

HERSCH LAUTERPACHT MEMORIAL LECTURES

Held at the Lauterpacht Centre for International Law, University of Cambridge, 22nd - 24th January 2008

**THE UNITED NATIONS SECRETARIAT
AND THE
USE OF FORCE IN A UNIPOLAR WORLD**

by

Mr Ralph Zacklin CMG*

Former Assistant Secretary-General for Legal Affairs, United Nations

**SECOND LECTURE:
Bosnia**
(delivered on 23rd January 2008)

BOSNIA

1. The Iraq-Kuwait conflict had ushered in what was commonly believed, at the time, to be a new era in collective security. There seemed to be no limit to what could be achieved by the United Nations acting through the decisions of the Security Council. In 1991 while the Secretariat was fully engaged in the implementation of the various elements of 687 – disarmament, boundary demarcation, compensation, return of property – which in pre-1991 times would have been considered a prodigiously ambitious undertaking in itself, it was also setting up major peacekeeping operations in Cambodia and Western Sahara.

* *The statements contained in these lectures reflect the personal views of Mr Zacklin and do not necessarily reflect the views of the United Nations. An expanded version of these lectures will be published in due course by Cambridge University Press as a book within the Hersch Lauterpacht Memorial Lectures series.*

The establishment of UNPROFOR

2. It was during this same year that the then Socialist Federal Republic of Yugoslavia (SFRY) began to disintegrate, presenting the United Nations with one of its most difficult challenges. Croatia and Slovenia declared their independence on 25 June 1991. The formal involvement of the Security Council in this crisis can be traced to September 1991 when it decided to impose an arms embargo on deliveries of weapons and military equipment to Yugoslavia. The most serious fighting took place in Croatia, involving Croatian forces, the Yugoslav army and Croatian Serb militias. Following a cease-fire signed at Sarajevo on 2 January 1992, the parties accepted the Vance Plan concept for a United Nations peacekeeping operation in Yugoslavia and on 15 February 1992 Mr. Boutros-Ghali who had recently assumed office as Secretary-General proposed to the Security Council the establishment of what came to be known as UNPROFOR to assist in the implementation of the Plan. The acronym UNPROFOR, which quite exceptionally included no place name in the title, attested to the looming complexities of the operation.

3. The Secretariat was an extremely reluctant participant in this process. From the beginning it was at odds with the Security Council over the very concept of inserting peacekeeping into the situation in the former Yugoslavia. Officials responsible for planning were of the view that peacekeeping was not a viable mechanism where there was no peace to keep. The head of the Peacekeeping Department argued against the deployment of UNPROFOR because based on his discussions with the parties it was clear that the fundamental requirement of consent was not present.

4. The Secretary-General who had only been in office a few weeks found himself in an unenviable position. Failure to recommend a peacekeeping mission would provoke criticism on the part of influential member states and the Secretariat would inevitably then be held responsible for the consequences. On the other hand, all the indications were that the mission would fail and that the peacekeepers would be drawn into an expanding conflict. Finally, with misgivings, the Secretary-General informed the Security Council

that he had concluded that “the danger that a United Nations peace operation will fail because of lack of cooperation of the parties is less grievous than the danger that delay in its dispatch will lead to a breakdown of the ceasefire and to a new conflagration in Yugoslavia”. The initial deployment of UNPROFOR, reflecting these concerns of the Secretariat, included no formed military units but was composed only of military observers.

5. In March 1992 UNPROFOR established its headquarters in Sarajevo. This was viewed at the time as a neutral location since UNPROFOR had no mandate in Bosnia. In April 1992, The Europeans and the United States having prematurely recognized Slovenia and Croatia in 1991 now repeated the exercise with Bosnia-Herzegovina (BH) with similar results. Fighting intensified and the Secretary-General was requested to explore the feasibility of a United Nations peacekeeping mission.

6. Although the Secretary-General reported to the Security Council in early May that the conflict in Bosnia was not susceptible to peacekeeping treatment without the agreement of the parties, he was nevertheless asked to take on limited functions in the Sarajevo area and to use his good offices to secure the delivery of humanitarian supplies. Through a series of Security Council resolutions adopted in 1992 the mandate of UNPROFOR in Bosnia was gradually expanded and by July of that year UNPROFOR’s authorized strength included a reinforced infantry battalion as well as military observers and civilian police. This process was what Secretariat officials referred to as “mission creep”. By year’s end UNPROFOR was responsible for security at Sarajevo airport, the delivery of humanitarian supplies and protection of humanitarian convoys, the monitoring of the no-fly zone in the airspace of Bosnia and the implementation of the arms embargo through the monitoring of Bosnia’s borders.

The Security Council searches for a strategy

7. At this stage of the conflict the negotiations for a political settlement were being conducted under the auspices of the International Conference on the Former Yugoslavia (ICFY) whose Steering Committee was chaired by Cyrus Vance, representing the Secretary-General, and David Owen representing the Presidency of the European Union. They presented the Vance-Owen Peace Plan on 2 January 1993. This Plan proposed a decentralized and demilitarized Bosnia made up of ten provinces based largely on the communities' pre-war make-up. It substantially reversed the ethnic cleansing which had taken place since the start of the conflict. The United States, however, strongly criticized the plan as an appeasement of the Serbs and called for a lifting of the arms embargo for Bosnia and air strikes against the Serbs (the lift and strike strategy). The Secretary-General some years later described this "as the product of some obscure Machiavellian calculation". As far as the Secretariat was concerned whatever the motive, it was feared that the lift and strike strategy would create a killing field in Bosnia and result in retaliation against UNPROFOR. They were not wrong. Despite ICFY support, the United States opposition meant that Vance-Owen was dead on arrival. The Bosnian Muslims were encouraged to hold out for better terms while for their part the Bosnian Serbs were relieved of the pressure from the ICFY to negotiate seriously. Two and a half years of war, atrocities of various kinds and of war crimes were to elapse before the United States would obtain at Dayton an agreement to end the conflict, an agreement which did not appreciably improve on the Vance-Owen Plan. These were among the darkest days of peacekeeping history. Secretariat officials responsible for UNPROFOR were to become familiar on a daily basis with the names of obscure Bosnian towns and villages such as Tuzla, Zepa, Gorazde and Bihac but none more infamous than Srebrenica.

8. In the 18 month period between the opening of full-scale hostilities in Bosnia in April 1992 and October 1993 the Security Council adopted no fewer than 47 resolutions and 42 Presidential Statements on the situation in the Former Yugoslavia, most of them relating to Bosnia. This was an unprecedented flow of decision-making by the Council

but unfortunately it masked an inability to achieve consensus on appropriate action. The Council was sharply divided between troop-contributing countries and non-contributing countries, between permanent and non-permanent members, and within the P5 between the three Western members and China and Russia. Council decision-making therefore tended towards the fudging of issues rather than clarity. Worse yet, in its desire to appear forceful the Council engaged in what can only be described as Chapter VII rhetoric whereby UNPROFOR's mandate appeared to be more robust than the means provided to carry it out. Yasushi Akashi the Japanese diplomat who had been appointed Special Representative of the Secretary-General in January 1994 has described the situation at this time as follows: "With a consensus absent in the Council, lacking a strategy, and burdened by an unclear mandate, UNPROFOR was forced to chart its own course. There was only limited support for a 'robust' enforcement policy by UNPROFOR. UNPROFOR thus chose to pursue a policy of relatively passive enforcement, the lowest common denominator on which all Council members more or less agreed."

9. Among the most noteworthy elements of the Council's rhetoric were the establishment of no-fly-zones and the designation of safe areas the implementation of which depended heavily on air power. The juxtaposition of a peacekeeping mission albeit one with "mission creep" resulting from ever greater reliance on Chapter VII and, in particular, on the use of air power to enforce Security Council decisions presented the Secretary-General and the Secretariat with an array of complex and unprecedented legal issues. These included questions concerning the Secretary-General's authority and responsibility vis-à-vis the Security Council; legal issues arising from the use of air power; and the problems arising from the designation of safe areas. In examining these questions and providing legal advice the Secretariat was confronted with a difficult and in some cases impossible task of executing a peacekeeping mandate in an environment of war, an environment in which civilian and military personnel deployed with the mission were hostage both literally and metaphorically to the Security Council's inability to develop an effective and consensual strategy.

Questions of coordination

10. The over-arching question politically as well as legally for the Secretary-General concerned his role and responsibility vis-à-vis the Security Council. In resolution 770 of 13 August 1992, the Security Council, acting under Chapter VII, had 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 of humanitarian assistance to Sarajevo and other parts of Bosnia. To some degree this involvement of regional agencies or arrangements was a reflection of the Secretary-General's own thinking. In his report to the Security Council An Agenda for Peace which had been submitted on 17 June 1992, he had drawn attention to the potential inherent in Chapter VIII of the Charter, a potential which in his view included operational support, co-deployment of personnel and joint operations. At the time United Nations experience of such cooperative endeavours was to say the least fairly limited. It included the deployment of United Nations observers in Liberia with a military mission from ECOWAS (the Economic Community of West African States), in Georgia and Tajikistan with the CIS (Commonwealth of Independent States), and cooperation with the OAU, the League of Arab States and the OIC in Somalia. But none of these cooperative endeavours could be remotely seen as a precedent for what the Security Council was proposing in 707, namely enforcement under Chapter VII and the use of all measures necessary which could be interpreted to include the use of armed force. The only regional arrangement capable of providing this level of assistance in Bosnia was NATO. This was almost certainly not what the Secretary-General had in mind in *An Agenda for Peace*. The Secretariat was venturing into uncharted territory.

11. This was the first time that the two organizations had been brought together to work operationally and it was to prove a difficult exercise. The reality was that the United Nations and NATO represented two very different histories and cultures. As one commentator has expressed it, the involvement of NATO in the implementation of Security Council resolutions meant more than the addition of military assets to the United Nations decision-making process. It meant an added layer of decision-making which

brought with it complications for the United Nations own decision-making process and particularly for the Secretary-General.

12. Unlike traditional peacekeeping operations which were implemented through formed military and police units where the chain of command was generally-speaking clear, the proposed use of air power in Bosnia through coordinated arrangements left unclear the key issues of chain of command and the locus of responsibility for the use of such air power. In the Secretary-General's thinking, as reflected in *An Agenda for Peace* and other documents, the evolving practice in coordination between regional arrangements and the United Nations should not blur the three distinct levels of authority that applied to United Nations peacekeeping. Overall political direction was the responsibility of the Security Council; executive direction and command was the responsibility of the Secretary-General; and the day to day command on the ground was the responsibility of the civilian chief of the mission and force commander. That these levels of authority could be maintained under the coordination arrangements foreseen in 770 was not self-evident. It was not at all clear to Secretariat officials whether the language of 770 meant that the states or regional arrangements concerned were subject to United Nations authority.

13. The issue first arose as a practical matter in February 1993 during a meeting between the Secretary-General and Messrs Vance and Owen. One of the questions discussed was the air drop of humanitarian supplies to the most seriously affected areas in Bosnia. The Secretariat was normally averse to air drops as a method of supply which it regarded as unsafe, inefficient and wasteful but in this case it had become a method of last resort because of the difficulties encountered in convoying and protecting the supplies. The question at issue was not whether the air drop could be achieved technically but whether United Nations authorization was required for those carrying it out. Some Secretariat officials were concerned that if the United Nations took the position that its authorization was necessary this could create problems for UNPROFOR as an impartial

peacekeeping mission in the event that it were to refuse authorization in any particular case. They therefore preferred that the responsibility for the air drops be assumed by the states or regional arrangement carrying it out.

14. The Secretary-General had a different view of the problem from that of his officials. He was concerned that if the United Nations simply stood by and failed to assert its authority regarding the implementation of Security Council decisions, this would create a precedent that would be exploited in the future. He therefore insisted on maintaining the authority of the United Nations and his own authority as the executor of Security Council decisions which called for coordination with then United Nations. This was a decision which was to assume greater significance as the Security Council gradually expanded the authorization to states and regional arrangements to use air power in support of UNPROFOR.

15. While the Secretary-General's decision clarified the question of executive authority, at least for the time being, it did not settle the issue of coordination which until this point had been handled pragmatically by the civilian and military officials in the field. In January 1994, Yasushi Akashi who had recently replaced Thorvald Stoltenberg as SRSG requested advice from Headquarters regarding the situation that would arise in the event of a lack of agreement between UNPROFOR and NATO. The issue of coordination had become more acute with the passage of Security Council resolutions 836 and 844 in June 1993 authorizing the use of air power "under the authority of the Security Council and subject to close coordination with the Secretary-General" in and around the safe areas in Bosnia.

16. Akashi had reported to the Secretary-General that Admiral Borda the head of NATO Southern Command had informed him and the Force Commander of UNPROFOR that NATO had no intention of striking any targets without the prior agreement or at the request of the SRSG. This statement on its face appeared to equate Nato's interpretation

of “coordination” with that of the Secretary-General who had already indicated clearly that he intended to safeguard his own responsibility and authority vis-à-vis the Security Council. NATO commanders it seemed did not contemplate unilateral action.

17. Nevertheless Akashi was concerned that a scenario could very well develop in which UNPROFOR and NATO did not agree on an action which given the nature of the conflict was not implausible. The NATO commander had suggested that in this eventuality the two sides would work out a “common position”. The Akashi-Borda discussions were at this stage as much about a cultural approach to problem-solving as they were about any real difference of opinion but events were to amply validate Akashi’s insistence on procedural protocols.

18. The Secretariat’s view regarding the procedural nature of this issue was that the statement by Admiral Borda was to be viewed as a statement of practical intent rather than as a legal concept. Translated into legal terms it would be the equivalent of negotiation as a means of settling disputes. The operational procedures for coordination agreed between UNPROFOR and NATO had foreseen that in the event of disagreements, the disputed matter would be referred up the military and political chain of command. Applying this procedure in the event of a disagreement between the SRSG and the NATO commander, it was the view of the Secretariat that the SRSG would have to refer the matter to the Secretary-General who would then decide how to proceed in the light of his responsibility towards the Security Council whose resolutions were the source of the authority to use air power.

The establishment of safe areas

19. Despite the steady stream of Security Council resolutions and Presidential Statements the situation on the ground deteriorated markedly in 1993. The Bosnian Serb forces operated virtually unchecked and anecdotal evidence began to emerge of possible war crimes and crimes against humanity. A landmark of a particularly dubious kind was

reached in February of 1993 when the Security Council decided to create an international criminal tribunal for the Former Yugoslavia. Hampered by the lack of political cohesion in the Security Council and its inability to find consensus on a workable strategy for peacekeeping, UNPROFOR found itself in an increasingly untenable posture. It was at about this time that proposals began to appear for the establishment of civilian areas that would enjoy international protection. These areas, the impetus for which appears to have been a statement made by the President of the ICRC Cornelio Sommaruga at the London Conference in August 1992, were variously referred to as “protected areas”, “safe havens”, or “security zones”.

20. Initially there had been very little support for this concept in the context of the Bosnian conflict either among the members of the Security Council or the chief negotiators and even less so among Secretariat officials who recognized how difficult it would be to implement. Messrs. Vance and Owen considered the concept flawed because they feared that it would accelerate the ethnic cleansing by virtually formalizing it. The United Nations High Commissioner for Refugees, Mrs. Ogata, doubted that even with some capacity for enforcement action the complete preservation of security in these areas would be possible; peacekeeping officials questioned whether peacekeeping rules of engagement would be sufficient to maintain such areas and the Force Commander opposed the concept in the absence of the agreement of the parties. In his view the nature of the safe havens mandate being proposed was inherently incompatible with peacekeeping since enforcing such a regime required enforcement not peacekeeping. He summarized his position in a cable to Headquarters stating that “one cannot make war and peace at the same time”.

21. As the plight of civilians mainly in Moslem eastern Bosnia became more precarious, in April 1993 Mrs. Ogata warned the Secretary-General that unless the United Nations substantially strengthened its presence on the ground a large-scale evacuation of civilians from an enclave named Srebrenica would have to be organized. In the midst of

confusion as to whether or not the enclave had actually fallen into the hands of the Bosnian Serbs (it hadn't) the Security Council unanimously adopted resolution 819 in which it demanded that all the parties treat Srebrenica as a "safe area".

22. Although 819 contained a limited reference to Chapter VII (citing it only in reference to the security of UNPROFOR personnel) it provided no additional mandate or resources to UNPROFOR that would have enabled it to implement the demands. The resolution was not interpreted either by the Council or by the Secretariat as creating an obligation on UNPROFOR to establish or protect a Srebrenica safe area. Whatever the view from New York, the reality on the ground was that the Bosnian Serbs were in complete military control around Srebrenica. Three weeks later following a Security Council mission to the area the Council adopted a further resolution (824 of 6 May 1993) extending the number of safe areas to include Sarajevo, Tuzla, Zepa, Gorazde, and Bihac. As in the case of 819 no additional mandate or resources were provided to UNPROFOR. The Security Council apparently believed that the mere designation of an area as safe would be sufficient to protect it.

23. Apart from the obvious operational deficiencies of the safe areas concept as conceived by 819 and 824, there was one other problem which was to prove particularly troublesome in the relationship of the United Nations and NATO. The resolutions designating the safe areas did not delimit their boundaries either descriptively or through map coordinates except in the most general terms. 819 referred to "Srebrenica and its surroundings" as a safe area and 824 used the same formula to describe the other five safe areas. This ambiguity, whether intentional or not, was of considerable consequence to UNPROFOR. The Secretary-General raised the issue in several of his periodic reports and had underscored the need to clearly delimit the safe areas. He suggested that the Council should mandate UNPROFOR to establish on its own responsibility the operational boundaries it believed it was capable of protecting. The Council declined to act upon this suggestion. Disagreements between UNPROFOR and NATO regarding the delimitation

of the safe areas in the later stages of the conflict only added to the confusion over the use of air power at a critical juncture in the war.

The use of air power

24. No question was more challenging, politically as well as legally, for the Secretary-General and the Secretariat than the use of air power. This presented a range of issues which brought together the various strands of the complex relationship between the Secretariat and the member states and regional arrangements in their attempts to implement Security Council decisions. There were significant issues of divided authority and of organizational culture which gave rise to differences over interpretation of key resolutions.

25. In October 1992 the Security Council had decided to establish a ban on military flights in the airspace of Bosnia other than UNPROFOR or other flights in support of United Nations operations including humanitarian assistance. Resolution 781 which was not adopted under Chapter VII called upon States to take nationally or through regional agencies or arrangements all measures necessary to provide assistance to UNPROFOR based on technical monitoring and other capabilities in monitoring compliance. France and the United Kingdom which were troop-contributors were less than enthusiastic but eventually accepted to co-sponsor the resolution after the United States had agreed to drop a reference to Chapter VII and the reference to “all measures necessary” was qualified in such a way as to make clear that it did not include enforcement. In March 1993 the Council, in resolution 816, acted to extend and clarify the nature of the ban to specifically include all fixed-wing and rotary-wing aircraft and this time it did so acting under Chapter VII. An operative paragraph authorized 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 UNPROFOR, all necessary measures in the airspace of (Bosnia-Herzegovina) , in the event of further violations, to ensure compliance with the ban on flights”. This was the

first time that the Council had directly established a no-fly-zone with enforcement provisions acting under Chapters VII and VIII. The negotiation of the text had taken many weeks in order to secure Russian and Chinese acquiescence. The key to this had been the requirement that any recourse to enforcement be subject to coordination with the Secretary-General and UNPROFOR. Two months later on 4 June 1993, in 836, the Council again acting under Chapter VII extended the mandate of UNPROFOR *inter alia* to deter attacks against the safe areas and authorized it, acting in self-defence, to take the necessary measures including the use of force to reply to bombardments against those areas by any of the parties, to armed incursions or obstruction of UNPROFOR or the movement of humanitarian convoys. A further operative paragraph extended the use of air power to assist UNPROFOR in the fulfillment of its new and enlarged mandate.

26. Resolution 836 crossed an invisible line between peace-making and war-making. In his memoir *Unvanquished*, the Secretary-General describes the action of the Security Council in adopting 836 thus: “In this way, the Security Council, in the words of the White Queen...asked the United Nations forces to perform ‘six impossible things before breakfast.’” Secretariat and UNPROFOR officials had argued for months that the safe areas could not be made safe because UNPROFOR lacked the means to either prevent attacks launched from inside the areas or deter attacks from the outside, all to no avail. At the same time the Secretary-General and UNPROFOR were expected to coordinate the use of air power with NATO against Serb targets that would inevitably result in retaliation against United Nations peacekeeping personnel on the ground.

27. The Secretary-General was not opposed in principle to the use of air power but he was mindful of the need to consult with the Security Council which he regarded as the source of his authority and above all to consider the views of the force commanders who were responsible for the safety of United Nations civilian and military personnel in the mission area. 836 had authorized the use of air power in the maintenance of the safe areas without distinguishing between air strikes and close air support. For the Secretary-General

and the commanders in UNPROFOR this was an important distinction in terms of the mandate which despite its increasingly robust profile was still essentially a peacekeeping mission. In the Secretary-General's view close air support was the limited use of air power to be called upon in situations where United Nations personnel came under attack in the exercise of their mandate. It was essentially defensive and indeed this view was supported by the language of operative paragraph 9 of 836 which authorized the use of force by UNPROFOR "acting in self-defence". While UNPROFOR commanders were ready to call for close air support when the mission came under attack, air strikes against other targets were a different matter. Air strikes are by definition strategic and this use of air power against communications facilities, bridges and similar targets would certainly be regarded as belligerent acts by the Serbs, Any pretence of United Nations impartiality in such an eventuality would have to be abandoned.

28. Given this context, it was important that the coordination of the use of air power leave the ultimate decision-making in the hands of the Secretary-General. The Secretary-General's insistence on maintaining control over the use of air power prevailed. In August 1993 the North Atlantic Council approved command and control arrangements under which first use of air power would be authorized by the Secretary-General. Agreement was also reached on a dual-key arrangement involving the UNPROFOR Force Commander and the NATO commander. Differences of interpretation concerning these arrangements emerged almost immediately. NATO viewed the arrangements in an offensive light, a means to ensure enforcement of Security Council decisions. But the United Nations Secretariat still viewed itself in peacekeeping mode and was concerned for the possible exposure of United Nations personnel. The Secretariat therefore took a restrictive view of 836 which hewed closely to the language of the resolution.

29. Although 836 had greatly strengthened UNPROFOR's mandate by providing it with additional authority to take the necessary measures, including the use of force, this authority was limited to acting in self-defence. UNPROFOR's leadership was reluctant to

avail itself of the use of air power other than through requests for close air support. The first such request in fact was not made until March 1994 when a Bosnian Serb tank bombarding the Bihac safe area had come close to impacting a French UNPROFOR position. Delays in the initiation of the approval process resulted in a failure to deploy and the first actual deployment of close air support occurred only on 10-11 April 1994 near Goradze. Three days later 150 United Nations peacekeepers were taken hostage near Sarajevo which seemed to illustrate the fears UNPROFOR had long expressed. On 16 April a NATO aircraft was brought down by an air defence missile and serious differences arose between UNPROFOR and NATO commanders regarding the verification of targets resulting in a decision by NATO not to approve any further requests for close air support but only air strikes at a strategic level. After months of close coordination and excellent cooperation the first attempts to use air power had resulted in a clear difference of views: NATO commanders believed that air strikes on a limited number of targets would demonstrate resolve on the part of the international community and avert a loss of credibility for UNPROFOR and NATO; UNPROFOR concerned for the safety of its personnel and collateral civilian damage, viewed air strikes as an instrument of last resort.

30. UNPROFOR's policy of relatively passive enforcement of its mandate was becoming increasingly untenable but in the face of the inability of the Security Council to deal with the crisis of peace-making into which it had plunged the mission it was not possible either politically or legally for the Secretariat to interpret its mandate in any other way. The differences in approach between a United Nations Secretariat that by tradition and culture interpreted its mandates restrictively and a NATO Southern Command that took its orders from Washington came to a head in late 1994 in the Udbina airfield incident.

31. In November 1994 the so-called Serb-Krajina forces in the Serb controlled region of Croatia attacked Croat and Moslem positions within the safe area of Bihac in Bosnia.

The attack which was carried out by aircraft based at Udbina in Croatia used napalm and cluster bombs which may explain why this particular action provoked such a strong condemnation and reaction. To prevent the imminent takeover of the town of Bihac, UNPROFOR requested air strikes against the Udbina airfield. NATO commanders proposed a strategic attack to destroy the entire Udbina complex but UNPROFOR insisted that the air strikes be limited to what they considered necessary and proportionate to render the airstrip unusable. UNPROFOR prevailed but the incident left a residue of ill-feeling. Among others, Richard Holbrooke described the United Nations action as a “shameful moment” and it no doubt reinforced his view that United Nations officials both at Headquarters and in the mission area lacked the purpose and vision to undertake credible enforcement actions even when the Security Council provided the necessary tools. Indeed, in resolution 958 adopted on 19 November 1994 two days before the air strike was carried out, the Security Council had decided unanimously to extend the authorization to use air power contained in 836 to Croatia. UNPROFOR’s action in the Udbina incident, however, was entirely consistent with its approach throughout since it regarded itself as a peacekeeping mission and where it was required to interpret its mandate it preferred to err on the side of the explicit rather than the implicit. The exposure of United Nations personnel to retaliation was only too real as the succession of hostage incidents had demonstrated. Following the Udbina strike, the Bosnian Serbs seized 400 hostages whose release had to be negotiated over many weeks by UNPROFOR.

The question of hot pursuit

32. The Bihac attack and the resulting Udbina air strike in due course led to a decision by the NATO Council to authorize “hot pursuit” into Croatian airspace. In July 1995 the Secretary-General was advised that NATO had authorized “hot pursuit” into Croatian airspace and the engagement of any aircraft there which had conducted offensive actions against United Nations forces in Bosnia. In addition it had also authorized the engagement of aircraft anywhere in Croatian airspace that had attacked United Nations forces

anywhere in Croatia. However, these authorizations were contingent upon confirmation by the United Nations Secretary-General that such actions would be consistent with existing Security Council resolutions. The Department of Peacekeeping Operations at Headquarters sought legal advice.

33. The legal advice entailed an examination of the NATO Council's decisions in the light of the Security Council's resolutions 816, 836, and 958 which had authorized the use of air power in Bosnia and Croatia. The NATO decisions themselves contained two separate policies: the first was hot pursuit into Croatian airspace and the engagement there of aircraft that had carried out offensive actions anywhere in Bosnia; the second was an authorization to NATO aircraft to engage aircraft in Croatian airspace that had attacked United Nations forces anywhere in Croatia.

34. As far as the first of these decisions was concerned, the legal view was that since resolution 958 had been an extension of authority initially granted in 816 and 836 which had limited the use of air power to the enforcement of the Bosnian no-fly-zone and safe areas all of which were in Bosnia, 958 could only be understood and interpreted as having the same purpose and object as 816 and 836. That this could be interpreted somewhat broadly had been illustrated by the air strike on Udbina in Croatia which had been carried out to safeguard the Bihac safe area but nevertheless it was a limited not a general authorization. Consequently as far as the second decision was concerned, the use of air power anywhere in Croatia in response to offensive actions that were unrelated to the Bosnia no-fly-zone and safe areas would not be consistent with the Security Council resolutions.

35. No doubt this split opinion would have been viewed by critics as further evidence of the Secretariat's passivity. But for the Secretariat it was simply a question of stating what they believed the mandate to be not what it should be or what some would like it to be. If the Secretariat had given a green light to a NATO decision to authorize a

generalized use of air power in Croatia this would have certainly attracted loud condemnation by many members of the Security Council and would have been seen as tantamount to a usurpation of the authority of the Council.

36. The contradictions inherent in the actions being followed by the Security Council were by now placing an impossible strain on the conduct of the United Nations mission. Serious differences regarding the use of force were developing not only between the United Nations and NATO but also within the civilian and military leadership of the United Nations. As the hostage incidents increased and after a number of UNPROFOR personnel were used as human shields, in June 1995 the Secretary-General sent a report to the Security Council containing a closely reasoned argument objecting to the use of force except in self-defence: “Nothing is more dangerous for a peacekeeping operation than to ask it to use force when its existing composition, armament, logistic support and deployment deny it the capacity to do so...Peacekeeping and the use of force (other than in self-defence) should be seen as alternative techniques and not as adjacent points on a continuum, permitting easy transition from one to the other”.

37. After the fall of Srebrenica in July 1995 but before the full picture of the horrifying events there had emerged, a conference of 15 countries including members of the Security Council and troop-contributors was held in London to consider the military measures that would be required to deter and prevent further attacks on the safe areas. The United States, United Kingdom and France made a joint demarche to the Bosnian-Serb leadership making clear that further attacks on the safe areas would be met by force. Although the mandate of UNPROFOR remained unchanged, the London meeting taken together with a similar Ministerial level meeting of the Organization of the Islamic Conference Contact Group, altered the political dynamic and provided the Secretariat with a basis for re-assessing its interpretation of the use of air power.

38. Within hours of the warning delivered to the Bosnian-Serb military leadership, the Department of Peacekeeping sought legal advice on the compatibility of air strikes at strategic targets in Bosnia with the authorized use of air power under 836. The implication of the warning had been clear: any attack on safe areas would be met by a generalized and strategic use of air power. But just how broad could such use of air power be without further Security Council authorization? In particular, given the language of 836, would air strikes have to be limited to the immediate environs of the safe areas or could they be extended to other targets in Bosnia if this was considered essential to ensuring their protection?

39. This request for legal advice was in many respects typical of the role that lawyers are expected to fulfill in an international organization. The question raised was essentially political rather than legal although there was an element of textual interpretation which gave it a legal character. There was also an intra-Secretarial element which opposed differing views held at Headquarters and in the mission. In such situations legal opinions act in the role of arbiter. The situation in Bosnia had clearly reached a pivotal stage between peace-making and war-making. The London Conference had appeared to draw a line in the sand but without indicating how it would be determined that the line had been crossed. Not for the first time in the Bosnia conflict the Secretariat found itself compelled to chart its own course, navigating between its mandate, express and implied, and expectations.

40. For lawyers, ambiguous texts are the norm and they are accustomed to employing interpretative techniques borrowed from treaty law. After analyzing the history of 836 and its predecessor resolution 824, and noting that neither resolution had delimited the safe areas except in the most general terms, the advice concluded that the Security Council had purposely used such ill-defined terms because under the lowest-common denominator doctrine it preferred the flexibility of ambiguity to the straight-jacket of precision. While the language of the resolutions was indicative of some limitation on the geographical

scope within which air power had been authorized, such limitation could be interpreted relatively broadly taking into account the functional object and purpose of the resolutions, particularly 836, which was to deter attacks against the safe areas. The teleological method of interpretation may have its critics but as a tool for resolving issues of creative ambiguity it can be invaluable.

41. For its part on 25 July 1995 the North Atlantic Council decided to authorize the initiation of air strikes for as long as they were needed in the “common judgment” of NATO and United Nations commanders. This decision was directed to the defence of Gorazde within what was termed a “zone of action”, a wider but still undefined geographical area than that which had previously been regarded as falling within the definition of the safe area concept. The Secretary-General who still retained dual-key authority at this stage, agreed with the new approach and over the initial objections of the SRSG instructed him to work with NATO to define the zone and to agree on criteria that would trigger the use of air strikes.

42. The very next day, on 26 July 1995, the Secretary-General who had been under considerable pressure to do so for some time, agreed to delegate his dual-key authority but only after ensuring that that the delegation was in a revocable form. The Security Council was informed that in order to streamline the decision-making process he had decided to delegate the necessary authority for air strikes to the Force Commander. At the same time the authority for close air support had been delegated by the SRSG to the Force Commander and to the UNPROFOR Commander and instructions had been given to reduce the vulnerability of United Nations personnel to possible retaliation.

43. The delegation of authority opened the way to a Memorandum of Understanding between the UNPROFOR Force Commander and NATO concerning the coordination of air operations to deter and prevent attacks on the safe areas of Gorazde, Sarajevo, Bihac and Tuzla. The MOU contained detailed provisions on targeting which incorporated the

concept of zones of action but without explicitly defining their geographic scope. Indirectly, their scope was defined by reference to target options in a first strike phase, an initial follow-on phase and a third expanded operations phase. This third option caused the United Nations negotiating team considerable difficulty because it clearly expanded the area of operations well beyond even the most liberal interpretation of the surroundings of the safe areas and once again raised the question of whether a new political decision by the Security Council would be required. The United Nations team thought that it would but despite the fact that there was no common understanding of the meaning of this option it was retained in the text with the qualification that it was subject to political approval.

44. The generalized use of air power in Bosnia was now a realistic option should the Serbs decide to attack any of the safe areas. When the market area of Sarajevo was attacked on 28 August 1995 with major loss of life and injuries, a “common judgment” was quickly agreed upon by UNPROFOR and NATO commanders that the criteria for air strikes had been met and NATO aircraft carried out attacks on a broad range of Serb air defence and other substantial targets across Bosnia. This was by far the heaviest use of air power by NATO in support of the United Nations that had ever been carried out but at this stage the operation was confined to the first strike phase (option 1) which fell within the agreed zone of operation. Even so the Secretariat at headquarters expressed unease at what it perceived to be the offensive mode of the operation and conveyed its views to the UNPROFOR command that it should not go beyond a “zone of reasonableness” that it believed was consistent with the mandate.

45. A formal “pause” became effective on 1 September but air strikes resumed on 5 September with the participation of an even larger number of aircraft. Despite having only recently argued that a generalized use of force would require a new mandate from the Security Council and that 836 gave UNPROFOR the right to use force only in self-defence, the Secretariat now said that these actions were consistent with 836. However, by 6 September when the initial follow-on phase (option 2) had virtually exhausted all

possible targets and NATO aircraft were striking targets in the far north of Bosnia far removed from the safe areas, it seemed to the Secretariat that operations had reached the expanded operations phase foreseen in option 3 of the MOU without having obtained the political authority for doing so. The UNPROFOR command was asked to explain how far the zone of operation for Sarajevo extended.

46. While the Secretariat was engaged in an increasingly discordant exchange of views with the UNPROFOR command the air strikes continued. The Secretariat was concerned that the line between peacekeeping and enforcement had been irrevocably crossed and that in doing so UNPROFOR had exceeded its mandated authority. The Russians urged the Secretary-General to retrieve his dual-key authority and even the United States raised questions indicating that they feared that the air campaign might derail the peace negotiations. For a brief moment it seemed that there might be a breakdown in relations between the civilian and military leadership of the operation. After air strikes around Banja Luka, a major Serb town in the north of Bosnia on 10 September, a Framework Agreement for a Cessation of Hostilities within the Sarajevo safe area was reached on 13 September and air operations were temporarily suspended on 14 September.

47. It was at this juncture that the Secretary-General decided to seek advice as to the legality of certain provisions of the MOU. The question whether the air strikes around Banja Luka exceeded existing authority was temporarily moot because of the suspension but should the bombing resume the Secretary-General would be in a difficult position vis-à-vis the Security Council. In particular, he wished to know whether the expanded operations phase that had been inserted into the MOU, over the Secretariat's misgivings, was consistent with 836 and 958 and whether the reference to "political approval" should be interpreted to mean that Security Council action was required. This was not so much a case of interpreting a legal document as excavating its genesis. The evolution of the document showed that once the concept of zones of action had been introduced following the London Conference in July 1995, the Secretariat's understanding of the expanded

operations phase was that this would require a new political decision, namely reference to the Security Council. The Legal Counsel therefore advised the Secretary--General to seek the approval of the Security Council before implementing that option.

48. This advice together with the views of his senior civilian and military officials was confirmation for the Secretary-General, if any confirmation was needed, that there was no longer an appropriate role for UNPROFOR in Bosnia. After the temporary pause in the air campaign was converted into a formal closure of the operation on 21 September the Secretary-General informed the Security Council that : "...if the current peace initiative does not succeed and more enforcement action is decided upon by the Security Council, I intend to recommend that UNPROFOR be replaced by a multinational force authorized by the Security Council to carry out such action and to assume such responsibility for those aspects of UNPROFOR's existing mandate which will remain valid."

49. The Secretary-General was spared the responsibility of announcing the demise of UNPROFOR. Events on the ground in Croatia and at the negotiating table finally produced a cease-fire and by November 1995 the Dayton process was underway. For the United Nations Secretariat the nightmare of an almost completely dysfunctional peacekeeping mission had come to an end but at a great cost in terms of a weakening of the prestige and credibility of the Organization, the future of peacekeeping and the erosion of the values and principles for which it stood. The role of the United Nations in the Bosnia conflict was forever linked, however unfairly, to Srebrenica and countless other crime scenes that are still being dealt with to this day.

Mr Ralph Zacklin CMG

23rd January 2008