

In search of symbiosis: the Security Council in the humanitarian domain

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Abstract

While the Security Council's incursion into the protection of individuals or groups could appear necessary – or even praiseworthy – it should be viewed with caution. The author argues that the search for perfect complementarity between the powers of the Security Council and humanitarian action should not overlook the political nature of the Council, the omissions and inconsistencies in its decisions regarding grave offences against human dignity and the effects of coercive action – including armed force – on the provision of neutral and impartial assistance to the victims of an armed conflict.

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In ecology, symbiosis is the name given to a close, generally long-term relationship between organisms of different species. While their relationship may be obligate or facultative, depending on the degree to which the two organisms need each other to survive, the term “symbiosis” does assume that the interaction is mutually beneficial. One well-known example is the relationship between the clownfish and the sea anemone: while the anemone protects the fish against predators, the fish removes parasites and dirt from the anemone.

Despite the risks involved in applying a biological concept to the analysis of normative developments, one can safely say that over the last decade the search has been on for a degree of “symbiosis” between humanitarian action and the action of the UN Security Council in armed conflicts. From this perspective, the

* The opinions in this article are those of the author alone. The article was submitted in December 2006 and does not take account of subsequent developments.

Security Council, on the one hand, would exercise its full powers under the UN Charter in support of agencies and organizations working to protect the victims of violence. On the other hand, the humanitarian actors would work – independently, neutrally and impartially – to mitigate the suffering inherent to military confrontation, perhaps helping to facilitate dialogue between the warring parties and the achievement of a solution to the conflict. Generally presented in its ideal form, this complementarity – under the legitimacy of a multilateral organization – is seen as furthering both the protection of the victims of armed conflict and the restoration of peace at an international level.

However, the perspective of perfect symbiosis between the world of protection and that of security cannot avoid the debate regarding the nature and responsibilities of the Security Council, whose primary function is the maintenance or restoration of international peace and security, a matter that falls within the domain of *jus ad bellum*. Furthermore, such a perspective brings with it an analysis of the compatibility of the means at the Security Council's disposal with the principles and norms that govern the protection of the victims of armed conflict, under *jus in bello*.

The conceptual distinction between *jus ad bellum* and *jus in bello* is seen as one of the basic principles of international humanitarian law. Ultimately, it is this distinction that guarantees the independence and universality of humanitarian action. It ensures that the rules governing the protection of the individual are applicable whenever there is an armed conflict, regardless of the legality or illegality of the use of force, and can be seen as establishing the principle of equality of the belligerents under humanitarian law. Even those who are responsible for a “war of aggression” are protected by *jus in bello*.¹

This article analyses some legal aspects of the Security Council's incursion into the protection of individuals and groups, with the aim of assessing the search for symbiosis between humanitarian action and that of the Security Council. The first two parts will briefly describe the evolution of the dichotomy between *jus in bello* and *jus ad bellum*, under a historical–doctrinaire approach. The third part will examine the legal regime established with the creation of the United Nations and certain modern developments in the international system for the protection of the individual. The final sections will examine some of the measures the Security Council has taken with regard to the victims of armed conflict, together with the continued relevance of the *jus in bello*–*jus ad bellum* dichotomy to current conflicts.

The imprecision of transcendental principles

Even though *jus ad bellum* and *jus in bello* are Latin terms, there was no clear distinction between the two concepts in classical times, nor during the

1 Marco Sassòli and Antoine Bouvier, *How Does Law Protect in War?* ICRC, Geneva, 1999, p. 85. François Bugnion, “Just war, war of aggression and international humanitarian law”, *International Review of the Red Cross*, Vol. 84, no. 847 (September 2002), pp. 523–46.

development of modern international law. However, the histories of various peoples include instances of a desire to regulate both the initiation and the conduct of hostilities, although the reasons for doing so generally presented more religious than legal traces.

From the histories of the Pan-Hellenic wars we learn that the ancient Greeks held to be sacred and inviolate certain places and persons, such as temples, sanctuaries and priests. Likewise, failure to respect the corpse of one's vanquished enemy or to allow him a decent burial would inevitably attract the punishment of the gods. In the *Iliad*, Achilles brought down divine wrath upon himself after he had defeated Hector:

But this man, now he has torn the heart of life from great Hektor, ties him to his horses and drags him ...; and nothing is gained thereby for his good, or his honour. Great as [Achilles] is, let him take care not to make us angry; for see, he does dishonour to the dumb earth in his fury.²

In Rome, such aspects of war as respect for truces and promises of safe conduct were tightly regulated. There are indications that if a city surrendered before the Roman troops took the main walls, the inhabitants – including the males – were to be spared, although it was possible for them to be taken as slaves. Classical literature is full of references to leaders who invoke the rhetoric of the *justa causa* as the basis for claiming Roman superiority – both moral and military. In particular, *jus fetiale* provided a formal system for rendering war legal; a war would be considered “pious and just” only if it was launched in accordance with a special procedure. This procedure, approved by the fetial college, would ensure that the gods looked with favour on the Roman armies.³

Assessment of war in material terms only became common in the Middle Ages. The concept of a “just war” (*justum bellum*) was proposed for the first time by Saint Augustine (354–430) and was later developed by Thomas Aquinas (1225–74). Aquinas fed the debate on war over the next few centuries by deeming a war to be just if it fulfilled three conditions:

First, the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private person to declare war, because he can seek for redress of his rights from the tribunal of his superior.... And as the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them. Secondly, a just cause is required, namely that those who are attacked should be attacked because they deserve it on account of

2 Homer, *Iliad*, Book XXIV, 50–4. English translation based on that by Richmond Lattimore in *Great Books of the Western World* 3, Encyclopaedia Britannica, Chicago, 1990, p. 291. See David Bederman, *International Law in Antiquity*, Cambridge University Press, Cambridge, 2001, pp. 249–63.

3 The priests – who had both religious and secular attributes – did not question the justice of the war. They merely supervised observance of formalities, which changed as the Roman Empire expanded. Celso de Albuquerque Mello, *Direitos Humanos e Conflitos Armados*, Renovar, Rio de Janeiro, 1997, pp. 78 ff. Ian Brownlie, *International Law and the Use of Force by States*, Clarendon, Oxford, 1963, pp. 3 ff. Bederman, above note 2, pp. 231–41.

some fault. Therefore Augustine says: *A just war is usually described as one that avenges wrongs* Thirdly, it is necessary that the belligerents should have a rightful intention, so that they intend the advancement of good, or the avoidance of evil.⁴

We owe the formalization of the *justum bellum* in legal terms to Francisco de Vitoria (1486?–1546), theologian and professor at Salamanca, regarded by some as the founder of international law. In addition to seeing war as a purely public issue, he considered that there was “only one single just cause for starting a war, namely the suffering of a [grave] wrong”. Nevertheless, given that the sovereign was his own judge with regard to war, error or good faith would excuse a war that was objectively unjust.⁵ Following on from this, Francisco Suárez (1546–1617) classified as just cause for a war the punishing of those who had violated the rights of a third party, the avenging of a wrong and the protection of the innocent. Nonetheless, before resorting to the use of arms it was necessary to establish that war was the only means of obtaining reparations.⁶

These teachings must be understood in the context in which the last two authors lived and worked. This was the period when both Catholic unity and the Holy Roman Empire were breaking up – the Emperor had been seen as the temporal leader of the Christian countries of the West. Religion, hitherto a unifying force across western Europe, had now become a reason for war both between and within states, as in the case of the Thirty Years War (1618–48). That conflict started as an internal dispute within the Holy Roman Empire, but spread to involve the majority of European countries, divided along religious lines, and saw worrying advances in methods of warfare. After three decades, the devastation was dramatic: some three quarters of the population in the areas directly affected had disappeared as a consequence of war, disease or mass migration.⁷

Grotius wrote his great work during the Thirty Years War, the Netherlands’ struggle for independence and the rise of Dutch naval power. He believed that it was not possible to conduct a just war against those who erred in their interpretation of the Christian faith or who refused to accept it, since the sovereign exercised secular supremacy over his subjects. He saw war as a judicial procedure – to obtain redress for injury – that could include punishing anyone who committed “grievous violations of the law of nature or nations”. He therefore believed that it was possible to conduct war for the sake of the oppressed:

4 Thomas Aquinas, *Summa Theologica*, second part of the second part (Secunda Secundæ Partis), question 40 (emphasis in original), trans. by Fathers of the English Dominican Province, rev. Daniel Sullivan, *Great Books of the Western World*, above note 2, Vol. 18, p. 578.

5 Francisco de Vitoria, *Relecciones del Estado, de los Indios, y del Derecho de la Guerra*, Relección Segunda, paras 13 and 20, Editorial Porrúa, Mexico City, 1974, pp. 82–5.

6 Francisco Suárez, *Selección de Defensio Fidei y Otras Obras*, Ediciones Desalma, Buenos Aires, 1966, pp. 305–12.

7 Tony Allan (ed.), Poderes da Coroa, *História em Revista*, Vol. 15, April, Rio de Janeiro, 1992, pp. 72–7. See Irène Herrmann and Daniel Palmieri, “The new conflicts: Back to the future?”, *International Review of the Red Cross*, Vol. 84, no. 849 (March 2003), pp. 23–44.

It is another question, whether we have a just cause for war with another prince, in order to relieve his subjects from their oppression under him.... But if the injustice be visible, as if a Busiris, a Phalaris, or a Thracian Diomedes exercise such tyrannies over subjects, as no good man living can approve of, the right of human society shall not be therefore excluded.⁸

While some authors from the classical period do demonstrate a concern for “innocents”, they make no conceptual distinction between *jus ad bellum* and *jus in bello*. This lack of precision meant that the rights and obligations of belligerents depended on the “legitimacy” of the causes they were pursuing. In the final instance, a combatant without a just cause had no rights. Francisco Suárez, for instance, believed that “if the end is legitimate, then so are the means required; in consequence, no harm done to the enemy during war is classed as injustice, excepting the death of innocents”, that is “children, women and all who cannot bear arms”.⁹ Similarly, a just cause granted legal title to goods taken by pillage, items that under other circumstances would have been considered stolen.¹⁰

Some of the precepts put forward by Grotius were reflected in the 1648 Peace of Westphalia, which brought an end to the wars of religion in Europe. This decreed that future religious disputes were to be resolved by “friendly” agreements between Catholics and Protestants. The institution of the Westphalian system marked the transition in Europe from the mediaeval era to a system of equal, sovereign states. War ceased to be perceived as a means of attaining superiority for one particular dogma and became an instrument – however imperfect – for settling differences.¹¹ The question of its legality was ignored in favour of the argument put forward by Niccolò Machiavelli (1469–1527), that “war is just when it is necessary”.¹² This concept was first espoused in legal terms by Balthazar Ayala (1548–84), who saw war as the prerogative of princes, rendering improper all discussion regarding the fairness of its causes. This opinion was developed by Alberico Gentile (1550–1608), who questioned the moral foundations of the

8 Hugo Grotius, *The Rights of War and Peace*, Book II, ch. XXV, para. VIII (1) (2), 1625, ed. and with an introduction by Richard Tuck, from the edition by Jean Barbeyrac, Indianapolis, Liberty Fund, 2005, pp. 1159, 1161, available at <http://oll.libertyfund.org/EBooks/Grotius_1032.02.pdf> (last visited 5 March 2007). The *Grand Dictionnaire Universel du XIXe Siècle*, by Pierre Larousse, explains the allusions made by Grotius: Busiris is a figure from Egyptian mythology, whose reign endured nine years of famine. A Cypriot fortune-teller told him that the curse could be lifted only by making an annual sacrifice of a foreigner. Busiris started off by sacrificing the fortune-teller, continuing with every foreigner who entered Egypt. Phalaris, born on Crete in the sixth century BC, was the tyrant of Agrigento. An Athenian sculptor, Perillo, gave him a bronze bull inside which a man would fit to be roasted over a slow fire. Phalaris roasted the artist who had invented this torture and then numerous enemies. According to some versions, he met the same end as they did. Diomedes, king of Thrace, owned fierce fire-breathing horses fed on human flesh – especially that of any foreigner who fell into his hands. Hercules defeated him and fed him to his own horses.

9 Suárez, above note 6, pp. 332–5, ICRC translation.

10 Thomas Franck, “Fairness in the international legal and institutional system”, *Recueil des Cours*, Vol. 240 (1993-III), pp. 258–60.

11 Bugnion, above note 1, p. 526.

12 Niccolò Machiavelli, *Il Principe*, in *Opere*, Riccardo Ricciardi, Milan, 1960, p. 84.

scholastic view: “if it is doubtful on which side justice is, neither can be called unjust”.¹³

The consequences of the immanent state

The rise of the modern state, with its independent political powers, gradually made war the prerogative of the sovereign, the *ultima ratio* of politics. As the state recognized no obligations beyond its own will, the principle of the inviolability of domestic jurisdiction developed as the corollary of sovereignty, and the situation of the individual was limited to his or her relations with the state, the sole source of rights and duties. Emmerich de Vattel (1714–67), for instance, writing when the European nation states were still affirming themselves, reinterpreted and limited the application of general principles that went beyond the will of nations and sovereigns. He raised doubts regarding the taking up of arms to punish grave breaches of the natural law:

Could it escape Grotius, that, notwithstanding all the precautions added by him ..., his opinion opens a door to all the ravages of enthusiasm and fanaticism, and furnishes ambition with numberless pretexts?¹⁴

The nineteenth century, in particular, was a time of unlimited right to war and the recognition of conquest, influenced by the political system of the Concert of Europe.¹⁵ Any international reaction to a conflict between states was dictated by political considerations rather than legal ones. Even in 1895, Bluntschli wrote that while one might deplore the effects of war, it would continue to be “an indispensable means of ensuring the necessary progress of humanity”.¹⁶ International law focused on the formalities of declaring war and the consequences for belligerents and third parties. Accioly summarized the classical doctrine of war as follows: “it is the role of international law to make a legal assessment, not of its legitimacy or illegitimacy, but merely of the manner in which it is conducted and the effects that it produces”.¹⁷

This absolute voluntarism, while conferring on states the freedom to decide as to the expediency of opening hostilities, favoured the setting of limits on the way in which the violence was conducted. Given that all the belligerents were acting legitimately, there was no contradiction in observing certain rules of

13 Balthazar Ayala, *De Jure et Officiis Bellicis et Disciplina Militari*, Book III, Book I, ch. II, paras. 33–35, translated by Pawley Bate, Carnegie Institution, Washington, 1912; vol. II, pp. 22–3. Regarding Gentili, see Brownlie, above note 3, pp. 11–12

14 Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law*, Book II, ch. I, para. 7 (English translation available at <<http://lonang.com/exlibris/vattel/vatt-201.htm>> (last visited 5 March 2007).

15 Brownlie, above note 3, p. 19. Christian Tomuschat, “International law: ensuring the survival of mankind on the eve of a new century”, *Recueil des Cours*, Vol. 281 (2001), p. 204.

16 Johann Caspar Bluntschli, *Le Droit International Codifié*, Guillaumin, Paris, 1895, p. 11, translated from the fifth edition of his *Das moderne Völkerrecht* (1868) (quotation: ICRC translation from Spanish).

17 Hildebrando Accioly, *Tratado de Direito Internacional Público*, 2nd edn, MRE, Rio de Janeiro, 1956, Vol. III, p. 91 (quotation: ICRC translation from Spanish).

behaviour while the “state of war” continued. Vattel had included in his work a series of rules as to “what we are allowed to do to the enemy’s person in a just war”. While promoting military necessity as the general rule, he considered illegal not only violence against all who were not carrying arms (as long as they refrained from hostile acts), but also certain methods of warfare, such as the use of poisoned weapons and the refusal to spare the lives of defeated or disarmed enemies, who were to be considered prisoners of war.¹⁸

To the extent that international law is confined to agreements between sovereign states, *jus in bello* loses its transcendental character, becoming a matter of reciprocal obligations between the belligerents. The second half of the nineteenth century saw the arrival of the Red Cross and the first multilateral conventions that attempted to establish “the technical limits at which the necessities of war ought to yield to the requirements of humanity”.¹⁹ The contractual nature of international law at this time, by interpreting the protection of nationals in the hands of the enemy or on enemy territory as being a matter of common interest, meant that for the first time states agreed to restrict their powers in favour of the individual, under international treaties open to universal ratification.

Likewise, the Hague peace conferences of 1899 and 1907 addressed issues related to *jus in bello* such as methods of warfare, neutrality and the Martens clause. At no time, however, were the terms *jus ad bellum* and *jus in bello* used. These expressions are rarely encountered before 1930.²⁰ Despite advances in the promotion of a peaceful solution to disputes, war continued to be the last resort of sovereigns. Only with the first attempts to make the use of arms illegal, and hence to criminalize war, did the distinction become clear. As the available justifications for armed action by states became clearer, so did the limits of military necessity.

The harsh reality of total war

The development of a legal regime governing the use of armed force in international relations went hand in hand with progress in military technology and strategy and the accompanying increase in the cost of resorting to war in human, political and economic terms. Modern developments in *jus in bello* and *jus ad bellum* show that while these two areas of law are separate, they do share a

18 Vattel maintains that “The lawfulness of the end does not give us a real right to any thing further than barely the means necessary for the attainment of that end. Whatever we do beyond that, is reprobated by the law of nature, is faulty, and condemnable at the tribunal of conscience.” Above note 14, Book III, ch. VIII, para. 137.

19 Preamble to the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (St Petersburg, 1868), preceded by the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (Geneva, 1864) (both available at <<http://www.icrc.org/ihl>>).

20 Robert Kolb, “Origin of the twin terms *jus ad bellum*/*jus in bello*”, *International Review of the Red Cross*, Vol. 37, no. 320 (October 1997), pp. 553–62.

common catalyst – the emergence of “total war”. This concept, initially a military strategy, became a synonym for destruction and suffering.

The devastation of the First World War raised sensitivity to the use of force, to the point at which attempts were made to hold Kaiser Wilhelm II responsible for unjustified recourse to war (the polemical war-guilt clause). Nonetheless, general opposition to any kind of restriction on the use of military means prompted the Dutch government to refuse the ex-Emperor’s extradition.²¹

During the interwar period there was a trend towards prohibiting states’ use of arms, through such instruments as the Covenant of the League of Nations (1919) and the “General Pact for the Renunciation of War”, also known as the Kellogg-Briand Pact (1928). In 1932, US Secretary of State Henry L. Stimson sent a note to the Japanese government in which he declared that the United States did not recognize the Japanese invasion of Manchuria.²² Despite being the logical corollary of the prohibition on the use of force, the principle of non-recognition (*ex injuria jus non oritur*) did not prevent the policy of appeasement in 1938, whereby the annexation of parts of Czechoslovakia by Hitler’s armies was recognized.

Following the collapse of the League of Nations and the devastation of the Second World War, the creators of the new order sought once again to institutionalize the use of force in relations between states. The principal objective of the United Nations is the maintenance of international peace and security (UN Charter, Article 1 (1)). The Preamble to the Charter makes clear the desire to “save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”. In addition to prohibiting the unilateral use of armed force except in self-defence,²³ the Charter established a system for the prevention of international armed conflict. That system followed on from earlier efforts and was based on the principle of the peaceful resolution of disputes (Article 2 (3)), the regulation, control and reduction of arms and the promotion of world economic and social welfare. The Charter reverses the presumption that war is a legitimate mode of political action, to the point of replacing the ancient absolute power regarding the use of force by a general prohibition on war (*jus contra bellum*).²⁴ The prohibition on the use or threat of force in international relations has become part of international custom, considered *jus cogens*.²⁵ The main exception is the collective security system, set up on the basis of the coercive powers of the Security Council under Chapter VII and Articles 25 and 103 of the Charter. However, the system was quickly paralysed by indiscriminate use of the

21 Brownlie, above note 3, pp. 53–4.

22 Japan, China and the United States had ratified the Kellogg-Briand Pact, *ibid.*, pp. 410–23.

23 Articles 2(4) and 51 of the UN Charter, which render the “inherent right of individual or collective self-defence” subordinate to the system of collective security under the Security Council.

24 Although *jus contra bellum* would be the most appropriate term, given the general prohibition on the use of force, this article will retain *jus ad bellum*, as the term is frequently used.

25 See Article 53 of the 1969 Vienna Convention on the Law of Treaties. Ian Brownlie, *Principles of Public International Law*, 5th edn, Clarendon, Oxford, 1998, p. 515. Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes*, Clarendon, Oxford, 1997, p. 78.

veto provided for in the Charter. Between 1945 and 1989, the veto was used on 279 occasions, leaving the UN impotent in the face of over 100 conflicts around the world, with some 20 million deaths.²⁶

The UN therefore turned its attention to other questions – considered secondary by the authors of the Charter – such as decolonization and human rights. The development of international human rights law gained momentum with the 1948 Universal Declaration of Human Rights and manifested itself over the next fifty years in a large number of conventions, judicial decisions and other mechanisms for supervising compliance with multilateral and regional obligations. Today, there is no dispute as to the legitimacy of international concern with human rights issues, anywhere and at any time.²⁷

The relationship between the UN and *jus in bello*, however, has been one of suspicion and ambiguity. The aim of the UN is to prevent war, not to regulate the conduct thereof. The International Law Commission therefore considered it unnecessary to include the law of war in its efforts to codify customary law in view of the general prohibition on the threat or use of armed force. In rather optimistic tones, it decided that “War having been outlawed, the regulation of its conduct has ceased to be relevant.”²⁸

The codification and progressive development of international humanitarian law therefore continued on the margins of the UN. Originally intended as “saving clauses”, applicable when a *de facto* armed conflict broke out, these humanitarian norms and principles are today codified in various conventional instruments that are almost universally accepted. Despite its contractual origins, based on inter-state conflicts, international humanitarian law expanded to cover internal conflicts and converged towards international human rights law, which applies in time of peace, but whose basic principles remain valid in time of public emergency. Article 3 common to the Geneva Conventions of 1949, for instance, applicable to “armed conflict not of an international character”, requires all parties to respect minimal standards of protection of the individual and reaffirms certain basic human rights.²⁹ It is accepted that, at least, the fundamental standards

26 United Nations, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, A/47/277-S/24111, United Nations, New York, 1992, para. 14. The system as created provided for military forces to be at the disposal of the Security Council if required. But as the agreements required under Article 43 were never signed, it became UN practice from the beginning of the 1990s to authorize member states that are “able and willing” to conduct military action, the legality of which will not be discussed in the present article.

27 Antônio A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, 2nd edn, vol. I, Universidade de Brasília, Brasília, 2003, pp. 340 ff. See United Nations, *Vienna Declaration and Programme of Action*, A/CONF.157/23, United Nations, New York, 12 July 1993.

28 See Hans Peter Gasser, “The United Nations and international humanitarian law: the International Committee of the Red Cross and the United Nations’ involvement in the implementation of international humanitarian law”, 1995, available at <<http://www.icrc.org/web/eng/siteeng0.nsf/html/57JMUK>> (last visited 15 September 2003).

29 See similarities between the provisions of the 1977 Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, and Article 4 of the International Covenant on Civil and Political Rights (1966), which lists a number of human rights from which no derogation is possible.

of *jus in bello* – including the content of common Article 3 – constitute imperative rules of international law (*jus cogens*).³⁰

The relationship between humanitarian law and the UN started to change in the 1960s. Two years after the adoption in 1966 of the International Covenant on Civil and Political Rights and on Economic, Social and Cultural Rights, the International Conference on Human Rights (Tehran, 1968) adopted a resolution on “human rights in armed conflicts”.³¹ Since then, a series of General Assembly resolutions has addressed matters related to the protection of the victims of armed conflict and the means and methods of warfare, from the point of view of the development and strengthening of human rights and refugee law. Any doubt regarding the formal reception of *jus in bello* by the UN finally disappeared at the end of the Cold War. Today, the organization operates in full recognition of this area of law and plays a significant role in its development.³²

Post-Cold War humanitarianism

The period following the fall of the Berlin Wall was one of non-international armed conflicts – not properly covered by *jus ad bellum* – and of increasing violence against civilians, which accounts for some 75 per cent of casualties in contemporary armed conflicts.³³ More recently, there has been an upsurge in what are being called “asymmetric conflicts”, in which the weaker side is tempted to use illegal methods of warfare, such as blending in with the civilian population, taking hostages or employing insidious techniques.³⁴

Although the ending of rivalry between East and West has reduced the threat of large-scale military conflicts, the affirmation of national, ethnic, sectarian and religious differences has presented new challenges to humanitarian action, in both legal and operational terms. The classic distinction between combatants on the one hand, and civilians and combatants *hors de combat* on the other, is becoming less clear-cut. The mechanisms intended to ensure respect for humanitarian standards ran up against state suspicions related to matters of jurisdiction or, more simply, against the interests of the combatants.

30 International Court of Justice, “Advisory opinion on the threat or use of nuclear weapons”, ICJ Reports 1996, para. 79. According to the Institute of International Law, these standards constitute basic principles of international humanitarian law (see *Annuaire*, Berlin session, 1999, p. 392).

31 Resolution XXIII, adopted on 12 May 1968. 68 votes for, 2 abstentions, no votes against (available at <<http://www.icrc.org/ihl.nsf/FULL/430?OpenDocument>> (last visited 9 March 2007)).

32 See *inter alia* A/Res 43/131 (1988), A/Res 45/100 (1990) and A/Res 46/182 (1991) on humanitarian assistance. René Kosirnik, “Books and reviews: ‘Les Nations Unies et le droit international humanitaire/ The United Nations and international humanitarian law’”, *International Review of the Red Cross*, Vol. 38, no. 323 (June 1998), pp. 374–9.

33 United Nations, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, S/2001/331, United Nations, New York, 30 March 2001, p. 1. Similarly, at the end of the 1990s it was estimated that 90 per cent of armed conflicts were occurring within states. United Nations, *Report of the Secretary-General on the Work of the Organization*, A/54/1, United Nations, New York, 1999, p. 8, available at <<http://www.un.org/Docs/SG/Report99/toc.htm>>.

34 See Toni Pfanner, “Asymmetrical warfare from the perspective of humanitarian law and humanitarian action”, *International Review of the Red Cross*, Vol. 87, no. 857 (March 2005), pp. 149–74.

The former UN Secretary-General has painted a sad picture of contemporary conflict:

In the new warfare that has emerged, the impact of armed conflict on civilians goes far beyond the notion of collateral damage. Targeted attacks, forced displacement, sexual violence, forced conscription, indiscriminate killings, mutilation, hunger, disease and loss of livelihoods collectively paint an extremely grim picture of the human costs of armed conflict.... Today's armed conflicts are more often low-intensity conflicts fought with small arms and light weapons in both urban and rural areas. Conventional warfare undertaken by large, formed, well-disciplined units with clear command and control structures is less common.³⁵

While new challenges arose for humanitarian action, the end of the ideological dichotomy of the Cold War allowed the UN to play a leading role in protecting the victims of armed conflict. A number of resolutions were adopted during the 1990s aimed at improving the co-ordination of emergency humanitarian assistance within the UN system – during both natural and man-made emergencies. These led to the creation of a United Nations Disaster Relief Co-ordinator, the Inter-Agency Standing Committee (IASC) and, in 1998, the Office for the Co-ordination of Humanitarian Affairs (OCHA), as one of the departments of the Secretariat.³⁶ Humanitarian activities are today on the agenda of various agencies and organizations within the UN system, such as the World Food Programme, UNICEF, the World Health Organization and the office of the United Nations High Commissioner for Human Rights.

The scope of the work, together with the possibility of co-ordinating separate initiatives and perceptions regarding humanitarian action, has allowed the UN to play a proactive role in protecting the victims of armed conflict. For instance, the large number of resolutions adopted by various bodies on humanitarian assistance bear witness to the development of a right to humanitarian assistance in recent years, and this now forms part of international custom and practice.³⁷

Inclusion of humanitarian activities in the UN system has gone hand in hand with conceptual and operational advances in the fields of human rights, humanitarian law and refugee law. Increasing interaction between the three major areas of international protection of the individual has helped to prevent offences against human dignity in situations of violence, however the situation may be classified. For instance, the entry of the rights of the individual into positive law at

35 United Nations, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, S/2005/740, United Nations, New York, 28 November 2005, pp. 1 and 2, available at <<http://www.un.org/Docs/sc/sgrep05.htm>>.

36 See A/Res/46/182, 19 December 1991, and A/Res/47/120, 8 October 1993.

37 Alberto Amaral Júnior, *O Direito de Assistência Humanitária*, Renovar, Rio de Janeiro, 2003. The Institute of International Law, at its Bruges session in 2003, took the view that “The victims of disaster [which may be due to violence during international or internal armed conflict] are entitled to request and receive humanitarian assistance.” Resolution II (1), available at <http://www.idi-iil.org/idiE/resolutionsE/2003_bru_03_en.PDF> (last visited 9 March 2007).

an international level, in the form of developments in the field of human rights, mean that the treatment of persons on the territory of a state – or under its jurisdiction – is not a merely internal issue. Those advances have also strengthened prosecution and punishment against grave breaches, on the basis of what has come to be called international criminal law, manifested in the creation of the International Criminal Court.

Nevertheless, existing mechanisms intended to ensure respect for fundamental international rules protecting individuals during extreme situations continue to show grave deficiencies. The nature of contemporary conflict has given new impetus to the criticism that humanitarian law can encourage a tolerant attitude towards possible war criminals, because of the need to obtain the consent of combatants. In many conflicts there has been a clear inability or lack of interest on the part of the state to ensure respect for fundamental rules that protect the individual. Yet at the same time, the international reaction has often been inadequate. In addition to the existence of “forgotten humanitarian emergencies”,³⁸ the changing nature of contemporary armed conflict has caused operational problems and has exacerbated the risks faced by humanitarian agencies in the field. Where state authority is fragmented, or where policy is directed against the beneficiaries of protection, the relevance of certain principles of humanitarian law – such as neutrality, impartiality and the distinction between *jus in bello* and *jus ad bellum* – is called into question.

While doctrine does recognize that certain violations – such as genocide, crimes against humanity and war crimes – could imply aggravated responsibility on the part of the state, there is no consensus regarding the legal consequences of this conclusion, either for the state responsible for the violation or for other states.³⁹ On one hand, it is necessary to ensure compliance with international rules on the protection of the individual, even in periods of institutional crisis, and it is the responsibility of states to take the necessary measures, both internally and externally. The obligation to “respect and ensure respect for” humanitarian law shows that there is no “right of indifference”, even if political considerations may give reason to abstain.⁴⁰ On the other hand, recourse to enforcement measures that do not fall within the mechanisms provided for under *jus in bello* raises doubts

38 United Nations, *Report of the Secretary-General, Strengthening the Coordination of Emergency Humanitarian Assistance of the United Nations*, A/58/89 – E/2003/85, United Nations, New York, June 2003. See various situations mentioned in the speech to the Security Council of the (former) Assistant Secretary-General for Humanitarian Affairs, Jan Egeland, on the protection of civilians in armed conflict, 4 December 2006, available at <<http://www.reliefweb.int>> (last visited 5 December 2006).

39 See Articles 40, 48 and 54 of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, approved by the 6th Committee of the UN General Assembly in December 2001 (A/Res/56/83) and the comments thereto, available at <<http://www.un.org/Depts/dhl/resguide/r56.htm>> (last visited 9 March 2007). James Crawford, *The International Law Commission’s Draft Articles on State Responsibility*, Cambridge University Press, Cambridge, 2002, pp. 178–86.

40 Article 1 common to the Geneva Conventions of 1949. Yves Sandoz, “‘Droit’ or ‘devoir d’ingérence’ and the right to assistance: the issues involved”, *International Review of the Red Cross*, Vol. 32, no. 288 (1992), available at <<http://www.icrc.org/eng/review>> (last visited 9 March 2007). Antonio Cassese, *International Law*, Oxford University Press, Oxford, 2001, p. 17.

concerning its consistency with the principles that govern humanitarian protection.⁴¹ Nevertheless, it is generally recognized that, while violations of humanitarian law are a subject of international concern, any action under Article 1 common to the Geneva Conventions has to respect the regime for the threat or use of armed force laid down in the UN Charter. Such action is limited to, for instance, suspension of co-operation programmes or the severing of diplomatic relations.

Certain analysts see a possible solution in the collective security system, represented by the powers of the UN Security Council. In principle, multilateral organizations are arguably best suited to ensure compliance with common values that the international community considers fundamental, such as the protection of the individual. It is reasonable to hope that international reaction in such cases would be “public”, or collective, as opposed to involving “ordinary” responsibility of a bilateral nature. Article 89 of Protocol I of 1977 additional to the Geneva Conventions of 1949 has something to say on the matter. That article, which is considered to apply also to non-international conflicts, at least with regard to the obligations set out in common Article 3, stipulates that

In 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.

In addition to making reference to the general ban on the threat or use of armed force (other than in self-defence or on the basis of the coercive powers of the Security Council, as specified in the UN Charter), this disposition recognizes the role of the UN in the face of grave breaches of *jus in bello*. From that point of view, the authority to adopt obligatory measures, for member states or for non-state actors,⁴² makes the Security Council the obvious body for ensuring compliance with fundamental humanitarian rules during extreme situations, thanks to a broad interpretation of what constitutes a “threat to international peace and security”, according to Article 39 of the Charter.⁴³ Similarly, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide stipulates that states can “call upon the competent organs of the United Nations to take such action ... as they consider appropriate for the prevention and suppression of acts of genocide” (Article 8).

41 Marco Sassòli, “State responsibility for violations of international humanitarian law”, *International Review of the Red Cross*, Vol. 84, no. 846 (June 2002), pp. 401–34. See Crawford, above note 39, and the debates in the International Law Commission regarding the fragmentation of international law, available at <<http://www.un.org/law/ilc/index.htm>>.

42 Although the Charter is an instrument binding on states, the practice of the Security Council recognizes the relationship between the actions of non-state actors, such as rebel forces and terrorist groups – and threats to international peace and security, e.g. in the case of UNITA (S/Res 1127 (1997)), Al Qaeda and members of the Taliban (S/Res 1267 (1999)). See Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd edn, Oxford University Press, Oxford, 2002, pp. 714–16.

43 Laurence Boisson de Chazournes and Luigi Condorelli, “Common Article 1 of the Geneva Conventions revisited: Protecting collective interests”, *International Review of the Red Cross*, Vol. 83, no. 837 (March 2000), pp. 67–87. Giorgio Gaja, “Jus cogens beyond the Vienna Convention”, *Recueil des Cours*, Vol. 172 (1982), p. 299.

A record of trial and error

With the end of the Cold War, the Security Council – in a process of continuous experimentation – has moved confidently into the field of international protection of individuals and groups, with varying results. Its limited size, the speed of its procedures and the flexibility of its decisions lead one to expect that the Council, in a framework of multilateral legitimacy, would be able to take prompt and effective steps to manage a humanitarian crisis, in accordance with its primary responsibility for the maintenance of international peace and security (Article 24 of the Charter). The search for symbiosis between the Security Council and humanitarian agencies during an armed conflict, even if limited to non-coercive action, implies a silent but credible threat that may well be effective in convincing any recalcitrant party: the possibility of the Council's invoking Chapter VII powers in order to ensure respect for humanitarian rules, under a broad interpretation of what constitutes a threat to international peace and security.⁴⁴

While reference was made to the rights of the individual as early as 1946, when the Security Council debated the dictatorial regime in Spain,⁴⁵ the Council only decisively entered the humanitarian domain in the 1990s. Since then it has adopted measures ranging from reminding belligerents of their obligations under international law – such as the obligation to ensure access and security for organizations providing humanitarian assistance, to avoid forced displacements of population and to release prisoners of war⁴⁶ – to the application of coercive measures.

Although the resolutions have often mixed security and protection concerns, on a number of occasions the Council has invoked its coercive powers under Chapter VII of the Charter with the aim of preventing, halting or remedying breaches of the fundamental rules that protect the individual. In addition to imposing sanctions against a state or a group taking part in hostilities,⁴⁷ the Council has authorized armed intervention with the objective – formally at least – of countering grave offences against human dignity, in both international and

44 The preparatory work leading up to the Charter shows that the lack of precision in the expression “threat to international peace and security” was deliberate. As a reaction to the supposed legalism of the League of Nations, the drafters decided to grant the Council a certain degree of leeway in deciding what constituted a threat to international peace, avoiding tight restrictions regarding the decision as to when to act. Hans Kelsen, *The Law of the United Nations*, Frederick Praeger, New York, 1951, p. 727.

45 The Council took no action. Later, the General Assembly adopted a (recommending) resolution on the question. Aznar-Gomes, “A decade of human rights protection by the UN Security Council”, *European Journal of International Law*, Vol. 13, no. 1 (2002), p. 225.

46 See S/Res 1430 (2002) on Eritrea/Ethiopia, S/Res 1524 (2004), and 1716 (2006), on Georgia and S/Res 1634 (2005), on Western Sahara.

47 The results of the various sanction regimes imposed are a matter of debate. The impact of comprehensive sanctions on the civilian population has led the Council to allow exceptions on humanitarian grounds or to look for alternative approaches, such as targeted sanctions. While certain sanctions against belligerent leaders, when applied, can delegitimize them internationally, they may not necessarily achieve the objective of moderating their followers' conduct. An effective arms embargo, however, does seem to promote both respect for the rules of humanity and the maintenance of security in the territory concerned. Examples include the sanctions imposed on Somalia (S/Res 751 (1992)), Sierra Leone (S/Res 1132 (1997) and S/Res 1171 (1998)) and Côte d'Ivoire (S/Res 1572 (2004)).

non-international conflicts: Somalia (1992–3), Rwanda (1994), Albania (1997), Timor-Leste (1999), Sierra Leone (2000), Congo (2003), Liberia (2003), Haiti (2004).⁴⁸ In other cases the Council has combined mechanisms specific to humanitarian law – such as setting up safe areas in the former Yugoslavia despite the absence of consent from Belgrade⁴⁹ and enforcing individual responsibility for grave breaches, with the creation of the ad hoc tribunals for the former Yugoslavia and for Rwanda, and the Special Tribunal for Sierra Leone.⁵⁰

Similarly, most UN peacekeeping operations have begun to include in their mandates subjects related to *jus in bello*. Current “multidimensional” operations, some of which were adopted under Chapter VII, include such tasks as:

- (a) facilitating or co-ordinating humanitarian assistance;⁵¹
- (b) assisting in the voluntary return of displaced persons and/or refugees;⁵²
- (c) conducting or supporting mine-clearing operations;⁵³
- (d) supporting the exchange of prisoners of war and other persons held by enemy forces;⁵⁴
- (e) protecting civilians and humanitarian personnel under immediate threat of physical violence;⁵⁵ and
- (f) capturing an ex-president to ensure that he was held to account for his actions.⁵⁶

48 Authorization for armed intervention is generally based on a number of factors, such as the existence of a humanitarian crisis, the flow of refugees, the breakdown of democratic rule, the effects of an internal conflict on regional stability, etc. See Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford University Press, Oxford, 2001, pp. 112–62.

49 S/Res 819 (1993). The measures adopted by the Council failed to prevent one of the “darkest pages of human history” in July 1995, when Srebrenica – one of six safe areas set up by the UN in Bosnia and Herzegovina – fell to Serbian forces, with the rules of engagement for the peacekeeping forces preventing decisive action on the part of the international community. Some 20,000 people were killed, the majority of them members of the Bosnian Moslem community. United Nations, *The Fall of Srebrenica*, A/54/549, United Nations, New York, 15 November 1999, paras. 2, 3, 468 and 495.

50 S/Res 827 (1993), S/Res 955 (1994) and S/1315 (2000), respectively. The Special Tribunal for Sierra Leone was set up under an agreement with the government of Sierra Leone, in accordance with Resolution 1315 (2000). In the other two cases, in addition to questions regarding the selectivity and competence of the Council, the existence of a threat to peace has not been established beyond all doubt. In the case of Rwanda, the internal conflict was already over when the tribunal was set up. Arguments regarding the legality of the tribunal for the former Yugoslavia were presented, unsuccessfully, as preliminary objections in the Tadic case.

51 UNOMIK (Kosovo), S/Res 1244 (1999); UNMIL (Liberia), S/Res 1509 (2003); UNOCI (Côte d’Ivoire), S/Res 1528 (2004) and S/Res 1609 (2005); ONUB (Burundi), S/Res 1545 (2004); MONUC (Congo), S/Res 1565 (2004); UNOFIL (Lebanon), S/Res 1701 (2006); UNMIT (Timor-Leste), S/Res 1704 (2006).

52 UNOMIK (Kosovo), S/Res 1244 (1999); ONUB (Burundi), S/Res 1545 (2004); MONUC (Congo), S/Res 1565 (2004); UNOFIL (Lebanon), S/Res 1701 (2006).

53 MONUC (Congo), S/Res 1291 (2000); UNMEE (Ethiopia/Eritrea), S/Res 1320 (2000) and S/Res 1430 (2002).

54 MINURSO (Western Sahara), S/Res 690 (1991); MONUC (Congo), S/Res 1291 (2000).

55 UNMIL (Liberia), S/Res 1509 (2003); UNOCI (Côte d’Ivoire), S/Res 1528 (2004) and S/Res 1609 (2005); MINUSTAH (Haiti), S/Res 1542 (2004); ONUB (Burundi), S/Res 1545 (2004); MONUC (Congo), S/Res 1565 (2004).

56 UNMIL (Liberia), S/Res 1638 (2005). Although it has not been explicitly revoked, this mandate lost its *raison d’être* when the former president Charles Taylor was arrested in March 2006, with the intention of bringing him before the Special Tribunal for Sierra Leone. In turn, S/Res 1688 (2006), adopted under Chapter VII, opened the way for his transfer to stand trial in The Hague for security reasons.

“The worst humanitarian crisis today”

The way in which the Sudan crisis is being managed demonstrates the variety of means at the disposal of the Security Council when dealing with grave offences against human dignity. The civil war in the south of the country that started in 1983 –the longest conflict in Africa – has so far cost the lives of some two million people.⁵⁷ Nevertheless, it only appeared on the agenda of the Security Council once peace negotiations started between the government in Khartoum and the Sudanese People’s Liberation Movement/Army. In January 2005 these negotiations culminated in a general peace agreement and a provisional national constitution. Under Resolution 1547 (June 2004) the Council set up an advance team that led to the creation (with the consent of the Sudanese government) of the United Nations Mission in Sudan (UNMIS), to which was assigned certain powers under Chapter VII, including the power to protect civilians under imminent threat (S/Res 1590, March 2005). When the first resolution was adopted, the conflict in western Darfur, southern Sudan, that had broken out in February 2003 had already led to the ICRC’s largest operation. And yet it received only passing mention in the resolution, with the Council calling on the parties to come to a political agreement without delay.

Between that time and the end of 2006, the Security Council adopted twenty resolutions on Sudan without achieving effective protection for the victims of violence in Darfur or preventing its effects from threatening neighbouring countries such as Chad and the Central African Republic. As early as its second resolution concerning Darfur, in July 2004, the Council set up an arms embargo under Chapter VII prohibiting the supply of arms and war material to non-governmental entities and individuals who were fighting in the region, supported an African Union protection force (the future African Union Mission in Sudan, or AMIS – to which Khartoum consented) and demanded that the Sudanese government disarm a specific militia – the Janjaweed – and prosecute its members. Besides threatening other action, the Council asked the Secretary-General to submit regular reports on the situation in Darfur.⁵⁸ In its following resolution, also adopted under Chapter VII, the Security Council went into further detail in threatening sanctions against the Sudanese government and its members, issued various calls on humanitarian issues and set up an international commission of enquiry to examine grave breaches of human rights law and humanitarian law and to determine whether acts of genocide had been committed in Darfur.⁵⁹ On 29 March 2005, the Council finally extended the arms embargo to include the

57 United Nations, *Report of the Special Rapporteur on the situation of human rights in the Sudan (Ms Sima Samar)*, E/CN.4/2006/111, United Nations, New York, 11 January 2006, p. 14.

58 S/Res 1556, 30 July 2004.

59 S/Res 1564, 18 September 2004. Despite the binding nature of the Council’s decision, the commission obtained the co-operation of the Sudanese government. The Council set up similar commissions on other occasions, such as in Rwanda, when the crisis was almost over (S/Res 935, July 1994), but has not yet resorted to the International Fact-Finding Commission (Protocol I, Article 90), which has expressed its predisposition to act in non-international armed conflicts.

Sudanese government, and set up a Subsidiary Committee to monitor the embargo and to designate those individuals who were to be subject to sanctions.⁶⁰ Two days later, on the basis of the report submitted by the commission of enquiry, it referred “the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court” and requested the full co-operation of the parties.⁶¹

The next relevant resolutions were only adopted one year later, after the Darfur peace agreement was signed on 5 May 2006. After calling a special session on Darfur (on 9 May), the Council, under Chapter VII, urged all parties to the agreement to implement it without delay and endorsed the African Union’s proposal for a transition from AMIS to a UN operation (S/Res 1679, 16 May 2006). A mission was sent to Sudan and Chad in June.⁶² As the peace agreement began showing serious deficiencies, the Council decided in August to create a strengthened UNMIS, under Chapter VII, to replace AMIS in Darfur. UNMIS would be mandated to support the peace process, protect UN personnel and installations, protect humanitarian organizations, prevent attacks on and threats to civilians and seize or collect arms or related material whose presence in Darfur was in violation of the peace agreements (S/Res 1706, 31 August 2006). Although it was not formally required, the resolution requested the consent of the Sudanese government for this expansion. The Sudanese government’s repeated refusal prompted increasing international pressure on Khartoum, the extension of the mandate of AMIS and a tussle between the UN and Sudan as to whether the special representative of the Secretary-General was to remain or not. In December the Sudanese government accepted a three-stage plan, the details of which are still under negotiation, under which the UN would support the African Union mission in Darfur, resulting in a “hybrid operation”. However, there is as yet no lasting solution to the crisis.

Formal symbiosis

Despite the varying results of the Council’s actions in the humanitarian domain, the prospect of symbiosis between international security and humanitarian action

60 S/Res 1591, 29 March 2005. In October 2006, the Panel reported that “blatant violations of the arms embargo by all parties operating in Darfur continue unabated”. It also reported that the Sudanese government had not applied the financial and travel sanctions against the four persons named by the Council in Resolution 1672 (April 2006), one of whom was a Sudanese general (UN Doc S/2006/795).

61 S/Res 1593, 31 March 2005. The Commission concluded that although the violence did not amount to genocide, the government and militias were responsible for acts that could constitute war crimes and crimes against humanity. Among other measures, it recommended that the case be referred to the ICC, under Article 13(b) of the Rome Statute, with a sealed list of fifty-one possible defendants (UN Doc S/2005/60). Although the prosecutor did not conduct direct investigations in Darfur at the time, because of security risks to victims, witnesses and officials, it was possible to proceed with the investigation, with the aim of presenting an initial case for judicial assessment by the end of February 2007. See International Criminal Court, *Fourth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)*, available at <<http://www.icc-cpi.int>> (last visited January 2007).

62 United Nations, *Report of the Security Council Mission to the Sudan and Chad, S/2006/433*, United Nations, New York, 4–10 June 2006.

resulted in the emergence of new concepts during the 1990s. Although markedly imprecise, terms such as “human security”, “the responsibility to protect” and “the protection of civilians in armed conflict” have become common in UN reports and documents, in political debate and in official declarations.⁶³ Even though, formally, we are still talking about *lege ferenda*, and not *lege lata*, these concepts combine principles and rules of humanitarian law, human rights and refugee law, with the aim of ensuring respect for values seen as fundamental by the international community – such as human life and dignity – in the changing context of contemporary warfare.

Acting on the basis of past experience, the Security Council adopted three generic resolutions on the “protection of civilians in armed conflict”.⁶⁴ Since Resolution 1265 (1999), the Security Council has called on the universal ratification of instruments in the field of international protection of individuals and has urged/demanded “all parties concerned to comply strictly with their obligations under international humanitarian, human rights and refugee law, in particular those contained in the Hague Conventions of 1899 and 1907 and in the Geneva Conventions of 1949 and their Additional Protocols of 1977, as well as with the decisions of the Security Council”. In Resolution 1296 (2006), the Security Council added that “systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security”, which could prompt the Council to take appropriate steps including, implicitly, the use of armed force. This was repeated in Resolution 1674 (2006), which also reaffirmed the conclusions of the World Summit held on the occasion of the sixtieth anniversary of the United Nations, in which the “responsibility to protect” was recognized. This responsibility, which is incumbent primarily on each state, could lead to coercive action aimed at ensuring compliance with international norms for the protection of human beings:

we are 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 regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁶⁵

63 Among the enormous number of references to these concepts by NGOs, governments and international organizations, one could cite the UN Secretary-General’s report entitled *We the Peoples: The Role of the United Nations in the 21st Century*, A/54/2000, United Nations, New York, 2000; ICSS, *The Responsibility to Protect*, ICISS, Ottawa, 2001 and *Human Security Now: Protecting and Empowering People*, available at <<http://www.humansecurity-chs.org>>.

64 According to OCHA, this is “an umbrella concept of humanitarian policies that brings together protection elements from a number of fields, including international humanitarian and human rights law, military and security sectors, and humanitarian assistance”. OCHA On-Line, *Institutional History of Protection of Civilians in Armed Conflict*, available at <<http://ochaonline.un.org>> (last visited 30 September 2006).

65 United Nations, A/Res 60/1, plus final document of the 2005 World Summit, paras. 138 and 139.

Similarly, the Council has examined other issues related to *jus in bello* in a generic fashion, such as refugees,⁶⁶ the security of humanitarian personnel,⁶⁷ sexual violence and women's, journalists' and children's rights in situations of armed conflict.⁶⁸ In Resolution 1612 (2005) in particular, the Council created a permanent supervision and reporting mechanism regarding the use of child soldiers and other abuses involving children in armed conflict. Despite being restricted to the situations that are on the Council's agenda, this mechanism does address a worrying trend in contemporary armed conflict,⁶⁹ and could serve as a model for other questions in the humanitarian domain.

A bull in a china shop

While the Security Council's incursion into the field of the protection of individuals or groups could appear necessary – or even praiseworthy – the various measures and resolutions adopted by the Council are not above criticism. In addition to the dubious results concerning the protection of victims, it has led to concepts that are extremely imprecise in legal terms, whose relationship with other regimes for the protection of the victims of armed conflict is, to say the least, somewhat unclear. On one hand, a decision by the Security Council can be a sign of cohesion on the part of the international community. For some, that can lend legitimacy to the application of pressure on the combatants with the aim of securing their co-operation and respect for the basic rules regarding the protection of the individual. On the other hand, one could question the adequacy of the Security Council in guaranteeing compliance with these values, since such a vision would make it the enforcer of humanitarian rules, taking no account of its political nature, its mandate or the effects that coercive measures could have in the humanitarian domain.

In 1945 the San Francisco Conference excluded all mention of international law from the organization's coercive mandate. The Council's powers under Chapter VII are not necessarily directed against violations of international legal obligations, so that they may be used against a state that has not breached international law, or may not be exercised in case of aggression, for instance.⁷⁰ The Council acts not as judge or jury, but rather as a police officer. The aim of its actions is to end the threat (coercion) and not to punish the failure to comply with an international obligation (responsibility);⁷¹ its procedures do not include any

66 S/Res 1208 (1998).

67 S/Res 1502 (2003).

68 S/Res 1325 (2000), for women's rights; S/Res 1738 (2006), for the rights of journalists, and *inter alia* S/Res 1661 (1999), S/Res 1314 (2000) and S/Res 1460 (2003), for the rights of children in armed conflict.

69 It is estimated that child soldiers are used in approximately 75 per cent of today's armed conflicts. United Nations, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, S/2005/740, United Nations, New York, 28 November 2005, p. 2, available at <<http://www.un.org/Docs/sc/sgrep05.htm>>.

70 Kelsen, above note 44, p. 730. Simma, above note 42, pp. 705–6.

71 1 Rosalyn Higgins, *Problems and Process: International Law and How we Use it*, Clarendon, Oxford, 2001, pp. 166–8.

provisions regarding “due process of law” and its intergovernmental character makes it difficult for non-state actors to participate in its proceedings, whereas their consent may sometimes be as important as – or more important than – that of a central government.

The actions of the Council are based not on any competence regarding the rights of the individual, but on the maintenance of international peace and security, which is not the same as the defence of international public order. The right of veto, for instance, means that any breach committed by a permanent member of the Security Council – or by any of their strategic allies – will evade action under Chapter VII. Justice is at best partial. However, the biggest obstacle to accepting such a role for the Council lies in its discretion in deciding whether a threat to international peace and security actually exists.⁷² While the conceptual framework adopted in recent years does seek to generate a consistent approach to grave humanitarian situations, the variable nature of the Council’s commitment to the defence of collective interests contrasts with the humanitarian principle that suffering be alleviated wherever it may exist.

Indeed, the expectation of perfect symbiosis between the Security Council and humanitarian agencies is at odds with the distinction between *jus in bello* and *jus ad bellum*. The Council’s mandate to maintain international peace requires debate on the respective causes of the belligerents, and can render irrelevant the question of their consent. As such, it is difficult to ensure compatibility between coercive steps taken by the Council – with the threat that failure to co-operate may lead to the use of armed force – and the fundamental principles of neutrality, impartiality and humanity that are inherent to humanitarian activity.⁷³ As has become apparent through the extensive debate on civil–military relationship in “complex situations”, the fact that humanitarian agencies are perceived by the belligerents as independent and impartial in relation to the aims of the conflict continues to be essential. This limits the extent to which these agencies can call on armed forces for protection or support.⁷⁴

The basis of humanitarian action is charity, not justice.⁷⁵ In order to ensure access to the victims of a conflict, humanitarian agencies avoid getting

72 Pierre Marie Dupuy, “A general stocktaking of the connections between the multilateral dimension of obligations and codification of the law of responsibility”, *European Journal of International Law*, Vol. 13, no. 5 (2002), p. 1068; Pierre Klein, “Responsibility for serious breaches of obligations deriving from peremptory norms of international law and United Nations law”, *European Journal of International Law*, Vol. 13, no. 5 (1999).

73 Regarding the principles of humanitarian law, see ICJ, “Military and paramilitary activities in and against Nicaragua (*Nicaragua v. United States of America*)”, ICJ Reports 1986, merits, para. 218 and “Legality of the threat or use of nuclear weapons, advisory opinion”, ICJ Reports, 1996, para. 78.

74 See *Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies (MCDA Guidelines)*, March 2003, and *Civil–Military Relationship in Complex Emergencies*, June 2004, available at <<https://www.ochaonline.un.org>>.

75 According to Jean Pictet, “One cannot be at one and the same time the champion of justice and charity. One must choose, and the ICRC has long since chosen to be the defender of charity.” See Theo C. van Boven, “Some reflections on the principle of neutrality”, in Christophe Swinarski, *Études et Essais sur le Droit International Humanitaire et sur les principes de la Croix-Rouge en l’Honneur de Jean Pictet*, Martinus Nijhoff, Geneva and The Hague, 1984, p. 647.

involved in legal questions related to *jus ad bellum*. During the Kosovo crisis in 1999, the Red Cross was able to operate in the Yugoslav zone, helping civilians affected by allied bombing and visiting NATO soldiers held prisoner in Belgrade.⁷⁶ Similarly, even if deployed according to the UN Charter, intervention against the will of the parties will not be seen as neutral and selfless, regardless of the motives that underlie it. If the situation deteriorates, this may lead almost inevitably to the use of armed force. As a result, any short-term benefit of intervention by the Security Council, such as action to protect the security of humanitarian personnel or to ensure the provision of assistance to victims, has to be weighed up in terms of the effects – present and future – on the perception of the neutrality of humanitarian action.

The inherent bias in a coercive military action undermines the ability to assist all the victims – including the victims of the multilateral military operation. As the International Court of Justice has already decided, the use of armed force cannot be considered an appropriate method of ensuring respect for the rules designed for the protection of the human person.⁷⁷ In addition to the risk of escalating a conflict, the possibility of military action may lead to an uncooperative attitude on the part of the state in which the violence is occurring, prompting the suspicion that “accepting humanitarian aid is the first step towards military intervention”.⁷⁸

Conclusions: an identity crisis

In biology, there is no risk that the organisms involved in symbiosis may fuse to the point of merging their fields of activity. However, the search for symbiosis between the action of the Security Council and efforts to provide humanitarian protection do run the risk of blurring the fundamental distinction between the maintenance of international peace and security on the one hand, and the principles and rules that govern the conduct of hostilities on the other. This lack of a clear distinction between the two fields of action has negative conceptual and practical consequences for the protection of the victims of violence.

In conceptual terms the distinction between *jus in bello* and *jus ad bellum*, the fruit of a gradual normative development, remains of the utmost importance. From a humanitarian point of view, the causes of the conflict must continue to be relegated to second place, so that its consequences can be dealt with. Otherwise,

76 At the end of March 1999 the ICRC was forced to withdraw from Kosovo for security reasons. However, because the organization was seen as neutral, it was able to resume work three weeks before the end of the conflict. Pierre Krähenbühl, “Conflict in the Balkans: human tragedies and the challenge to independent humanitarian action”, *International Review of the Red Cross*, Vol. 82, no. 837 (2000), pp. 11–29.

77 ICJ, “Military and paramilitary activities in and against Nicaragua (*Nicaragua v. United States of America*)”, ICJ Reports 1986, merits, para. 268.

78 United Nations, *Opening remarks by the Secretary-General to an International Peace Academy Symposium on Humanitarian Action*, United Nations, Press Release SG/SM/7632, November 2000.

there is a risk of politicizing humanitarian action and undermining its hard-won legitimacy.⁷⁹ The mandate of the Security Council, imprecise though it may be, delimits the conceptual domain in which it operates. Although it has dealt with such issues as the protection of civilians, giving priority to vulnerable groups and to the security of organizations that are bringing humanitarian assistance, the Council has taken no equivalent decisions on the methods of warfare, the treatment of persons detained in connection with the conflict or persons who are *hors combat*. While incursioning into the area of *jus in bello*, the Security Council has not been able to distance itself from its original *jus ad bellum* mandate and achieve the neutrality and impartiality that are inherent to humanitarian action.

The self-declared expansion of the Security Council's mandate echoes the conceptual limitations of the "just war" doctrine, whereby the treatment given to the enemy is – at best – dependent on the clemency shown by the side fighting for the just cause, and not on its legal obligations. The debates on the application of humanitarian norms to forces acting with the authorization of the Security Council reflect this conceptual ambiguity, with the risk of tolerating abuses committed by the force invested with formal multilateral legitimacy.⁸⁰ Unlike the classical "just war" theories, international rules for the protection of the individual are universal, and protect even the worst of enemies, such as those who commit genocide, acts of terror and war crimes.

In practical terms, the incursion of the Security Council into the humanitarian domain has increased the risk that warring factions will see humanitarian activity as favouring the enemy. The Council is a political body, and its acknowledged deficiencies in terms of representativeness, openness, fairness and accountability reduce the legitimacy of its decisions. Simply adding humanitarian concerns to its mandate, in the hope that good intentions will demonstrate the impartiality of its discussions or the neutrality of the troops that act under its authorization, may not convince those groups that suffer its forcible measures. The omissions and inconsistencies in its action against grave breaches of *jus in bello* – which are largely due to its original *jus ad bellum* mandate – reduce the possible dissuasive effect of its coercive powers.

As a result, the actions of the Security Council in the humanitarian domain should be limited to persuading the parties to meet their international obligations, such as allowing neutral and impartial assistance to victims and ensuring the physical safety of humanitarian agencies. Such a role is compatible with agreed military operations that should not necessarily exclude some Chapter VII powers. Coercive measures may have a detrimental effect on efforts to protect the victims, such as limiting the extent to which personnel of the United Nations and its agencies can provide impartial assistance. Therefore the independence of

79 Krähenbühl, above note 76, p. 18. Anne Ryniker, "The ICRC's position on "humanitarian intervention"", *International Review of the Red Cross*, Vol. 83, no. 842 (2001), pp. 527–32.

80 See "Application of international humanitarian law and international human rights law to UN-mandated forces: report on the expert meeting on multinational peace operations", *International Review of the Red Cross*, Vol. 84, no. 853 (2004), pp. 207–12.

strictly humanitarian agencies acquires fundamental importance as a means of ensuring that no party to the conflict perceives them as a threat.

Rather than assuming functions proper to humanitarian agency, the Security Council should take determined action against threats to international peace and security, including preventive action that aims, whenever possible, to prevent violence from breaking out.⁸¹ When an armed conflict occurs, the Council should use the full range of powers conferred on it by the Charter to restore international peace, by facilitating dialogue between the belligerents, negotiating truces or supporting innovative solutions.

The question is not whether it is right to undertake military action in extreme cases. It may be necessary for the Security Council to use coercive armed force in cases of systematic, widespread violations of human rights and humanitarian law. In situations such as genocide or crimes against humanity, the neutrality and impartiality of *jus in bello* lose their meaning, as they run counter to the primary objective of protecting the victims of the conflict. One has to recognize that in such cases humanitarian action has reached its limits.⁸² Such a decision must be taken in terms of *jus ad bellum*: political and military action aimed at dealing with the causes of the conflict, as opposed to humanitarian action – palliative by definition – aimed at dealing with its effects.⁸³ Above all, it is important to ensure that “humanitarianism” does not become an excuse for political inaction, because of the difficulty of resolving the underlying causes of the violence, to the detriment both of international peace and the declared objectives.

81 See United Nations, *Progress Report on the Prevention of Armed Conflict*, A/60/891, United Nations, New York, 18 July 2006.

82 United Nations, “*There Can be no Neutrality in the Face of Genocide.*” *Report of the Independent Inquiry into the Actions of the UN during the 1994 Genocide in Rwanda*, S/1999/1257, United Nations, New York, p. 33. See Boven, above note 75, pp. 648 ff. André Pasquier, “Humanitarian action: constructing legitimacy”, *International Review of the Red Cross*, Vol. 83, no. 842 (2001), pp. 311–22.

83 Sandoz, above note 40. See Jakob Kellenberger, *Protection of Civilians in Armed Conflict*, *Statement of the President of the ICRC to the UN Security Council*, 19 April 2000, available at <<http://www.icrc.org>> (last visited 29 September 2003); Aurélio Viotti, *Ações Humanitárias pelo Conselho de Segurança: entre a Cruz Vermelha e Clausewitz*, Funag, Brasília, 2005.



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France, War 1914–1918. Champagne. First aid on the front line.



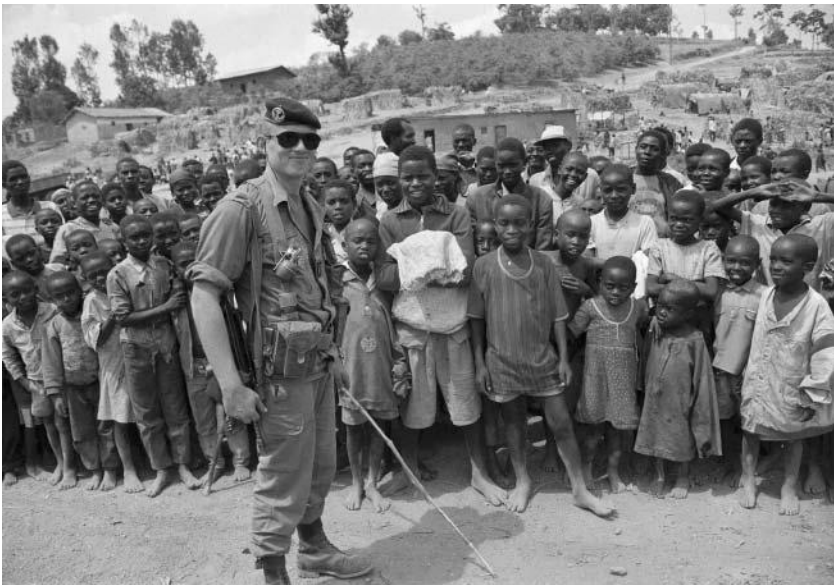
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Guinea, Conakry, 06/03/2003. Arrival and welcoming of more than 1.400 Guinean nationals fleeing violence in the Ivory Coast. Since the beginning of the conflict, thousands of civilians have been killed, millions have been internally displaced and about 400.000, have fled to neighbour countries.



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Iraq, Baghdad, 11/2003. Palestinian refugees camp.



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Rwanda, Gikongoro, 27 July 1994: A French peacekeeping soldier protecting a camp in Gikongoro.



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Macedonia, Stenkovec 2 camp, 16/04/1999. Refugees waiting to be transferred to other camps. Built by the French army around 12 km from Skopje, this camp shelters 10,000 refugees from Kosovo.



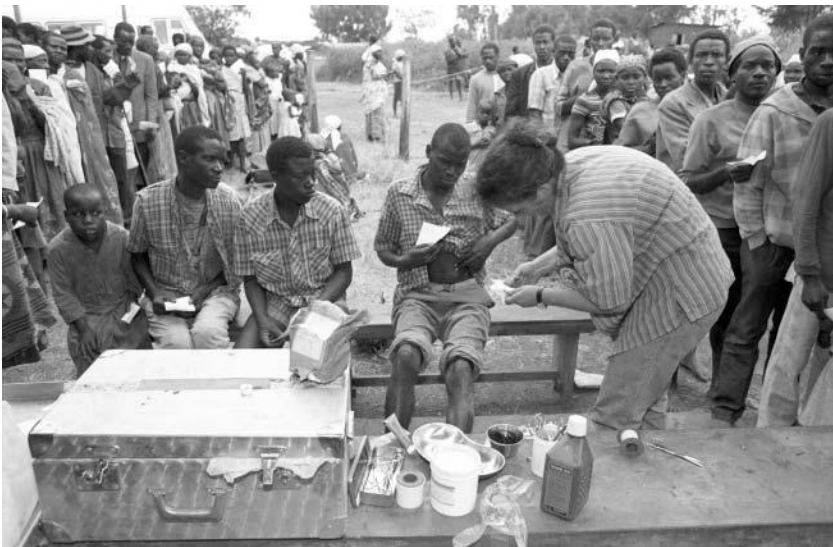
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Afghanistan, Ghor province, 11/2002. Preparing for an ICRC food distribution to vulnerable families.



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Indonesia, Papua, Merauke camp for displaced persons, 2005. An ICRC water point provides clean water for drinking and household needs.



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Rwanda, Nyagahita, 01/08/1993. Mobile Clinic.



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Liberia, Monrovia, 2006. Central prison. The ICRC interviews all detainees falling within its mandate in a given place of detention. Visiting security detainees on a regular basis helps ensure they receive acceptable treatment and helps prevent disappearances.



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Liberia, Lofa county, Barkedou, 2006. ICRC employee explaining the role of the tracing agency: reuniting families split up by the turmoil of armed conflict.



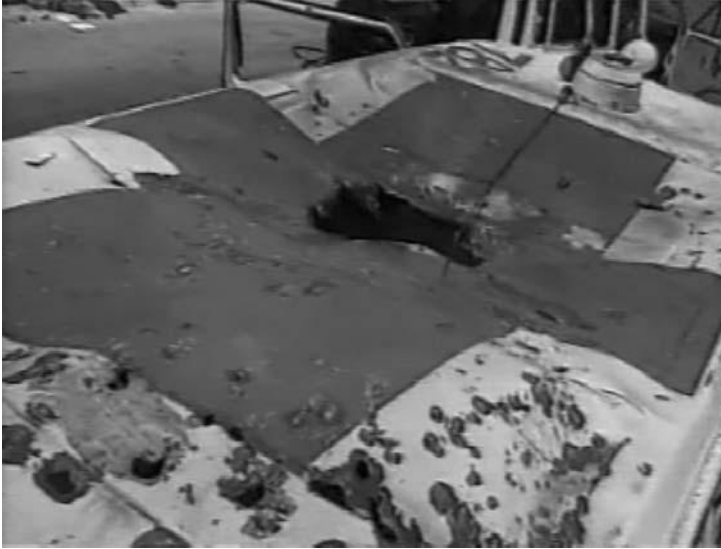
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Thailande/Cambodia, Site B refugee camp, 1988. Father just received Red Cross message from son. In a wide range of contexts, the ICRC has given prisoners of war, civilian internees, security detainees and sometimes even ordinary detainees the opportunity to communicate with their relatives.



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Nairobi. Dissemination to the paramilitary General Service Unit (GSU) of the Kenya Police. Police officer with an ICRC leaflet.



<http://www.icrc.org/Web/eng/siteeng0.nsf/iwplist5771FE66CF8A9A9FEF2C12571B5005F59A0>
 (AP Photo)

Cana, a village in southern Lebanon, 23 July. According to Lebanese Red Cross reports, two of its ambulances were struck by munitions, although both vehicles were clearly marked by the red cross emblem and flashing lights that were visible at a great distance. The incident happened while first-aid workers were transferring wounded patients from one ambulance to another. As a result, nine people including six Red Cross volunteers were wounded.



Today, there is a wide range of humanitarian actors, identifying themselves with a variety of emblems.