the conflict confirmed in the strongest possible terms the unacceptability of genocide, ethnic cleansing and other fundamental violations of humanitarian law which were being perpetrated. At least with respect to attempts to destroy concentrations of civilians through direct attack, or through starvation, the Council had explicitly authorized the use of military force by UNPROFOR and of air power by NATO. Insisting on humanitarian access would not have been "an act of pure war", as General Rose put it, but an act that was even justified under a peace-keeping mandate.

The underlying agenda of those controlling the actual implementation of the mandate, however, was radically different. Instead of insisting on a minimum of humanity in warfare, through the use of force if necessary, the UN and some of the force-contributing states attempted to preserve its role of a "non-combatant" by "reconcil[ing] the belligerent parties' values with the UN's and world community's interests".

While it must by now be clear that the mandate relating to UNPROFOR had in fact been conducted as if it were peace-keeping, despite the

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[257] Barber, quoting from an interview with General Rose, in Few Cheers for Rose as he Bows out of Bosnia, The Independent, 24 January 1995, at 9.

[258] Rose, A Year in Bosnia: What has been Achieved, Royal United Services Institute Journal, June 1995, at 22, 23.

terms of the relevant resolutions, the British guidance document indicates that even NATO action was to be subjected to similar prudence. This was also confirmed by the UN Commander for the Republic of Bosnia and Herzegovina. As General Rose indicated: "NATO always remained within the limitations prescribed for the use of force in a peace-keeping mission. Its peace-keeping doctrine accords precisely with that of the UN."[259]

In this way, the intended balance of Resolution 836 (1993) was totally upset. After all, the delicate division of tasks among paragraphs 5, 9 and 10 had established broad aims for the so-called safe areas, but only limited military enforcement authority for UNPROFOR on the ground. On the other hand, NATO was given wide authority in supporting UNPROFOR through air power with respect to both paragraphs 5 and 9. True, the effectiveness of this arrangement was somewhat hamstrung by the unspoken requirement for consultation with the Security Council. But now it turned out that major force-contributing states, which were also part of NATO and had considerable influence over the conduct of UNPROFOR operations, along with the UN Secretariat and the UN military commanders, were also treating NATO's role principally as one of "peace-keeping". And NATO was, of course, operating under the control of the UN military and civil authorities.

Hence, NATO missions were generally confined to what became known as "close air support". According to the DUTCHBAT report quoted above, such support was only available when "UN positions" were "in acute danger".[260] According to the UN force Commander in the Republic of Bosnia and Herzegovina, General Rose, when such force was used, it was kept "relevant", i.e., the target was generally linked to the violation, it had to be timely, it was "done with warning", only as a last resort, using a minimum level of force and avoiding collateral damage.[261] This formula would fulfil the test of self-defence in general international law, or be possibly even more restrictive than that which is permissible in general international law. It is totally divorced from the mandate of UN forces relating to the safe areas, that is, deterrence of attacks against so-called safe areas, the prevention of incursions into them, ensuring free humanitarian access, etc. And even the peace-keeping mandate was not implemented fully. That is to say, ground troops used force only in self-de-

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[259] Id., at 24.

[260] *Supra*, note 250.

[261] Rose (note 258), at 22, 24. Also Barber (note 257), at 9.

fence, rather than offensively insisting on their freedom of movement to effect humanitarian relief.[262] Even when they responded to armed attacks, this was done in a very restrained way.[263]

The abandonment of the formal mandate of UNPROFOR to use force at least in reply to bombardments and incursions and to ensure humanitarian aid supplies was supported by a re-interpretation of Resolution 836 (1993). A view was adopted which reduced even these functions enunciated in paragraph 9 of the resolution to self-defence of UNPROFOR, rather than as an enforcement measure directed against those attacking or strangulating the so-called safe areas. For, the use of force in reply to bombardments or incursions into so-called safe areas where UNPROFOR would be present (and hence also subject to attack), or in the event of any deliberate obstruction to the freedom of movement of UNPROFOR and protected convoys, would actually already be covered by the extensive interpretation of the right to self-defence as it appertains to UN peace-keeping operations generally, and as it was restated in Resolutions 815 (1993) and 817 (1993), and subsequent resolutions in the context of Chapter VII. Inconsistently with the object and purpose of Resolution 836 (1993), the object of protection would therefore be shifted back from the so-called safe areas to UNPROFOR itself.

A second strand of re-interpretation, presaged in the Secretary-General's report which emphasized deterrence instead of defence with respect to the so-called safe areas, was also adopted. According to the understanding reached in the Council, the broad functions contained in paragraph 5 were supposed to be achieved through deterrence, at least as far as UNPROFOR was concerned. The more limited functions of ensuring the survival and integrity of the areas in case of bombardment, incursion or strangulation was to be ensured through defence. However, defence of the safe areas was substituted by the concept of deterrence which now also extended to the much more limited aims contained in paragraph 9 of Resolution 836 (1993). Defensive action would only be taken in case of imminent or actual attack on UNPROFOR. Attacks on the safe areas and the populations contained within them were to be deterred. Of course, it is not clear how deterrence could ever have worked. After all, the very point of this reinterpretation of UNPROFOR's military mandate

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[262] Warbrick, The United Nations Rules of Engagements and the British Soldier in Bosnia, 43 ICLQ 496, 497.

[263] One notable exception towards the end of the conflict was the recapture of a bridge in Sarajevo by French forces after it had been forcibly taken.

with respect to the safe areas was to signal that the UN would not use force unless its own troops were imminently threatened.

The discovery that neither the UN nor NATO had exhibited a credible commitment to their formal Chapter VII mandates had profound implications. The continued presence of UNPROFOR, and the continued implementation of its mandate, had been used as the principal argument for keeping in place the arms embargo and preventing the direct involvement of other, especially Islamic, states in the crisis. With the fall of Srebrenica, the myth of the implementation of UNPROFOR's mandate appeared to have collapsed. In the absence of even a pretence of the implementation of the measures necessary to restore international peace and security, individual states prepared to take action outside of the framework of UNPROFOR. Hence, the essential aims of some of the key states involved in the management of the crisis were suddenly at stake.

C. The Proposed Removal of the Enforcement Mandate

When it came to the renewal of UNPROFOR's mandate in March 1995, the Government of the Republic of Bosnia and Herzegovina had already hinted at a possible termination of its consent for the deployment of UNPROFOR. In response to this development, the Council requested the Secretary-General in Resolution 982 (1995) to report to the Council on the implementation of UNPROFOR's mandate, taking into account, *inter alia*, the concerns that had been raised by the Government of the Republic of Bosnia and Herzegovina. Those concerns were precisely that the UN Secretariat had been stressing "UNPROFOR's Chapter VI approach to its mandate while marginalizing, even disregarding, the Chapter VII authority adopted in the relevant Security Council resolutions".[264]

The Secretary-General's views, produced against the backdrop of the hostage crisis which had followed upon the air strikes against Pale, were however, not likely to allay the concerns of the Government of the Republic of Bosnia and Herzegovina. The UN Secretary-General presented various options for the future of UNPROFOR to the Security Council. He did so in the light of his finding that "peace-keeping and the use of

[264] Letter from the Chargé d'affaires a.i. of the Permanent Mission of Bosnia and Herzegovina to the United Nations Addressed to the Secretary-General, S/1995/227, 28 March 1995. For a comprehensive listing of the failings of UNPROFOR from a host country perspective, also see the Letter from the Chargé d'affaires a.i. of the Permanent Mission of Bosnia and Herzegovina to the United Nations addressed to the Secretary-General, S/1995/318, 19 April 1995.

force (other than self-defence) should be seen as alternative techniques and not as adjacent points on a continuum, permitting easy transition from one to the other".[265] Once again, this view reflected a confusion. In principle, there should not have occurred a blurring of the thin blue line between enforcement and peace-keeping, at least according to the mandates under which UNPROFOR was formally operating. Virtually all of UNPROFOR's functions on the ground were in fact based on enforcement mandates (freedom of movement, humanitarian access, deterrence against, and responses to, attacks on so-called safe areas, including the maintenance of weapons exclusion zones around civilian concentrations and the prevention of incursions). In reality, it was the UN Secretariat's assumption, fed by certain troop-contributing states, that it could somehow implement an enforcement mandate through the peace-keeping techniques of consensus and compromise which had created the so-called continuum the Secretary-General was attacking.

In order to make reality conform to the self-imposed image of the UN's role in the Republic of Bosnia and Herzegovina, the Secretary-General now proposed that the Council should:

> "revise UNPROFOR's mandate so that the force would be required to perform only those tasks that a peace-keeping operation can reasonably be expected to perform in the circumstances prevailing in Bosnia and Herzegovina. These would include good offices, liaison and negotiation; monitoring ceasefires, etc. as long as the parties remained willing to implement them; maintaining a presence in the safe areas, after negotiating appropriate regimes for them but without any actual or implied commitment to use force to deter attacks against them; operation of Sarajevo airport with the consent of the parties; facilitating the normalization of life in Sarajevo; escorting humanitarian convoys and supporting other humanitarian activities; border monitoring, if accepted by the parties; and the use of force, including air power, only in self-defence."[266]

This formal reversion to a peace-keeping footing was obviously unacceptable to the Government of the Republic of Bosnia and Herzegovina. If UNPROFOR abandoned all pretence of insisting at least on the enforcement of a minimum standard of humanity and instead formally made its operations dependent on the consent and co-operation of the Serb side,

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[265] Report of the Secretary-General Pursuant to Security Council Resolutions 982 (1995) and 987 (1995), S/1995/444, 30 May 1995, para 62. See also S/1995/1, paras 35, 36.

[266] Id., para 77. The Secretary-General also considered transferring the enforcement mandate to a coalition of states acting under a UN mandate, but independently of UNPROFOR, or instead of it.

it was going to be of very limited utility to the Government of Bosnia and Herzegovina, whose consent and co-operation was required.

VI. The Rapid Reaction Force and Large-Scale Air Strikes

Faced with the prospect of a total collapse of the UNPROFOR mission, a meeting of EU and NATO states contributing to UNPROFOR was called in Paris.

A. Establishing the Rapid Reaction Force

At the Paris meeting, it was agreed that the United Kingdom, France and the Netherlands would make available a Rapid Reaction Force (RRF). This multinational brigade was to operate under UN command and in support of UNPROFOR's mandate. This decision was taken explicitly to:

"ensure that UNPROFOR could fulfil its operational mandate and reduce its vulnerability;

maintain the UNPROFOR presence in the so-called safe areas;

ensure freedom of movement for UNPROFOR, especially with respect to the so-called safe areas;

increase the level of equipment of UNPROFOR;

maintain the option of NATO air strikes in support of UNPROFOR."[267]

In pursuance of this decision, representatives of France, the United Kingdom, and the Netherlands met with the UN Secretary-General in New York, proposing to augment UNPROFOR with an extra 12,500 rapid reaction troops. In his report on this meeting, the Secretary-General somewhat reluctantly endorsed this proposal, emphasizing however, that the reinforcement "would not alter the fact that UNPROFOR cannot by itself end the war in Bosnia and Herzegovina. Its role is to create conditions in which progress can be made towards a peaceful settlement, to help implement agreements that are reached and to support to relieve the humanitarian suffering created by the war".[268] The Secretary-General claimed in this context that the Security Council had recognized that the functioning of UNPROFOR was dependent on the readiness of the par-

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[267] Communiqué diffusé à la suite de la réunion des Ministres de la Défence représentant les pays de l'Union européenne et de l'Alliance atlantique contribuant aux opérations des Nations Unies en Bosnie-Herzegovine, Paris, 3 June 1995.

[268] Letter from the Secretary-General Addressed to the President of the Security Council, S/1995/470, 9 June 1995.

ties to cooperate with it. The proposal of the three governments was intended to reinforce UNPROFOR in its peace-keeping role, he indicated.[269]

The actual proposal of the three states itself had indicated that the new forces would operate under existing United Nations rules of engagement. "The purpose of the RRF would be to give the commander a capacity between 'strong protest and air strikes'; it would increase tactical operational flexibility and would be intended to have a deterrent effect but it would not change the United Nations rule to peace-enforcement; the status of UNPROFOR and its impartiality would be unaffected; ...".[270] More specifically, RRF missions could include emergency actions/responses to assist isolated or threatened United Nations units; helping redeployment of elements of UNPROFOR; and facilitating freedom of movement where necessary.

The proposal and the Secretary-General's letter appear to assume that the earlier proposal by the Secretary-General to reduce UNPROFOR to a peace-keeping role had been accepted by the Security Council. This, however, had not been the case. Indeed, in its Resolution of 31 March 1995, which completely restructured UN operations for the former Yugoslavia as a whole, it explicitly decided that all previous relevant resolutions relating to UNPROFOR's mandate in the Republic of Bosnia and Herzegovina should continue to apply, at least up to 30 November 1995.[271] And the mandate of the RRF, to ensure that UNPROFOR could fulfil its operational mandate, appeared to relate to enforcement tasks. Indeed, the government of France suggested that the Rapid Reaction units should create, by force if necessary, a secure humanitarian corridor to Sarajevo.

This confusion as to UNPROFOR's mandate, including that of the RRF, was also visible in the Security Council debate on Resolution 998 (1995) which endorsed the deployment of the Rapid Reaction Force. During the debate, some delegations confirmed that UNPROFOR was operating under Chapter VII. "We do not agree with the attempt to characterize UNPROFOR as merely a peace-keeping operation and to downplay UNPROFOR's mandate relating to its enforcement responsibilities. The existing mandate suffers from a lack of implementation," the delegate from Malaysia, explained. In his view, the Rapid Reaction Force should be

269 Id.
270 Id., Annex.
271 Resolution 982 (1995), 31 March 1995.

used in support of the enforcement mandate for UNPROFOR.[272] Turkey indicated that "almost all Security Council Resolutions on Bosnia and Herzegovina refer to Chapter VII of the Charter. The United Nations Force in Bosnia and Herzegovina was established as a protection force and has never, from the very outset, been a traditional peace-keeping force."[273]

On the other hand, the Russian Federation supported the return of UNPROFOR "to a purely peace-keeping function".[274] Honduras supported the creation of the RRF, because it would permit UNPROFOR to "continue to be a peace-keeping operation".[275]

China, on the other hand, objected to the establishment of the RRF, because it "brings about a *de facto* change to the peace-keeping status of UNPROFOR."[276]

The United Kingdom and France, as the main contributors to the new force, took a somewhat ambivalent position. While placing the RRF in the context of peace-keeping, they indicated that its function was to enable UNPROFOR to carry out its mandate effectively.[277] And that mandate itself had not really been changed by the Council from enforcement to peace-keeping.

In summary, at least three views were evidenced during the debate. One was that UNPROFOR was indeed operating under a Chapter VII mandate and would continue to do so. Another view was that UNPROFOR was acting under Chapter VII, but should be reduced to a peace-keeping footing. Finally, some argued that UNPROFOR was already acting under a peace-keeping, rather than an enforcement mandate. Similarly, it was unclear whether the RRF represented an addition to UNPROFOR for the purpose of revitalizing and finally implementing its enforcement mandate, or whether its task was merely to protect UNPROFOR while it was engaging in peace-keeping.

Resolution 998 (1995) itself reflected this disagreement. As had been the case in previous resolutions concerning UNPROFOR's mandate, Chapter VII was invoked, but merely in the context of ensuring the security of UN forces and their freedom of movement. The resolution endorsed the creation of the RRF, acting "under the present mandate". That would in-

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272 S/PV3543, 16 June 1995, at 4. Also Egypt, id., at 6.
273 Id., at 7.
274 Id., at 9.
275 Id., at 12.
276 Id., at 14.
277 Id., at 18, 19.

dicate that no authority was granted to the RRF in addition to that already enjoyed by UNPROFOR. Formally, UNPROFOR enjoyed a mandate to use force in self-defence, to ensure its freedom of movement, including for the delivery of humanitarian aid, and to respond to bombardment or incursion into the so-called safe areas. In reality, UNPROFOR had only used force in self-defence, and the real mission of the RRF appears to have been to protect UNPROFOR while it operated in its peace-keeping role.

It was also made clear throughout that the force would be under direct UN command. Although its members would not wear blue berets and its tanks would not be painted white, it was unequivocally part of UNPROFOR as a whole. Hence, just like the application of air power, it could be argued that any significant use of force other than self-defence, even if that had been contemplated, would have had to be approved in consultations by the Council (including Russia) and by the Secretary-General or his Special Representative.

The plan for the deployment of the RRF provided for readiness of the force within 30 days of Security Council and host country approval. Although some elements of the force were in the theatre of operations before that date, there was no evidence of a willingness on the part of the UN to make use of this resource in support of the Dutch battalion stationed in Srebrenica, or to deploy it to save the next targets of Serb aggression.

B. Drawing the Line at Gorazde

On 12 July 1995, after the fall of Srebrenica, the Security Council, acting under Chapter VII, demanded that Serb forces cease their offensive and withdraw from the "safe area" immediately. The Secretary-General was requested to use "all resources available to him" to restore the status of the so-called safe area, calling, at the same time, on the parties to the conflict to cooperate to that end.[278] Of course, the Secretary-General did not bring to bear significant resources that might have been available to him to restore Srebrenica to the status of a so-called safe area.[279] Indeed,

[278] Resolution 1004 (1995), 12 July 1995.

[279] The Government of the Republic of Bosnia and Herzegovina had requested the use of the Rapid Reaction Force to re-take the enclaves. Letter from the Chargé d'affaires a.i. of the Permanent Mission of Bosnia and Herzegovina to the United Nations Addressed to the President of the Security Council, S/1995/579, 14 July 1995.

no significant action was taken to protect the next likely target of Serb military operations, the so-called safe area of Zepa.[280]

The United Kingdom then called a conference in London. The meeting concluded that:

> "the current Bosnian Serb offensive, and the continuing siege of Sarajevo, must be met with a firm and rapid response. ... The meeting therefore warned that in order to deter any attack on Gorazde, any such action will be met with a substantial and decisive response. There was strong support for this to include the use of air power, but there was also great concern expressed. Countries are conscious of the serious risks involved in this course of action. We emphasized that the United Nations must not go to war, but needs to support realistic and effective deterrence. ... It underlined its determination to ensure access to Sarajevo and resupply of the UN forces, and support for the early use of the Rapid Reaction Force to protect UNPROFOR in maintaining access for these deliveries. ...".[281]

It is noteworthy that the declaration did not refer to Zepa, which was close to collapse at the time. Instead, that so-called safe haven was left to be overrun three days after the London Conference, without any serious attempt having been made to save it. Somewhat oddly, the conference appeared to have reduced the coverage of the safe area concept to only some, or, indeed, only one, of the concentrations of civilians which had been identified by the Security Council. On the other hand, the deterrence of attacks against the so-called safe areas, or at least of Gorazde, was to be achieved by the threat of a substantial and decisive response. This was taken to mean that NATO air strikes would not only be used against the very forces which might be menacing a so-called safe area, but against the wider military infrastructure of the aggressor force. The threat of a substantial and decisive response was, of course, somewhat undermined by the acknowledgement of the need for caution in the light of the serious risks involved. The apparent limitation of the RRF to protecting UNPROFOR and its freedom of movement, including humanitarian access, also appeared to have been confirmed.

Of course, the London Conference was not a meeting of the Security Council and it had no legal authority to act in its place. In fact, the intention was probably to communicate somehow that action would now be

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280 See PRST/1993/33, 20 July 1995.

281 Transcript of a Press Conference given by the Foreign Secretary, Mr Malcolm Rifkind, in London, 21 July 1995. The Conference was attended by Bangladesh, Belgium, Canada, Denmark, France, Germany, Italy, the Netherlands, Norway, Russia, Spain, Sweden, Turkey, the Ukraine, the USA, the EU, the UN, NATO and the UK.

taken outside of the narrow strictures hitherto applied by the UN. In substantive terms, the Conference merely marked a return to the terms of Resolution 836 (1993) and the mandate to use air power contained therein. It appeared to threaten armed action of a kind which, in general international law, might have been considered disproportionate and could therefore not be covered by an extensive interpretation of the right to self-defence.

The decision of the London Conference was endorsed by the North Atlantic Council.[282] The UN Secretary-General also agreed that "an attack by the Bosnian Serbs on Gorazde should be met by a firm and decisive response, including air strikes". He also noted that the North Atlantic Council had asked the NATO military authorities, in consultation with UNPROFOR, to formulate proposals on the possible use of air power with respect to the worsening situation in Sarajevo and Bihac. Therefore he instructed UN commanders in the field to undertake the necessary planning in consultation with NATO. The Secretary-General stressed that these measures were "all being taken with a view to implementing existing Security Council resolutions, in particular Resolution 836 (1993), and are consistent with that resolution".[283]

The Secretary-General added that he had already informed UNPROFOR force-contributing states of the measures he was taking, and that he had instituted action to protect UN personnel in the theatre and to reduce their vulnerability to retaliation and hostage taking. He also indicated that the "dual key" arrangements for the use of NATO air power would remain in place. However, in order to streamline decision-making within the United Nations chain of command when air strikes were deemed to be necessary, he delegated necessary authority in this respect to the overall Force Commander General Janvier based in Zagreb. As regards close air support, he indicated that his Special Representative had that day delegated the necessary authority to the Force Commander who, in turn, was authorized to delegate it further to the UNPROFOR Force Commander General Smith in Sarajevo when operational circumstances so required. Finally, the UN Secretary-General indicated that he had instructed Under-Secretary-General Kofi Annan and UNPROFOR Force Commander Janvier to travel to Brussels to arrange for the operational modalities for implementing these measures.

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[282] Decision of 25 July 1995.

[283] Letter from the Secretary-General to the President of the Security Council, S/1995/623, 26 July 1995.

In Brussels, Mr Annan praised the "extremely constructive and positive discussions" which had been held about the operational modalities for implementing the measures to which the UN and NATO were "both firmly committed".[284]

In the meantime, and in the light of continuing hostilities in the region of the so-called safe area of Bihac which had not been effectively addressed by either NATO or the UN, the Republic of Bosnia and Herzegovina concluded a Declaration on Joint Defence with the Government of Croatia and in that context, requested "urgent military and other assistance against aggression, especially in the area of Bihac".[285] In the Declaration, it was indicated that Croatia had accepted this request, which was made within the framework of the Federation arrangement between the two states.[286] The Declaration on Joint Defence was immediately implemented, with reference to Article 51 of the UN Charter and the continued failure of the UN and NATO "to meet their commitment to respond to the assault upon the Bihac region and 'safe area'".[287]

The Government of Turkey also reported to the Security Council that its Grand National Assembly had determined that the UN, NATO, the Council of Europe, the WEU, the OSCE and the European Union had proved to be totally useless and have lost all their credibility. The "policies of the European countries of treating on an equal level the innocent and the aggressor, the oppressed and the oppressor, describing the ongoing genocide as a civil war ... have resulted in the mass murder not only of the Muslim Bosnians but also of those Serbs and Croats loyal to the Republic of Bosnia and Herzegovina."[288] The Assembly declared that Turkey should make it possible for the Bosnian Government to use its right to self-defence, as envisaged by Article 51 of the Charter, and take the lead for concluding bilateral and multilateral defence cooperation agreements with it. Should UNPROFOR be partially or totally withdrawn, Turkey

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[284] Press Release, Statement by Mr Kofi Annan at NATO HQ, 28 July 1995.

[285] Enclosed in Letter from the Representatives of Bosnia and Herzegovina to the United Nations, Addressed to the Secretary-General, S/1995/609, 24 July 1995.

[286] Letter from the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations Addressed to the Secretary-General, S/1994/255, 4 March 1994, Annex.

[287] Letter from the Chargé d'affaires a.i. of the Permanent Mission of Bosnia and Herzegovina to the United Nations Addressed to the President of the Security Council, S/1995/637, 1 August 1995.

[288] Declaration of the Grand National Assembly of Turkey, 22 July 1995, transmitted in Letter from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations Addressed to the Secretary-General, S/1995/625, 27 July 1995.

and the Organization of the Islamic Conference should not only keep their military troops in Bosnia and Herzegovina, but should also equip them with the appropriate military arms and military material.

At this point, the strategy of containing the conflict through the presence of UNPROFOR which lay at the heart of the policy of certain Western European states was once more nearing collapse. The members of the Organization of Islamic States had openly declared their intention to defy the arms embargo, the Republic of Bosnia and Herzegovina was invoking its right to collective self-defence and had already obtained military support from Croatia, and other states were considering to involve themselves directly, and outside of the UN framework, in the hostilities.

In the light of these developments, the attitude of certain key states appeared to change. The arguments which had been previously deployed in support of the suggestion that UNPROFOR was merely engaging in peace-keeping and condemned to a position of so-called neutrality were being radically reversed, both in terms of substance and procedure. In addition to re-interpreting the UN mandate in accordance with Chapter VII and with the wording of the relevant resolutions as originally adopted, the arrangements for the command and control of the application of air power were revised further.

C. Expanding the Threat of a Decisive Response

On 1 August 1995, the North Atlantic Council approved the necessary planning to deter an attack by Bosnian Serbs against Gorazde. It now also declared its readiness to "take the same robust action to defend the other Safe Areas in Bosnia, Bihac, Tuzla and Sarajevo".[289] That same day, the Republic of Bosnia and Herzegovina reiterated her threat to demand a withdrawal of UNPROFOR, unless the mandate was to be finally fulfilled.[290]

On 10 August, Admiral Leighton Smith, the CIC of NATO's Allied Forces in Southern Europe, and UN Force Commander Lt General Bernard Janvier, signed a memorandum of understanding on the execution of NATO air operations for the protection of UN designated "Safe Areas" within Bosnia and Herzegovina. The aim of these arrangements was "to

[289] Press Statement by the [NATO] Secretary-General following the North Atlantic Council Meeting of 1 August 1995.

[290] Letter from the Chargé d'affaires a.i. for the Permanent Mission of the Republic of Bosnia and Herzegovina to the United Nations Addressed to the Secretary-General, S/1995/638, 1 August 1995.

deter attacks, or threats of attack, against the safe areas, and to be ready, should deterrence fail, to conduct operations to eliminate any threat, or defeat any force engaged in an attack on a safe area".[291]

Moreover, it was reportedly agreed that, once authority had been granted for the application of air power, it would remain valid until the operation was terminated by NATO. In addition, in accordance with the London decision, targets were no longer to be restricted to those directly involved in the infraction which triggered the application of air power. Finally, the extraordinary practice of giving specific warning to the party to be subjected to air strikes was to be abandoned.[292]

On 18 August, the Government of the Republic of Bosnia and Herzegovina learnt through the media that UNPROFOR would be withdrawn from Gorazde, despite the fact that several states had apparently offered to make available substantial troop reinforcements to deter attacks on the so-called safe areas. The Government of the Republic of Bosnia and Herzegovina reserved the right "to undertake other measures under Article 51, including alternative bilateral arrangements to redress the matter".[293]

D. Decisive Action

NATO finally implemented the threat of a substantial and decisive response after another bombardment of civilians in Sarajevo on 28 August 1995 had resulted in at least 33 dead and 88 wounded. On 30 August, the NATO Secretary-General announced that in the early morning hours aircraft operating within the provisions of Operation Deny Flight commenced attacks on Bosnian Serb military targets in Bosnia. According to his statement, the air operations were initiated after the UN military commanders concluded, beyond any reasonable doubt, that the attack against Sarajevo came from Bosnian Serb positions. The operations were "jointly decided upon by the Commander in Chief, Allied Forces Southern Europe, and the Force Commander, UN Peace Forces, under UN Security Council Resolution 836 and in accordance with the North Atlantic Council's decisions of 25 July and 1 August, which were endorsed by the

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[291] Allied Forces Southern Europe, Press Release 95–23, 10 August 1995.

[292] NATO Press Release, 95–21, 10 August 1995; Reuters, 10 August 1995, RTw 10/08/95, 10:02.

[293] Letter from the Chargé d'affaires a.i. of the Permanent Mission of Bosnia and Herzegovina to the United Nations Addressed to the President of the Security Council, S/1995/710, 18 August 1995.

UN Secretary-General".[294] The declared aims of the operation, which was ongoing, were to "reduce the threat to the Sarajevo Safe Area and to deter further attacks there or on any other Safe Area. We hope that this operation will also demonstrate to the Bosnian Serbs the futility of further military actions and convince all parties of the determination of the Alliance to implement its decisions."[295] The NATO Secretary-General also indicated his fervent hope that this decisive response would contribute to attaining a peaceful settlement.

The NATO Secretary-General called upon all parties to exercise restraint, indicating that no one should seek military benefit from the action. According to a subsequent statement by the United States Government, the Bosnian Government had undertaken to comply with that provision and was complying with it.[296] The Government of the Republic of Bosnia and Herzegovina later clarified that its undertaking to refrain from offensive operations only related to the areas surrounding safe areas.[297]

Subsequently, it emerged that a number of detailed conditions had been established for the termination of the air campaign. These were the withdrawal of Serb heavy weapons for the Sarajevo exclusion zone, an end to shelling, the re-opening of Sarajevo airport and the re-opening of the access road to Sarajevo.[298]

The air campaign was conducted in conjunction with operations by the Rapid Reaction Force, especially ground based forward air controllers and artillery units. Initial targets of attacks were the integrated Serb air defence system in the territory of the Republic of Bosnia and Herzegovina and Serb ammunition storage facilities. Further targets included artillery pieces, supply deports and other essential military facilities. Many of these targets had been concentrated around Sarajevo, but others, especially air defence installations, were a significant distance away from the city. NATO emphasized that great care was being taken to avoid non-military targets.[299]

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[294] Statement by the Secretary-General of NATO, NATO Press Release 95–73, 30 August 1995.

[295] Id.

[296] White House Report, Press Briefing, US Press Release EUR401, 7 September 1995.

[297] Reuters, RTw, 11 September 1995, 19:56.

[298] Interview with M. Alain Juppé, Prime Minister of France, Paris, 31 August 1995. Text supplied by the French Embassy in London.

[299] Transcript of News Conference with Admiral Leighton W. Smith, CIC Allied Forces Southern Europe, Naples, Italy, 31 August 1995. US Press Release EUR503 09/01/95, Operation Deliberate Force Press Briefing by Group Captain Trevor Murry, RAF, 1 September 1995.

The initial strikes were suspended on 1 September to permit meetings between UN and Bosnian Serb officials. On 3 September, the North Atlantic Council, taking note of a report by the NATO military commanders of the operation dubbed "Deliberate Force", stated that the Bosnian Serb reply to UN demands was not a sufficient basis for the termination of air strikes. Since 3 September, the UN Force Commander and the NATO CIC Southern Europe had also conducted an extensive joint assessment to determine if the Bosnian Serbs had begun to implement the UN conditions. While some movement of Bosnian Serb military equipment was observed, the NATO and UN commanders agreed that the movements were not significant, and therefore judged that the Bosnian Serbs had failed to comply. Hence, air strikes resumed. The NATO Secretary-General indicated that "our objective remains attaining compliance of the Bosnian Serbs to cease attacks on Sarajevo or other Safe Areas; the withdrawal of Bosnian Serb heavy weapons from the total exclusion zone around Sarajevo, without delay; complete freedom of movement for UN forces and personnel and NGOs and unrestricted use of Sarajevo airport."[300] These conditions were formally transmitted to the Bosnian Serbs in a letter from General Janvier of 3 September.

Already on 31 August, the Russian representative at the United Nations expressed concern about the air strikes, indicating that they were not in conformity with relevant Security Council resolutions.[301] The rump Yugoslavia condemned the "inappropriate use of air force" and insisted on their immediate cessation.[302] The NATO campaign was, however, fully supported by the UN Secretary-General.[303]

At the request of the Russian delegation, the Security Council met on 8 September, while air strikes were still on-going. Russia alleged that the strikes "go beyond the decisions of the Security Council, change the peace-keeping character of the United Nations operation in Bosnia and involve the international community in a conflict against one of the parties". The Russian delegate further alleged that the strikes were punitive in character, being also directed against the civilian infrastructure of Serb areas, and they were "disproportionate and extensive, whereas ... the Secur-

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[300] Statemement by the [NATO] Secretary-General, 5 September 1995, Press Release (95) 79.

[301] UN Press Release DH1969, 31 August 1995.

[302] Letter from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations Addressed to the President of the Security Council, S1995/758, 31 August 1995.

[303] UN Press Release DH/1971, 5 September 1995.

ity Council took no decisions on changing the principle of proportionality regarding the use of force".[304]

Russia also objected that no consultations had been held with Council members.[305] Her delegation furthermore expressed astonishment at the fact that the dual key procedure had apparently been changed "and that now the United Nations had no opportunity to put an end to the use of force without NATO's agreement".[306]

Finally, Russia objected to the involvement of the Rapid Reaction Force in "neutralizing Serb positions", in its view in excess of the mandate set out in Resolution 998 (1995). This approach, according to the Russian delegate, "very clearly illustrates the fact that the Rapid Reaction Force is no longer impartial, although it remains an integral part of the United Nations peace-keeping operation in Bosnia".[307]

These allegations were denied in a summary fashion by the delegates of the United Kingdom, France, the United States and Germany (i.e., the other members of the contact group). The Russian position was only supported by the rump Yugoslavia and China, the latter indicating that it objected to the use of force as a matter of principle.

Despite the conclusion of an agreement about basic principles for a peaceful settlement of the Bosnia crisis by the Governments of the Republic of Bosnia and Herzegovina, Croatia and the rump Yugoslavia on 8 September,[308] NATO continued its military campaign. On 10 September, thirteen US Tomahawk cruise missiles were launched against Serb radar and missile positions near Banja Luka, in a strategy of a "graduated response" designed to increase pressure on Bosnian Serbs.[309]

On 14 September a framework agreement on compliance with General Janvier's demands of 3 September was signed by Bosnian Serb leaders in Belgrade and air strikes were suspended. On 17 September, General Janvier and Admiral Smith jointly determined that the Bosnian Serbs had shown "initial compliance" and a further suspension of air strikes was agreed, for an additional 72 hours.[310]

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304 S/PV.3575, 8 September 1995, at 2, 3.

305 Id., at 3.

306 Id.

307 Id., at 4.

308 *Infra*, note 316.

309 Statement by Admiral Smith, reported in Reuters, RTec, 11 September 1995, 15:24 hrs.

310 Joint Statement by Admiral Smith and General Janvier, NATO Press Release 94–42, 17 September 1995.

In the light of rapid advances of Bosnian Government forces in Western Bosnia, allegedly supported by allied Croat units, the Security Council, on 18 September, issued a Presidential statement urging the parties not to take military advantage of the situation.[311] The Government of the Republic of Bosnia and Herzegovina responded, indicating that its armed actions were being undertaken "within the framework of total efforts towards halting the occupiers' terror against the civilian population and preventing further destruction and devastation of the territories currently under occupation".[312] The Government gave assurances that it would not permit the mistreatment of civilians in areas which were now coming under its control. In a letter of 21 September, the Foreign Minister of the Republic of Bosnia and Herzegovina reaffirmed the right of the Republic to defend its sovereignty and territorial integrity, but indicated that his Government would not rely upon military action to secure sovereign objectives, if that could be avoided. Specifically, he indicated that Government forces would not advance into Banja Luka. Nevertheless, that day the Council adopted Resolution 1016 (1995), calling for an immediate cease-fire throughout the territory of the Republic of Bosnia and Herzegovina.

On the same day, Admiral Smith and General Janvier announced that the Bosnian Serbs had fulfilled the conditions enunciated in the letter of 3 September. Specifically, they had withdrawn defined heavy weapons from the Sarajevo exclusion zone, under UN supervision, UN patrols had been able to move freely through the exclusion zone, Sarajevo airport had been opened and unimpeded humanitarian access had been granted into Sarajevo. The two commanders therefore agreed "that the resumption of air strikes is currently not necessary".[313] They indicated, however, that any subsequent attack on Sarajevo, or on any other safe area, or other non-compliance to the exclusion zone, freedom of movement or the functioning of the airport would be subject to investigation and resumption of air strikes.

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311 PRST/1995/47, 18 September 1995.

312 Letter from the Chargé d'affaires a.i. of the Permanent Mission of Bosnia and Herzegovina to the United Nations Addressed to the President of the Security Council, S/1995/808, 19 September 1995.

313 Joint Statement by General Janvier and Admiral Smith, NATO Press Release 95–43, 21 September 1995.

On 5 October, the parties reached a general cease-fire agreement which was to enter into force on 10 October and which was widely complied with.[314]

The massive aerial operation was clearly not an exercise of self-defence on behalf of UNPROFOR. It also went far beyond a proportionate response to a specific bombardment of a so-called safe area, in accordance with paragraphs 9 and 10 of Resolution 836 (1993). Instead, the action represented a much wider reading of the resolution, which empowered NATO to take all necessary measures to ensure the implementation of the aims enunciated in paragraph 5 of that resolution. Even this was achieved in a rather broad way, by attacking the military infrastructure of the Bosnian Serbs throughout the territory of the Republic of Bosnia and Herzegovina. The action only became possible after decision-making authority had been located away from the UN Secretariat and placed in the hands of the military commanders. The Russian Federation objected with some justification to the violation of the apparent understanding which had hitherto governed the command and control of NATO air power in its support for UNPROFOR.

VII. The Implementation Force

A. The Dayton Agreements

The Agreed Basic Principles of 8 September, negotiated by the Governments of the Republic of Bosnia and Herzegovina, Croatia and the rump Yugoslavia (mandated to act for the Bosnian Serbs), provided for the continued legal existence of the Republic of Bosnia and Herzegovina within her present borders. However, it was envisaged that two entities would be created within the Republic. 49 per cent of its territory would appertain to the Bosnian Serb entity, and 51 per cent to the Bosniak-Croat Federation which had been established in accordance with the 1994 Washington agreement.[315] The entities were to be committed to the holding of elections under international auspices, the adoption of international human rights standards, the return of the displaced and the creation of certain joint institutions.[316]

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[314] PRST/1995.52, 12 October 1995.

[315] *Supra*, note 286.

[316] Agreed Basic Principles, US Press Release, EUR503, Geneva, 8 September 1995.

Ten days after the adoption of the Agreed Basic Principles, the UN Secretary-General submitted a report on the future of peace-keeping in the Republic of Bosnia and Herzegovina. He proposed that the Security Council should authorize interested member states, assisted as appropriate by regional organizations or arrangements, to undertake both the military and civilian aspects of such a task. In addition to financial, logistical and other grounds, this view was based on "the impossibility of entrusting to a United Nations peace-keeping force a mandate which would require it to take enforcement action against parties whose cooperation it required if it was to be able to carry out its peace-keeping function."[317] The Secretary-General added that even if the current peace initiative would not succeed, he intended to recommend to the Council that UNPROFOR be replaced by a multinational force authorized by the Security Council to carry out such action and to assume responsibility for those aspects of UNPROFOR's mandate which would remain valid. In any event, he proposed to prepare for the handing over of the UNPROFOR mission to a multinational force yet to be created.

The Agreed Basic Principles were followed by additional understandings as to the future of the Republic of Bosnia and Herzegovina[318] and the conclusion of the cease fire agreement of 5 October.[319]

On 21 November 1995, after three weeks of proximity talks at a spartan US air base, the parties initialled the Dayton Agreements, which created a concrete structure for the implementation of the Agreed Basic Principles. The agreements entered into force upon signature in Paris on 14 December 1995.[320] A significant part of the annexes to the Dayton Framework Agreement, which are an integral part of the agreement, are devoted to the international participation in securing the implementation

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[317] Letter from the Secretary-General Addressed to the President of the Security Council, S/1995/804, 18 September 1995.

[318] Further Agreed Basic Principles, 26 September 1995, Letter from the Permanent Representatives of France, Germany, Italy, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the Secretary-General, S/1995/920, 3 November 1995, Annex I.

[319] Cease Fire Agreement for Bosnia and Herzegovina, 5 October 1995, signed by the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the "Republika Srpska", id., Annex II.

[320] French Press Release SAC 95, 289, Paris Conference on Bosnia and Herzegovina, 14 December 1995. The Bosnian Serbs were again represented by Belgrade.

of the agreements. Additional instruments were signed at implementation conferences in London, Brussels and Bonn.[321]

In Military Annex 1-A, the Republic of Bosnia and Herzegovina and the two entities within it (the Bosniak Croat Federation and the so-called Srpska Republic) "welcome the willingness of the international community to send to the region, for a period of approximately one year, a force to assist in implementation of the territorial and other militarily related provisions of the agreement".[322] To this end, it is agreed to invite the Security Council to adopt a resolution by which it will authorize member States or regional organizations and arrangements to establish a multinational military Implementation Force (IFOR). The parties understand and agree that IFOR may be composed of ground, air and maritime units from NATO and non-NATO nations, deployed to help ensure compliance with the provisions of the Agreement.

The parties agree 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 through the NATO chain of command".[323] This provision indicates that, although NATO's authority is ultimately to be derived from a Chapter VII mandate of the Security Council, the implementation of the mandate is left entirely in the hands of NATO, to the exclusion of the UN. In other cases of the granting of enforcement authority to *ad-hoc* coalitions or regional organizations, this authority tends to be subject to control or coordination with the UN, and there may be a reporting or monitoring requirement attached to the mandate. This is not foreseen in the Agreements. The total absence of Security Council control over the implementation of its mandate can be justified, however, inasmuch as a Chapter VII mandate would not, strictly speaking, be legally necessary in this instance. After all, the parties themselves have explicitly and expressly agreed to the exercise of certain of their sovereign powers by NATO and no Chapter VII authority is required in such circumstances. The parties specifically agree to the authorization of IFOR to take such action as required, "including the use of force, to ensure compliance" with the Annex on the Military Aspects of the Peace Settlement.[324]

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[321] Of relevance to the military implementation are the London Conclusions of the Peace Implementation Conference held at Lancaster House, 8–9 December 1995, UK press release of December 1995.

[322] Annex 1-A, Article 1.

[323] Id.

[324] Id., Article 2.

The Military Agreement obliges the parties to:
- cease hostilities,
- withdraw non-indigenous armed forces,
- redeploy forces behind lines of separation,
- notify mine-fields and other hazards,
- identify the strength and equipment of their military forces,
- abolish all restrictions to the freedom of movement for IFOR,
- terminate military air traffic and shut down air defence installations.

In addition to these obligations which strictly relate to military matters, the Military Agreement also obliges the parties to:
- provide a safe and secure environment for all persons in their respective jurisdictions in accordance with human rights standards,
- cooperate with international civilian personnel.

In accordance with Article II of the agreement, the military enforcement authority of IFOR would also apply to these broader tasks. Under Article VI of the Military agreement, participation in these matters is a "supporting task" which, within the limits of its assigned principal tasks and available resources, and on request," includes the following:
- to help create secure conditions for the conduct by others of those tasks associated with the peace settlement, including free and fair elections,
- to assist the movement of organizations in the accomplishment of humanitarian missions,
- to assist the UNHCR and other international organizations in their humanitarian missions,
- to observe and prevent interference with the movement of civilian populations, refugees and displaced persons, and to respond appropriately to deliberate violence to life and the person,
- to monitor the clearing of minefields and obstacles.

In addition, the parties agree that the North Atlantic Council may establish additional duties and responsibility for IFOR in implementing this Annex. The substance of the mandate is therefore literally open-ended.

In paragraph 5 of Article VI, the parties agree that the IFOR Commander shall have the authority, without interference or permission of any Party, to do all that he or she judges necessary and proper, including the use of military force, to protect the IFOR and to carry out the responsibilities listed above.

In theory, therefore, the enforcement mandate proposed for IFOR extends not only to military matters, but also to facilitating the vast "re-

sponsibilities" of the civilian component, which have been incorporated by reference into the Military Annex. However, whether or not this mandate is exercised depends on the fulfilment of the principal, military tasks, available resources and a request, presumably from the relevant civilian component.

In contrast to the incorporation of civilian tasks into the Military Annex, it is noteworthy that the Annex does not concern itself, at least directly, with certain military functions to be exercised by organizations other than NATO. These include military confidence-building measures and arms reduction requirements, which are to be implemented by the Organization for Security and Co-operation in Europe, which does not enjoy an enforcement mandate.[325] As opposed to some of the civilian functions, such as the International Police Task Force, there does not appear to exist a right of involving IFOR in case of a failure by one of the parties to co-operate with these very important obligations.[326] On the other hand, the IFOR Commander might always be entitled to invoke the carte blanche granted in paragraph 4 of the Military Annex, and extend the functions and powers of IFOR to cover this area as well.[327]

B. The Deployment of IFOR

A day after the initialling of the Dayton Agreements, the Council took initial steps towards the lifting of the arms embargo and the lifting of economic sanctions.[328]

On 30 November, the Security Council, after having received a report from the Secretary-General to this effect, decided to extend the mandate for UNPROFOR for a period terminating on 31 January 1996, pending further action by the Council with regard to the implementation of the Peace Agreement. It also requested information of the arrangements for a transfer of authority to IFOR.[329]

On 1 December, NATO started deploying an enabling force of around 2,600 personnel to "prepare for the rapid and efficient arrival of the main body of IFOR following signature of the peace agreement and adoption of a Security Council resolution". The enabling forces would operate

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[325] Annex I-B.

[326] Annex 11, Article V.

[327] In this context, also see the London Conclusions, *supra* note 321, para 8.

[328] Resolution 1021 (1995), 22 November 1995, Resolution 1023 (1995), 22 November 1995.

[329] Resolution 1026 (1995), 30 November 1995.

under NATO command and with NATO rules of engagement, but in close coordination with the UN Peace Force and under the status of forces agreements contained in the Dayton Agreements.[330] Military planning for full deployment was concluded on 5 December, when the North Atlantic Council endorsed Operation Joint Endeavour.[331]

On 13 December 1995, a day before the coming into force of the Dayton Agreements, the UN Secretary-General presented a detailed report on their implementation and the proposed transfer of authority from UNPROFOR to IFOR. The bulk of that report, however, was devoted to the continued role of the UN in implementing the civilian aspects of the peace agreement.[332]

A day after the signing of the Dayton Agreements, the Security Council unanimously adopted Resolution 1031 (1995), acting under Chapter VII of the Charter. The Council authorized member states acting through or in cooperation with the organization referred to in Annex 1-A of the Peace Agreement to establish a multinational implementation force (IFOR) under unified command and control to fulfil the role specified in Annex 1-A and Annex 2 of the Peace Agreement. The resolution authorized states to take all necessary measures to effect implementation of and to ensure compliance with Annex 1-A of the Agreement, to take all necessary measures to ensure compliance with the rules and procedures, to be established by the commander of IFOR, governing command and control of airspace over Bosnia and Herzegovina with respect to all civilian and military air traffic, and to take all necessary measures, at the request of IFOR, either in defence of IFOR or to assist the force in carrying out its mission, and recognized the right of the force to take all necessary measures to defend itself from attack or threat of attack.

The Council also decided that the principal enabling resolutions relating to UNPROFOR would be terminated upon transfer of authority from UNPROFOR to IFOR. On that day UNPROFOR's mandate would lapse. Instead, the Council authorized civilian functions to be carried out as proposed by the Secretary-General.

On 20 December 1991, the UN Secretary-General reported to the President of the Security Council that the transfer of authority from the

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330 NATO Press Release (95) 125, 1 December 1995.

331 NATO Press Release M-NAC-2 (95) 119, 5 December 1995. See also the Chairman's Summary of the Meeting of the North Atlantic Cooperation Council, Brussels, 6 December 1995.

332 Report of the Secretary-General Pursuant to Resolution 1026 (1995), S/1995/1031, 13 December 1995.

United Nations Protection Force to the Implementation Force had taken place at 11 a.m. local time on that day.[333]

VIII. Conclusion

The international community was faced with severe challenges to basic political principles and legal rules when determining its attitude to the developments in the Republic of Bosnia and Herzegovina. These concerned the protection of the territorial unity of a state, its protection from the use of force and the suppression of grave and persistent violations of fundamental rules of humanitarian law conducted within the context of a campaign of ethnic cleansing and probable genocide.

In their responses, international organizations and states overwhelmingly rejected these challenges. They determined unambiguously that grave violations of these essential principles and rules were being committed, they identified the principal author of the violations, determined that the results of the violations could not enjoy the protection of the international legal order and had to be reversed, and adopted, and at times administered, counter-measures. However, these responses were carefully graduated. The measures taken consisted of the minimum necessary in order to prevent a precedent which would undermine the fundamental principles and rules in question. Measures going beyond that required minimum were either not adopted, or where they were adopted, their implementation was actively frustrated, until decisive measures were finally taken after some three years of relative inaction.

In terms of the protection of the territorial unity of the Republic of Bosnia and Herzegovina, it was frequently confirmed that there existed no claim to statehood for the Serb entity within the Republic of Bosnia and Herzegovina. The need to preserve the territorial unity of the Republic was restated over and over again, even while the various internationally brokered peace proposals moved towards its factual division. In the end, the legal personality of the Republic of Bosnia and Herzegovina was nominally preserved in the Dayton Agreements. However, the Serb entity was promoted to the status of a "Republic" entitled to internal self-government, complete with the right to retain its present name and Constitution, to the formation of a special relationship with the rump Yugoslavia

[333] Letter from the Secretary-General to the President of the Security Council, S/1995/1050, 20 December 1995.

and to the exercise of limited international personality.[334] In having established this status, the seeds for an eventual secession of the Serb entity may well have been sown. The Republic of Bosnia and Herzegovina, in contrast, remains a hollow shell, endowed with limited authority and no means to overcome the *de-facto* division of its territory through the exercise of public powers in the Serb entity. It is reduced to the very minimum of that which is necessary to be able to proclaim that the territorial unity of the state has not been formally sacrificed.

In having pressured the Government of Bosnia and Herzegovina into signing the agreements, it has also become possible to claim that the factual division of the territory was not brought about through the use of external force. Instead, it reflects the wishes of the parties, as expressed in the agreements.

The fact that the Serb entity had managed to establish itself as a result of a use of force or armed intervention on the part of the rump Yugoslavia had of course been clearly noted in the resolutions of the UN Security Council and related documents. Hence, self-defence should have been available. In addition, the doctrine of non-intervention in civil wars should not have been applicable to the government. If an opposition force in one state obtains effective control of territory as a result of military assistance given to it by an outside power, then the Government thus threatened enjoys a legal right to receive external military assistance as well. However, the application of this principle, and of the right to self-defence, was defeated by the claim that the arms embargo which had been imposed against the SFRY would also apply to the Republic of Bosnia and Herzegovina. This decision, informed by a desire of some European states to prevent the spreading of the conflict due to the possible involvement of external powers, was somewhat balanced by the imposition of the No Fly Zone. Although it was imposed ostensibly for humanitarian motives, it meant that the Bosnian Serbs would no longer be able to derive a military advantage from the application of Belgrade's air power on their behalf, or from the use of aircraft which had been made available to them by Belgrade.

The imposition of very comprehensive economic sanctions, and their military enforcement against the rump Yugoslavia further manifested the determination of the international community that Belgrade was, to a significant extent, responsible for the situation in the Republic of Bosnia and Herzegovina. The lifting of sanctions immediately after the initialling of the Dayton Agreements appears to reflect a view that the rump Yugosla-

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[334] Dayton Agreements Annex 4, Constitution of Bosnia and Herzegovina, Article 1.

via has now partially discharged its obligation of assisting by nominally reversing some of the consequences of the acts of armed intervention that were attributed to her to allow for the termination of counter-measures.

The insistence of the international community on compliance with minimum standards of humanitarian law was made manifest in innumerable resolutions, decisions and declarations of international organizations and governments. There was no doubt as to the nature and extent of the violations that were being committed, recorded by the organs of the international community and duly rejected, and even prosecuted by a specially created International Tribunal. It was also clearly established by competent and authoritative international agencies that the very purpose of these violations, attributable mainly to the Serbs, was the creation of ethnically pure regions. However, the vast number of condemnations of this horrifying campaign and demands for compliance with international decisions in itself indicates the ineffectiveness of such action.

Not having permitted the Government of the Republic of Bosnia and Herzegovina to obtain the necessary level of armament in order to combat this campaign of ethnic cleansing and probable genocide conducted on its territory, the international community instead attempted to negate some of the consequences of this campaign. Initially, UN peace-keeping forces attempted to ensure the survival of threatened populations by monitoring the situation and facilitating humanitarian relief. In so doing, they attempted to rely on the co-operation of the parties. As one of the parties (initially two) was pursuing a strategy of driving out or exterminating the very populations the UN was hoping to assist, it was obviously unrealistic to count on its co-operation. This was recognized from the beginning by the UN Secretary-General who drew attention to the expansive right of self-defence enjoyed by UN peace-keepers, which includes the right to use force in case of forcible obstruction of the implementation of the mandate. However, this view was never translated into action, even after the right to use force in self-defence and to ensure the freedom of movement of UNPROFOR, already available under a strict peace-keeping mandate, had been restated under the terms of Chapter VII of the UN Charter.[335] Humanitarian relief therefore remained sporadic and its occasional toleration gave the Serb side a powerful bargaining chip in bolstering its status *vis-à-vis* the United Nations. In a sense, this practice ap-

[335] In the *Katanga* case, which also related to action against an unlawfully seceding entity, the UN did use extensive force, nominally to ensure its freedom of movement, but effectively defeating the secession.

peared to confirm the claim of the Bosnian Serbs that they, as part of their armed campaign, had a right to regulate humanitarian access. This *de facto* collaboration with a practice which conflicted with fundamental humanitarian rules was of course consistently rejected by the Security Council, in innumerable resolutions and decisions which demanded that full humanitarian access must finally be granted. But on the ground, these absolute demands were translated into a commodity that could be subjected to negotiation.

The attempt to circumvent the UN Secretariat and permit military support for humanitarian action on the part of states or regional organizations acting outside of UNPROFOR was strangled as soon as it had been made. Resolution 770 (1992) was rapidly integrated into the context of UN peace-keeping.

Of course, some humanitarian successes could be achieved by UNPROFOR and its reliance on the cooperation of the parties. But the overall failure of this policy of compromise was made manifest when, in the light of the fact that UNPROFOR was not implementing its mandate, the Security Council was constrained to call for air drops of humanitarian supplies.

Having failed to obtain the freedom of movement necessary to support threatened populations in all parts of the Republic of Bosnia and Herzegovina, an attempt was made to protect at least isolated concentrations of displaced persons in the so-called safe areas. This protection was supposed to extend both to the prohibition of direct military attacks against these civilian centres and to the provision of humanitarian aid.

UNPROFOR was given an enforcement mandate to achieve these aims, but was only empowered to use force in reply to bombardments of the so-called safe areas and incursions into them and to ensure humanitarian access. The fact that UNPROFOR was lacking in troop strength and heavy equipment, and the will to use the military means that were at its disposal, was supposed to be compensated for by making available to it the potentially massive power of NATO air forces. The mandate granted to NATO was significantly wider than that available to UNPROFOR. However, according to an apparent understanding reached at the time of the adoption of Resolution 836 (1993), NATO air power was subjected to Security Council consultation, and effectively the control of some of its members. In addition, the UN Secretariat, which exercised authority in consultation with the Council, only declared itself willing to use NATO in support of a peace-keeping role, despite the broad military enforcement authorization that had been granted, at least in formal terms. Once more,

binding demands issued by the Security Council were made subject to negotiations with the very party whose intransigence had made the invocation of Chapter VII measures necessary.

UNPROFOR itself thus actively undermined the threat of force upon which its deterrence function was supposed to have been based. Through its practice of limiting the air power available to it to so-called close air support, it effectively also reduced NATO's mandate from broad Chapter VII enforcement powers to very limited self-defence. The intention lying behind this *de facto* change of a *de jure* mandate was to avoid appearing "un-neutral" in the conflict. This meant that UNPROFOR appeared to accept the view that the horrendous international crimes committed by Bosnian Serb forces against civilian concentrations did not in any way disturb the purported equality of "the parties" to the conflict. UNPROFOR simply accepted the Serb perception that insistence on compliance with minimum humanitarian standards in armed conflict was equivalent with the "taking of sides", because it would deprive one party of a military advantage to which it should somehow be entitled. Indirectly, UNPROFOR therefore appeared to legitimize the Serb military strategy of brutal ethnic cleansing and probable genocide.

The UN Secretary-General also undermined the original "safe areas" concept by attempting to rob it of its territorial basis. In addition, it was argued that the safe areas, which were apparently not to be defended by UNPROFOR or NATO, would nevertheless have to be disarmed. The failure to achieve such a disarmament, which had been explicitly rejected by the Council when adopting the "safe areas" resolutions, was in turn invoked as one of the grounds for having failed to defend the areas. In the end, the very "safe areas" which had in fact been virtually disarmed were overrun by Serb forces and subjected to severe atrocities.

The limited and belated use of air-power was heavily criticised as a betrayal of the apparently strong mandate granted in Resolution 836 (1993) by some Council members. Such strong criticism was by no means limited to the Islamic states. With respect to the failure to use air power in a timely and robust fashion when Gorazde came under attack in spring 1994, New Zealand, for example, indicated that "it was not until the tanks were actually in the streets of the city that the United Nations and the North Atlantic Treaty Organization were galvanized into deterrent action by the use of air power, which had been promised in Resolution 836 (1993). We believe that that situation must not be repeated".[336]

[336] S/PV.3461, 19 November 1994, at 6.

UNPROFOR's failure to comply with Security Council decisions was not only attributable to the hesitancy of the UN Secretariat and the Force Commanders pursuing its policy. Some of the force contributing states, including especially the United Kingdom, themselves actively undermined the Council mandate, claiming that its actual implementation would constitute intervention in a civil war.

When the Serbs took hundreds of UNPROFOR troops and others hostage, it became even more evident that UNPROFOR would no longer attempt to implement its mandate. Indeed, the fall of Srebrenica and Zepa, followed by deportations, torture, rape and mass killings, occurred virtually unopposed from the side of UNPROFOR. The UN Secretariat attempted to justify this betrayal of its mandate with reference to limited resources. However, as was made clear subsequently, UNPROFOR's resources, especially when backed up by NATO, could have been employed with great effectiveness, had that been desired. UNPROFOR could also have reduced its vulnerability by concentrating its forces and by giving the appearance of actually being willing to resist detention, frustration of their mandate and attack.

The deployment of the Rapid Reaction Force did not significantly alter the picture. Its coming into being was surrounded by considerable confusion about its mandate. In reality, it should have been clear that the Force enjoyed the same Chapter VII authority that had been granted to other elements of UNPROFOR. However, since UNPROFOR was not making use of its authority, the Rapid Reaction Force was similarly limited in its function, essentially to protect UNPROFOR, rather than those whom UNPROFOR was intended to protect. Hence, the Force was not really a means of finally fulfilling the mandate that had been granted, but instead the role envisaged was that it should ensure in the wake of the hostage crisis that UNPROFOR could continue to operate, despite the terms of its mandate, in essentially a peace-keeping mode.

The willingness on the part of elements within NATO, led by the United States, to take more decisive action was consistently frustrated by the UN and some force-contributing states. NATO ultimata were generally undermined by UNPROFOR's acceptance that Serbs had substantially complied with their conditions when, in fact, that was not the case. NATO "close air support" power was only requested rarely, and when this was done, it tended to follow specific warning to the parties and was restricted to the specific targets which were found to have attacked UNPROFOR or equivalent targets. Air power was used even more sparingly to enforce weapons exclusion zones imposed by NATO

in pursuance of Security Council resolutions relating to the so-called safe areas.

The "dual key" arrangement for the control of NATO air operations in reality reflected its subordination to the UN command, despite the fact that Resolution 836 (1993) had merely required close coordination between the two organizations. Although the Security Council frequently referred to Chapter VIII of the UN Charter, NATO was operating under Articles 42 and 48 of the Charter, as the direct enforcement agent of the Security Council, represented by the Secretary-General. The Russian Federation attempted to protect the influence of the Council (and thus herself) on decisions relating to the use of NATO power by insisting that the Secretary-General was not only bound by Council mandates, but that he also had to consult with members of the Council in implementing the mandate. This insistance may have been based on certain understandings reached at the time of the adoption of Resolution 836 (1993).

The insistence throughout the conflict that the application of force by the UN and NATO was a matter of self-defence, and hence did not constitute a violation of a misconceived idea of "neutrality", is likely to have serious consequences. Some of the uses of force were clearly not covered by self-defence as it is understood in general international law. By invoking that justification, instead of Chapter VII authority of the Security Council, rather odd precedents relating to the hitherto well understood criteria triggering the application of the right to self-defence have been created.

The aim of containing the conflict through the maintenance in place of a peace-enforcement operation which, in fact, was merely engaging in peace-keeping, was finally threatened by formal declarations of Islamic states indicating that they would no longer comply with the arms embargo. In addition to the profound disillusionment about the United Nations in connection with its role in the Republic of Bosnia and Herzegovina, this is perhaps the most damaging result of the mishandling of the crisis. As British Foreign Secretary Douglas Hurd explained, the suggestion that states are no longer required to comply with a mandatory arms embargo imposed by the Council because, in their view, it fails to take account of the claim to self-defence or *jus cogens*, or both, would severely undermine the authority of the Security Council. "It is not open to states unilaterally to decide that some higher law overrides decisions of the Council", he exclaimed.[337] Precisely this result obtained, however, in the

[337] *Supra*, note 72.

final phase of the crisis, when the members of the Organization of the Islamic Conference formally declared themselves no longer bound by Resolution 713 (1991).

In addition to the imminent collapse of the arms embargo, the direct involvement of Croatia, and the possible direct involvement of other states, such as Turkey, led to a radical change in the situation. Suddenly, the enforcement mandate was rediscovered and applied in an aerial campaign of great vigour. The operation could only be justified by reference to Chapter VII enforcement authority contained in paragraphs 5 and 10 of Resolution 836 (1993). NATO's response was certainly not proportionate to the attack which triggered it. Instead, offensive force was used to disrupt and destroy the military infrastructure of the Serbs within the theatre of conflict with the aim to secure the security of the so-called safe areas in general, ensure UNPROFOR's security and freedom of movement and create safe-corridors into Sarajevo. Ultimately, the aim of the aerial campaign was to persuade the Bosnian Serb side to terminate the conflict.

This operation was made possible through the delegation of authority to the UN military commanders in the theatre. This relocation of decision-making authority away from the UN Secretary-General also somewhat removed it from the application of influence or pressure by the Russian Federation. Nevertheless, NATO action continued to be carried out under Articles 42 and 48. It was only after the massive air campaign had resulted in the conclusion of peace accords, that it was proposed that the new Implementation Force would operate independently of UN command or control, possibly in accordance with Article 53 of the Charter. The powers of this force are unprecedented. However, they are grounded in the consent of the parties and merely reflected in the Chapter VII authorization for the deployment of the force.[338]

Overall, this episode is as tragic as it is disquieting. The organs of the international community did everything that was necessary to confirm the legal situation, to identify the violators and perpetrators of international crimes, and to ensure that, nominally at least, no disruptive precedent would arise from the situation. In addition, measures were taken to prevent a spreading of the conflict.

Military enforcement measures were only undertaken where that could be done with minimum risk (enforcing the embargo and the aerial exclusion zone). However, instead of admitting that no further military action would be possible, due to a lack of commitment of some of the European

[338] Reference to enabling resolution to follow.

states, a phantom enforcement operation was constructed. A formal peace-enforcement mandate was conducted in an effective peace-keeping mode throughout the conflict. Hence, the expectations of the UN membership that effective action would be taken was nominally satisfied in mandates which were known by certain members of the Council, by the Secretariat and by UN force-contributing states, never to be implemented. On the other hand, the keeping in place of the arms embargo was supported with reference to the humanitarian enforcement mission that was supposedly an effective means of at least ameliorating the worst consequences of a conflict.

Despite the limited good that was achieved, and despite the sacrifices made by international personnel, this largest deployment of United Nations forces in history thus remained a charade from beginning to end. The charade was aimed at isolating the international system from the consequences of a conflict, even if it meant that the victims of aggression and probable genocide would be left without protection. In the context of this strategy, the UNPROFOR mission was dominated by states that were themselves unwilling to engage in the necessary enforcement tasks, but which at the same time sought to ensure that no other outside powers would involve themselves in the situation with a view to achieving what UNPROFOR was unable to achieve. Only when this strategy was brought close to collapse, when UNPROFOR's impotence became altogether too manifest, was effective action taken. The immediate success of the massive aerial campaign in bringing the conflict to a close rather undermined the argument that actual, effective peace-enforcement would have been inappropriate or impossible at an earlier stage.