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Key Points

- ◆ The Prosecutor of the International Criminal Court (ICC) has opened a couple of preliminary examinations regarding theaters of NATO-led operations.
- ◆ The NATO track record regarding its cooperation with the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia is positive.
- ◆ NATO may want to consider developing a similarly positive working relationship with the ICC prosecutor based on mutual goodwill and respect, and on an ad hoc basis.

NATO and the ICC: Time for Cooperation?

by Ulf Haeussler

Following the wars in the Balkans, the North Atlantic Treaty Organization (NATO) and the International Criminal Tribunal for the former Yugoslavia (ICTY) established solid cooperation, whereby NATO supported ICTY in its quest to bring persons indicted for war crimes (PIFWCs) to justice. NATO Headquarters has provided substantial material used as evidence in various ICTY cases. NATO members have participated as witnesses to ICTY. Personnel of the NATO-led operations in Bosnia and Herzegovina,¹ as well as Kosovo,² have detained and handed PIFWCs over to ICTY personnel who arrested them based on indictments issued by the tribunal's prosecutor.³ The solid working relationship, while possibly temporarily challenged, was not put in serious jeopardy when the ICTY prosecutor investigated NATO's conduct of operations during Operation *Allied Force* (also known as the Kosovo Air Campaign). The investigation did later clear NATO of the allegations of war crimes levied against it.⁴

War Crimes in NATO's Current Theaters?

The International Criminal Court (ICC) might be interested in cooperation of a similar nature since it is investigating the situation in at least one theater where NATO has led an international military operation and is reportedly conducting preliminary examinations regarding other theaters where NATO currently deploys forces. On the one hand, the ICC prosecutor was reported to have opened a preliminary file regarding Afghanistan⁵ and earlier conducted a preliminary examination regarding Iraq.⁶ For the purpose of analyzing the seriousness of any allegations that lead to opening these files, the ICC prosecutor may seek information from appropriate sources, including international organizations.⁷ Nothing, however, is publicly known as to whether some interaction between NATO and the ICC followed suit. On the other hand, the possible investigation of NATO's conduct of operations regarding Libya⁸—as requested by the lawyer of Colonel Muammar

Qadhafi's family⁹—might also warrant interaction. Again, however, no related press reporting exists. All mentioned theaters should be expected to involve crimes within the ICC's jurisdiction.

Notably, it is significantly more likely that those war crimes (Afghanistan and Iraq) and crimes against humanity (Libya), respectively, were perpetrated by individuals whose conduct is not controlled by NATO—mainly members of nongovernmental organized armed groups but allegedly also host nation security forces—than by personnel of the NATO-led operations.¹⁰ Preliminary examinations and investigations conducted by the ICC prosecutor might hence confirm that NATO and its members abide by the law of armed conflict/international humanitarian law, confirmation that would add legitimacy to the conduct of hostilities by NATO-led forces. Thus, there may be good reasons for NATO and the ICC to work together.

In light of the foregoing, it seems worthwhile to inquire whether such cooperation could occur, employing the overall positive record of cooperation between NATO and ICTY as a blueprint for similar cooperation between NATO and the ICC in the future.

The Challenges

To date, nothing in press reports or other publicly accessible sources suggests the existence of any formal ties between NATO and the ICC. As a matter of fact, taking into account that not all members of NATO are also states parties to the ICC Statute¹¹ (the United States and Turkey are not), it would be surprising if any such formal ties existed. Since formal ties might imply some kind of recognition of the ICC, there may be strong policy incentives to keep such recognition rather “low key.” In particular, it would seem that from the perspective of the non-parties it may be desirable to ensure that such recognition does not imply acquiescence regarding any of the “innovations” contained in the ICC Statute. As far as substantive international criminal law is concerned, the notion of “innovations” refers to rules that aim to penalize conduct that was not outlawed by the principles and rules of the law of armed conflict/international humanitarian law, which are binding upon all

members of NATO. These principles and rules stem from the 1949 Geneva Conventions (to which all members of NATO are states parties) and customary international humanitarian law. By contrast, the ICC statute contains criminal provisions whose scope is broader than the prohibitions contained in the 1949 Geneva Conventions and customary international humanitarian law; in some cases they might even be broader than the limits placed upon the conduct of hostilities by the 1977 Additional Protocols (to which neither the United States nor Turkey have subscribed) and other existing international agreements.

However, trying to avoid the impression of acquiescence regarding any of the mentioned “innovations” might not be palatable for the members of NATO who are also states parties to the ICC statute and may hence consider themselves legally bound to promote its broader approach to international criminal law.¹²

What Cooperation, If Any?

The absence of formal ties does not mean that there could not (and should not) be any interaction between NATO and the ICC. There are many cases where NATO has cooperated with other international organizations at the working level or even at the policy level, although using an ad hoc approach rather than establishing permanent formal ties. Such cooperation was even possible regarding politically contentious matters. For instance, although NATO and the Council of Europe (CoE) do not have formal interorganizational relations, they have nevertheless agreed on a mechanism whereby the CoE's Committee for the Prevention of Torture can be granted access to detention facilities run by the Kosovo Force (KFOR) in Kosovo.¹³ Applying the lessons learned in this context to potential cooperation between NATO and the ICC could indeed be an option.

However, it may be noted that drafting the letter whereby NATO responded to the CoE request for access, by its Committee for the Prevention of Torture, to KFOR detention facilities took more than 2 years due to the consensus requirement for decisionmaking among the members of NATO. It would hence seem unlikely that agreement on a similar high profile

commitment whereby NATO pledges support to the ICC can be reached in the immediate to near future.

That said, working-level cooperation on a case-by-case basis might be a more promising route to take. Apart from support regarding detentions and evidence, NATO could also provide protection to investigators and/or facilitate witness protection.¹⁴ If goodwill exists within both the ICC and NATO, their cooperation could leverage the positive experience regarding NATO's interaction with the ICTY, and vice-versa. For those members of NATO that are states parties to the ICC statute, such cooperation might be a useful method to discharge their obligation to support the ICC.¹⁵ It is accepted practice that such an obligation can be discharged through action in the appropriate international organizations of which a state is a member. In addition, cooperation by NATO with the ICC can relieve its members from political pressure they may otherwise be exposed to, such as the disclosure of classified documents.¹⁶

It may be assumed that those members of NATO that are not parties to the ICC statute could constructively abstain from interfering with this method just as, for example, those members of NATO not supportive of the Libya campaign did in regard to Operation *Unified Protector*. The U.S. vote in favor of United Nations Security Council Resolution 1970 (2011), which referred the situation in Libya to the ICC, may indicate that this assumption is not unrealistic.¹⁷

Conclusion

If reciprocal goodwill is allowed to grow, NATO may well take the ICC seriously despite the non-membership of the United States and Turkey in the latter, but with their full understanding. Arguably, NATO has demonstrated goodwill on its part through the conduct of operations by Operation *Unified Protector*. The targeting practice of this campaign suggests that NATO has given due respect to the ICC prosecutor's move to seek an indictment against Qadhafi for crimes against humanity. It would seem counterintuitive had NATO not been able to take lethal action against Qadhafi who, as commander of his forces, was a lawful target. However, from a policy viewpoint it would not have demonstrated much wisdom had NATO really

taken such lethal action. The noise made after Qadhafi was killed by the forces that captured him reinforces that point. Accordingly, despite the absence of substantial reporting, it may have been NATO policy to not put Qadhafi on its list of prioritized targets but, rather, to put him on the no-strike list.

While this "no-strike list theory" is merely a hypothesis based on the known facts, it nevertheless indicates that NATO may have laid solid ground for subsequent cooperation with the ICC. The manner in which the ICC prosecutor's prospective report regarding the situation in Afghanistan deals with the conduct of hostilities by NATO and its members will indicate whether the ICC is indeed interested in trustful and sustainable cooperation with NATO, based on reciprocal goodwill and respect.

Consequently, if the right mechanism for cooperation between NATO and the ICC is developed and supported by political will, it could actually happen. If such cooperation were to evolve, it would boost transitional justice significantly.¹⁸ It is worthwhile recalling that NATO-led operations in the Balkans made a significant contribution to bringing the perpetrators of war crimes and crimes against humanity to justice. NATO's support to transitional justice was part of a larger military effort to prevent ex- and would-be-belligerents from resuming armed conflict. This legacy demonstrates that prudent military action can complement the international community's effort to break the cycle of impunity as a means for making peace durable. Cooperation between NATO and the ICC could be the next step in that direction.

Notes

¹ The North Atlantic Treaty Organization (NATO)-led operations in Bosnia and Herzegovina were, in the order of their succession, the Implementation Force (1995-1996), Stabilization Force (SFOR) (1996-2004), and NATO Headquarters Sarajevo (since 2004).

² NATO is the lead organization of the Kosovo Force since the summer of 1999.

³ For instance, the judgment in *Prosecutor v. Furundzija* (case no. IT-95-17/1-T), December 10, 1998, mentions that "The accused was detained by members of the multinational Stabilisation Force, hereafter 'SFOR,' acting pursuant to a warrant for arrest issued by the International Tribunal. The accused was immediately transferred to the International Tribunal and detained in its detention unit in The Hague, the Netherlands" (paragraph 3). While it is imprecise to speak of an arrest by SFOR—armed forces, not being law enforcement agencies, detain rather than arrest—this passage captures the essence

of the NATO/International Criminal Tribunal for the former Yugoslavia cooperation regarding the detention of persons indicted for war crimes (PIFWCs). NATO has reported many cases where its forces detained PIFWCs. See, for instance, the Statement by former NATO Secretary-General Lord George Robertson, "SFOR Detains Person Indicted for War Crimes," October 25, 1999, available at <www.nato.int/cps/en/natolive/opinions_27514.htm?selectedLocale=en>.

⁴ See "Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia," available at <www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf>.

⁵ Louis Charbonneau, "ICC prosecutor eyes possible Afghanistan war crimes," September 9, 2009, available at <www.reuters.com/article/2009/09/09/us-afghanistan-warcrimes-idUSTRE58871K20090909>.

⁶ This preliminary examination led to the conclusion that by February 2006 the International Criminal Court (ICC) statute's requirements for seeking authorization to initiate an investigation in the situation in Iraq had not been satisfied. See the Office of the Prosecutor response to communications received concerning Iraq, February 9, 2006, available at <www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Iraq/>.

⁷ See Article 15 (2) of the ICC statute.

⁸ In his "Statement to the United Nations Security Council on the situation in Libya, pursuant to United Nations Security Council Resolution (UNSCR) 1970 (2011)," November 2, 2011, the ICC prosecutor mentioned the existence of "allegations of crimes committed by NATO forces" (paragraph 18).

⁹ Jamie Davis, "Gaddafi family to file ICC war crimes complaint against NATO," October 2011, available at <<http://jurist.org/paperchase/2011/10/gaddafi-family-plans-to-file-icc-war-crimes-complaint-against-nato.php>>.

¹⁰ According to Lee Berthiaume's news report, "ICC mulls probe into Canada's treatment of Afghan detainees," November 15, 2011, the ICC prosecutor may soon release a report that will address the question of whether a formal investigation should be launched into Canada's treatment of Afghan detainees. According to the report, he observed that "[m]ost allegations . . . are against the Taliban," available at <<http://news.nationalpost.com/2011/11/15/icc-mulls-probe-into-canadas-treatment-of-afghan-detainees/>>.

¹¹ The ICC statute is the international agreement establishing the court, determining its organization, and defining its jurisdiction, including through its detailed provisions outlining the conduct amounting to war crimes, crimes against humanity, or genocide. The United States had initially signed the ICC statute but later withdrew its signature.

¹² Under Article 17(1)(b)/(2) of the ICC statute, states parties have agreed that the ICC may try any case they have "decided not to prosecute" where this "decision resulted from the unwillingness . . .

genuinely to prosecute." As indicated by the ICC prosecutor's remark in a documentary produced by Canadian filmmaker Barry Stevens regarding alleged war crimes in relation to Afghan detainees—that "he would investigate the issue if Canadian authorities didn't" (see Berthiaume)—it is not beyond the realm of the possible that a narrow approach to international criminal law may lead to issues with the ICC.

¹³ See Council of Europe press release 437, July 19, 2006, available at <<https://wcd.coe.int/ViewDoc.jsp?id=1021371&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE>>; for context, see Ulf Haeussler, "KFOR: Current Legal Issues," *Journal of International Law of Peace and Armed Conflict* 24/26sq, available at <www.ruhr-uni-bochum.de/ifhv/documents/huvi/huv_2007/1_2007.pdf>.

¹⁴ Ulf Haeussler, "Witness Protection by Peace Missions," in *Law Enforcement within the Framework of Peace Support Operations*, ed. Roberta Arnold (Leiden, The Netherlands: Martinus Nijhoff, 2008), 257.

¹⁵ This obligation stems from Article 86 of the ICC statute whereby "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."

¹⁶ According to Article 73 of the ICC statute: "If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information." Article 93(9)(b) of the ICC statute requires states parties, when discharging of their obligation to cooperate regarding any ICC request that "concerns information, property or persons which are subject to the control of . . . an international organization by virtue of an international agreement" to "so inform the Court" that in turn "shall direct its request to the . . . international organization." NATO being an international organization, these provisions would apply to documents bearing a NATO classification or marking; NATO might be asked to agree to disclosure or receive ICC requests for potential evidence.

¹⁷ The United States abstained from voting on UNSCR 1593 (2005), which referred the situation in Darfur, Sudan, to the ICC although its former Secretary of State Colin Powell had used the word *genocide* when publicly deploring the activities that eventually triggered the referral.

¹⁸ The notion of transitional justice refers to the effort of supporting a nation's transition from armed conflict and/or repression with judicial means. It aims at denying impunity to the (major) perpetrators of genocide, crimes against humanity, and war crimes (armed conflict) or gross violations of human rights (repression) by way of bringing them to justice. Transitional justice may be coupled with truth and reconciliation efforts that may involve (limited) amnesty as a reward for disclosure of outrages that would otherwise never be revealed.

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