The United Nations Security Council and the enforcement of international humanitarian law

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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, partlyremedying 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

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\(^1\) This Article uses “international humanitarian law,” “jus in bello,” “laws of war,” and “law of armed conflict” synonymously.
\(^4\) 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.
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.” In addition, this Article deals
specifically neither with measures taken with regard to the protection of particular
vulnerable groups (e.g., women and children), nor with the role that the Security
Council has played in the normative development of the law of armed conflict. 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. “Human rights” have however been interpreted broadly in UN fora since

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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 Quénivet, supra note 5, at
355, 372-75.

9 On this aspect, see Comellas Aguirrezabal, supra note 6, at 201 ff.

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. 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.”

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: 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.” 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. 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.”

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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, its scope has been progressively expanded by the Council. 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.” 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.” 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. 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.

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

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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).


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)).


regard to Bosnia and Herzegovina. 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. 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. 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.

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, 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.”

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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)).
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.” 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.” Other commentators refer to the limit of good faith and to the doctrine of abuse of right. It is true that there is no direct judicial control over acts of the Council, 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.

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. 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].
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].
It will however be seen that customary international law appears to have made this *de minims* 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

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36 *See infra* Section I.D.


38 U.N. Charter, art. 94, para. 2.


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.\textsuperscript{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.\textsuperscript{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 Convention\textsuperscript{44} and the 1993 Chemical Weapons Convention,\textsuperscript{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).\textsuperscript{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.”\textsuperscript{47} While these treaties could not confer


\textsuperscript{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).


\textsuperscript{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)).

\textsuperscript{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. 20th, 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.


\(^{50}\) See *Conferti*, *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.  

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.”51 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.52 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.”53 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


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 États 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.

have a destabilizing effect on international peace and security and whether or not they have been established in an ICJ judgment.\textsuperscript{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 \textit{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.\textsuperscript{56} This \textit{dédoublement fonctionnel}\textsuperscript{57} seems confirmed by paragraph 139 of the 2005 World Summit Outcome Document, which

\textsuperscript{55} It has been observed that “[h]umanitarian principles have value \textit{per se} and should not be considered only when security issues which endanger international peace and security are at stake” (Laurence Boisson de Chazournes, \textit{The Collective Responsibility of States to Ensure Respect for Humanitarian Principles}, in \textsc{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 \textit{obligation} to act. Indeed, it has been suggested that state practice shows that “Article 1 allows third states to intervene, but does not \textit{oblige} them to do so” (Robert Kolb & Richard Hyde, \textsc{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, \textit{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 \textit{moral} incentive or obligation (Frits Kalshoven, \textit{The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit}, 2 \textsc{Y.B. Int’l Human. L.} 3, 60 (1999)). See similarly the Separate Opinion of Judge Kooijmans in the \textit{Wall Advisory Opinion}, \textit{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, \textit{Human Rights and Humanitarian Norms as Customary Law} 31 (1989). See generally id. at 30-31.

\textsuperscript{56} Such use of the UN would be contemplated in an emerging norm of customary international law (Paolo Picone, \textsc{Comunità internazionale e obblighi \textit{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 \textit{erga omnes}” (Fassbender, \textit{supra} note 50, at 592) (emphasis added). \textit{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).

\textsuperscript{57} For the notion of \textit{dédoublement fonctionnel}, see Georges Scelle, \textsc{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


the High Contracting Parties to the IV Geneva Convention and it has condemned or deplored violations and those who perpetrated them. The Council has also set up fact-finding bodies (albeit that these have sometimes been preliminary to the adoption of coercive measures). 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.

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


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). These calls could be adopted under Chapter VI but also under Chapter VII. 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. 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.

The Council has also on various occasions demanded that the belligerents take certain actions, e.g. prevent violations, guarantee humanitarian access to the population, protect civilians, provide compensation and prosecute those responsible for the

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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.


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

The most incisive measures at the disposal of the Security Council are however those provided in Articles 41 and 42 of Chapter VII. 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. 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. 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. 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.

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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)).


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)).

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.\footnote{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.} 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.\footnote{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.} Their efficacy, which depends on their implementation by Member States, is however doubtful.\footnote{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).} 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.\footnote{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. The 2006 Watson Report made a number of recommendations for reform with regard to the processes of notification, access, fair hearing and effective remedy. 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.

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 law and the creation of the UN Compensation

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84 World Summit Outcome Document, supra note 58, para. 109.
87 S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) and Res. 955, supra note 24, respectively. According to Meron:

[the 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.\textsuperscript{88} Furthermore, by Resolution 1593 (2005), acting under Chapter VII the Council referred the situation in Darfur to the ICC.\textsuperscript{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 \textit{jus in bello} violations.\textsuperscript{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.\textsuperscript{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 \textit{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,\textsuperscript{92} the

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\item\textsuperscript{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 \textit{jus ad bellum} and not of other international law (including \textit{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)).
\item\textsuperscript{90} \textit{Tadić, supra} note 29, paras. 32 ff. (which confirmed the view of the Trial Chamber on the point), Prosecutor v. \textit{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. \textit{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. \textit{See, contra}, Gaetano Arangio-Ruiz, \textit{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 \textit{erga omnes} obligations committed by the belligerents in Yugoslavia (supra note 56, at 353-75, especially at 358).
\item\textsuperscript{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 \textit{ex post facto} by their success or failure to achieve their ends” (\textit{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, \textit{Criminal Proceedings before the International Criminal Tribunals for the Former Yugoslavia and Rwanda}, 5 LAW & PRACTICE OF INT’L CTS. & TRIBS. 89 (2006).
\item\textsuperscript{92} International Committee of the Red Cross, \textit{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
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Security Council could take or authorize military action under Chapter VII in order to prevent or stop violations of international humanitarian law.\textsuperscript{93} From this perspective, it has been claimed that there is “an evident trend towards militarization in the implementation of international humanitarian law.”\textsuperscript{94} In 1996, the ICTY amended its Rules of Procedure and Evidence and adopted Article 59 \textit{bis}, which authorizes the arrest of ICTY indictees by international forces in the field when necessary to ensure the effective functioning of the Tribunal.\textsuperscript{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).\textsuperscript{96} Although the language is not always consistent (apart from “necessary action,” peacekeeping forces have

\textsuperscript{93} Commentary on Article 89 of Additional Protocol I, in \textit{Sandoz, Swinarski \& Zimmermann}, \textit{supra} note 12, paras. 46, 3598; Henckaerts \& Doswald-Beck, \textit{supra} note 53, at 512-13. \textit{See also} the \textit{Palestinian Wall} Advisory Opinion, \textit{supra} note 52, para. 159.

\textsuperscript{94} Boisson de Chazournes and Condorelli, \textit{supra} note 54, at 82.

\textsuperscript{95} \textit{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: \textit{see} Lamb, \textit{supra} note 28, at 379-84.

\textsuperscript{96} S.C. Res. 1270, para. 14, U.N. Doc. S/RES/1270 (Oct. 22, 1999); \textit{Victoria Holt, Glyn Taylor \& Max Kelly}, \textit{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 (\textit{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]).

The inclusion of protection activities in the mandate of UN forces, as reaffirmed in Resolutions 1674 (2006) and 1894 (2009),\footnote{S.C. Res. 1674, \textit{supra} note 25, para. 16 and S.C. Res. 1894, \textit{supra} note 25, para. 19.} 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.\footnote{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, \textit{supra} note 64 and S.C. Resolutions 1296, 1674, 1738, and 1894, \textit{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...}} The Group meets when a
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...
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.
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” (Cryer, supra note 63, at 274). 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 *jus 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).


\(^{114}\) 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.


\(^{116}\) 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 CRISIS 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).
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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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

\textsuperscript{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.”


\textsuperscript{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. 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).

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),” 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. 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.

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.” It would indeed be bizarre if States, when acting through an international organization, were allowed to derogate from provisions that

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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.
127 Tadić, supra note 29, para. 28.
128 Id. para. 93.
130 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 79 (July 8).
are “intrangressible” when they act individually. 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.” Whatever one might think of the power of the Security Council to derogate from customary international law, nobody has seriously doubted that resolutions contravening with *jus cogens* would be null and void and therefore not binding on Member States.

**Conclusions**

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

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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 estopped 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).


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.

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.\footnote{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).} The political nature of the Council leads then to enforcement \textit{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 \textit{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,\footnote{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),} the Security Council can play a complementary role by...
using its broad powers. The Council’s action, however, by no means could or should replace that of other actors, in particular the ICRC.