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THE UNITED NATIONS SECURITY COUNCIL AND THE ENFORCEMENT OF INTERNATIONAL HUMANITARIAN LAW

*Marco Roscini**

This Article discusses the competences and powers of the UN Security Council in securing compliance with international humanitarian law, in particular through the adoption of the measures provided in Chapter VII of the Charter. The competence of the Council in this field can be founded on several legal grounds: on a broad interpretation of the notion of “threat to the peace” (Article 39 of the Charter), on Article 94(2) with regard to the International Court of Justice’s judgments establishing violations of the jus in bello and also on the customary duty to ensure respect for international humanitarian law as reflected in Article 1 Common to the 1949 Geneva Conventions on the Protection of the Victims of War. In particular, such customary provision empowers the Security Council to react to any violation of international humanitarian law regardless of a nexus with concerns of international stability. Although the Council has adopted a variety of measures in relation to violations of the laws of war, the most incisive ones are those provided in Articles 41 and 42 of Chapter VII, which however are not without problems. The role the Security Council has played in the enforcement of international humanitarian law has been criticized because of its selective and opportunistic approach, which is due to the political nature of the organ. Also, in several instances the Council, far from securing compliance with the jus in bello, has instead interfered with its application. However selective and imperfect the Council’s approach might be, though, its power to adopt decisions binding on UN members and its competence to take or authorize coercive measures involving the use of force make it potentially a formidable instrument against serious violations of international humanitarian law, partly remedying the lack of enforcing mechanisms in the treaties on the laws of war.

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INTRODUCTION

This Article discusses the UN Security Council's competences and powers to secure compliance with international humanitarian law.¹ In the first twenty years of its existence (1945-1967), which have been appropriately labeled the “*tabula rasa* period,”² the Council totally ignored *jus in bello* issues. The first explicit reference to international humanitarian law in a Security Council resolution was in Resolution 237 (1967) following the Six Days' War in the Middle East, recommending that the governments concerned comply with the Geneva Conventions.³ In the 1970s-1980s, the Council reluctantly started to engage with international humanitarian law: In Resolution 436 (1978) on Lebanon, for instance, for the first time it expressly referred to the International Committee of the Red Cross (ICRC).⁴ During this period, however, many armed conflicts involving violations of international humanitarian law were ignored by the Council or dealt with at a very late stage.⁵ After the end of the Cold War, the Council's role as an “international policeman” became more palpable and expanded to very diversified situations, including violations of the laws of war. References to international humanitarian law in Security Council resolutions grew more frequent due to the proliferation of non-international armed conflicts generating an increasing number of civilian casualties. At the same time the Council started to make use of its Chapter VII powers.⁶

The focus of the present Article is on the *enforcement* of international humanitarian law by the Security Council through coercive measures, rather than on other aspects of implementation: As noted by Abi-Saab, enforcement involves “exercising coercive

¹ This Article uses “international humanitarian law,” “*jus in bello*,” “laws of war,” and “law of armed conflict” synonymously.

² Theodoor A. van Baarda, *The Involvement of the Security Council in Maintaining International Humanitarian Law*, 12 NETHERLANDS Q. HUM. RTS. 137, 142 (1994).

³ S.C. Res. 237, para. 2, U.N. Doc. S/RES/237 (June 14, 1967).

⁴ S.C. Res 436, para. 2, U.N. Doc. S/RES/436 (Oct. 6, 1978) calls upon all involved to allow the ICRC into the conflict area to evacuate the wounded and provide humanitarian assistance.

⁵ Gregor Schotten & Anke Biehler, *The Role of the UN Security Council in Implementing International Humanitarian Law and Human Rights Law*, in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 309, 312 (Roberta Arnold & Noëlle Quéniévet eds., 2008). It appears that, during this period, the Council mainly focused on the Middle East and the Palestinian Occupied Territories, the conflict between Iran and Iraq and the invasion of Kuwait (Christiane Bourloyannis, *The Security Council of the United Nations and the Implementation of International Humanitarian Law*, 20 DENV. J. INT'L L. & POL'Y 335, 353 (1992)).

⁶ MARÍA TERESA COMELLAS AGUIRREZÁBAL, LA INCIDENCIA DE LA PRÁCTICA DEL CONSEJO DE SEGURIDAD EN EL DERECHO INTERNACIONAL HUMANITARIO 24 (2007).

pressure on the deviant subject to realign his conduct to the prescriptions of the rules,” while implementation, which is a broader concept, also includes “direct application by the subjects of the legal system, or the addressees of its rules” and “determinations by third parties—ideally judicial, but could be quasi-judicial instances as well—in case of dispute as to the proper application by the subjects.”⁷ In addition, this Article deals specifically neither with measures taken with regard to the protection of particular vulnerable groups (e.g., women and children),⁸ nor with the role that the Security Council has played in the normative development of the law of armed conflict.⁹ Section II determines the legal grounds of the Security Council’s competence to enforce international humanitarian law, while Section III discusses Chapter VII measures that have been used to react to violations of the *jus in bello*. The problems related to the enforcement of international humanitarian law by the Security Council will finally be examined, in particular its selective approach and the instances in which the Council, instead of enforcing, has actually interfered with the application of the laws of war.

I. IS THE SECURITY COUNCIL COMPETENT TO ENFORCE INTERNATIONAL HUMANITARIAN LAW?

A. VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW AS A “THREAT TO THE PEACE”

The UN Charter does not contain any express reference to international humanitarian law. If “respect for human rights” is mentioned among the purposes of the United Nations in Article 1(3), no mention of the laws and customs of war appears in either Article 1 or 2. This omission was intentional, as the drafters saw any reference to the *jus in bello* as an implicit recognition that, in spite of Article 2(4) and the collective security mechanisms provided in the Charter, armed conflicts could not be prevented.¹⁰ “Human rights” have however been interpreted broadly in UN fora since

⁷ Georges Abi-Saab, *Conclusions*, in LES NATIONS UNIES ET LE DROIT INTERNATIONAL HUMANITAIRE : ACTES DU COLLOQUE INTERNATIONAL À L’OCCASION DU CINQUANTIÈME DE L’ONU 307 N.8 307 (Luigi Condorelli, Anne-Marie La Rosa & Sylvie Scherrer eds., 1996).

⁸ On securing compliance with the provisions protecting children in armed conflict, see Matthew Happold, *Protecting Children in Armed Conflict: Harnessing the Security Council’s “Soft Power,”* 43 ISR. L. REV. 360 (2010). On the protection of women, see Anke Biehler, *Protection of Women in International Humanitarian Law and Human Rights Law*, in Arnold and Quéniwet, *supra* note 5, at 355, 372-75.

⁹ On this aspect, see COMELLAS AGUIRREZÁBAL, *supra* note 6, at 201 ff.

¹⁰ *Report of the International Law Commission to the General Assembly* [1949] 1 Y.B. Int’l L. Comm’n 281, U.N. Doc A/CN.4/13. See Schotten & Biehler, *supra* note 5, at 311.

the 1960s: the notion of “human rights in armed conflict,” which includes international humanitarian law, was introduced at the 1968 UN International Conference on Human Rights in Teheran and was later reaffirmed in several General Assembly resolutions, starting with Resolution 2444 (XXIII) of December 19, 1968.¹¹ Resolution 9/9 (2008) of the UN Human Rights Council has also clearly stated that “conduct that violates international humanitarian law ... may also constitute a gross violation of human rights.”¹²

Nonetheless, the fact that promoting and encouraging respect for international humanitarian law can now be considered one of the UN purposes does not necessarily mean that the Security Council is competent to act to achieve that purpose. Indeed, the main responsibility of the Security Council under the Charter is to maintain international peace and security (Article 24(1)) rather than to ensure that hostilities are conducted in accordance with the *jus in bello*. The Charter, thus, makes the Council the arbiter of *when* armed force can be used, but does not say anything about *how* this force can be employed:¹³ as noted by Judge Fitzmaurice, “[i]t was to keep the peace, not to change the world order, that the Security Council was set up.”¹⁴ In particular, the problem with using Chapter VII enforcement powers to secure compliance with international humanitarian law is that, as is well-known, according to Article 39 of the Charter those powers can be invoked by the Council only in case of a “threat to the peace, breach of the peace, or act of aggression,” as their purpose is to keep the peace and not to enforce the law.¹⁵ It is however quite possible that these two goals occasionally coincide. The question is whether a breach of international humanitarian law can be considered by the Security Council a “threat to the peace.”¹⁶ Although

¹¹ G.A. Res. 2444 (XXIII), U.N. Doc. A/RES/2444(XXIII) (Dec. 19, 1968).

¹² Human Rights Council Res. 9/9, Annual Reports of the HRC, 9th Sess., Sept. 9-24, 2008, A/HRC/RES/9/9 at 1 (Sept. 18, 2008). As observed in the Commentary to Article 89 of Additional Protocol I to the 1949 Geneva Conventions “[a]cting for the protection of man, also in time of armed conflict, accords with the aims of the United Nations no less than does the maintenance of international peace and security” (COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 para. 3596 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987)).

¹³ James D. Fry, *The UN Security Council and the Law of Armed Conflict: Amity or Enmity?*, 38 GEO. WASH. INT’L L. REV. 327, 333 (2006).

¹⁴ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ 16, 294, para. 115 (June 21) [hereinafter *Namibia* Advisory Opinion] (Dissenting Opinion of Judge Fitzmaurice).

¹⁵ HANS KELSEN, *THE LAW OF THE UNITED NATIONS* 294 (1950).

¹⁶ The other two situations triggering Chapter VII powers, breaches of peace and acts of aggression, refer to the outbreak of an inter-state armed conflict.

the drafters regarded this concept as linked to the international use of armed force,¹⁷ its scope has been progressively expanded by the Council.¹⁸ Koskenniemi has highlighted the Security Council's "willingness to use its exceptionally 'hard' powers of enforcement, binding resolutions, economic sanctions and military force for 'soft' purposes of international justice."¹⁹ He claims that "[t]he sense of 'peace' has been widened from the (hard) absence of the use of armed force by a State to change the territorial *status quo* to the (soft) conditions within which ... peace in its 'hard' sense depends."²⁰ It can thus be argued that, although in principle the primary function of the Security Council is the maintenance of international peace and security, which is not necessarily identical to the remedying of internationally wrongful acts, in practice there has been a significant overlap, with the Council qualifying the most diverse breaches of international law as constituting threats to the peace.²¹ The nexus between the maintenance of peace and 'humanitarian' considerations was initially emphasized in the 1992 statement by the President of the Security Council on behalf of its members:

The absence of war and military conflicts among States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters.²²

Violations of international humanitarian law were expressly considered as a threat to the peace by the Security Council for the first time in Resolution 808 (1993) with

¹⁷ INGER ÖSTERDAHL, THREAT TO PEACE: THE INTERPRETATION BY THE SECURITY COUNCIL OF ARTICLE 39 OF THE UN CHARTER 85 (1998).

¹⁸ It is well-known that the drafters of the Charter deliberately left the notion undefined (United Nations Conference on International Organization, Documents, Vol. XII, 1945, 505).

¹⁹ Martti Koskenniemi, *The Police in the Temple. Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT'L L. 325, 341 (1995).

²⁰ *Id.* Gaja argues that the extensive interpretation of the notion of "threat to the peace" "trouve surtout sa raison d'être dans l'exigence de répondre à des violations d'obligations essentielles pour la société internationale. ... [L]es nouvelles frontières du concept de menace à la paix, telles qu'elles ressortent de la pratique du Conseil, ont pour conséquence de restreindre l'admissibilité des réactions individuelles" (Giorgio Gaja, *Réflexions sur le rôle du Conseil de sécurité dans le nouvel ordre mondial. A propos des rapports entre maintien de la paix et crimes internationaux des Etats*, 97 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 297, 307, 309 (1993)).

²¹ DANIEL H. JOYNER, INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION 178 (2009).

²² Note by the President of the Security Council at 3, U.N. Doc. S/23500 (Jan. 31, 1992).

regard to Bosnia and Herzegovina.²³ The following year, Resolution 955 (1994) qualified violations of international humanitarian law committed in an internal armed conflict (Rwanda) as a threat to international peace and security.²⁴ In Resolution 1296 (2000) on the protection of civilians in armed conflict, systematic, flagrant and widespread violations of international humanitarian law were qualified for the first time as potentially constituting threats to the peace without reference to any specific conflict.²⁵ The Security Council's meeting records also show that several States have reaffirmed the link between the maintenance of international peace and security and compliance with international humanitarian law.²⁶

The question is, however, whether *any* violation of international humanitarian law can qualify as a threat to the peace in the sense of Article 39. Even though the Security Council enjoys a broad discretion in determining the existence of such a threat,²⁷ this *kompetenz-kompetenz* is not unlimited: a threat to the peace could not be “artificially created as a pretext for the realization of ulterior purposes.”²⁸ The International

²³ S.C. Res 808 at 2, U.N. Doc. S/RES/808 (Feb. 22, 1993).

²⁴ S.C. Res 955 at 1, U.N. Doc. S/RES/955 (Nov. 8, 1994). In other resolutions, e.g., Res. 794 (1992) with regard to Somalia, it is the consequences (“human tragedy”) of the violations of international humanitarian law and of the armed violence more than the violations themselves that were qualified as a threat to the peace (S.C. Res 794 at 1, U.N. Doc. S/RES/794 (Dec. 3, 1992)).

²⁵ S.C. Res 1296, para. 5, U.N. Doc. S/RES/1296 (Apr. 19, 2000). See also S.C. Res. 1674, para. 26, U.N. Doc. S/RES/1674 (Apr. 28, 2006), S.C. Res 1738, para. 9, U.N. Doc. S/RES/1738 (Dec. 23, 2006) and S.C. Res. 1894, para. 3, U.N. Doc. S/RES/1894 (Nov. 11, 2009) on the protection of civilians in armed conflict and Res. 1314 (2000) on children and armed conflict, that use identical language.

²⁶ See, e.g., Egypt (U.N. SCOR, 55th Sess., 4130th mtg. (Resumption 1) at 12, U.N. Doc. S/PV.4130 (Resumption 1) (Apr. 19, 2000)); Morocco (U.N. SCOR, 64th Sess., 6066th mtg. (Resumption 1) at 22-23, U.N. Doc. S/PV.6066 (Resumption 1), (Jan. 14, 2009)); United Arab Emirates (*id.* at 8); Canada (U.N. SCOR, 64th Sess., 6151th mtg. (Resumption 1) at 8, U.N. Doc. S/PV.6151 (Resumption 1) (June 26, 2009)); Croatia (U.N. SCOR, 64th Sess., 6216th mtg. at 10, U.N. Doc. S/PV.6216 (Nov. 11, 2009)). An exception appears to be India's claim that Chapter VII does not apply to breaches of international humanitarian law (Karel Wellens, *The UN Security Council and New Threats to the Peace: Back to the Future*, 8 J. CONFLICT SEC. L. 15, 60 (2003)).

²⁷ See the Dissenting Opinion of Judge Weeramantry in Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. UK; Libyan Arab Jamahiriya v. US), Order on Request for the indication of Provisional Measures, 1992 I.C.J. 160, 176 (Apr. 14): “the determination under Article 39 of the existence of any threat to the peace, breach of the peace or act of aggression, is one entirely within the discretion of the Council. It would appear that the Council and no other is the judge of the existence of the state of affairs that brings Chapter VII into operation.”

²⁸ Dissenting Opinion of Judge Fitzmaurice, *supra* note 14, para. 116-17. The qualification as a threat to the peace of the failure of Libya to extradite the alleged perpetrators of the Lockerbie

Criminal Tribunal for the former Yugoslavia (ICTY) made clear that “the ‘threat to the peace’ is more of a political concept. But the determination that there exists such a threat is not a matter of totally unfettered discretion, as it has to remain, at the very least, within the limits of the purposes and principles of the Charter.”²⁹ According to Conforti, the conduct of a State cannot be considered a threat to the peace “*when the condemnation is not shared by the opinion of most of the States and their peoples.*”³⁰ Other commentators refer to the limit of good faith and to the doctrine of abuse of right.³¹ It is true that there is no direct judicial control over acts of the Council,³² but there are indirect ones: protest by refusal to comply with the resolution by the UN Member States, indirect judicial control when a resolution becomes relevant to decide a case before an international or national tribunal, and acceptance of the Security Council’s action by the international community.³³

In order to establish the existence of a threat to the peace, then, the rank of the breached norm or value, the severity of the violation and its transboundary effects need be taken into consideration.³⁴ This conclusion is confirmed by the practice of the Council: Resolutions 808 (1993), 955 (1994), 1296 (2000), 1674 (2006), 1738 (2006), 1894 (2009) and 1314 (2000) all specify that the violations of international humanitarian law amounting to a threat to the peace are “systematic, widespread and

bombing and to renounce terrorism “by concrete actions,” contained in Res. 748 (1992), has for instance been criticised (Susan Lamb, *Legal Limits to United Nations Security Council Powers*, in *THE REALITY OF INTERNATIONAL LAW. ESSAYS IN HONOUR OF IAN BROWNLIE* 361, 378-79 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999)).

²⁹ Prosecutor v. Tadić, Case no. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 29 (Oct. 2, 1995) [hereinafter *Tadić*].

³⁰ BENEDETTO CONFORTI, *THE LAW AND PRACTICE OF THE UNITED NATIONS* 177 (2005) (emphasis in the original).

³¹ See Thomas M. Franck, *Fairness in the International Legal and Institutional System*, 240 *RECUEIL DES COURS* 9, 191 (1993-III); Lamb, *supra* note 28, at 385.

³² In his Separate Opinion in the *Genocide* case, Judge ad hoc Lauterpacht recalled that the ICJ’s power of judicial review “does not embrace any right of the Court to substitute its [own] discretion for that of the Security Council in determining the existence of a threat to the peace, a breach of the peace or an act of aggression, or the political steps to be taken following such a determination.” Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Further Requests for the Indication of Provisional Measures, 1993 I.C.J. 407, para. 99 (Sept. 13) [hereinafter *Genocide* case].

³³ Michael Bothe, *Les limites des pouvoirs du Conseil de sécurité*, in *THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL - WORKSHOP OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 67, 70 (René-Jean Dupuy ed., 1992).

³⁴ MATTHIAS HERDEGEN, *DIE BEFUGNISSE DES UN-SICHERHEITSRATES: AUFGEKLÄRTER ABSOLUTISMUS IM VÖLKERRECHT?* 16 (1998).

flagrant.”³⁵ It will however be seen that customary international law appears to have made this *de minimis* requirement of scarce practical importance.³⁶

B. ARTICLE 94(2) OF THE UN CHARTER

The competence of the Security Council to secure compliance with the *jus in bello* could also be indirectly founded on another Charter provision. Article 94(2) confers on the Security Council the additional authority to make recommendations or decide upon measures with the purpose of giving effect to the judgments of the International Court of Justice (ICJ), including of course those that might establish violations of international humanitarian law.³⁷ The Council, however, could act only upon recourse of the successful litigant, and not of other UN members. Furthermore, the Council may decline to enforce the judgment, as Article 94(2) provides for action only “if [the Council] deems necessary.”³⁸

As Article 94(2) does not specify what “measures” the Council could adopt to enforce an ICJ judgment, one has to conclude that these include, but are not limited to,³⁹ those provided in Chapters VI and VII.⁴⁰ It is to be observed, though, that the adoption of Article 41 measures on the basis of Article 94(2) would not be subordinated to the conditions spelt out in Article 39, i.e., the previous determination of the existence of a threat to the peace, breach of peace or act of aggression.⁴¹ As to measures involving the use of force, it has been suggested that the Council could not

³⁵ S.C. Res. 808 (*supra* note 23, at 2) with regard to Bosnia and Herzegovina makes the example of mass killings and ethnic cleansing. France, sponsor of the resolution, declared that the violations of international humanitarian law in Bosnia were a threat to the peace because their commission would inflame the conflict (U.N. SCOR, 48th Sess., 3175th mtg. at 8, U.N. Doc. S/PV.3175 (Feb. 22, 1993)). See S.C. Res 955, *supra* note 24; S.C. Res 1296, *supra* note 25, para. 5; S.C. Res. 1674, *supra* note 25, para. 26; S.C. Res 1738, *supra* note 25, para. 9; S.C. Res. 1894, *supra* note 25, para. 3; S.C. Res. 1314, para. 9, U.N. Doc. S/RES/1314 (Aug. 11, 2000).

³⁶ See *infra* Section I.D.

³⁷ See, e.g., *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgement, 2005 I.C.J. 168, para. 345 (Dec. 19, 2005).

³⁸ U.N. Charter, art. 94, para. 2.

³⁹ Oscar Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AM. J. INT'L L. 1, 21 (1960).

⁴⁰ Available measures are discussed by Attila Tanzi, *Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations*, 6 EUR. J. INT'L L. 539, 561-63 (1995).

⁴¹ Hermann Mosler & Karin Oellers-Frahm, *Article 94*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY Vol. 2, 1174, 1177 (Bruno Simma et al. eds., 2d ed. 2002); Schachter, *supra* note 39, at 19-20; Tanzi, *supra* note 40, at 561.

resort to them to enforce an ICJ judgment in the absence of the preconditions listed in Article 39, as ICJ decisions are peaceful means to settle a dispute.⁴² This conclusion cannot be accepted for several reasons. First, such an interpretation would make Article 94(2) largely redundant. Second, the provision under examination does not make any distinction among different Chapter VII measures. Finally, both sanctions and measures involving the use of force share the same rationale, as they are both measures taken *against* a State.⁴³

C. OTHER TREATIES

Certain treaties containing international humanitarian law provisions specifically provide a role for the Security Council in their implementation, i.e., the 1977 Environmental Modification Convention⁴⁴ and the 1993 Chemical Weapons Convention,⁴⁵ while Article 13(b) of the 1998 Rome Statute confers upon the Council the right to refer a situation involving, inter alia, the commission of war crimes to the International Criminal Court (ICC).⁴⁶ More vaguely, Article 89 of the 1977 Additional Protocol I to the Geneva Conventions provides that “[i]n situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.”⁴⁷ While these treaties could not confer

⁴² Mosler & Oellers-Frahm, *supra* note 41, at 1177; Schachter, *supra* note 39, at 22; T.D. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers Under Chapter VII of the Charter*, 26 NETHERLANDS Y.B. INT’L L.33, 59-60 (1995).

⁴³ In any case, given the broad interpretation of the notion of “threat to the peace” by the Council, the problem seems of limited practical relevance (Tanzi, *supra* note 40, at 561).

⁴⁴ Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, art. V, Dec. 10, 1976, 1108 U.N.T.S. 151.

⁴⁵ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, art. XII (4), Jan. 13th, 1993, 1974 U.N.T.S. 45.

⁴⁶ Rome Statute of the International Criminal Court, art. 13(b), Jul. 17, 2000, 2187 U.N.T.S. 3. This right has been exercised for the first time with regard to the situation in Darfur (S.C. Res. 1593, para. 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005)).

⁴⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 89, June 8th, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. A similar provision is contained in the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the event of Armed Conflict, art 31, Mar. 26th, 1999, 2253 U.N.T.S. 172. According to the Commentary to Article 89, “serious violations” of the Conventions or of the Protocol means “conduct contrary to these instruments which is of a serious nature but which is not included as such in the list of ‘grave breaches’” (Sandoz, Swinarski & Zimmermann, *supra* note 12, para. 3591). This call for cooperation in reacting against

competences upon the Security Council that it does not already possess under the Charter, they would at least prevent States parties from claiming that when the Council adopts a resolution that tries to secure compliance with the international humanitarian law provisions contained in such instruments, it is acting *ultra vires*.

D. CUSTOMARY INTERNATIONAL LAW AS REFLECTED IN ARTICLE 1 COMMON TO THE 1949 GENEVA CONVENTIONS

Neither Article 39 nor Article 94(2) of the Charter can found a *general* competence of the Security Council to enforce international humanitarian law, as the former only applies to serious and widespread violations amounting to a threat to the peace while the latter operates exclusively with regard to violations established in an ICJ judgment. The competence of the Security Council could however find a legal basis on customary international law, as reflected in Article 1 Common to the 1949 Geneva Conventions on the Protection of Victims of War.⁴⁸ Indeed, the Charter is a treaty and, as such, can be modified by subsequent custom: informal modifications of the Charter were endorsed by the ICJ in the 1971 Advisory Opinion on *Namibia* with regard to Article 27(3).⁴⁹ If one admits that customary international law can modify certain Charter provisions like those on the UN organs' voting procedure and powers,⁵⁰ there does not seem to be any reason why such modification could not occur with regard to the provisions fixing the competences of these organs. This has for instance occurred

at least the most serious violations of international (humanitarian) law is also contained in Article 41(1) of the Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission (ILC) in 2001 and endorsed by the UN General Assembly, which provides that "States shall cooperate to bring to an end through lawful means any serious breach" of an obligation arising under a peremptory norm of general international law (Rep. of the Int'l Law Comm'n, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001 at 286 U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001)). The Commentary to the article states that this "[c]ooperation could be organized in the framework of a competent international organization, in particular the United Nations" (*Id.* at 287).

⁴⁸ See *infra* note 122.

⁴⁹ *Namibia* Advisory Opinion, *supra* note 14, at 22, para. 22. See also Wolfram Karl, Bernd Mützelburg & Georg Witschel, *Article 108*, in Simma, *supra* note 41, at 1341, 1346, paras. 11-12.

⁵⁰ See CONFORTI, *supra* note 30, at 66-67, & 208, who gives the examples of the validity of Security Council non-procedural decisions adopted with the abstention of one or more permanent members and the delegation of the use of force by the Council to Member States. Those who see the Charter as a "constitution" come to a different conclusion (see, e.g., Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 586, 600 (1998)).

with the politicization of the role of the Secretary-General well beyond what provided in Articles 97-101 of the Charter.⁵¹

Under Common Article 1 of the Geneva Conventions, “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”⁵² It is true that the UN is not a party to the Conventions, but in the *Nicaragua* case the ICJ held that this provision codifies customary international law.⁵³ The ICTY further clarified that Common Article 1, as a “general principle,” “lays down an obligation that is incumbent, not only on States, but also on other international entities including the United Nations.”⁵⁴ Even though it cannot be construed as implying an *obligation* to act, the customary provision reflected in Common Article 1 constitutes a legal ground for the Security Council, as the UN organ provided with enforcement powers, to exercise such powers in order to ensure compliance with international humanitarian law “in all circumstances,” whether or not the violations

⁵¹ Ingo Winkelmann, *United Nations Charter, Amendment*, para. 17, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (R. Wolfrum ed.) Online edition <http://www.mpepil.com>.

⁵² Emphasis added. See also Additional Protocol I, *supra* note 47, art. 1(1), and Convention on the Rights of the Child, art. 38(1), Nov. 20 1989, 1577 U.N.T.S. 3. A similar provision does not appear in Additional Protocol II but it has been argued that, as the situations covered by this Protocol also fall within the scope of application of Common Article 3 of the Geneva Conventions, the obligation to respect and ensure respect applies to non-international armed conflicts as well (Luigi Condorelli & Laurence Boisson de Chazournes, *Quelques remarques à propos de l'obligation des Etats de «respecter et faire respecter» le droit international humanitaire «en toutes circonstances»*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 17, 17 (Christophe Swinarski ed., 1984)). It has been demonstrated that the obligation to ensure respect contained in Common Article 1 of the Geneva Conventions was initially intended by the drafters as referring to internal observance within the states parties to the Conventions (Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11, 29-30 (1995)). The new, broader interpretation of Article 1, which also addresses states not involved in the armed conflict, was solemnly supported by the above mentioned Res. 2444 (XXIII) on Human Rights and Armed Conflict, adopted by the 1968 International Conference on Human Rights with no vote against (*supra* note 11). This interpretation has also been endorsed by the ICJ in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 199-200, para. 158 (July 9) [hereinafter *Wall Advisory Opinion*]: “It follows from that provision [Common Article 1] that every State party to that Convention, *whether or not it is a party to a specific conflict*, is under an obligation to ensure that the requirements of the instruments in question are complied with” (emphasis added).

⁵³ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, para. 220 (June 27). This is also the ICRC position, see 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 509-13 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005). See also Condorelli & Boisson de Chazournes, *supra* note 52, at 27-29.

⁵⁴ *Tadić*, *supra* note 29, para. 93. See also Laurence Boisson de Chazournes & Luigi Condorelli, *Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests*, 82 INT'L REV. RED CROSS 67, 70 (2000).

have a destabilizing effect on international peace and security and whether or not they have been established in an ICJ judgment.⁵⁵ Indeed, as argued by a commentator, the Council can act at the same time as an organ of a traditional international organization, entrusted by its members to pursue the purposes defined in its Charter and within the limits contained therein, and as a material organ of the international community for the protection of *erga omnes* obligations under customary international law: The exercise of new competences and powers by the Security Council should be seen as a manifestation of the latter phenomenon.⁵⁶ This *dédoulement fonctionnel*⁵⁷ seems confirmed by paragraph 139 of the 2005 World Summit Outcome Document, which

⁵⁵ It has been observed that “[h]umanitarian principles have value *per se* and should not be considered only when security issues which endanger international peace and security are at stake” (Laurence Boisson de Chazournes, *The Collective Responsibility of States to Ensure Respect for Humanitarian Principles*, in MONITORING HUMAN RIGHTS IN EUROPE 247, 255 (Arie Bloed, Liselotte Leicht, Manfred Nowak and Allan Rosas eds., 1993)). Common Article 1 does not however, impose on the Council an *obligation* to act. Indeed, it has been suggested that state practice shows that “Article 1 *allows* third states to intervene, but does not *oblige* them to do so” (ROBERT KOLB & RICHARD HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS 288 (2008)). The ICRC Study on customary international humanitarian law appears to share this view: Rule 144 vaguely provides that states “must exert their influence, to the degree possible, to stop violations of international humanitarian law” (Henckaerts & Doswald-Beck, *supra* note 53, at 509). According to Kalshoven, “the primary legal obligation arising from common Article 1 is for States Parties to impose respect for the applicable rules of international humanitarian law, ‘in all circumstances’, on their armed forces, including armed groups under their control, and on their populations,” as only for this obligation can states be held legally responsible, while when it comes to respect by their peers, States are only under a *moral* incentive or obligation (Frits Kalshoven, *The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit*, 2 Y.B. INT’L HUMAN. L. 3, 60 (1999)). See similarly the Separate Opinion of Judge Kooijmans in the *Wall* Advisory Opinion, *supra* note 52, at 232-34, paras. 46-50. The existence of a positive duty to ensure respect for international humanitarian law “at the very least by third parties controlled by that state” is claimed by THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 31 (1989). See *generally id.* at 30-31.

⁵⁶ Such use of the UN would be contemplated in an emerging norm of customary international law (PAOLO PICONE, COMUNITÀ INTERNAZIONALE E OBBLIGHI «ERGA OMNES» especially 215-18, 273-74, 306-08, 332 (2006)). Another commentator has also emphasized that “[t]he existence of community organs allows us to speak of an organized entity possessing a right, and the actual ability, to demand the performance of obligations *erga omnes*” (Fassbender, *supra* note 50, at 592) (emphasis added). See also the words of the Libyan representative during the debate on the protection of civilians in armed conflict: “*The international community, represented mainly by this Council, not only has the right to take measures but has the responsibility to act if the parties directly concerned have not managed to protect civilians or have shown a lack of will to do so*” (U.N. SCOR, 64th Sess., 6151st mtg. at 20, U.N. Doc. S/PV.6151 (June 26, 2009)) (emphasis added).

⁵⁷ For the notion of *dédoulement fonctionnel*, see GEORGES SCELLE, PRÉCIS DE DROIT DES GENS: PRINCIPES ET SYSTÉMATIQUE VOL. II 10-12 (1934).

invokes the notion of the “responsibility to protect” and declares that the international community is

prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant international organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from ... war crimes....⁵⁸

As can be seen, the paragraph does not expressly link the exercise of such responsibility to the maintenance of international peace and security. Although not binding, the document is important, as it reflects the consensus reached at the largest gathering of heads of State and government in history.

II. THE ENFORCEMENT OF INTERNATIONAL HUMANITARIAN LAW THROUGH CHAPTER VII MEASURES

The Security Council has adopted a variety of measures in relation to international humanitarian law. It has for instance determined that international humanitarian law applies to certain situations⁵⁹ or that certain conduct amounts to a violation of international humanitarian law,⁶⁰ it has invited to consider to convene a meeting of

⁵⁸ 2005 World Summit Outcome, G.A. Res. 60/1, para. 139, U.N. Doc. A/RES/60/1 (Sept. 16, 2005) [hereinafter World Summit Outcome Document]. On the “responsibility to protect” see Marco Roscini, *Neighbourhood Watch? The African Great Lakes Pact and ius ad bellum*, 69 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 931, 948-55 (2009), and the bibliography cited therein.

⁵⁹ See the reaffirmation of the *de jure* applicability of the IV Geneva Convention to the territories occupied by Israel since 1967. The first express reference in this regard is contained in S.C. Res. 271, para. 4, U.N. Doc. S/RES/271 (Sept. 15, 1969), although the Council had already implicitly recognized this in Res. 237, *supra* note 3, para. 2. See also S.C. Res. 469, U.N. Doc. S/RES/469 (May 20, 1980), S.C. Res. 471, U.N. Doc. S/RES/471 (June 5, 1980), S.C. Res. 607, U.N. Doc. S/RES/607 (Jan. 5, 1988) and S.C. Res. 636, U.N. Doc. S/RES/636 (July 6, 1989), which reaffirm the applicability of arts. 1, 27, 47 and 49 of the IV Geneva Convention to the Palestinian Occupied Territories, respectively. The Council has also urged Israel to recognize the *de jure* application of the IV Geneva Convention (S.C. Res. 681, para. 4, U.N. Doc. S/RES/681 (Dec. 20, 1990)). These calls have however proved not to be very effective, although they might have been one of the factors bringing Israel and the Palestinians to the negotiating table (Michael Bothe, *The United Nations Actions for the Respect of International Humanitarian Law and the Coordination of Related International Operations*, in Condorelli, La Rosa & Scherrer, *supra* note 7, at 213, 220).

⁶⁰ See, e.g., S.C. Res. 819, para. 8, U.N. Doc. S/RES/819 (Apr. 16, 1993) on Bosnia and Herzegovina, that qualifies impeding the delivery of humanitarian assistance as a serious violation of international humanitarian law.

the High Contracting Parties to the IV Geneva Convention⁶¹ and it has condemned or deplored violations and those who perpetrated them.⁶² The Council has also set up fact-finding bodies (albeit that these have sometimes been preliminary to the adoption of coercive measures).⁶³ This exercise of a fact-finding function by the Council has at least partly remedied the paralysis of the International Fact-Finding Commission envisaged in Article 90 of Additional Protocol I, although it has also been noted that this practice of establishing ad hoc bodies is one of the factors that have condemned the Commission to inactivity.⁶⁴

⁶¹ S.C. Res. 681, *supra* note 59, para. 6, with regard to the Palestinian Occupied Territories.

⁶² The first time a state was censored for breaching international humanitarian law was in S.C. Res. 446, para. 2, U.N. Doc. S/RES/446 (Mar. 22, 1979), which strongly deplored the establishment of Israeli settlements in the Palestinian and Arab territories. For condemnations of violations of international humanitarian law in general, see, e.g., S.C. Res. 540, U.N. Doc. S/RES/540 (Oct. 31, 1983) with regard to the Iran-Iraq conflict; S.C. Res. 876, U.N. Doc. S/RES/876 (Oct. 19, 1993) with regard to Abkhazia; S.C. Res. 1565, U.N. Doc. S/RES/1565 (Oct. 1, 2004), S.C. Res. 1711, U.N. Doc. S/RES/1711 (Sept. 29, 2006) and S.C. Res. 1736, U.N. Doc. S/RES/1736 (Dec. 22, 2006) with regard to the Democratic Republic of the Congo (DRC); S.C. Res. 1865, U.N. Doc. S/RES/1865 (Jan. 27, 2009) with regard to Côte d'Ivoire; and S.C. Res. 1881, U.N. Doc. S/RES/1881 (July 30, 2009) with regard to Darfur. See also the presidential statement adopted in January 2009 condemning all violations of international humanitarian law and demanding that all relevant parties cease those violations (S.C. Pres. Statement 2009/1 at 1, U.N. Doc. S/PRST/2009/1 (Jan. 14, 2009)). For condemnations of certain specific conduct or provisions, see, e.g., S.C. Res. 1231, para. 3, U.N. Doc. S/RES/1231 (Mar. 11, 1999) with regard to attacks on civilians and the recruitment of child soldiers in Sierra Leone; S.C. Res. 771, para. 2, U.N. Doc. S/RES/771 (Aug. 13, 1992) with regard to ethnic cleansing in the former Yugoslavia; S.C. Res. 864 para. 13, U.N. Doc. S/RES/864 (Sept. 15, 1993) with regard to attacks on UN personnel in Angola; and S.C. Res. 1925 at 2, U.N. Doc. S/RES/1925 (May 28, 2010) with regard to targeted attacks against the civilian population, widespread sexual violence, recruitment and use of child soldiers and extrajudicial executions in the DRC.

⁶³ One may recall, in this regard, the creation of the Commissions of Experts for the former Yugoslavia and Rwanda and of an Inquiry Commission for Darfur (S.C. Res. 780, para. 2, U.N. Doc. S/RES/780 (Oct. 6, 1992), S.C. Res. 935, para. 1, U.N. Doc. S/RES/935 (July 1, 1994) and S.C. Res. 1564, para. 12, U.N. Doc. S/RES/1564 (Sept. 18, 2004), respectively). If the influence of the reports by the Commissions of Experts for the former Yugoslavia and Rwanda is debatable, the Security Council seems to have followed the indications of the Darfur Commission, which recommended referral of the situation to the ICC (Robert Cryer, *The Security Council and International Humanitarian Law*, in TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 245, 262-63 (Susan C. Breau & Agnieszka Jachec-Neale eds., 2006)). The Security Council has also requested the UN Secretary-General, special representatives, States, non-governmental organizations and peacekeeping forces to collect information (e.g., S.C. Res. 918 at 2, U.N. Doc. S/RES/918 (May 17, 1994); S.C. Res. 674, para. 2, U.N. Doc. S/RES/674 (Oct. 29, 1990); S.C. Res. 771, *supra* note 62, para. 5; S.C. Res. 1865, *supra* note 62, para. 25; S.C. Res. 1893, para. 12, U.N. Doc. S/RES/1893 (Oct. 29, 2009); S.C. Res. 1925, *supra* note 62, para. 17; S.C. Res. 1933, para. 22, U.N. Doc. S/RES/1933 (June 30, 2010)).

⁶⁴ See Additional Protocol I, *supra* note 47, para. 90. See also the words of the Swiss representative in the Security Council, S/PV.6151 (Resumption 1), *supra* note 26, at 6 ("Switzerland recalls the existence of the International Humanitarian Fact-Finding Commission established by the First Additional Protocol to the Geneva Conventions. We encourage the Security Council to give

Although the importance of the above declaratory and fact-finding measures cannot be underestimated, this article will focus on the enforcement measures provided in Chapter VII aimed at forcing compliance by actors breaching the *jus in bello*. First, the Security Council has in various armed conflicts encouraged, urged, called on, demanded and requested belligerent States to comply with international humanitarian law (in general or with regard to specific instruments).⁶⁵ These calls could be adopted under Chapter VI but also under Chapter VII.⁶⁶ In Resolution 1265 (1999) on the protection of civilians in armed conflict, for the first time the Council urged all States to respect international humanitarian law without reference to a specific conflict.⁶⁷ In some cases, the calls have been accompanied by the threat of the adoption of coercive measures in case of non-compliance: it has however been observed that these threats usually have a negligible effect on the conduct of those to whom they are addressed.⁶⁸ The Council has also on various occasions demanded that the belligerents take certain actions, e.g. prevent violations,⁶⁹ guarantee humanitarian access to the population,⁷⁰ protect civilians,⁷¹ provide compensation⁷² and prosecute those responsible for the

a mandate to that permanent commission rather than appointing ad hoc commissions of inquiry⁷³). In S.C. Res. 1265, para. 6, U.N. Doc. S/RES/1265 (Sept. 17, 1999) and S.C. Res. 1894, *supra* note 25, para. 9, however, the Council recalled the possibility of using the International Fact-Finding Commission.

⁶⁵ See, e.g., S.C. Res. 814, para. 8, U.N. Doc. S/RES/814 (Mar. 26, 1993) and S.C. Res. 1863, para. 3, 15, U.N. Doc. S/RES/1863 (Jan. 16, 2009) with regard to Somalia, S.C. Res. 876, *supra* note 62, para. 4, with regard to Abkhazia, S.C. Res. 1881, *supra* note 62, para. 7 and S.C. Res. 1919 at 2, U.N. Doc. S/RES/1919 (Apr. 29, 2010) with regard to Sudan, S.C. Res. 1868 at 3, U.N. Doc. S/RES/1868 (Mar. 23, 2009); S.C. Res. 1890 at 2, U.N. Doc. S/RES/1890 (Oct. 8, 2009) and S.C. Res. 1917 at 3, U.N. Doc. S/RES/1917 (Mar. 22, 2010) with regard to Afghanistan.

⁶⁶ In order to establish whether a resolution has been adopted under Chapter VII in the absence of an express reference, one should look, for instance, at whether the resolution also simultaneously adopts measures under Articles 40, 41 or 42, or whether it expressly qualifies the situation as a threat to the peace, breach of the peace or act of aggression, or whether it refers to a crisis involving the use of armed force. See CONFORTI, *supra* note 30, at 180.

⁶⁷ S.C. Res. 1265, *supra* note 64, para. 4.

⁶⁸ COMELLAS AGUIRREZÁBAL, *supra* note 6, at 113. See, e.g., S.C. Res. 1564, *supra* note 63, para. 1, with regard to Sudan and S.C. Res. 1893, *supra* note 63, at 1 with regard to Côte d'Ivoire.

⁶⁹ See, e.g., S.C. Res. 1493, para. 8, U.N. Doc. S/RES/1493 (July 28, 2003) with regard to the DRC and S.C. Res. 1556 at 2, U.N. Doc. S/RES/1556 (July 30, 2004) with regard to Sudan.

⁷⁰ See, e.g., S.C. Res. 819, *supra* note 60, para. 8, with regard to the former Yugoslavia, S.C. Res. 1744, para. 11, U.N. Doc. S/RES/1744 (Feb. 21, 2007) and S.C. Res. 1910, para. 17, U.N. Doc. S/RES/1910 (Jan. 28, 2010) with regard to Somalia, and S.C. Res. 1923, para. 22, U.N. Doc. S/RES/1923 (May 25, 2010) on Chad and the Central African Republic.

⁷¹ See, e.g., S.C. Res. 1592, at 2, para. 3, U.N. Doc. S/RES/1592 (Mar. 30, 2005) with regard to the DRC and S.C. Res. 1863, *supra* note 65, para. 19, with regard to Somalia.

⁷² See, e.g., S.C. Res. 471, *supra* note 59, para. 3, with regard to the Palestinian Occupied Territories.

violations.⁷³ Again, these calls can range from mere recommendations to decisions adopted under Chapter VII. In some cases, the Council has even called upon States not involved in a given conflict to adopt certain measures, as in the case of the resolutions calling upon third States not to provide assistance to Israel in connection with settlements in the Palestinian Occupied Territories.⁷⁴

The most incisive measures at the disposal of the Security Council are however those provided in Articles 41 and 42 of Chapter VII.⁷⁵ As to the former, most of the sanctions regimes established after 1997 have had the purpose of limiting violence that had an impact on civilians.⁷⁶ In particular, at least four of the sanctions regimes created after 2004 (Côte d'Ivoire, Sudan, the Democratic Republic of Congo (DRC), and Somalia) are related to violations of human rights or international humanitarian law.⁷⁷ The problem with full-scale sanctions is that they may at the same time enforce international humanitarian law and have severe negative effects on civilians and vulnerable groups.⁷⁸ Two solutions have been engineered to solve this problem. The first is the inclusion of a humanitarian exception in the sanctions regime, in order to allow the provision of goods essential for the survival of the civilian population.⁷⁹

⁷³ See, e.g., S.C. Res. 1653, para. 6, U.N. Doc. S/RES/1653 (Jan. 27, 2006) with regard to the African Great Lakes. S.C. Res. 1012 at 1, U.N. Doc. S/RES/1012 (Aug. 28, 1995), requesting the Secretary-General to set up an international commission of inquiry on Burundi, recalls that "impunity ... leads to violations of international humanitarian law."

⁷⁴ See, e.g., S.C. Res. 465, para. 7, U.N. Doc. S/RES/465 (Mar. 1, 1980) and 471, *supra* note 59, para. 5, with regard to the Palestinian Occupied Territories.

⁷⁵ It is worth recalling that the limit of domestic jurisdiction does not prejudice the application of Chapter VII enforcement measures (U.N. Charter art. 2, para. 7).

⁷⁶ SECURITY COUNCIL REPORT, PROTECTION OF CIVILIANS 9 (Oct. 14, 2008), <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/XCuttingPOC2008.pdf> [hereinafter SECURITY COUNCIL REPORT]. Economic sanctions have been defined as "measures not including the use of military force and taken individually or collectively by States to put pressure on an individual State (the targeted or embargoed State), with a view to inducing the authorities of that State to adopt a specified course of action" (Hans-Peter Gasser, *Collective Economic Sanctions and International Humanitarian Law*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 871, 876 (1996) (footnote omitted)).

⁷⁷ SECURITY COUNCIL REPORT, *supra* note 76, at 9. See S.C. Res. 1844, U.N. Doc. S/RES/1844 (Nov. 20, 2008) on Somalia, as well as S.C. Res. 1907, U.N. Doc. S/RES/1907 (Dec. 23, 2009) with regard to Eritrea.

⁷⁸ In his 1995 "Supplement to the Agenda for Peace," the UN Secretary-General famously described sanctions as a "blunt instrument" that inflicts suffering on the vulnerable groups in the target country and which has "unintended or unwanted effects" (U.N. Secretary-General, Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, para. 70, U.N. Doc. A/50/60-S/1995/1 (Jan. 25, 1995)).

⁷⁹ See, e.g., S.C. Res. 757, para. 4(c), U.N. Doc. S/RES/757 (May 30, 1992) that excludes foodstuffs and medical supplies from the embargo against Yugoslavia (Serbia and Montenegro). See

The second and now most popular solution is to replace indiscriminate measures with “smart” or “targeted” sanctions in certain cases accompanied by the authorization to use all necessary means to ensure their respect.⁸⁰ The sanctions regimes with regard to Liberia, Côte d’Ivoire, Sierra Leone, Sudan, and DRC, for instance, provide for measures specifically targeting individuals and entities responsible for violations of international humanitarian law (including non-State actors), e.g. arms embargoes, bans on the export of natural resources aimed to finance conflicts, the freezing of financial assets and restrictions on flights and movement.⁸¹ Their efficacy, which depends on their implementation by Member States, is however doubtful.⁸² Another problem lies in the fact that targeted measures on individuals might amount to the imposition of penalties without due process guarantees: indeed, decisions on listing and de-listing targeted individuals and entities are taken by political organs (the sanctions committees) that do not disclose the reasons for their decisions, the listees are not represented in the procedure and no judicial review against the decisions is provided.⁸³ It is therefore not surprising that the World Summit Outcome Document

also S.C. Res. 661, para. 3(c), U.N. Doc. S/RES/661 (Aug. 6, 1990), S.C. Res. 666, para. 1, U.N. Doc. S/RES/666 (Sept. 13, 1990) and S.C. Res. 986, paras. 1-2, U.N. Doc. S/RES/986 (Apr. 14, 1995) with regard to Iraq, S.C. Res. 1127, para. 5, U.N. Doc. S/RES/1127 (Aug. 28, 1997) with regard to UNITA in Angola, S.C. Res. 1591, para. 3(g), U.N. Doc. S/RES/1591 (Mar. 29, 2005) with regard to Sudan and S.C. Res. 1596, para. 16, U.N. Doc. S/RES/1596 (May 3, 2005) with regard to the DRC.

⁸⁰ See, e.g., S.C. Res. 787, paras. 9-10, U.N. Doc. S/RES/787 (Nov. 16, 1992) with regard to Yugoslavia and S.C. Res. 1132, U.N. Doc. S/RES/1132 (Oct. 8, 1997) with regard to Sierra Leone.

⁸¹ See, e.g., S.C. Res. 1478, U.N. Doc. S/RES/1478 (May 6, 2003) and S.C. Res. 1521, U.N. Doc. S/RES/1521 (Dec. 22, 2003) in relation to Liberia; S.C. Res. 1493, *supra* note 69, S.C. Res. 1596, *supra* note 79, and S.C. Res. 1807, U.N. Doc. S/RES/1807 (Mar. 31, 2008) in relation to the DRC; S.C. Res. 1556, *supra* note 69, and S.C. Res. 1591, *supra* note 79, in relation to Sudan; S.C. Res. 1572, U.N. Doc. S/RES/1572 (Nov. 15, 2004) in relation to Côte d’Ivoire; S.C. Res. 1306, U.N. Doc. S/RES/1306 (July 5, 2000) in relation to Sierra Leone.

⁸² SECURITY COUNCIL REPORT, *supra* note 76, at 27. In a recent debate on the protection of civilians in armed conflict, China declared itself “not in favour of the Council resorting to the use of or threatening the use of sanctions at every turn” (S/PV.6151, *supra* note 56, at 13). On whether economic sanctions are an adequate response to violations of international humanitarian law, see Bourloyannis, who argues that in cases of use of prohibited weapons or indiscriminate attacks on civilians an arms embargo seems appropriate, but if it is directed at all parties to the conflict it would disadvantage those belligerents that comply with international humanitarian law. On the other hand, an arms embargo only targeting those who breach international humanitarian law might alter the military balance between the parties. In case of violations of the law of occupation, a comprehensive economic embargo does not seem appropriate, as it would increase the suffering of the population living in the occupied territory and in the target state (Bourloyannis, *supra* note 5, at 354-55).

⁸³ Challenges against targeted sanctions listings have been brought before different fora, most famously before the European Court of Justice. See Enzo Cannizzaro, *A Machiavellian Moment? The UN Security Council and the Rule of Law*, 3 INT’L ORG. L. REV. 189 (2006); Pasquale De Sena & Maria Chiara Vitucci, *The European Courts and the Security Council: Between Dédoublement*

reaffirmed the need for fair and clear procedures for placing individuals and entities on sanctions lists and for removing them.⁸⁴ The 2006 Watson Report made a number of recommendations for reform with regard to the processes of notification, access, fair hearing and effective remedy.⁸⁵ Some of these procedural safeguards to protect individual rights were eventually adopted by the Security Council in Resolution 1730 (2006), by which the Council requested the UN Secretary-General to establish within the Secretariat a “focal point” to receive de-listing requests and perform the tasks described in the annex to the resolution.⁸⁶

The Security Council has also adopted other measures that can be ascribed to Article 41 but are not expressly mentioned therein. The most famous examples are the establishment of the international criminal tribunals for the former Yugoslavia and for Rwanda in order to investigate and prosecute those responsible for grave violations of international humanitarian law⁸⁷ and the creation of the UN Compensation

Fonctionnel and Balancing of Values, 20 EUR. J. INT'L L. 193 (2009); Andrea Gattini, *Joined Cases C-402/05 P & 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission, judgment of the Grand Chamber of 3 September 2008*, nyr., 46 COMM. MKT. L. REV. 213 (2009); Christopher Michaelsen, *Kadi and Al Barakaat v Council of the European Union and Commission of the European Communities: The Incompatibility of the United Nations Security Council's 1267 Sanctions Regime with European Due Process Guarantees*, 10 MELB. J. INT'L L. 329 (2009); Gabriele Porretto, *The European Union, Counter-Terrorism Sanctions against Individuals and Human Rights Protection*, in FRESH PERSPECTIVES ON THE 'WAR ON TERROR' 235 (Miriam Gani & Penelope Mathew eds., 2008).

⁸⁴ World Summit Outcome Document, *supra* note 58, para. 109.

⁸⁵ WATSON INST. FOR INT'L STUDIES, STRENGTHENING TARGETED SANCTIONS THROUGH FAIR AND CLEAR PROCEDURES (2006) available at http://www.watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf. The Report subsequently became both a General Assembly and Security Council official document (Identical Letters dated May 19, 2006 from the Permanent Representatives of Germany, Sweden and Switzerland to the United Nations addressed to the President of the General Assembly and the President of the Security Council, UN Doc. A/60/887-S/2006/331 (June 14, 2006)) and was updated in 2009 (THOMAS BIERSTEKER ET. AL., ADDRESSING CHALLENGES TO TARGETED SANCTIONS: AN UPDATE OF THE “WATSON REPORT” (2009), http://watsoninstitute.org/images_news/FB09_sanctionsreport.pdf (hereinafter Addressing Challenges to Targeted Sanctions)).

⁸⁶ S.C. Res. 1730, para. 1, U.N. DOC. S/RES/1730 (Dec. 19, 2006). See Addressing Challenges to Targeted Sanctions, *supra* note 85, at 12-14. Further guarantees, including the introduction of an independent and impartial ombudsperson to look into requests for delisting targeted individuals and entities, have subsequently been introduced by the Council, but only with regard to the sanctions regimes against international terrorism and not in relation to other sanctions (S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006); S.C. Res. 1822, U.N. Doc. S/RES/1822 (June 30, 2008); S.C. Res. 1904, U.N. Doc. S/RES/1904 (Dec. 17, 2009)).

⁸⁷ S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) and Res. 955, *supra* note 24, respectively. According to Meron:

[t]he singling out of violations of humanitarian law as a major factor in the determination of a threat to the peace creates an important precedent, and the establishment of the tribunal as

Commission for Iraq.⁸⁸ Furthermore, by Resolution 1593 (2005), acting under Chapter VII the Council referred the situation in Darfur to the ICC.⁸⁹ The ICTY and the International Criminal Tribunal for Rwanda (ICTR) have both held that the Council had not exceeded its powers when it created judicial organs to prosecute *jus in bello* violations.⁹⁰ According to the ICTY, in particular, the legality of the tribunals does not depend on the question whether these measures have been actually successful in securing compliance with international humanitarian law.⁹¹

As to measures involving the use of force, if States and regional organizations are not entitled to unilaterally use military coercion in order to secure compliance with the *jus in bello* as neither Common Article 1 of the Geneva Conventions nor Article 89 of Additional Protocol I constitute exceptions to Article 2(4) of the UN Charter,⁹² the

an enforcement measure under the binding authority of chapter VII ... may foreshadow more effective international responses to violations of humanitarian law.

Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78, 79 (1994) (citation omitted).

⁸⁸ S.C. Res. 692, U.N. Doc. S/RES/692 (May 20, 1991). It has been noted that “[c]laims for compensation of violations of humanitarian principles can clearly be brought before the Commission” (Boisson de Chazournes, *supra* note 55, at 253). In fact, even if Iraq’s responsibility arises from a violation of *jus ad bellum* and not of other international law (including *jus in bello*), the Commission has played a function in the reparation of violations of international humanitarian law in case of state responsibility. The creation of a similar compensation commission has been recommended by the Inquiry Commission for Darfur (U.N. Secretary-General, Letter dated Feb. 1, 2005 from the Secretary-General addressed to the President of the Security Council, paras. 590-603, U.N. Doc. S/2005/60, (Feb. 1, 2005)).

⁸⁹ S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

⁹⁰ *Tadić*, *supra* note 29, paras. 32 ff. (which confirmed the view of the Trial Chamber on the point), Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on Defence Motion on Jurisdiction in the Trial Chamber, paras. 25-31 (Aug. 10, 1995); Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, paras. 17 ff (June 18, 1997). Both courts concluded that the creation of the international criminal tribunals could be seen as a measure adopted under Article 41 of the UN Charter. See, *contra*, Gaetano Arangio-Ruiz, *On the Security Council’s «Law-Making»*, 83 RIVISTA DI DIRITTO INTERNAZIONALE 609, 724 (2000); and Picone, who sees the creation of the ICTY as the exercise of new powers by the Security Council and as a sanction adopted by the organ in reaction to the violations of *erga omnes* obligations committed by the belligerents in Yugoslavia (*supra* note 56, at 353-75, especially at 358).

⁹¹ According to the ICTY “[i]t would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures *ex post facto* by their success or failure to achieve their ends” (*Tadić*, *supra* note 29, para. 39). On the role played by the ad hoc tribunals in the judicial enforcement of international humanitarian law, see Fausto Pocar, *Criminal Proceedings before the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 5 LAW & PRACTICE OF INT’L CTS. & TRIBS. 89 (2006).

⁹² International Committee of the Red Cross, *Report on the Protection of War Victims*, 33 INT’L REV. RED CROSS 391, 427-28 (1993) (“international humanitarian law could not possibly provide a State not involved in the conflict with a pretext for intervening militarily or for deploying forceful measures outside the framework provided for by the United Nations Charter”); Commentaries on

Security Council could take or authorize military action under Chapter VII in order to prevent or stop violations of international humanitarian law.⁹³ From this perspective, it has been claimed that there is “an evident trend towards militarization in the implementation of international humanitarian law.”⁹⁴ In 1996, the ICTY amended its Rules of Procedure and Evidence and adopted Article 59 *bis*, which authorizes the arrest of ICTY indictees by international forces in the field when necessary to ensure the effective functioning of the Tribunal.⁹⁵ The Security Council has also repeatedly authorized UN peacekeeping and peace enforcement forces, state coalitions and regional organizations to use force if necessary to protect civilians and guarantee humanitarian access: The Council referred for the first time to the “protection [of] civilians under imminent threat of physical violence” and authorized a peacekeeping force to take “necessary action” to ensure such protection in Resolution 1270 (1999) establishing the UN Mission in Sierra Leone (UNAMSIL).⁹⁶ Although the language is not always consistent (apart from “necessary action,” peacekeeping forces have

Article 1(1) and Article 89 of Additional Protocol I, in Sandoz, Swinarski & Zimmermann, *supra* note 12, paras. 46, 3598; Henckaerts & Doswald-Beck, *supra* note 53, at 512-13. See also the *Palestinian Wall* Advisory Opinion, *supra* note 52, para. 159.

⁹³ Commentary on Article 89 of Additional Protocol I, in Sandoz, Swinarski & Zimmermann, *supra* note 12, para. 3597. The above mentioned World Summit Outcome Document makes it clear that the international community can take collective action against, inter alia, the commission of war crimes only “through the Security Council” (World Summit Outcome Document, *supra* note 58, para. 139). In the thematic debate on the protection of civilians in armed conflict, the Russian representative in the Security Council stated that “[t]he international community can only take appropriate steps, especially when it comes to the use of force, under the auspices and with the consent of the Security Council, as well as in accordance with the Charter of the United Nations” (S/PV.6216, *supra* note 26, at 16).

⁹⁴ Boisson de Chazournes and Condorelli, *supra* note 54, at 82.

⁹⁵ See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence (as further amended 18 January 1996), U.N. Doc. IT/32/Rev. 7 (Jan. 18, 1996). Arrests of several war criminals have as a consequence been executed by UN forces in the former Yugoslavia. This rule-making power of the Tribunal with regard to arrests is not without problems and was challenged before the Tribunal itself: see Lamb, *supra* note 28, at 379-84.

⁹⁶ S.C. Res. 1270, para. 14, U.N. Doc. S/RES/1270 (Oct. 22, 1999); VICTORIA HOLT, GLYN TAYLOR & MAX KELLY, PROTECTING CIVILIANS IN THE CONTEXT OF UN PEACEKEEPING OPERATIONS, INDEPENDENT STUDY JOINTLY COMMISSIONED BY THE DEPARTMENT OF PEACEKEEPING OPERATIONS (DPKO) AND THE OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (OCHA) 36-37 (2009) [hereinafter DPKO/OCHA Study]. However, as the Study has demonstrated, what the Security Council means by “protecting civilians from imminent threat” is not always clear or consistent (*id.* at 75-77). From the most recent document, it appears that the UN is moving towards a broader notion of protection of civilians which goes beyond physical protection (DPKO/DEPARTMENT OF FIELD SUPPORT, A NEW PARTNERSHIP AGENDA: CHARTING A NEW HORIZON FOR UN PEACEKEEPING 20 (2009) [hereinafter A NEW PARTNERSHIP AGENDA]).

also been authorized to use “all necessary means” or “all necessary measures” to implement their mandate), the inclusion of a protection mandate based on Chapter VII is now virtually standard in UN peace operations.⁹⁷

The inclusion of protection activities in the mandate of UN forces, as reaffirmed in Resolutions 1674 (2006) and 1894 (2009),⁹⁸ is one of the most important developments in the field of peacekeeping in recent years. In fact, one of the results of the Security Council public thematic debate on the protection of civilians in armed conflict has been the establishment, in January 2009, of an informal Expert Group on the Protection of Civilians to receive and consider briefings from the Secretariat prior to consultations on the mandates of specific peacekeeping operations.⁹⁹ The Group meets when a

⁹⁷ See, e.g., the UN Mission in the DRC (MONUC), now renamed UN Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) (S.C. Res. 1291, para. 8, U.N. Doc. S/RES/1291 (Feb. 24, 2000); S.C. Res. 1493, *supra* note 69, para. 25; S.C. Res. 1856, para. 5, U.N. Doc. S/RES/1856 (Dec. 22, 2008); S.C. Res. 1906, para. 6, U.N. Doc. S/RES/1906 (Dec. 23, 2009); S.C. Res. 1925, *supra* note 62, para. 11), the UN Mission in Sudan (UNMIS) (S.C. Res. 1590, para. 16, U.N. Doc. S/RES/1590 (Mar. 24, 2005) and S.C. Res. 1706, para. 12, U.N. Doc. S/RES/1706 (Aug. 31, 2006)), the AU-UN Operation in Darfur (UNAMID) (S.C. Res. 1769, para. 15, U.N. Doc. S/RES/1769 (July 31, 2007) that does not refer to the fact that civilians must be “under imminent threat of physical violence”), the UN Interim Force in Lebanon (UNIFIL) (S.C. Res. 1701, para. 12, U.N. Doc. S/RES/1701 (Aug. 11, 2006)), the UN Mission in the Central African Republic and Chad (MINURCAT) (S.C. Res. 1861, para. 7, U.N. Doc. S/RES/1861 (Jan. 14, 2009) and S.C. Res. 1923, *supra* note 70, para. 8) and the UN Operation in Côte d’Ivoire (UNOCI) (S.C. Res. 1528, para. 8, U.N. Doc. S/RES/1528 (Feb. 27, 2004), S.C. Res. 1609, para. 8, U.N. Doc. S/RES/1609 (June 24, 2005), S.C. Res. 1739, para. 5, U.N. Doc. S/RES/1739 (Jan. 10, 2007), S.C. Res. 1933, *supra* note 63, para. 16(b)). The Council has also authorized the EU operation in Chad and in the Central African Republic to take all necessary measures to protect civilians in danger (in particular refugees and displaced persons) and humanitarian personnel and to facilitate the delivery of humanitarian aid (S.C. Res. 1778, para. 6, U.N. Doc. S/RES/1778 (Sept. 25, 2007)). See also S.C. Res. 1671, U.N. Doc. S/RES/1671 (Apr. 25, 2006) authorizing the deployment of EUFOR R.D. Congo in the DRC and S.C. Res. 1528, *supra*, para. 16, authorizing the French forces to use all necessary means to support UNOCI.

⁹⁸ S.C. Res. 1674, *supra* note 25, para. 16 and S.C. Res. 1894, *supra* note 25, para. 19.

⁹⁹ The debate on the protection of civilians in armed conflict first took place on February 12 and 22, 1999 and occurs twice a year. It has led to the adoption of five thematic resolutions on this topic (S.C. Res. 1265, *supra* note 64 and S.C. Resolutions 1296, 1674, 1738, and 1894, *supra* note 25) and to several presidential statements (the first being S.C. Pres. Statement 1999/6, U.N. Doc. S/PRST/1999/6 (Feb. 12, 1999)). Other thematic Security Council debates involve the protection of women and children in armed conflict and sexual violence in situations of armed conflict. As observed by Costa Rica, these debates “must be an instrument to guide and to facilitate specific decision-making” (U.N. SCOR, 64th Sess., 6066th mtg. at 8, U.N. Doc. S/PV.6066 (Jan. 14, 2009)). It should also be recalled that, on January 29, 2009, the Council held a private meeting on the subject “Maintenance of International Peace and Security: Respect for International Humanitarian Law” under the auspices of the French Presidency, in order to identify measures that the Council could adopt to more effectively prevent and stop violations of international humanitarian law: this was the first time that respect for international humanitarian law was addressed as a separate issue. However, it is unclear whether

peacekeeping mandate with a protection element needs be renewed.¹⁰⁰ Obviously, this broader peacekeeping mandate requires that peacekeepers be provided with all necessary resources to implement it: This does not seem to have been the case of UNAMID (African Union/UN Hybrid operation in Darfur) which has made very little progress because of insufficient troops and assets and because of limited cooperation from Sudan.¹⁰¹ As observed by the representative of Japan, “a substantial gap exists between the high expectations placed on a mission to carry out the mandate when the Security Council takes a decision and the actual implementation on the ground of those mandates.”¹⁰² It is therefore not surprising that the two recently published studies of the Department of Peace Keeping Operations try to address the operational challenges faced by UN operations in the implementation of robust mandates involving the protection of civilians in armed conflict.¹⁰³

It is worth recalling that Article 42 provides that it is only when Article 41 measures have proven, or are assumed, to be inadequate that measures involving the use of force can be taken, and only “as may be necessary.”¹⁰⁴ Therefore, even though “Article 39

there will be a follow-up (*see* SECURITY COUNCIL REPORT, RESPECT FOR INTERNATIONAL HUMANITARIAN LAW (2009) *available at* http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Update%20Report%2027%20January%202009_IHL.pdf).

¹⁰⁰ The first meeting took place in January 2009 on the mandate of the UN Operation in Côte d’Ivoire. China has so far not participated in the works of the Group. The representative of Viet Nam observed that “the establishment of any new mechanism within the Security Council must be thoroughly studied before a decision is made in order to avoid operational and institutional duplication, as well as financial implications” (S/PV.6151, *supra* note 56 at 9). In January 2009, the Security Council also adopted an Aide Memoire, first developed in March 2002 at the Council’s request (S.C. Pres. Statement 2002/6, U.N. Doc. S/PRST/2002/6 (Mar. 15, 2002)) and revised in 2003 (S.C. Pres. Statement 2003/27, U.N. Doc. S/PRST/2003/27, Annex (Dec. 15, 2003)), in order to facilitate its consideration of the issue of the protection of civilians in armed conflict. Based on the Council’s practice, the aide-memoire identifies measures that the Council should adopt to respond to protection concerns, including targeted sanctions against the perpetrators of violations (*id.* at 12) and the referral of situations to the ICC.

¹⁰¹ Security Council Report, *supra* note 76, at 18. MONUC also received similar criticism (CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 318 (3d ed. 2008)). The DPKO/OCHA Independent Study analyzes how certain peacekeeping operations (UNMIS, UNAMID, UNOCI and MONUC) have implemented protection of civilians mandates in the field (DPKO/OCHA Study, *supra* note 96, at 156-207).

¹⁰² S/PV.6151, *supra* note 56, at 12. *See* DPKO “Capstone Doctrine,” that reaffirms the necessity of a “clear and achievable mandate” (DPKO AND DEPARTMENT OF FIELD SUPPORT, UNITED NATIONS PEACEKEEPING OPERATIONS: PRINCIPLES AND GUIDELINES (“Capstone Doctrine”) 51 (2008), http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf).

¹⁰³ A New Partnership Agenda, *supra* note 96; DPKO/OCHA Study, *supra* note 96.

¹⁰⁴ U.N. Charter, art. 42. The Council does not however have a procedural obligation to adopt sanctions first, as it could consider that they are inadequate in the light of the circumstances without actually trying them.

leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations,¹⁰⁵ this discretion is not unlimited, both from the perspective of the Charter and of the “general system of law in which all international legal persons operate.”¹⁰⁶ This means that the Security Council should not resort to coercive measures if the situation can be effectively dealt with through other means: minor or isolated violations of international humanitarian law could for instance be addressed through its peaceful settlement powers under Chapter VI. If adopted, coercive measures will have to be proportionate to the violation they react against, as “the Security Council, like other international legal persons, would be governed by the requirement that all use of force must be proportionate to its aim.”¹⁰⁷ As a consequence, only the most serious and widespread breaches of the *jus in bello* would justify the adoption of military measures by the Council: indeed, “[m]ilitary enforcement action is a blunt instrument ... [which] is unlikely of achieving results unless it is employed highly selectively.”¹⁰⁸

III. THE SECURITY COUNCIL AS AN INTERNATIONAL HUMANITARIAN LAW ENFORCER: DOES IT REALLY WORK?

In spite of its broad powers, the role the Security Council has in fact played in the enforcement of international humanitarian law can be criticized from several points of view. First, the Council has acted in a selective and opportunistic manner. It has dealt with certain conflicts, but in others it has kept a very low profile or has not adopted any measure at all: divisions within the Council or lack of political interest have often constrained action.¹⁰⁹ Furthermore, the Council has tried to enforce certain *jus in bello*

¹⁰⁵ *Tadić*, *supra* note 29, para. 39.

¹⁰⁶ Judith G. Gardam, *Legal Restraints on Security Council Military Enforcement Action*, 17 MICH. J. INT'L L. 285, 307 (1996). See also Vera Gowlland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 INT'L & COMP. L.Q. 55, 90 (1994).

¹⁰⁷ Gardam, *supra* note 106, at 307. See also Bothe, *supra* note 33, at 78-79.

¹⁰⁸ Gill, *supra* note 42, at 132.

¹⁰⁹ See Bothe, *supra* note 33, at 227. As observed by Australia in a recent debate on the protection of civilians, “there is clearly a need for greater consistency in the Council’s approach. Too often still, the Council appears unwilling to address the plight of civilians in many internal armed conflicts, notwithstanding the obvious destabilizing effects and regional consequences of such conflicts. In failing to do so, the Council falls short of its obligations under the Charter.” Even though the Council has effective tools at its disposal, “[w]hat is lacking, at times, ... is the political resolve of the Council to use those tools to protect civilians and of the broader membership to support such Council action” (S/PV.6151 (Resumption 1), *supra* note 26, at 13). The Croatian representative also made clear that

provisions and instruments but not others,¹¹⁰ has condemned the violations committed by only one belligerent (e.g., in Iraq and Afghanistan),¹¹¹ has adopted coercive measures in certain cases but milder measures in other comparable circumstances without this being justified by the situation on the ground.¹¹² In the end, this “ad hoc-ism”¹¹³ must be ascribed to the fact that the Council is a political organ, which the Charter does not require to be consistent or impartial. In practice, this means that the Council acts only when it is in the interest of its members: no obligation to take action exists, not even in the case of massive violations of international humanitarian law amounting to a threat to the peace.¹¹⁴ As has been observed, to establish such obligation “the UN Charter would have to be rewritten, and even then it would be difficult in practice to force the Security Council to live up to its presumed obligation to intervene.”¹¹⁵ This selective and opportunistic approach of the Security Council with regard to, inter alia, the enforcement of international humanitarian law could in the end affect its legitimacy: even though “[n]o system of collective security can be realistically expected to respond to every transgression of the prevailing order or effectively respond to every breach of the public peace[,] ... [it must nonetheless] show a reasonable degree of coherence, consistency and effectiveness.”¹¹⁶

the Council needs to have “a more consistent approach at the country-specific level” and that “we must abandon selective approaches to violations of international humanitarian law” (S/PV.6066, *supra* note 99, at 19-20). See also the statements of Nicaragua (S/PV.6151 (Resumption 1), *supra* note 26, at 16) and Pakistan (S/PV.6066 (Resumption 1), *supra* note 26, at 36), which highlight the inequity in the international response to gross violations of international human rights and humanitarian law.

¹¹⁰ The Security Council has mainly focused on the respect for the Geneva Law more than for the Hague Law (Cryer, *supra* note 63, at 274).

¹¹¹ In another case, S.C. Res. 1603, at 2, U.N. Doc. S/RES/1603 (June 3, 2005), where the Council dealt with allegations of sexual offences committed by UN peacekeepers in Côte d’Ivoire, it “slipped into euphemism” and qualified those actions as “misconduct” and affirmed that the troops “should limit their behaviour,” even though it had condemned violations of international humanitarian law by all the parties to the conflict in previous resolutions (Cryer, *supra* note 63, at 261).

¹¹² COMELLAS AGUIRREZÁBAL, *supra* note 6, at 195-96. S.C. Res. 1860, U.N. Doc. S/RES/1860 (Jan. 8, 2009) on Gaza, for instance, does not mention the importance of respect for international humanitarian law, which led Switzerland to regret that references to the *ius in bello*, and to the Geneva Conventions in particular, “have become the object of political negotiation and discretion” (S/PV.6066 (Resumption 1), *supra* note 26, at 2).

¹¹³ Andrea Bianchi, *Ad-hocism and the Rule of Law*, 13 EUR. J. INT’L L. 263 (2002).

¹¹⁴ See World Summit Outcome Document, *supra* note 58, para. 139 that affirms collective action through the Security Council under Chapter VII in reaction to the commission of war crimes will be taken “on a case-by-case basis.” Such an obligation does not exist even when the Council acts under the customary provision reflected in Article 1 Common to the Geneva Conventions: see *supra* note 55.

¹¹⁵ Inger Österdahl, *The Exception as the Rule: Lawmaking on Force and Human Rights by the UN Security Council*, 10 J. CONFLICT SEC. L. 1, 14 (2005).

¹¹⁶ Gill, *supra* note 42, at 129.

Second, the ICRC has emphasized that the measures adopted by the Security Council under Chapter VII “cannot be considered neutral within the meaning of international humanitarian law, even though their ultimate objective may in some cases include the aim of putting an end to violations of that law.”¹¹⁷ In this regard, the ICRC has recommended clearly distinguishing between actions aimed at the maintenance and restoration of international peace and security and actions taken to facilitate the application of international humanitarian law, on the basis that the latter is founded on the belligerents’ consent, while the former does not exclude coercion.¹¹⁸

Finally, in certain cases the Security Council, far from securing compliance with international humanitarian law, has actually interfered with its application. In 2003, the Council adopted Resolution 1497, authorizing the establishment of a multinational force in Liberia in order to support the peace process in that country.¹¹⁹ Paragraph 7 of the resolution provides for the exclusive jurisdiction of the contributing states which are not parties to the ICC Statute over current or former officials or personnel for all alleged acts or omissions arising out of or related to the multinational force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by the contributing state. A similar paragraph was included in Resolution 1593 (2005) on Sudan by which the Security Council decided to refer the situation in Darfur to the ICC Prosecutor.¹²⁰ Neither Resolution 1497 nor Resolution 1593 provide for the obligation of a contributing State which is not a party to the Rome Statute to exercise its jurisdiction over the individuals in question: the exclusive jurisdiction of the contributing State might thus result in impunity.¹²¹ It may be claimed that the above mentioned resolutions, insofar as they also relate to grave breaches of the Geneva Conventions, cannot be easily reconciled with Article 49 of the I Geneva Convention, Article 50 of the II Geneva Convention, Article 129 of the III Geneva Convention and Article 146 of the IV Geneva Convention, that provide

¹¹⁷ Report on the Protection of War Victims, *supra* note 92, at 428 (emphasis omitted). See also Toni Pfanner, *Le rôle du Comité international de la Croix-Rouge dans la mise en œuvre du droit international humanitaire*, in EUR. COMM’N, LAW IN HUMANITARIAN CRISES vol. I, 177, 224 (1995); van Baarda, *supra* note 2, at 146-48. Condorelli refers to the inevitability of the “amalgame action humanitaire-sanction ... lorsque la première est imposée au sens du Chapitre VII” (Luigi Condorelli, *Conclusions générales*, in Condorelli, La Rosa & Scherrer, *supra* note 7, at 463).

¹¹⁸ Report on the Protection of War Victims, *supra* note 92, at 429.

¹¹⁹ S.C. Res. 1497, U.N. Doc. S/RES/1497 (Aug. 1, 2003).

¹²⁰ S.C. Res. 1593, para. 6, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

¹²¹ Giorgio Gaja, *Immunità squilibrate dalla giurisdizione penale in relazione all'intervento armato in Liberia*, 86 RIVISTA DI DIRITTO INTERNAZIONALE 762, 763 (2003).

for universal jurisdiction and for the obligation of the States parties to either try or extradite the accused.¹²²

Reference may be made in this context also to Resolution 1483 (2003), which extends the rights of the occupying powers in Iraq well beyond what is provided in Article 43 of the 1907 Hague Regulations.¹²³ Indeed, as has been noted, the promotion of the welfare of the Iraqi people, the establishment of the Development Fund for Iraq and the Coalition Provisional Authority's management of petroleum and other resources all go beyond the scope of the law of occupation, which essentially aims at maintaining the status quo and does not amount to a "license to transform."¹²⁴ Resolution 1483 also modified the application of Article 42 of the Hague Regulations in that, it did not qualify Poland as an occupying power even

¹²² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 75 U.N.T.S. 287. Under those provisions, contracting States are under an obligation either to prosecute the accused of grave breaches, regardless of his/her nationality, or to extradite him/her to another contracting party concerned if such a party "has made out a prima facie case."

¹²³ S.C. Res. 1483, at 2, U.N. Doc. S/RES/1483 (May 22, 2003). It is well-known that the occupying Powers have significantly changed the Iraqi political, military and economic system (Rüdiger Wolfrum, *The Adequacy of International Humanitarian Law Rules on Belligerent Occupation: To What Extent May Security Council Resolution 1483 be Considered a Model for Adjustment?*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 497, 503 (Michael N. Schmitt & Jelena Pejic eds., 2007)). See Coalition Provisional Authority Order Number 39: Foreign Investment (2003), that introduces important changes to Iraqi investment law, Coalition Provisional Authority Order Number 37: Tax Strategy for 2003 (2003), which revises the tax system, and Coalition Provisional Authority Order Number 64: Amendment to the Company Law No. 21 of 1997 (2004) amending Iraqi company law. Kolb observes that the Security Council could derogate from specific non-fundamental rules of the law of occupation if the maintenance of international peace so requires, but not from fundamental rules and not from the whole body en bloc (Robert Kolb, *Occupation in Iraq Since 2003 and the Powers of the UN Security Council*, 90 INT'L REV. RED CROSS 29, 33 (2008)). Zwanenburg adds that, on the basis of Articles 25 and 103 of the Charter, "the Security Council can derogate from the law of occupation at least with regard to non-peremptory norms, but if it does so it should provide an alternative standard of behaviour" (Marten Zwanenburg, *Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation*, 86 INT'L REV. RED CROSS 745, 762-63 (2004)).

¹²⁴ David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 851 (2003). See generally *id.* at 844-46. Res. 1483 is however ambiguous, as its paragraph 5 calls "upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907" (S.C. Res. 1483, *supra* note 123).

though a small area in Southern Iraq was “actually placed under the authority” of Polish troops.¹²⁵ Similarly, Resolution 1546 (2004) considered to be terminated the occupation of Iraq as at the end of June 2004 even though little had changed on the ground (actual control being the sole factor determining the existence of belligerent occupation under Article 42 of the Hague Regulations).¹²⁶

The above cases raise the question whether the Security Council can set aside international humanitarian law when the maintenance of international peace and security in its narrow sense so requires. The preferable answer seems negative. The ICTY made clear that “neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law),”¹²⁷ and it has already been seen that the obligation to respect international humanitarian law “in all circumstances” is incumbent not only on States but on the United Nations as well.¹²⁸ In relation to Resolution 1483, for instance, the representative of Pakistan in the Security Council emphasized that

under the Charter the powers delegated by the Security Council under this resolution are not open-ended or unqualified. They should be exercised in ways that conform with “the principles of justice and international law” mentioned in article 1 of the Charter, and especially in conformity with the Geneva Conventions and the Hague Regulations, besides the Charter itself.¹²⁹

Furthermore, in its Advisory Opinion on the *legality of nuclear weapons*, the ICJ maintained that “a great many rules of humanitarian law applicable in armed conflict are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.”¹³⁰ It would indeed be bizarre if States, when acting through an international organization, were allowed to derogate from provisions that

¹²⁵ Convention (IV) respecting the Laws and Customs of War on Land, Annex: Regulations concerning the Laws and Customs of War on Land, art. 42, Oct. 18, 1907. See Kolb, *supra* note 123, at 41-43; Zwanenburg, *supra* note 123, at 756.

¹²⁶ S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004). See YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 273 (2009). According to Kolb, however, this was a “movable” date and the Council’s statement is declaratory, not constitutive (*supra* note 123, at 44).

¹²⁷ *Tadić*, *supra* note 29, para. 28.

¹²⁸ *Id.* para. 93.

¹²⁹ U.N. SCOR, 58th Sess., 4761st mtg. at 11-12, U.N. Doc. S/PV.4761 (May 22, 2003).

¹³⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 79 (July 8).

are “intransgressible” when they act individually.¹³¹ In any case, the ICTY clarified that “most norms of international humanitarian law, in particular those prohibiting war crimes ... are ... peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character.”¹³² Whatever one might think of the power of the Security Council to derogate from customary international law,¹³³ nobody has seriously doubted that resolutions contravening with *jus cogens* would be null and void and therefore not binding on Member States.¹³⁴

CONCLUSIONS

Fifteen years ago, Judge Schwebel observed that “[c]riticizing the United Nations Security Council has been a popular sport since 1946.”¹³⁵ Some of this criticism is

¹³¹ According to de Wet, “[t]his ... would undermine the logic that states cannot confer more powers to organs of international organizations than they can exercise themselves” (ERIKA DE WET, *THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL* 189 (2004)). De Wet also suggests that, as Article 1 (3) includes among the UN purposes the achievement of international cooperation in the solving of international problems of, *inter alia*, a humanitarian character, “the basic rules of international humanitarian law ... constitutes a further limitation on the enforcement powers of the Security Council under Chapter VII of the Charter” (*id.* at 204). The fact that the UN has repeatedly committed itself to respect international humanitarian law and has contributed to its development has also stopped its organs from conduct that would breach its core principles, as “this would constitute an act of bad faith on the part of the organisation” (*id.* at 206).

¹³² Prosecutor v. Kupreškić et. al., Case no. IT-95-16-T, Judgment, para. 520 (Jan. 14, 2000).

¹³³ Several commentators have argued that Article 103 allows the Security Council to overrule not only international agreements, but also customary international law. See, e.g., Rudolf Bernhardt, *Article 103*, in Simma, *supra* note 41, at 1292, 1299; Report of the Study Group of the Int’l Law Comm’n on the Fragmentation of International Law, finalized by Martti Koskenniemi, 58th Sess., May 1-June 9, July 3-Aug. 11, 2006, at 175-176, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006); Zwanenburg, *supra* note 123, at 761; Fassbender, *supra* note 50, at 586. See also the Declaration of Acting President Oda in the Lockerbie case, *supra* note 27, at 17, para. I. *Contra*, Gaetano Arangio-Ruiz, Note e Commenti, *Article 39 of the ILC First-Reading Draft Articles on State Responsibility*, 83 RIVISTA DI DIRITTO INTERNAZIONALE 747, 752 (2000); Karl Zemanek, *The Legal Foundations of the International System*, 266 RECUEIL DES COURS 9, 232 (1997); Rain Liivoja, *The Scope of the Supremacy Clause of the United Nations Charter*, 57 INT’L & COMP. L.Q. 583, 602-08 (2008).

¹³⁴ See, e.g., the Separate Opinion of Judge Lauterpacht in the *Genocide* case: “The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot—as a matter of simple hierarchy of norms—extend to a conflict between a Security Council resolution and *jus cogens*” (*supra* note 32, at 440, para. 100). See also Cannizzaro, *supra* note 83, at 211-15; DE WET, *supra* note 131, at 188-89. The problem would however be as to exactly which international humanitarian law provisions would have such a fundamental character.

¹³⁵ Stephen M. Schwebel, *The Roles of the Security Council and the International Court of Justice in the Application of International Humanitarian Law*, 27 N.Y.U. J. INT’L L. & POL. 731, 732 (1995).

undoubtedly fair and is still valid today, at least with regard to the role that the Council has been playing in securing compliance with international humanitarian law. Indeed, the Security Council was not conceived as a law enforcer but as a peacekeeper that acts on political grounds: a lot depends on the interests of the permanent members and the reasons for acting or not acting are often not explained.¹³⁶ The political nature of the Council leads then to enforcement *à la carte* where certain situations are addressed but others are ignored.

This, however, does not necessarily mean that the Security Council can never play a constructive role in securing compliance with international humanitarian law, selective and imperfect as it may be: acting in one case may not be deemed inappropriate just because in other similar occasions nothing was done. The privileged position of the Council, which has exclusive competence to take coercive measures involving the use of armed force and whose decisions are binding on all UN Member States, makes it potentially a formidable instrument against serious violations of international humanitarian law, which can at least partly remedy the lack of enforcing mechanisms in the treaties on the laws of war, where compliance is mainly based on the goodwill of the states parties. One should also not forget the important role that the Council has played in trying to ensure compliance with international humanitarian law by non-State actors and in reaffirming that the *jus in bello* was applicable to specific conflicts and to certain reluctant States: under Article 25 of the UN Charter, such reaffirmations, when adopted under Chapter VII, also broaden the subjective scope of application of international humanitarian law treaties that are not universally ratified. Finally, the pressure of public opinion arising from a Security Council resolution upon the target State should not be underestimated.

It can thus be concluded that, if the primary responsibility for securing compliance with international humanitarian law still rests with the belligerents and with humanitarian organizations,¹³⁷ the Security Council can play a complementary role by

¹³⁶ As observed by a commentator, the Council's "composition, procedures and practices are completely indefensible if we assume that its tasks extend to assessing and enforcing the conditions of good life—including rules of international law—among and within States" (Koskenniemi, *supra* note 19, at 344).

¹³⁷ See S.C. Resolutions 1674, at 2, 1738 at 1 and 1894, at 1 (*supra* note 25), on the protection of civilians in armed conflict, and the presidential statement adopted on January 14, 2009 (S.C. Pres. Statement 2009/1, *supra* note 62). The primary responsibility of the parties to the conflict to ensure the protection of civilians has also been recalled by several representatives in the Security Council debates, e.g., Croatia (S/PV.6151, *supra* note 56, at 7), Qatar (*id.* at 29), South Korea (S/PV.6151 (Resumption 1), *supra* note 26, at 29), United States (S/PV.6066, *supra* note 99, at 21),

using its broad powers. The Council's action, however, by no means could or should replace that of other actors, in particular the ICRC.

United Kingdom (*id.* at 23), United Arab Emirates (S/PV.6066 (Resumption 1), *supra* note 26, at 7); Russian Federation (S/PV.6216, *supra* note 26, at 16); Tanzania (U.N. SCOR, 64th Sess., 6216th mtg. (Resumption 1) at 27, U.N. Doc. S/PV.6216 (Resumption 1) (Nov. 11, 2009); Hungary (*id.* at 44)). Other representatives more generally referred to the primary responsibility of "states" (e.g., Japan (S/PV.6151, *supra* note 56, at 11), Costa Rica (*id.* at 14), Morocco (S/PV.6151 (Resumption 1), *supra* note 26, at 17), Jordan (*id.* at 14), Sri Lanka (*id.* at 23), Guatemala (*id.* at 27), Viet Nam (S/PV.6066, *supra* note 99, at 10), Turkey (*id.* at 12), France (*id.* at 25), Colombia (S/PV.6066 (Resumption 1), *supra* note 26, at 28), Uruguay (*id.* at 5), Kenya (*id.* at 30), Venezuela (*id.* at 32); Sudan (S/PV.6216 (Resumption 1), *supra* at 42).