

## THE SECURITY COUNCIL AND HUMAN RIGHTS

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The Security Council is maybe the least obvious organ within the United Nations to have a human rights role, yet it is also arguably one of those that can make the most difference – both positive and negative - when it comes to the upholding of human rights standards.<sup>1</sup> This initial paradox will provide much of the background for this chapter's analysis of the Council's role in furthering human rights.

There is what I would call a 'Gulliver and the Lilliputians' quality to the Security Council's encounter with human rights. The Council's 'height' and the broadness of its panoramic vision can easily render it oblivious to the swarming masses – make them look more like a theoretical construct than individuals of flesh and blood – not to mention the fate of particular individuals among them. Because of the considerable power that the Council wields, it can have a very decisive effect on human beings. The smallest decision of the Council can, through the amplified force of its arm, have considerable repercussions.

Of late, the Lilliputians have become increasingly interested in harnessing the power of Gulliver to guarantee their rights, or at least to minimize the extent to which he can affect them negatively. But the Security Council is, like all giants, rather hard to move in the first place, and possibly just a little dangerous when it does. Will the Lilliputians manage to rein him in? Or will it be for Gulliver to learn to self-constrain itself? Can the bounds of law ever restrain it, or will changes in Security Council policy always be dependent on the more or less enlightened nature of its politics? Might human rights be better off altogether if the Security Council ignored them?

Behind these questions lie four key analytical variables which uniquely influence the Council's ability and willingness to deal with human rights issues: the Council's *nature*, its *mandate*, its *means*, and its *power*.

First, in terms of its *nature*, the Security Council is not only an organ composed of states, it is also composed at any moment of only a fraction of states, and within those it knows (uniquely, within the UN) of a category of privileged members (the permanent members). This surely affects its ability and willingness to take on human rights considerations (I). Second, even if it were organically more prone to commit to human rights, the Council is functionally limited in what it can hope to achieve because of its limited *mandate*. The Security Council is the body entrusted with the maintenance of international peace and security, a concept whose ties with human rights are, at least to begin with, far from obvious (II). Third, the Council may decide to incorporate human rights as one of the *means* that allow it to discharge its mandate. This has probably been a very significant development in the Council's work, although one can see how it also contains a risk of

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<sup>1</sup> Strikingly, under the 'human rights bodies' section of the High Commissioner for Human Rights' website, every single body examined in this book (and a few others) is listed, but not the Security Council (<http://www.ohchr.org/english/bodies/index.htm>).

instrumentalization (III). Fourthly, a new and very different category of problems has emerged resulting from the Council's sheer *power*, and the risks it portends for the respect of human rights in a world of failing states, increasingly powerful non-state actors, and potentially rein-free global governance (IV).

A methodological point is in order. In this chapter, I will be as much interested in intention as results. One take the approach that "it does not matter what the Security Council says it is doing, only results matter". I find that statement too simplistic. True enough, output is a good indication of whether the statements were purely rhetorical or not – but there may be all kinds of reasons why a Security Council program of action in a particular case would fail, not all of which are attributable to lack of will or even bad faith. On the contrary, I believe, without lapsing into formalism, that what the Council *says* it is doing is essential to understanding what it does – and is, in fact, part of what it does. In that respect, the Council is not merely an operational body. It is also, albeit in complicated ways, a *normative* body that interprets, processes norms, and as a result creates and maintains a number of expectations about what its future behaviour will be, what its goals are, and what the decisive norms of the international legal order are.

## A. The Council's Nature

I cannot go in any detail in the internal politics of the Council, and only want to underline a few salient features, outside its mandate, that have historically conditioned its capacity to incorporate human rights concerns.

### ***I. The Council's functioning***

The Council can hold sessions outside its New York seat but, for the most part, does hold its meetings at UN Headquarters. This certainly keeps it at a distance from where the centre of gravity of the UN's human rights activities is, namely in the UN's Geneva office. One of the advantages of the Security Council is that it exists in continuous session. That makes it a uniquely reactive body, something which it of course it owes mostly to its role as enforcer of international peace and security, but which can be crucial during major human rights crises, and which is different than much of the UN's human rights machinery. This has also made it a particularly active body, especially since the end of the Cold War.

On the other hand, the fact that for many decades, the sessions were typically held behind closed doors made many of its debates inscrutable and probably did not generally favour the taking into account of human rights issues. It is only in the beginning of the twenty-first century, that the Council has begun holding more public sessions. Although this was not a move primarily undertaken to favour the incorporation of human rights,<sup>2</sup> it is nonetheless a change of policy which, in creating more transparency, can only bolster the Council's accountability, and has probably improved the penetration of human rights concerns.

The Security Council is composed of 15 member states. Five of the Council's seats are for permanent members, the permanent members being China, France, Russia, the United

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<sup>2</sup> There are probably many reasons, but one of the most oft-cited is the fact that a number of troop-contributing states who were not permanent Council members were becoming impatient with the fact that they had very little access to decisions that would end up affecting their troops directly.

Kingdom and the United States. Russia's seat used to be held by the Soviet Union. The 10 other seats are for so-called elected members. These are elected for two-year terms according to the system of regional groups (which ensures a certain representativity), and confirmed by the General Assembly.

Resolutions have to be adopted by a majority. However, permanent members wield a disproportionate amount of power since, according to article 27 of the Charter, they hold a right of veto. No human rights language or initiative therefore, can get underway without the assent, or at least the abstention, of all permanent members. A positive development in this respect is that the use of the veto has gone down dramatically since the end of the Cold War. The softening of the Soviet and Chinese vetoes, in particular, has made it easier to experiment with novel policies and ways to implement them, including human rights. As a result of the continued existence of the veto power (and the rise of its use by the US), however, it remains extremely unlikely that a human rights initiative targeting a permanent member or one of its close allies would not be struck down.<sup>3</sup> It is to be noted, nonetheless, that a 'country situation' can be put on the Council's agenda by a nine member majority, with no possibility of veto. This has occasionally allowed a majority at the Council to at least bring the situation of certain countries up for discussion, even though it was very unlikely that a resolution could be adopted given the opposition of a permanent member. Putting a country situation on the agenda because of human rights concerns can in and of itself send a signal to the regime involved.

Indeed, it is crucial to note that the Security Council is dominated by big powers. One of the common trait of the Council members (perhaps its lowest common denominators) is that they are all official nuclear weapons holders under the Nuclear Non-Proliferation Treaty. The intense power concentration of the Council can be both a help and a hindrance to human rights. It can be a help because, to the extent they can come to agreement, the Council collectively wields considerable power, both political, military and economic. When it throws its full weight behind enforcement action, for example, as it did in the Korean War or the First Gulf War, the Council is an indispensable guarantor not only of international peace and security, but also, arguably, of international legality.

The intensity of the geopolitical interests, however, is also what has made the Council a stage for intense rivalry and distrust. Apart from a few cases such as the almost universal condemnation of the Apartheid regime, the Security Council remained mostly aloof from human right during the Cold War as a result of superpower rivalry. Although the dynamics have changed since the end of the Cold War, rivalry between various combinations of permanent members is still a constant feature of Security Council politics, and it is not hard to see the potential it has to overshadow human rights crises.

In addition to being big (or relatively big) powers, permanent members have historically had very different attitudes to human rights at home and, accordingly, to the role that human rights should have in their foreign policy (both bilateral and multilateral) and internationally. I cannot go in any detail as to the human rights practices of each permanent members but, for example, during the Cold War, the Soviet Union adamantly stood for the view that human rights were a matter entirely within the domestic purview of states. Today, China and Russia have taken a leading role in fending off human rights scrutiny as a matter

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<sup>3</sup> It is important in this respect to see the veto as as much a sociological as a legal constraint. For all uses of the veto, there are innumerable instances where resolutions were not even conceived of because of the certainty that they would be exposed to the veto. The existence of the veto is thus a structuring and implicit constraint on all the activity of the Council to the extent it is internalized by all involved political actors, beyond its actual uses.

of principle,<sup>4</sup> although that is not to say that other members will take lightly scrutiny that might affect them or some of the close allies.

It should also be mentioned that ordinary members have often had a role in tilting the balance towards a majority, especially in cases where this is likely to be decisive, i.e. when there is no threat of veto. Although it is in the nature of ordinary members that they change regularly, some significant segments of the international community stand out. For many decades during the Cold War, a great many states sided systematically with the Soviet Union or the US, leading to an acutely polarized situation at the Council. The non-aligned group, however, was susceptible to throw its weight either way. The Third World did often resist increased human rights scrutiny from the Council, and has tended to do so to this day, particularly in the context of the so-called 'Responsibility to protect'.

It is noteworthy, however, that in recent years, a number of African states have become much more vocal about the need for the UN to intervene in certain dire humanitarian situations. Debates on Sudan in 2006, for example, saw states like Ghana (who was at the time a member of the Council), which in the past had tended to see humanitarian and rights based intervention as a form of colonialism, were quite willing to endorse the principle of strong UN involvement. A greater willingness to break regional ranks is also evident in Asia, where some ASEAN states have gone on the record to say that they would not automatically shield Myanmar from Council sanctions.

Council reform has been discussed for much of its existence, although it has only seriously been on the UN agenda since the mid-1990s. Central to that reform is the possibility of extending the Council's membership. Brazil, Germany, India and Japan have made some of the most notable bids for seats. Kofi Annan proposed two options for extension, a Plan A which would create six new permanent members and 3 non-permanent ones, and Plan B which would create a new class of members who would serve for four years plus one non-permanent seat. In both cases the total membership would pass from 15 to 24. It does not seem that human rights have featured prominently at all on talk about SC reform, which seems principally based on political considerations, and the need to have a Council that is more representative of the contemporaneous reality. The increase in membership could play out in a variety of unforeseen ways when it comes to human rights, and it is very hard to anticipate what the consequences might be. At least, though, neither plan anticipates an extension of the veto power, something which would have made strong human rights initiatives even more improbable.

## ***II. Openness to Civil Society***

More relevant to the Council's evolving human rights inclinations are its attitude to external voices, particularly civil society. If there has been one forum within the UN that has strictly closed its doors to NGOs (including human rights NGOs) historically, it is the Security Council. The Council was above all and saw itself as a meeting of states, powerful states at that, engaged in the characteristically elevated inter-state activity of maintaining international peace and security. Although the UN might consult NGOs on matters that

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<sup>4</sup> Indeed, on the 13<sup>th</sup> January 2007, China and Russia both vetoed a resolution that would have sanctioned Myanmar's human rights record, the first time since 1972 that these two countries had simultaneously done so. This suggests the possible emergence of an 'anti-human rights scrutiny front' at the Security Council which could substantially compromise efforts to adopt resolutions condemning human rights practices.

seemed intimately tied to the organization of society – issues of health, labor, social policy and even human rights – international peace and security was certainly not an issue on which civil society was seen as having anything to contribute.

The end of the Cold War, however, was to gradually change that rigid attitude. NGOs slowly found several ways to bear on Council debates. The implication of many NGOs in many of the same contexts that the Security Council was involved in (which included, increasingly, non-international conflict situations), their interaction with various peacekeeping forces on the ground, their substantial field experience and access to information, and their increasing global legitimacy also meant that they could not be so easily brushed off. Conversely, NGOs themselves probably came to see more than ever the importance of working to influence the Council, particularly after a number of spectacular Council failures with catastrophic human rights consequences (the Rwandan genocide being no doubt the prime example). Even though influencing the Council might seem a tall order, not trying was not really an option given the stakes.

Of course, bringing in the NGOs may have been seen as largely a public relations manoeuvre for Council members keen on rekindling the body's prestige and legitimacy, even possibly a distraction from the much more fundamental issue of increasing membership. It nonetheless opened the way to a much more complex process of interaction between the Council and international civil society, where the latter has increasingly come to be seen, if not quite like a partner, at least like a voice to be reckoned with.

Concretely NGOs have become fairly prominent in the Council through several routes. The easier one was to have the attention of one or several delegations. One of them was simply through the provision of expertise to some of the smaller delegations in the Council, several of which were avid for information and ideas that could help them assume their role. But even some of the relatively bigger delegations (Portugal, Chile, Sweden) and some of the permanent Council members came to see consultation with NGOs as more generally part of the formulation of their foreign policy and gradually began the process of opening doors to the Council. During the genocide in Rwanda, for example, some ambassadors sought leading NGOs' advice. Bilateral meetings between NGOs and one member of the Council became quite common by the late 1990s.

Interaction with specific delegations, however, was no substitute for engaging the Council directly *qua* institution. Several NGOs began moving slowly towards that goal. The ICRC, always a relative favourite of states, had set up an office in New York as early as the 1980s. More activist NGOs with a human rights mandate such as Amnesty International made an appearance later. More importantly, NGOs began organizing themselves collectively to make a difference through such mechanisms as the NGO Working Group on the Security Council (which today includes such human rights NGOs as Amnesty and Human Rights Watch), a coalition of about 30 NGOs originally created in 1995 to influence the reform agenda, emphasizing transparency and accountability. The Working Group provided a much needed visibility for NGOs and soon became a regular interlocutor with the Council. Although not without initial reluctance, the Council eventually agreed that Council ambassadors should be free to regularly meet with the WG, although only in their national capacity and to the exclusion of the President of the Council. Eventually the meetings became a regular exercise of public "briefing" of the WG

A breakthrough eventually came out of a process of experimentation with what is known as the Arria formula. The Arria formula, from the name of the then Venezuelan ambassador at the Council, had been devised in 1993 as a way to hear voices outside the

Council, but had originally been reserved for senior political leaders. Humanitarian organizations were the first to benefit from that privileged channel. Indeed, typically the Council is more interested in humanitarian issues than strictly human rights ones (even though the former has a bearing on the latter). In 1997, however, the human rights community's engagement with the Council reached an early high point when Pierre Sané, the Secretary-General of Amnesty International, was invited at a meeting of the Council. Complex politics of space and decorum were involved. The idea of the meeting had initially been met with resistance by some Council members (including, reportedly, the UK), but a compromise solution was found (the so-called "modified Arria formula") whereby the meeting would not take place in the normal Council room but in a different chamber, and without interpretation: a rather petty manifestation of statist superiority, but nonetheless a compromise that made the meeting possible. Perhaps one of the highlights of Security Council- NGO relationship with an impact on human rights was Global Witness's 1998 report revealing the way in which the diamonds trade in Angola was financing UNITA forces. A clear link was drawn in the report between violations of human rights by UNITA and international peace and security.<sup>5</sup> Global Witness was invited to brief the Council's Angola sanctions committee, and it seems very likely that the toughened sanctions regime that emerged in the wake of the briefing was largely attributable to the report.

This is not to say that the Security Council now routinely interacts with NGOs, particularly human rights NGOs. Most highly sensitive issues geopolitically would not be susceptible to NGO briefings. The fact that the Council hears NGOs hardly means that it listens to them, and there is always a risk that NGO briefings will become set exercises leading to very little in terms of policy orientation. But several leading human rights NGOs, including Amnesty International, Human Rights Watch, the International Center for Transitional Justice, alongside a variety of grass root NGOs with rights agendas and many women's organizations, have had a handful of opportunities to make their case directly to the Council. A crucial channel of communication has been set up which may prove very significant in certain circumstances, and sheds light on the Council's changing sensitivity to human rights matters.

An interesting spin-off of the Arria formula, apart from greater contacts with NGOs, is that parts of the UN with a rights mandate have occasionally been invited in Council meetings to contribute some of their expertise. For example, Louis Joinet, the Independent Expert appointed by the Secretary-General on the situation of human rights in Haiti, gave the introductory remarks during an Arria on the Council's Mission to Haiti. The High Commissioner on Human Rights has also been increasingly active in briefing the Security Council<sup>6</sup>, and there have been calls for her to do so more often.

## II. Human Rights as an End: Redefining International Peace and Security.

The relationship between the Security Council and human rights is one that is rooted in the UN Charter, the UN's institutional balance, as well as some of the dominant assumptions that structured international relations and law after the Second World War. It is a relationship that has evolved tremendously in the last fifty years, alongside the more general evolution of the UN and the Council itself. It is, as a result, a relationship that is complex,

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<sup>5</sup> Global Witness, *A Rough Trade: the Role of Companies* (1998).

<sup>66</sup> See, for example, *Security Council Briefed on Urgency of Ending Human Rights Violations, Culture of Impunity in Democratic Republic of Congo*, Press Release SC/7662, 13<sup>th</sup> February 2003.

elusive and fluid and most attempts to impose too rigid a conceptual framework on it are probably bound to fail.

Behind the institutional framework lie some very central ideas about the international order, and in particular the relative roles of power, sovereignty, justice, rights and the law. As is well known, the Charter seeks to strike a balance between some of these conflicting notions. The heart of the system is that it must both validate a certain vision of international order, while ideally incorporating enough flexibility to adapt to changes.

Given the way in which the Second World War and the Nuremberg Tribunal had highlighted the interrelatedness of war and human rights violations, one could have thought that the UN would adopt a more holistic approach to both problems. Instead, the UN structure was based very much on a clear functionalist division of labour, with each body allotted a specific responsibility and the specific powers that went with it. The Council was thus created to deal with the problem of threats and breaches to international peace and security. The first paragraph of Article 1 in the Charter, for example, which sets forth conditions for peace and security, does not refer to human rights (although it does mention 'conformity with the principles of justice and international law'). That the Council had as its primary task international peace and security, in turn, meant that it could absolutely not become involved in human rights. Indeed, at least originally the concept of international peace and security was and could only be defined in a very narrow way, namely as entailing an armed conflict between states. This is easy to understand in light of the enduring significance of the concept of sovereignty.

In conceptual terms, protecting international peace and security was not seen as necessarily exclusive of the defence of human rights. The dominant perception emerging from Nuremberg was that there was probably no greater threat to human rights than cataclysmic inter-state conflagrations, so that the averting of war and the maintenance of peace could be presented as realizing one of the primary conditions for human rights to be at least conceivable. But averting war was seen as a task analytically and politically wholly distinct from that of promoting rights.

The Council's exceptional power by Charter standards, were conferred upon it based upon that narrow understanding. In granting the Security Council the legal power to impose binding decisions on all member States and, if necessary, economic and military sanctions, the Charter conferred unprecedented authority on a small group of States. Member States, large and small, did not envisage this grant of power as leading to nascent world government. The prevailing metaphor at the time likened the Council to a police officer, empowered to act when necessary in specific disputes or situations that endangered or breached international peace and security. Governments did not expect the Council to regulate international relations or to provide remedies for the pervasive ills of the world, even though they might otherwise have recognised that some of those ills formed the underlying causes of international violence and insecurity.

The very concentration of legal power in the Security Council, moreover, made it an unacceptable body to deal with the wide range of problems - economic, social, political - that called for international attention. Those underlying causes of war and insecurity were left to the General Assembly and the other United Nations organs, which could rely only on recommendatory powers backed by the persuasive force of perceived common interests and political bargaining. It was anticipated that States would voluntarily agree to assume obligations through treaties or unilateral undertakings in response to collective recommendations. Human rights, as envisaged by the sparse general references in the

Charter, fell into this category. Within this perspective, it is not surprising that the Security Council was the one organ not accorded a role in the development and implementation of human rights.

However, this 'logical' division of responsibilities under the Charter turned out to be difficult to sustain in practice on the long run as the importance of human rights grew, threats to international peace and security evolved, and challenges to the Council rose. The end of the Cold-War, in particular, by removing some of the ideological obstacles which had blocked the taking into account of human rights, precipitated a renewed interest by the Security Council in the issue.

To begin with, and still in large part to this day, the only way that human rights could enter Security Council debate was through the idea of a breach or threat to international peace and security. The definition of such a breach or threat thus became the locus of intense symbolic, conceptual and political battles. Of course, what constitutes a breach or threat to international peace and security had always left quite open to Council interpretation. Moreover, there has hardly ever been any sense that this meaning is cast in stone, or that it should be mechanically deduced from first legal principles. To a remarkable extent, international peace and security has been and is "what the Council says it is". The inherent fluidity of the notion is what ultimately left it open to increasing human rights interpretations.

The Security Council's justifications of its enforcement actions and the qualification of what constitute threats or breaches to international peace and security are complex matters, and any given intervention may be justified on several subtly overlapping grounds. Aside from the issue of whether the Security Council does or should respect its own 'precedents', this makes it difficult to discern clear patterns in a fluid international environment where geo-strategic considerations often overshadow the search for anything like legal systematicity. The redefinition of international peace and security as entailing at least some human rights can nonetheless be said to have followed four principal axes: racist regimes, the disruption of democracy, humanitarian crises, and the commission of certain international crimes.

## ***I. Racist Regimes***

Until the 1990s, the Security Council's strongest condemnations of human rights violations were directed against the minority racist governments in southern Africa. In 1960, the Council called on South Africa 'to abandon its policies of apartheid and racial discrimination'<sup>7</sup>. Three years later it adopted two resolutions that were without precedent. The first called on States to voluntarily embargo arms to South Africa<sup>8</sup> and appealed to South Africa to liberate all persons imprisoned or subject to other restrictions due to their opposition to apartheid. Soon thereafter the Council adopted a second resolution which recognised the need to eliminate discrimination with respect to human rights and fundamental freedoms for all individuals in South Africa, without regard to race, sex, language, or religion<sup>9</sup>. This was in all probability only the second time the Council had used the term 'human rights' in its resolutions.

In 1970, the Council warned the South African government that the continuation of apartheid,

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<sup>7</sup> S/RES/134 (1960); the Council did, however, only state that South Africa's racist policies constituted a 'disturbance' of peace and security; it should also be noted that, at that point, the General Assembly had already been condemning the apartheid regime for many years, its first resolution stemming from 1949 (44(I)).

<sup>8</sup> S/RES/181 (1963)

<sup>9</sup> S/RES/182 (1963).

together with the expansion of its military, constituted a potential threat to international peace and security<sup>10</sup>, and in 1976, following the Soweto uprising, it called the racial unrest in itself such a threat<sup>11</sup>. Finally, in 1977, the Council imposed an arms embargo on South Africa, using its Chapter VII authority for the first time in relation to an internal crisis consisting of what it qualified as massive human rights violations by a government against its people<sup>12</sup>.

In the years following this break-through resolution, the Council continued to adopt numerous resolutions directed against apartheid in South Africa. In many of these, it called for a range of human rights-oriented actions. It demanded amnesties, a renouncement of executions, an end to political trials, and called for the provision of equal education for all South Africans<sup>13</sup>. In 1984, it denounced the 'new' South African constitution and declared elections for particular racial groups null and void<sup>14</sup>. Although these Council resolutions were not accepted by the apartheid regime, they formed a notable contribution to the international campaign against apartheid, which contributed to its overthrow in 1994.

The only other State that was subject to such open criticism regarding its human rights practices was Southern Rhodesia, another openly racist regime. Following Ian Smith's Unilateral Declaration of Independence in 1965, the Council condemned this act 'by a racist minority' and urged States not to recognize or assist the new illegal regime<sup>15</sup>. Shortly thereafter, the Council adopted resolution 217 (1965) in which it warned that a continuation of the illegal regime would constitute a threat to international peace and security and called for a voluntary oil and arms embargo; it followed suit in its resolution 221 (1966) declaring that the situation in Southern Rhodesia did, indeed, constitute such a threat and also authorised the country's administering power, the United Kingdom, to use force, if necessary, to prevent circumvention of the oil embargo.

The Council then went on to impose binding economic sanctions under Chapter VII powers and reiterated that the persisting situation constituted a threat to international peace and security<sup>16</sup>. Until the regime was ousted, the Council, as in the case of South Africa, continued to condemn specific human rights violations<sup>17</sup>, and reaffirmed the right of the people of Southern Rhodesia to self-determination.

The Security Council's decisions against these two racist regimes received wide support from the UN membership and from world opinion. Some dissenting views questioned whether the two situations should have been properly treated as threats to international peace and security. However, the situation in South Africa was generally perceived by international lawyers as constituting a threat to international peace and security either in itself or because it lead to a threat or use of armed force across national borders.

It is important to note, however, that the Council has never again so unequivocally

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<sup>10</sup> S/RES/282 (1970)

<sup>11</sup> S/RES/392 (1976)

<sup>12</sup> S/RES/418 (1977); it called South Africa's policies and acts to be 'fraught with danger' as regards international peace and security, and based its argument on both the 'massive violence against, and killings of the African people', as well as its 'military build-up and its persistent acts of aggression against neighbouring states'

<sup>13</sup> See for example: S/RES/191 (1964); S/RES/417 (1977); S/RES/473 (1980).

<sup>14</sup> S/RES/554 (1984); for further documentation, see *The United Nations and Apartheid, 1948-1994, The United Nations Blue Book Series*, Volume I (1994).

<sup>15</sup> S/RES/216 (1965).

<sup>16</sup> S/RES/232 (1966)

<sup>17</sup> See for example S/RES/445 (1979): 'Indignant at the continued executions by the illegal regime ... of persons sentenced under repressive laws' and 'reaffirming the inalienable right of the people of Southern Rhodesia (Zimbabwe) to self-determination...' and S/RES/463 (1980), calling for the release of all political prisoners.

linked racism to threats to international peace and security – despite a number of cases where it could arguably have done so. One might have thought, for example, that the situation prevalent in Kosovo during the 1990s, with its enforced separation of Serb and ethnic Albanian populations, might have qualified as a situation akin to apartheid, yet at no time was it described as such by the Security Council. This suggests that the whole series of initiatives taken by the Security Council in relation to South Africa and, to a lesser extent, Namibia, are better analyzed as a product and the particularly intense political mobilization, than as the preliminaries to a real trend whereby the Security Council systematically reacts strongly to situations of racism. It must be said that the South African and Namibian regimes were also peculiar in that they were quite explicitly and formally constituted as racist states, providing an exceptionally clear-cut case for Security Council intervention.

Nonetheless, the legacy of the UN's treatment of the Apartheid question is that for the first time a situation involving essentially the treatment of its own citizens by a state was articulated as a threat to international peace and security. This provided the conceptual breakthrough for further forays by the Council into behaviour that would traditionally have been considered entirely domestic. Future rights oriented action of the Security Council would employ very much the same channel, albeit in slightly different ways.

## ***II. Promoting democracy***

The right of people to choose their governments through democratic processes is recognised in Article 21 of the Universal Declaration and in Article 25 of the International Covenant on Civil and Political Rights. Furthermore, there is a strong conceptual and empirical link between human rights and democracy, so that much of the UN's action in favour of democracy can also be analyzed as furthering certain human rights.

Although the Security Council has not specifically referred to these articles, it has recognised in a number of cases that 'the will of the people' may be a factor in maintaining international peace and security. The idea that international peace could be endangered by a non-democratic regime already appeared implicitly in a 1946 Security Council's resolution which condemned the Franco dictatorship in Spain as a potential danger to international peace<sup>18</sup>. This was, however, a peculiar case, because of Franco's ideological association with Axis States. It is really only much later in its history that the Security Council began describing certain denials of democracy as threats to international peace and security.

For a long time, invocations of democracy were restricted to conflicts involving territorial disputes between States. The Council, for example, called for a popular vote – a plebiscite or referendum –, in the Kashmir dispute between India and Pakistan<sup>19</sup> and the Western Sahara dispute between Morocco and Polisario<sup>20</sup>. When Argentina invaded the Falkland Islands (Malvinas), the Council did not request a referendum of the inhabitants (who were almost entirely British), but some members of the Council did stress that the principle of self-determination required a decision of the people, and its call for the withdrawal of the Argentine forces seemed to be at least partially premised on exactly such a right<sup>21</sup>.

In these cases, the link between disrespect of a people's right to choose their government and the existence of a threat to international peace and security fell well within a

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<sup>18</sup> S/RES/4 (1946).

<sup>19</sup> S/RES/47 (1948).

<sup>20</sup> S/RES/690 (1991).

<sup>21</sup> S/PV.2364, at 21, 23-26.

conventional inter-state matrix. But the Security Council has since gone a step further by considering that purely internal disruptions of democracy might in themselves constitute a threat to international peace and security. Generally speaking it is a noteworthy fact in itself that denunciations of 'governmental illegitimacy'<sup>22</sup> or, conversely, highlighting the need for<sup>23</sup> or praising the holding of<sup>24</sup>, 'free, fair and democratic' have become fairly routine in Security Council resolutions.

The concept of democratic intervention is a contentious one in itself<sup>25</sup>, and the notion that the Security Council could become the prime locus for the restoration of democracy is even more so<sup>26</sup>. Notwithstanding, and although clearly the Security Council has not and will not always take strong action to defend democracy, it has shown itself ready to do so in certain special circumstances. Haiti stands out as a *cas d'école* of Security Council sponsored 'democratic intervention' in the 1990s, even though it has hardly set a trend.

The newly elected President, Jean-Bertrand Aristide, had been ousted following a *coup d'Etat*. After it became clear that the military were not going to allow Aristide to come back to power, the Security Council imposed a drastic embargo<sup>27</sup>. A number of States had sought to prevent the issue from even featuring on the Council's agenda and both China and Brazil expressed their concern that intervention to restore democracy exceeded the boundaries of what constitutes a threat to international peace and security, a view that probably reflected that of many UN members at the time<sup>28</sup>. This did force the US, as the prime sponsor of Resolution 940, to frame it so that it would not be the absence of democracy directly which was described as a threat to international peace and security, but the outward flow of refugee and impending humanitarian crisis it might cause on security in the region<sup>29</sup>.

The Council eventually authorised member States to form a multilateral force under unified command and control to employ all necessary means to facilitate the departure from Haiti of the military leadership and the restoration of the legitimately elected authorities<sup>30</sup>.

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<sup>22</sup> See, for example, S/RES/1287 (2000) (considering 'unacceptable and illegitimate the holding of self-styled elections and referendum in Abkhazia, Georgia'); S/PRST/1996/31 ('condemning any attempt to overthrow the legitimate Government of Burundi by force or *coup d'état*').

<sup>23</sup> S/RES/1206 (1998); S/RES/1216 (1998); S/RES/1233 (1999), par. 6; S/RES/1234 (1999), par. 4-5.

<sup>24</sup> S/RES/1230 (1999); S/RES/1271 (1999); S/RES/1274 (1999).

<sup>25</sup> See Farer, 'Collectively Defending Democracy in a World of Sovereign States: The Western Hemisphere's Prospect', 15 *Hum. Rts. Q.* 716 (1993); Carothers, 'Empirical Perspectives on the Emerging Norm of Democracy in International Law', 86 *Am. Soc'y Int'l Proc.* 261 (1992); Cerna, 'Universal Democracy: An International Legal Right or the Pipe Dream of the West?', 27 *N.Y.U. J. Int'l L. & Pol.* 289 (1995); D'Amato, 'The Invasion of Panama Was a Lawful Response to Tyranny', 84 *Am. J. Int'l L.* 516, 520 (1990); Franck, 'The Emerging Right to Democratic Governance', 89 *Am. J. Int'l L.* 46 (1992); Fox, 'The Right of Political Participation in International Law', 17 *Yale J. Int'l L.* 539 (1992).

<sup>26</sup> Donoho, 'Evolution or Expediency: The United Nations Response to the Disruption of Democracy', 29 *Cornell Int'l L.J.* 329 (1996).

<sup>27</sup> S/RES/841 (1993), S/RES/873 (1993), S/RES/875 (1993) and S/RES/917 (1994).

<sup>28</sup> Corten, 'La Résolution 940 du Conseil de sécurité autorisant une intervention militaire en Haiti', 6 *EJIL* 116-33 (1995).

<sup>29</sup> The debate is made more confusing by the fact that some authors have considered that interventions to restore democracy should rightly qualify as 'humanitarian interventions'. Fielding, 'Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy', 5 *Duke J. Comp. & Int'l L.* 329, 374 (1995). This attempt to collapse different categories of intervention probably obscures the problem rather than clarifies it. See Ruth E. Gordon, 'Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti', 31 *Tex. Int'l L.J.* 43, 44 (1996).

<sup>30</sup> S/RES/940 (1994).

As often in such cases, the Security Council's emerging jurisprudence opened the way to more creative interpretations, and its decisions in Haiti should be seen, for instance, in light of subsequent action in Sierra Leone. After the military government that had ousted the elected President Kabbah defaulted on its pledge to hand over power in accordance with the Conakry peace agreement, the Security Council imposed an oil and arms embargo and made the Nigerian-led ECOMOG troops responsible for its enforcement<sup>31</sup>. Although Resolution 1132 itself was not without ambiguity<sup>32</sup>, the statements made during Council debates made it clear that the members considered that the preservation of democracy was a sufficient ground to intervene<sup>33</sup>. ECOMOG was not allowed to go beyond enforcing the embargo by, in particular, intervening in Sierra Leone to re-establish the legitimate government, but its action to that effect was not condemned by the Security Council as such, and could even be said to have been endorsed by some statements of the Council's President<sup>34</sup>.

Intervention to protect democracy has extended to cases of self-determination. In East-Timor, for example, the Security Council showed that it was ready to back-up its support for democracy with force by sending a multilateral force (INTERFET)<sup>35</sup> after the elections it had itself organised led to an eruption of violence. Timor was a case of decolonization rather than one of a minority exercising a more general right to self-determination. In the latter case, it seems the Council will be disinclined to encourage any drive to secession. So far, for example, the international community and the Security Council in particular do not seem to have been in favour of the independence of Kosovo – although clearly any move by the Security Council to allow Kosovo inhabitants to decide their own territorial status, following a referendum for example, would have some considerable implication for the Council's role.

On the whole, the possibility that the Security Council intervene purely on the basis of restoring democracy, despite a confirmation of the Haitian precedent in Sierra Leone, remains contentious in view of the haphazardness of practice and the risks that under the guise of democratic intervention various forms of hegemonic behaviour be justified. Moreover, although Security Council action has been successful in reinstalling displaced leaders, this cannot as such be said to be a sufficient condition of democracy, and both Haiti and Sierra Leone have continued to experience severe democratic difficulties.

### **III. Humanitarian Crises**

The drafters of the Charter probably did not expect the Security Council to authorise the use of armed force to protect persons from the ravages of civil wars. Yet since the 1990s, a major part of the Council's activity has focused on precisely this protective role<sup>36</sup>. It is true,

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<sup>31</sup> S/RES/1132 (1997)

<sup>32</sup> The Council, while 'condemning the military coup', also declared itself more generally 'concerned at the continued violence and loss of life (...) the deteriorating humanitarian conditions in that country, and the consequences for neighbouring countries'. S/RES/1132 (1997). It is worth noting, however, that unlike Resolution 940, no mention was made of 'special circumstances'.

<sup>33</sup> See generally U.N. SCOR, 52d Sess., 3822d mtg., U.N. Doc. S/PV.3822 (1997) and in particular the declarations of the French and Kenyan representatives.

<sup>34</sup> See Statement by the President of the Security Council, U.N. SCOR, 53d Sess. at 1, U.N. Doc. S/PRST/1998/5 (1998). 'welcom[ing] the fact that the rule of the military junta has been brought to an end.' and 'encourag[ing] ECOMOG to proceed in its efforts... in accordance with relevant provisions of the Charter of the United Nations.'

<sup>35</sup> S/RES/1246 (1999)

<sup>36</sup> Eisner, 'Humanitarian Intervention in the Post-Cold War Era', 11 *B.U. Int'l L.J.* 195 (1993).

of course that in such cases, the Security Council often abstained to invoke human rights specifically. Humanitarian protection nonetheless can be analyzed as aimed to secure fundamental human rights goals to the extent it is designed to protect the lives and welfare of vulnerable peoples in situations of armed violence and depredation – surely something that has a huge bearing on the enjoyment of basic human rights. A survey of the Security Council’s practice reveals an increasing willingness to justify Chapter VII action on the basis of humanitarian concerns, although of course the Security Council’s humanitarian endeavours have not all been successes.

It is in relation to Iraq that some of the Council’s most important and seminal decisions of principle were taken. Resolution 688 of 1991 in particular, which condemned and demanded an end ‘to the repression of the Iraqi civilian population’ in many parts of Iraq has been hailed as a turning point in contemporary concepts of humanitarian intervention. From a human rights point of view, the resolution was noteworthy for linking a hope that ‘the human and political rights of all Iraqi citizens’ be respected<sup>37</sup> with a request to the Secretary-General to pursue humanitarian efforts in favour of the Iraqi civilian population<sup>38</sup>.

Resolution 688 led to the creation of safe-havens in Northern Iraq where humanitarian assistance could be delivered safely. Whether the Council was legally competent to adopt that resolution became a matter of dispute among UN member States. In the course of Council debates, several States asserted that human rights violations of a flagrant character could be regarded as relevant to keeping the peace<sup>39</sup>. But only ten out of fifteen Security Council members supported the resolution, and that those who did support it all insisted on the trans-boundary nature of the humanitarian problem. Moreover, five members expressed apprehension about a Security Council role in matters they viewed as essentially domestic<sup>40</sup>.

A precedent was nonetheless set that would serve as a blueprint for providing humanitarian protection and assistance in ulterior conflicts. Perhaps the archetype of Security Council authorised humanitarian interventions came with the events in Somalia in 1992. Confronted with a catastrophic humanitarian situation, the Security Council, declaring itself ‘alarmed at the rapid deterioration of the situation in Somalia and the heavy loss of human life and widespread material damage resulting from the conflict in the country’<sup>41</sup>, ordered an embargo on all military equipment to Somalia arguing that the continuation of such a situation constituted a threat to international peace and security. A few months later, ‘disturbed by the magnitude of the human suffering caused by the conflict’, the Council extended UNOSOM’s mandate to include delivery humanitarian assistance<sup>42</sup> and authorised airlifts to vulnerable populations<sup>43</sup>. Faced with a deteriorating situation made worst by the obstacles to the delivery of humanitarian assistance, the Council eventually authorised ‘all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia’<sup>44</sup>, leading to the intervention of ground troops (UNITAF)<sup>45</sup>. The

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<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*; importantly, the Council also insisted that Iraq grant immediate access to humanitarian relief organisations, putting the humanitarian crisis resulting from Iraq’s treatment of the Kurds into the centre of its attention

<sup>39</sup> See, among others, statements by the Foreign Ministers of Germany and Belgium.

<sup>40</sup> See, generally, Alston, ‘The Security Council and Human Rights: Lessons to Be Learned from the Iraq-Kuwait Crisis and its Aftermath’, 13 *Australian Y.B. of Int’l L.* 107 (1992), at 133.

<sup>41</sup> S/RES/733 (1992).

<sup>42</sup> S/RES/746 (1992), S/RES/751 (1992).

<sup>43</sup> S/RES/767 (1992).

<sup>44</sup> S/RES/794 (1992).

UN's ensuing mission (UNOSOM II) would also be authorized to use force to maintain the appropriate environment for the delivery of assistance.

This was of course a highly exceptional decision, and many Council members were only prepared to vote in favour of resolution 794 because Somalia was at the time effectively considered a 'failed state'. Nonetheless the UN's intervention in this case was noteworthy for being based exclusively on the 'magnitude of human tragedy in Somalia constitutes a threat to international peace and security' without any further reference to the potential trans-boundary aspects of the crisis. The 'provision of humanitarian assistance', furthermore was 'recognised' as an 'important element in the effort of the Council to restore international peace and security in the area'.<sup>46</sup>

The conflicts in the former Yugoslavia are another important case in point, with the Security Council repeatedly authorising force on the basis of, inter alia, the existence of a humanitarian crisis<sup>47</sup>. The initial step came with the enlargement of the United Nations Protection Force's (UNPROFOR) mandate<sup>48</sup> to secure the Sarajevo airport for the delivery of humanitarian aid<sup>49</sup>. In a 1992 resolution, after stating that the 'provision of humanitarian assistance (...) is an important element in the Council's effort to restore international peace and security', the Security Council 'called upon all states to take' – using an expression which is generally held to green light use of force –, 'all measures necessary to facilitate' the delivery of humanitarian aid<sup>50</sup>.

UNPROFOR was specifically asked to support efforts by the United Nations High Commissioner for Refugees to deliver humanitarian relief throughout Bosnia and Herzegovina, and to protect convoys of released civilian detainees if the International Committee of the Red Cross so requested. Almost a year later, the Council used its Chapter VII authority in unprecedented fashion to establish so-called 'safe areas' to ensure free access of humanitarian aid<sup>51</sup>. Significantly the Security Council based its Chapter VII authorisations action in relation to the five safety-zones directly on humanitarian and human-rights concerns<sup>52</sup>. For the first time in the history of the United Nations, the delivery of humanitarian aid, initially with the consent of the parties and later by force, became a means of dealing with an ongoing armed conflict.

Despite these significant advances in the Council's understanding of its mandate, however, attempts by the Security Council to deliver humanitarian assistance in armed conflict have been plagued by a number of problems. Humanitarian mandates have, for example, occasionally been criticized for showing a distinct vulnerability to be stretched beyond the original intentions of at least some of their authors. The practice of the United States, the United Kingdom, and France of continuing to bomb the safety zones in Iraq<sup>53</sup> based on a loose interpretation of the legal consequences of the Gulf War<sup>54</sup> for example, has

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<sup>45</sup> Ibid.

<sup>46</sup> S/RES/767 (1992).

<sup>47</sup> S/RES/770 (1992).

<sup>48</sup> Established by S/RES/743 (1992)

<sup>49</sup> S/RES/761 (1992); S/RES/770 (1992).

<sup>50</sup> S/RES/770 (1992).

<sup>51</sup> S/RES/824 (1993) and S/RES/836 (1993)

<sup>52</sup> S/RES/824 (1993), S/RES/836 (1993), S/RES/900 (1994), S/RES/913 (1994)

<sup>53</sup> Johnstone, *Aftermath of the Gulf War: An Assessment of UN Action* (1994).

<sup>54</sup> Schachter, 'Legal Aspects of the Gulf War of 1991 and its Aftermath', in Kaplan and McRae (eds.), *Law, Policy and International Justice* (1993), 5, 29; Stromseth, 'Iraq's Suppression of its Civilian Populations, Collective Responses and Continuing Challenges', in Damrosch (ed.), *Enforcing Restraint* (1993), 77, 100.

not proved convincing to all<sup>55</sup>, and the linkage between Iraqi persecution of its minorities and its potential aggression remains to this day a matter of conjecture<sup>56</sup>.

Even if such mandates are not used for purposes at odds with humanitarianism, humanitarian assistance authorised by the Security Council has often been of dubious efficiency. Although Operation Restore Hope is credited with saving a considerable number of lives, UNOSOM II is generally thought to have inaugurated a 'dark period for UN peacekeeping'<sup>57</sup>. Its 'nation-building' activities did go some way toward ending the famine. Factional conflicts and widespread lawlessness, however, greatly impeded these efforts and obscured the positive benefits of UN assistance, eventually leading to the withdrawal of UNOSOM after several prominent incidents involving US casualties. A similar experience is the legacy in Bosnia where, despite UNPROFOR's considerable efforts, civilian populations continued to suffer disproportionately from the war. Indeed, concerns have been raised by specialised humanitarian agencies as to whether the Council's involvement in assistance provision might not lead to a militarisation of humanitarian assistance prejudicial to the perception of its neutral and independent character.

Finally, the case has been made that even if humanitarian assistance were entirely successful in a given situation, it may in some cases be part of the problem rather than the solution. The Bosnian population, in particular, was probably not suffering primarily from humanitarian shortages, but from a much graver campaign of ethnic cleansing and genocide which doomed the strictly humanitarian part of UNPROFOR's mandate to failure. Indeed, it can be wondered whether the Security Council's unique prerogatives in terms of international peace and security might not be put to better use by stopping such massive human rights violations in the first place, rather than treating their symptoms.

#### **IV. Atrocities and International Crimes**

Although often confused under the broad-heading of 'humanitarian intervention', the kind of action that the Security Council may take to prevent the commission of some of the worst atrocities is conceptually distinct from the above reviewed efforts to provide basic security and food assistance to populations in need. Both may overlap in the sense that areas of intense conflict sometimes involve both a dismal humanitarian situation and systematic violations of human rights; by the same token, not all dismal humanitarian situations are caused by or necessarily involve international crimes.

International crimes such as genocide or crimes against humanity although they are most often cast in the language of international criminal law, are of course analysable as massive human rights violations (right to life, right to be free from torture, right to be free from discrimination). Considerable expectations have been cast on the Security Council that it would act as a sort of 'enforcer of last resort', and therefore as a sort of forceful linchpin of the international human rights regime, when all other means have failed and grave and widespread or systematic violations are undergoing. These expectations have tested like little

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<sup>55</sup> Gray, 'After the Ceasefire: Iraq, The Security Council and the Use of Force', *British Y.B. of Int'l L.* 1994, 135, 162-3.

<sup>56</sup> Moreover, one only has to compare the reaction of the Security Council to the similar (if not worse) plight of the Kurdish population scant distance away -- in neighbouring Turkey -- to demonstrate graphically the limits of Security Council willingness to intervene solely on the basis of human rights considerations.

<sup>57</sup> Clapham and Henry, 'Peacekeeping and Human Rights in Africa and Europe', in Henkin (ed.), *Honoring Human Rights and Keeping the Peace - Lessons From El Salvador, Cambodia, and Haiti* (1995), 149.

else the ultimate willingness of the Council to act in a way that is fully consonant with its increasing comprehension of international peace and security and human rights being intimately connected.

In the former-Yugoslavia, for example, the Security Council condemned ‘in the strongest possible terms’ and on numerous occasions ‘unspeakable acts of brutality’, ‘the massive, organized and systematic detention and rape of women’, the ‘large scale displacement of civilians’, the ‘deliberate impeding of the delivery of food and medical supplies to the civilian population’, the existence of a ‘systematic campaign of terror’, of a ‘consistent pattern of summary executions, rape, mass expulsion, arbitrary detentions, forced labour and large-scale disappearances’, the ‘looting’, the ‘killing of civilians’ and the ‘abhorrent and systematic practice of ‘ethnic cleansing’ as ‘clear violations of international humanitarian law and of human rights’ which threatened international peace and security<sup>58</sup>.

In addition to the imposition of several embargoes and no-flight zones, UNPROFOR was deployed specifically, inter alia, to protect civilian populations particularly in certain designated protected areas first in Croatia and later in Bosnia<sup>59</sup>. As part of its mission, the United Nations force was explicitly authorised to use force in self-defence in response to attacks against these areas, and to co-ordinate with the North Atlantic Treaty Organization (NATO) the use of air power in support of its activities. UNPROFOR’s mixed character as a peacekeeping mission and one designed to ensure the protection of civilian populations, the confusion between protection and assistance, however, made it incapable of preventing the commission of crimes against the civilian population that occurred in all areas under its nominal protection. The tragic culmination of this incapacity came with the infamous ethnic cleansing of Srebrenica, one of the UN protected enclaves. It was only by the time NATO contributed its firepower in 1995 that an end to the worst suffering could be put.

But perhaps the Security Council’s worst failures in that respect are illustrated by its incapacity to take adequate action at all in cases where its intervention would have mattered most. The genocide unfolding in Rwanda between April and June 1994 probably stands at an all-time-low in that respect. Despite some delay in doing so, the Council did deplore the ‘large-scale violence in Rwanda, which has resulted in the death of thousands of innocent civilians, including women and children’, the ‘fighting, looting, banditry and the breakdown of law and order’, the ‘mindless violence and carnage’ the ‘very numerous killings of civilians’, the ‘systematic, widespread and flagrant violations of international humanitarian law in Rwanda, as well as other violations of the rights to life and property’ and eventually described the events for what they were, namely ‘genocide’<sup>60</sup>. One might have thought that the Council had thereby put itself in a situation where it could not avoid taking action in accordance with the clear obligations imposed on all States by the Genocide Convention.

Instead the Council rejected the only option that might conceivably have stopped or at least slowed down the atrocities, and reduced UNAMIR’s force level by half<sup>61</sup>. Subsequent efforts to moderate the effects of the ensuing conflict in Rwanda which by then threatened to cause another wave of violence focussing on the Hutu population, also failed. In addition to imposing an embargo on Rwanda, an expanded mission was planned (UNAMIR II) which was to ‘contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including the establishment and maintenance of ... secure humanitarian

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<sup>58</sup> See S/RES/787 (1992); S/RES/798 (1992); S/RES/808 (1993); S/RES/819 (1993); S/RES/827 (1993); S/RES/941 (1994); S/RES/1010 (1995); S/RES/1019 (1995); S/RES/1034 (1995).

<sup>59</sup> S/RES/758 (1992).

<sup>60</sup> S/RES/912 (1994); S/RES/918 (1994); S/RES/935 (1994).

<sup>61</sup> S/RES/912 (1994).

areas'<sup>62</sup>. Despite the official creation of the mission<sup>63</sup>, the Secretary General's efforts were met with State inertia<sup>64</sup> and prospects of establishing the operation rapidly quickly receded<sup>65</sup>.

The Security Council eventually had no choice but to approve the use by member States of 'all necessary means to achieve the humanitarian objectives' of UNAMIR II<sup>66</sup>. This led to the French-commanded mission Operation Turquoise. Although that operation did arguably protect one and a half million displaced persons and refugees, concerns have been raised that French failure to arrest those responsible for the genocide in turn contributed to an ever-worsening humanitarian situation in what was then still Zaire.

Indeed, in due course that situation degenerated to the point that the Security Council called on governments to provide military protection to Rwandan refugees in that area<sup>67</sup>. In a by then familiar scenario, the Council based its finding of a threat of international peace and security on the existence of a humanitarian catastrophe<sup>68</sup>. This time again, however, perhaps as one of the starkest illustrations of the limits of the role of the Security Council and despite an offer by Canada<sup>69</sup> to lead the multinational mission, the response by States who might have contributed troops was so slow that the mission had to be cancelled altogether.

The limits of the Security Council's willingness to authorise armed intervention in case of large-scale violation of human rights were again tested in Kosovo where a campaign of ethnic cleansing was taking place. The Security Council had condemned the 'excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties' and stressed that it was 'deeply concerned (...) by reports of increasing violations of human rights and of international humanitarian law'.<sup>70</sup> In addition to the already existing embargo against the Yugoslav Republic, a plan of action was laid out that authorised an OSCE led Kosovo Verification Mission and went as far as to suggest that 'should the concrete measures demanded in this resolution and resolution 1160 not be taken (...) further action and additional measures to maintain or restore peace and stability in the region'<sup>71</sup> might be considered.

Such 'further action' however, was blocked by the veto of some of the permanent members, notably Russia. This led NATO to intervene without an explicit authorization. By the time such conduct was underway the coalition could effectively put the Security Council before the *fait accompli* of its actions and no requisite majority emerged within the Security Council to condemn the raids<sup>72</sup>. But strong doubts remain – notwithstanding the still open debate as to whether the raids did indeed constitute a successful instance of humanitarian intervention – as to whether it was ever the Security Council's intention to authorize such an intervention. Whatever the answer to that particular debate, it showed simultaneously the limits of Security Council efforts to prevent massive crime, and the danger that a State or a

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<sup>62</sup> S/RES/918 (1994).

<sup>63</sup> S/RES/925 (1994).

<sup>64</sup> S/1994/728. Many of the troop offers were highly conditional.

<sup>65</sup> Such a failure is of course not entirely and strictly attributable to the Security Council as legal entity, but one might have thought that at least some of the permanent members who voted in favour of the resolution might have been more forthcoming in allowing the mission to proceed.

<sup>66</sup> S/RES/929 (1994).

<sup>67</sup> S/RES/1078 (1996).

<sup>68</sup> S/RES/1080(1996).

<sup>69</sup> S/1996/941.

<sup>70</sup> S/RES/1199 (1998).

<sup>71</sup> Ibid.

<sup>72</sup> The Russian Federation did introduce a condemnatory draft resolution, but was only supported by China and Namibia [S/PV.3989 (1999)]

group of States may consider themselves authorised to intervene in cases where it does not.

In the wake of the Kosovo crisis, a considerable effort was launched within and around the UN to seek and tackle some of the divides the episode had exposed. While one could make the argument during the Rwandan and even the Kosovo crisis that the UN was caught without an established doctrine on the commission of massive atrocities, the UN had been actively involved in removing that possible excuse for itself and its members by the mid-2000s. Several ‘lessons-learnt’ exercises<sup>73</sup> led to the promotion and eventual solemn adoption by the General Assembly of what came to be known as the ‘Responsibility to Protect’ (also known under the rather gadgety acronym ‘R2P’). The name, in its now formal form, suggests something somewhat grander than what really is at stake, but it does constitute the most authoritative statement to date of what the UN thinks it should and will do when confronted with major atrocities.

According to the Millennium + 5 Outcome document, “The international community, through the United Nations, (...) has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means (...) to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”. Furthermore, member states affirm that “In this context, we are prepared to take collective action, in a timely and decisive manner”<sup>74</sup>. In an attempt to pre-empt fears that R2P may be used as an excuse to intervene in the affairs of sovereign states on the basis of mere pretexts, the resolution emphasizes that the responsibility is primarily that of states and that the Council is only to intervene if states are ‘unable or unwilling to protect their citizens’. There is no mistaking, nonetheless, that this is quite a striking and novel commitment.

On the positive side, this does seem to indicate that in theory UN members will not stop short of anything to prevent genocide, and solemnly recognize that they have responsibilities that go beyond the contingent politics of the Council, or any other qualm that the international community may have about legitimizing intervention in the name of human rights. By the same token, many indicia suggest that we are far from a radical change. The resolution to begin with, was not well received by all. Venezuelan President Chavez criticized it for making it easier for powerful countries to invade developing ones. The Chinese ambassador indicated that his country was “against any wilful intervention on the ground of rash conclusion that a nation is unable or unwilling to protect its own citizens”.<sup>75</sup> The Resolution’s status, furthermore, is weak. It is in no way a revision of the Charter and should be seen, rather, as an attempt to consolidate certain ‘understandings’ of the Charter by indicating the standard to which the UN intends to hold itself.

There are, moreover, more than a few ambiguities about the statement itself. For one thing, this is the General Assembly saying that it has a duty to take action - but that action, in truth, can only really be taken by the Security Council. The Resolution does pay lip service to the notion that action has to be taken “*through* the Security Council”, but that is a bizarre formulation: surely the Council is not an instrument for the General Assembly to achieve its aims, and it is unlikely that the Assembly has the power to simply thrust its ambitions on the Council. Moreover, the Resolution makes it clear that any action must be taken “in

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<sup>73</sup> The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (ICISS) (December 2001); High Level Panel on Threats, Challenges and Change (December 2, 2004), particularly paras. 199-203; In Larger Freedom, A/59/2005, March 21 2005, particularly paras. 122-135.

<sup>74</sup> A/59/2005, 15 September 2005, para. 139.

<sup>75</sup> A Road Towards Peace, Harmony and Common Development, Statement by Mr. Li Zhaoxing, Minister of Foreign Affairs of China at the General Debate of the 60<sup>th</sup> Session of the UN General Assembly, New York, September 19, 2005.

accordance with the Charter”, particularly chapters VI to VIII, which makes one wonder how far the authors of the resolution were really willing to go in terms of challenging some of the deficiencies of the Charter.<sup>76</sup> The duty to protect does proclaim a standard, but it then relies for the upholding of that standard on the very decision making mechanism (including, for example, the veto power) which made it so easy for standards to be ignored.

It is noteworthy nonetheless that the Security Council itself, subsequent to the General Assembly’s adoption of R2P did endorse the standard. In Resolution 1674 adopted on 28 April 2006, the Council ‘reaffirms’ the relevant paragraphs of the 2005 World Summit Outcome document on the responsibility to protect. This statement has been hailed as a significant victory by the partisans of R2P. It is hardly, however, a resounding and solemn proclamation that times have changed. It appears in the middle of a resolution that deals with many other issues, and does not make it clear what the Council is committing itself to. In particular, there has been little response either collectively or even individually – unsurprisingly – to the several calls that have been made for the permanent members to commit themselves publicly to refrain from using their veto in cases of genocide and large scale human rights abuses.<sup>77</sup>

It is submitted that in the ambiguities of concept itself, and of the General Assembly and Security Council’s commitment lie many of the inconsistencies that have since seemed to expose the ‘responsibility to protect’ as little more than rhetorical flourish on a grand scale. Indeed, it has come as a shock and as a sobering reminder of the extent to which the Council is still very much an unreliable rights enforcer that its response to the crisis in Sudan’s Darfur region has, by most accounts, been largely inadequate to the task. The scale of atrocities in Sudan was impossible to deny (200 000 killed, as many as 2 million displaced), and in all likelihood greater than many scenarios which had warranted strong Security Council action in the past (e.g.: Somalia, Haiti). Moreover, the Council put itself in a situation where it could not deny the existence of international crimes. It set up an International Commission of Inquiry<sup>78</sup> headed by the Italian jurist Antonio Cassese, which came back with strong evidence that at the very least crimes against humanity had been committed and insisted “(t)he international community must take on the responsibility to protect the civilians of Darfur”.<sup>79</sup> In fact, the Council went as far, when adopting Resolution 1706, to refer to the responsibility to protect.<sup>80</sup>

Having put itself squarely in front of its responsibilities, the Council then proceeded to by and large elude them. It is only by August 2006, that it finally decided on the idea of sending a 20 000 strong peacekeeping force. But the Council simultaneously declined to exercise more muscle when it could have, by ‘inviting’ rather than ‘requiring’ Sudan to consent to the deployment of those troops. The imposition of sanctions, in the meantime, has been haphazard, and much vaunted smart sanctions have been used so sparingly as to put in question the Council’s resolve. The tendency that the Council has had of going out of its way

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<sup>76</sup> The Report of the International Commission (supra, note 73) had worked on the hypothesis where the Security Council would be ‘paralyzed’, but the Millennium + 5 Outcome document is very ‘legitimist’ in that it does not anticipate that possibility and is only interested in what the Council might and should do.

<sup>77</sup> High Level Panel, supra note 73, para. 256 (‘We (...) ask the permanent members, in their individual capacities, to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses’).

<sup>78</sup> S/Res/1564, 18 September 2004.

<sup>79</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25<sup>th</sup> February 2005, para. 569.

<sup>80</sup> S/RES/1706 (2006), second paragraph of the preamble.

to alleviate any concern that Sudanese sovereignty might be encroached upon, in a context where the Sudanese government is widely credited for backing the militias that have been responsible for the majority of the killings, has seemed to make short shrift of any serious commitment to R2P.

As a result, the Darfur crisis threatens to deeply and durably undermine the Council's credibility and seems to expose the – otherwise broadly positive trend of the Council's increasing attention to matters of human rights – as at best a set of self-serving propositions, which have little constraining value on the Council's actions.

## ***V. The Increasing Conflation of Human Rights and International Peace and Security***

The realization that racist regimes, threats to democracy, humanitarian crises, and the commission of international crimes, which all involve human rights, also constitute breaches or threats to international peace and security, has arguably set the stage for a gradual and more direct taking into account of human rights violations as such. Indeed, by the early 2000s it seemed that the meshing of international peace and security and human rights was well under way, at least at a rhetorical level.

One of the ways in which this change has been effected is through the concept of human security, which seems to have been created (and probably was in large part) precisely to wield the two notions. Security is redefined as human; human rights are formulated in a way that emphasizes basic protection: although they certainly do not wholly coincide, the idea has the potential to tremendously highlight overlap.

More generally, it is fair to say that there has been a gradual rhetorical softening of the edges of “international peace and security” as a concept, which is increasingly being defined in a human being-centered way (if not quite always in rights language specifically). A striking example of this is the acceptance by the Security Council that the AIDS epidemic constitutes a threat to international peace and security. Although AIDS is by and large a health issue, its connection to rights has been highlighted many times, and one can see the Council's move to address these issues as part of the same larger phenomenon of connecting dots that are sometimes quite far apart conceptually.

Quantitatively speaking there has been a clear inflation of “human rights talk” in general. Qualitatively speaking, the Council has shown renewed interest in various categories of especially vulnerable categories of people such as women<sup>81</sup>, children<sup>82</sup>, refugees<sup>83</sup> and, generally, civilians in armed conflict<sup>84</sup>, and it rarely misses an opportunity to remind States of their obligations. Council resolutions are increasingly notable for their willingness to take into account and encourage the role of human rights mechanisms such as the High Commissioner for Human Rights<sup>85</sup> or the Commission on Human Rights<sup>86</sup>. Much of that

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<sup>81</sup> See S/RES/1325 (2000).

<sup>82</sup> In S/RES/1261 (1999) and S/RES/ 1214 (2000), the Council committed itself to a similar protection of children in armed conflict, including with regard to sanctions.

<sup>83</sup> S/RES/1208 (1998) on refugees in the African context outlined the human rights and humanitarian obligations the Council considers itself and the international community to have with regard to refugees in general

<sup>84</sup> The Council adopted a similar line in its two resolutions concerning civilians in armed conflict, namely S/RES/1296 (2000) and S/RES/1318 (2000)

<sup>85</sup> S/RES/ 1160 (1998) at par. 16(e). Resolution 1160 (1998) is of particular interest, inasmuch as the Council declared that decisions concerning the lifting of sanctions against the Federal Republic of Yugoslavia would

contemporary human rights talk by the Council has an increasing tendency to be detached from any obvious threat to international peace and security.

By the mid-2000s, the US, UK and France, urged by some NGOs, began a trend of more aggressively seeking to use the Security Council to put pressure on regimes that were seen as blatantly violating human rights, even when the human rights violations occurred in largely domestic contexts, with few obvious international repercussions. For example, the Western permanent members have on several occasions sought to censure such states as Burma, Belarus, Sudan and Zimbabwe. The argument behind raising the situation of such countries before the Council seems to have been that today's grave human rights violations might become tomorrow's threats to international peace and security. Given the likelihood of opposition otherwise, draft resolutions have remained relatively hortatory in character, but nonetheless seemed to indicate a quite revolutionary path whereby the Council could increasingly act as a guardian of human rights, in a way that was increasingly disconnected from any nexus – other than rhetorical – with international peace and security.

China and Russia, however, with the backing of some of the Third World, have so far successfully blocked such attempts, often successfully preventing as much as their discussion. On one occasion, as Burma was being targeted by a US sponsored resolution, the Russian ambassador made it clear that in his mind “the situation in this country does not pose any threat to international or regional peace”. He went on to add in no ambiguous terms that “(...) attempts aimed at using the Security Council to discuss issues outside its purview are unacceptable”. Interestingly, one of the ambassador's arguments was that the issue of Myanmar was already being dealt with by other UN bodies and that “Substitution of (these bodies') efforts by the Security Council would be counterproductive and would not facilitate the division of labour between the main bodies of the World Organization, which is provided for in the UN Charter, or development of their constructive cooperation”.<sup>87</sup> Although the institutional argument here may be largely opportunistic, it does suggest a possible rift within Council members about the proper distribution of roles within the UN when it comes to human rights.

International peace and security and human rights, therefore, show no sign of being comprehensively equated any time soon, and it is probably that the Council by the mid-2000s had reached a conceptual and political ceiling of sorts. Indeed overall the phenomenon of defining international peace and security in terms of human rights remains deeply paradoxical. While the Council has occasionally been strong on the rhetoric, it has in no way been consistently so, and has hardly always followed with action commensurate with the level of condemnation, even in the cases where the evidence of generalized and systematic human rights violations was the most flagrant – Darfur is the obvious example. The Security Council's ‘normative’ or ‘quasi-normative’ boldness, therefore, is both inconsistent and incomplete, even if the seeds for future developments may have been sown.

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depend *inter alia* upon the Yugoslav government facilitating a mission to Kosovo by the UN High Commissioner for Human Rights. See also S/RES/1370 (2001).

<sup>86</sup> S/RES/1234 (1999) at par. 7.

<sup>87</sup> *Statement by His Excellency Ambassador Vitaly Churkin, Permanent Representative of the Russian Federation to the United Nations at the meeting of the Security Council, January 12, 2007.*

### C. Human Rights as a Means: Making Human Rights Part of the Security Council's Activities

Human rights have increasingly become a motive for and goal of the Security Council's actions, but the Council has also increasingly been involved in 'using' human rights to achieve its mandate. This section proposes to examine those actions that are taken by the Security Council that can be specifically described as 'human rights action'. These are analytically distinct from traditional 'international peace and security measures' which aim to improve human rights; rather they are 'human rights measures' which, essentially, aim to bring about international peace and security. The Council's involvement in human rights activities can be seen as the logical corollary of the idea that an inherent dimension of international peace and security is based on respect for human rights.

Not all methods that substantially have recourse to human rights are characterised as such by the Security Council, but this section will deal with *effective* uses of human rights measures, regardless of their formal denomination. As a preliminary, it may be worth pointing out that over the years the Security Council has discreetly developed its own methods of human rights investigation, which have some normative bearing for UN human rights protection in general. One mechanism which has rarely been analyzed systematically as such but which is noteworthy is the creation by the Council of experts' commissions which have as their mandate the investigating, among other things or even principally, the commission of grave human rights violations. These subsidiary bodies have at times produced significant human rights analysis which, even though it is principally designed for internal decisional consumption by the Council, can be seen as a distinctive Council contribution in the domain of human rights. Early Commission include the Security Council Commission on Israeli Settlements which operated in the late 1970s and early 80s and occasionally mentioned human rights concerns.<sup>88</sup> Notable commissions since that have had a strong core human rights component include the Commission of Experts on violations of international humanitarian law in the Former-Yugoslavia (1992), the Commission of Experts to investigate allegations of mass killings of civilians and genocide in Rwanda (1994), the International Commission of Inquiry on Darfur (2006).

In terms of a more operational role, human rights dimensions are unlikely to appear as such in enforcement actions but have a role to play in peacekeeping and, most importantly, in peace-building operations. The concept of peace-building reflects a departure from traditional concepts of peacekeeping and an increasing desire by the Council to go beyond treating, as the so-called Brahimi Report put it, 'the symptoms rather than the sources of conflict'<sup>89</sup>. To the extent that human rights are considered by the Council part of the very fabric peace, their promotion has featured prominently in peace operations under different guises, whether as part of Council sponsored election monitoring (I), or activities specifically directed at reinforcing human rights in general (II). An intriguing but major part of the Council's activities since the 1990s has been its role in dealing with complex problems of transitional justice, truth and reconciliation in the aftermath, leading it to assume a leading role in the creation of international criminal tribunals (III).

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<sup>88</sup> S/Res/446 (1979).

<sup>89</sup> S/2000/809 and A/55/305

## ***I. Election Monitoring***

The Security Council's concern with democracy has expressed itself in multiple ways, from rhetorical urging of States to respect the verdict of elections to, as has been seen, the possibility of Chapter VII action in certain cases of forceful disruption of democracy. At the same time, filling a crucial gap between these two extremes, the UN has often itself been involved directly in the organisation and conduct of elections, prompting one author to comment that monitored elections have 'become virtual fixtures in U.N.-brokered peace accords to end civil wars'<sup>90</sup>.

The integration of electoral assistance to peace-building operations is the logical consequence of considering that the disruption of democracy is, in certain circumstances, a threat to international peace and security. Through the organisation of elections, it is a number of 'political' rights that are being promoted such as freedom of expression, of organisation, of movement or of assembly.

The Security Council had been involved in election monitoring during the Cold War in the limited context of decolonization. This was the case, most notoriously, of Namibia (former Southwest Africa), leading that country successfully to independence<sup>91</sup>. The key difference in the post-cold War era, however, is that the Security Council has increasingly undertaken election monitoring in sovereign nations. The Security Council's role in Angola, in that respect probably marked a transition from the more traditional decolonization endeavours, to the peace-building operations that would become a hallmark of the UN's activities from the 1990s onwards<sup>92</sup>. Although election monitoring is certainly not the exclusive domain of the Security Council<sup>93</sup>, it has featured prominently in many of the Council's peace initiatives perhaps because its authorization seems inevitable if the monitoring has to take place in a context of 'massive internal upheaval (...) or armed insurgency' and necessitate even minimal military deployment<sup>94</sup>.

Election monitoring mandates often derive their legitimacy from existing peace agreements<sup>95</sup>. Such mandates generally come on top of a larger and already existing ones more generally concerned with pacification (demilitarisation, demobilisation, demining, etc). Security Council sponsored elections can fit in a variety of ways in peace-building. They may be part of a transition from war to peace (El Salvador; Cambodia ; Central African Republic), decide the status of an internationally-disputed territory (Sahara), form the backbone of a complex minority-protection scheme in the context of the restitution of a territory to a State

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<sup>90</sup> Fox, 'The Role of International Law in the Twenty-First Century: Multinational Election Monitoring: Advancing International Law on the High Wire', 18 *Fordham Int'l L.J.* 1658 (1995), at 1661.

<sup>91</sup> S/RES/435 (1978).

<sup>92</sup> In 1991, the Security Council, in its resolution 696 (1991), extended the mandate of the United Nations Angola Verification Mission (UNAVEM I, thereafter UNAVEM II) to include the observation and verification of legislative and presidential elections following the comprehensive peace agreement between the Angolan government and the UNITA rebels.

<sup>93</sup> See generally Yves Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (1994). The General Assembly is the other organ which can grant monitoring mandates.

<sup>94</sup> See Satterthwaite, 'Human Rights Monitoring, Elections Monitoring, and Electoral Assistance as Preventive Measures', 30 *N.Y.U. J. Int'l L. & Pol.* 709 (1998) at 757, noting that 'While no bright line divides the type of work the HCHR can undertake sua sponte in the field and work which requires authorization by the General Assembly or the Security Council, the difference usually appears based on practical concerns; authorization by either of these bodies enables larger-scale missions to be designed and implemented'.

<sup>95</sup> The 'acordos de paz' in the case of Angola, the Paris Agreements in the case of Cambodia, for example.

(Eastern-Slavonia), be aimed at stimulating local democracy (Kosovo), or pave the way to independence (Timor) .

Election monitoring is often distinguished according to different levels of Security Council involvement. At the most basic, the Security Council can be called to merely ‘verify’ national elections. National authorities remain in charge and the United Nations supervise the legitimacy of the electoral process and may provide technical assistance. Peacekeepers under Security Council supervision may be asked, under the general heading of providing a ‘supportive role’ to, for example, ensure the security of electoral monitors, transport electoral materials and conduct limited monitoring themselves<sup>96</sup>. The Security Council has instigated such supervision in Nicaragua<sup>97</sup>, El Salvador<sup>98</sup>, Mozambique<sup>99</sup>, Liberia<sup>100</sup>, and the Central African Republic<sup>101</sup>.

The most ambitious programs, so-called ‘organize and conduct’<sup>102</sup> or ‘major electoral missions’<sup>103</sup>, involve the UN taking over what would otherwise have been the role of national authorities. The Security Council’s involvement in Cambodia, for example, was particularly noteworthy since the UN not only monitored but actually organised the elections itself, deploying unprecedented energies to register voters and even taking over key Cambodian ministries in an effort to educate the population in view of the elections<sup>104</sup>. Similarly ambitious endeavours include the United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium (UNTAES) which was requested to organize elections for all local government bodies in April 1997 in cooperation with Croatian authorities. UNMIK<sup>105</sup> and UNTAET<sup>106</sup>, the international administrations created by the Security Council to administer Kosovo and East-Timor have also been tasked to organize elections which they have supervised in their entirety.

Electoral missions can raise considerable technical/political difficulties. The U.N. Mission for the Referendum in Western Sahara (MINURSO<sup>107</sup>), for example, was confronted with the question of who should be allowed to register in that territory for the purposes of the

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<sup>96</sup> S/RES/1201 (1998).

<sup>97</sup> This was in the context of the United Nations Observer Group in Central America (ONUCA), established pursuant to General Assembly resolution 644 (1989)

<sup>98</sup> A special Electoral Division (S/RES/832 (1993)) was added to ONUSAL (S/RES/693 (1991)) by the Security Council in 1993 to observe a general election in 1994. For a thorough evaluation, see Francesco Manca, *The UN and the observation of the electoral process in El Salvador, Electoral Observation and democratic transition in Latin America* Center for US-Mexican Studies at the University of California San Diego, January 24/25, 1997.

<sup>99</sup> The United Nations Operation in Mozambique (ONUMOZ), established by S/RES/797 (1992), provided, among others, electoral assistance for the 1994 parliamentary and presidential elections; see also *The United Nations and Mozambique, 1992-1995, The United Nations Blue Book Series, Volume V* (1995)

<sup>100</sup> The United Nations Observer Mission in Liberia (UNOMIL), established by S/RES/866 (1993), originally to help implement various peace agreements, took part in the monitoring and verification of presidential elections held in July 1997, pursuant to S/RES/1020 (1995).

<sup>101</sup> See especially the monitoring of successive legislative and presidential elections in the context of the United Nations Mission in the Central African Republic (MINURCA). S/RES/1182 (1998); S/RES/1201 (1998); S/RES/1230 (1999), par. 9.

<sup>102</sup> The terminology here is borrowed from Margaret Satterthwaite, *supra* note 94.

<sup>103</sup> This is the terminology generally in use with the Electoral Assistance Division of the Political Affairs Department of the UN Secretariat.

<sup>104</sup> In the context of the United Nations Transitional Authority in Cambodia (UNTAC), established by S/RES/745 (1992); see also *The United Nations and Cambodia, 1991-1995, United Nations Blue Book Series, Volume II* (1995)

<sup>105</sup> S/RES/1244 (1999) (par. 11 (c)).

<sup>106</sup> S/RES/1338 (2001).

<sup>107</sup> S/RES/690 (1991).

referendum, an immeasurably complex question given the nomadic character of many of the populations involved. These difficulties, however, are only likely to be made worse in the absence of cooperation by the relevant parties, arguably the single biggest threat to success of even Security Council backed peace-building. UNTAC's work, for instance, was considerably hampered by Khmer Rouge refusal to join the elections and general harassment of UNTAC officials. Sometimes the level of disagreement can reach such a level that the elections have to be postponed indefinitely as with MINURSO which was supposed to launch the referendum in 1992, but because of persistent inability to agree on the modalities of the vote has not to date accomplished its mission.

The success of Security Council sponsored election monitoring has varied. One minimal condition for success, once an election has effectively been held, seems to be that the parties to the elections are basically committed to accept the outcome. Here Angola stands as the most spectacular failure, with conflict resuming and raging for years after UNITA refused the results of the election. This is not to say that there have not been some spectacular successes, and indeed UNTAC was hailed as an extremely positive precedent<sup>108</sup>. The imprimatur of the United Nations, together with the approval of many non-governmental bodies, are generally significant factors in the acceptance of the results. It goes without saying, however, that successful elections are no guarantee of a fruitful democratic life, and most States where the Security Council has held elections could be considered, even several years later, to suffer from significant democratic deficiencies.

## ***B. Human Rights Promotion and Protection.***

Although it is by no means the only organ to do so in post-conflict situations or the one that has done so most prominently, the Security Council has also gone beyond simple election monitoring, by seeking to strengthen respect for human rights specifically in the course of various interventions. This is a type of mission that remains both new and limited for an organ that is above all concerned with international peace and security. The Council, either by itself or by explicitly supporting initiatives by the Secretary General or the High Commissioner for human rights aimed at integrating human rights to existing peace-operations, is increasingly active in the field. Some of the more ambitious human rights operations occurred in the early 1990s (ONUSAL, UNTAC) often to be followed by more watered-down operations, but a certain trend to the increased integration of human rights is discernible.

Human rights initiatives may be undertaken as part of peacekeeping operations<sup>109</sup>, but are most likely to form part of the civilian component of peace-building initiatives, once the minimal conditions of law and order have been restored. Human rights mandates may be given to a mission from the outset (e.g.: ONUSAL, BONUCA) or added to already existing peace operations when the need is felt (e.g.: UNOMIL, UNMOT, UNSMA). They often

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<sup>108</sup> Vu, 'The Holding of Free and Fair Elections in Cambodia: the Achievement of the United Nations' Impossible Mission', 16 *Mich. J. Int'l L.* 1177, 1995.

<sup>109</sup> UNPROFOR, for example, had a role in monitoring human rights long before any peace agreement.

derive their legitimacy from specific mentions in peace agreements<sup>110</sup>. Although they may cover only part of a territory<sup>111</sup>, they most often extend to its entirety.

The type of human rights tasks involved is likely to evolve rapidly depending on the situation on the ground. ONUSAL in El Salvador, for example, started-off as a monitoring mission but soon extended its role to providing assistance in institutional reform. The United Nations Mission in Haiti (UNMIH)<sup>112</sup> which began with a few observers eventually took part in a much wider range of humanitarian and human rights activities designed to reinforce Haitian democracy<sup>113</sup>. UNOMIL moved from being asked to 'report on any major violations of international humanitarian law'<sup>114</sup> to being in charge of investigating human rights abuses<sup>115</sup>.

As was the case for electoral missions, the dividing line seems to be between those missions where the UN is essentially assisting an already existing government, and those where it takes over the functions of government altogether. At the most basic, peace-building operations may have monitoring or reporting roles, and it is often thought that the mere presence of human rights monitors may sometimes marginally reduce governmental conduct prejudicial to human rights. Monitoring and reporting are of course partly designed for institutional use and are an integral part of the Security Council's appreciation of an evolving situation. Hence UNPROFOR became in itself a key element of documentation of human rights violations by the various parties to the Bosnian conflict. Some reports, however, may also be forwarded to interested parties domestically in an effort to improve human rights performance.

Technical assistance generally consists in advising appropriate authorities (government, ministries). In exceptional circumstances, however, the UN may occasionally be asked to take the reform of an entire sector of the State apparatus in its own hands. In Haiti, for example, the Security Council deployed hundreds of United Nations Police Monitors to « provide guidance and training to all levels of the Haitian police »<sup>116</sup>, alongside a smaller number of « military trainers » who worked to modernize the Haitian armed forces by providing non-combat instruction. Similarly, the International Police Task Force (IPTF) established by the Security Council in Bosnia<sup>117</sup> had a wide-ranging mandate to train police personnel<sup>118</sup>.

Generally speaking, most peace-building missions have been engaged in training and information campaigns directed at specific categories of the population (lawyers, mayors, students, armed forces), occasionally through the media. UNTAC human rights officers, for

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<sup>110</sup> The parties to the Dayton agreement, for example, 'request[ed] that the United Nations establish by a decision of the Security Council, as a UNCIVPOL operation, a U.N. International Police Task Force (IPTF)' (Dayton Agreement, Annex 11, Article 2).

<sup>111</sup> In Bosnia, for example, the United Nations Protected Areas were targeted for special human rights protection and UNPROFOR's duties there went beyond those it exercised in the rest of the country.

<sup>112</sup> Established by S/RES/867 (1993)9179179

<sup>113</sup> See especially UNMIH's joint action with the Haitian government, the Friends of the Secretary General for Haiti, and the International Civilian Mission in Haiti (MICIVIH - together with the Organisation of American States); see S/RES/1212 (1998)

<sup>114</sup> S/RES/866 (1993); what was exceptional even then, however, was that it was the first UN peacekeeping operation undertaken in co-operation with a pre-existing peacekeeping force deployed by another organisation, in this case ECOWAS

<sup>115</sup> S/RES/1020 (1995)

<sup>116</sup> S/RES/867 (1993), par. 3.

<sup>117</sup> S/RES/1035 (1995).

<sup>118</sup> Dayton Agreement, Annex 11, Article 2.

example, taught courses at Phnom Penh University and developed human rights curricula for primary and secondary schools.

The particular focus of peace-building missions varies depending on local circumstances and the type of mission. It may be general, as when UNTAC was asked to 'foster [...] an environment in which respect for human rights shall be ensured'<sup>119</sup>, but is most likely to be specific and deal with a particular type of rights or government function. The police and the judicial system tend to be primary areas of work, sometimes alongside the prison system. There is no single institutional formula for the carrying-out of human rights tasks. Typically a human rights 'component' (UNTAC), 'unit' (UNAVEM III, UNSMA) or 'division' (MONUA) may be part of the set-up. Some peace-building missions have received extensive powers to fulfil their human rights mandate. ONUSAL, for example, had the right to receive communications concerning human rights violations, visit any place or establishment freely and without notice or hold meetings anywhere on the territory of El Salvador. Strong relations with local human rights groups and the capacity to work with them are generally considered a key part of the success of peace-building.

Some of the more developed human rights initiatives have included structures to deal with human rights complaints. UNTAC, for example, examined more than 1,300 human rights violations complaints and was at one point endowed with a U.N. Special Prosecutor's office with the power to issue arrest warrants to be carried out by U.N. police. UNMIK has illustrated itself by creating an ombudsman post with wide-ranging powers (such as a 'complete, unimpeded, and immediate access to any person, place, or information upon his or her request') to investigate human rights abuses<sup>120</sup>.

A special situation has been introduced in cases of Security-Council mandated international administrations, such as were created in Kosovo (UNMIK) and East-Timor (UNTAET). Here, the UN is no longer simply assisting governments but is seen to take over sovereign authority during an interim period following a State collapse or power vacuum. As regards Kosovo for example, the 'main responsibilities' of the United Nations Interim Administration in Kosovo (UNMIK) set up by the Security Council included, in addition to the promotion and protection of human rights specifically, the provision and running of a basic civilian administration, the promotion of substantial autonomy and self-government, the facilitation of a political process to determine Kosovo's future political status, the support of the reconstruction of key infrastructure, the maintenance of civil law and order, the assurance of the safe and unimpeded return of all refugees and displaced persons into Kosovo<sup>121</sup>. When the UN takes over essential sectors of government, it becomes unhelpful, as in traditional peace-building operations, to speak of separate human rights initiatives. In a sense, every activity undertaken by the international administration will have an impact on the enjoyment of human rights. This is accordingly reflected in efforts to mainstream human rights into the missions' mandates.

The success of human rights as a part of peace-building missions varies, but seems to depend closely on the level of security on the ground and the cooperation of the government or parties concerned. UNTAC<sup>122</sup> and ONUSAL<sup>123</sup> have been widely held as precedent-

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<sup>119</sup> Agreement on a Comprehensive Political Settlement on the Cambodia Conflict, Article 16.

<sup>120</sup> See Chapter VI of the Rambouillet Agreement, Interim Agreement for Peace and Self-Government in Kosovo and the ensuing UNMIK Regulation 038.

<sup>121</sup> S/RES/1244 (1999) at par. 11. For UNTAET's similar mandate in East-Timor, see S/RES/1272 (1999).

<sup>122</sup> Findlay, *Cambodia: the Legacy and Lessons of UNTAC* (1995).

setting successes. Similarly, the mission in Angola is considered to have contributed significantly to the promotion, in the words of the Secretary General, of a ‘human rights culture’ in the country<sup>124</sup>. Conversely, UNMIH’s work in Haiti was thwarted by the kind of constant local opposition that eventually led to its expulsion and the international intervention. Those human rights activities that were undertaken in Bosnia by UNPROFOR also suffered from the prevalent context of violence. There is also evidence that political imperatives may at times conflict with optimal human rights action. It has been deplored, for example, that the Secretary General’s Special representative in Cambodia often failed to take the ‘corrective’ action it was allowed to take when cases of gross human rights abuse were presented to him, under the guise of protecting the electoral process.

### **C. Creation of and Relationship With International Criminal Tribunals**

An issue which the Security Council has been confronted with increasingly during the 1990s and which can be seen as the ultimate outgrowth of its peace-building activities, is the best manner to deal with legacies of gross human rights violations following periods of conflict or civil strife. The types of episodes the Council has had to deal with are ones where a simple improvement of the judicial and police sectors will in most cases not do, and where important decisions have to be taken regarding justice and reconciliation. A clear tension runs throughout the Security’s decisions on those matters.

On the one hand, the Security Council has traditionally been little inclined to take into account issues of transitional justice. The prevailing culture of international peace and security is one which emphasizes order and stability, rather than idealistic notions of justice. In fact, the *realpolitik* case against accountability is that it runs a very real risk of bringing about a renewal of conflict. On the other hand, the Security Council is an organization of states, which are not immune to the ideas of their time. Some Security Council members, including some permanent ones (the UK and France, in particular, and, to a lesser extent the US) have become increasingly sensitive, particularly since the 1990s, to the idea that an essential component is lost if, when seeking to create conditions of international peace and security, the Council is oblivious to the impact, both short term and long term, that justice can have on the ground.

The Security Council’s attitude to transitional justice issues thus seems to have constantly oscillated between these poles, from the early 90s to the present. The Council began the 1990s by giving the impression that criminal prosecutions for grave violations of human rights were not an indispensable feature of restoring international peace and security. The Mexico agreement which put at end to the Salvadorian conflict, although it specified that this was ‘without prejudice to the obligations incumbent on the Salvadorian courts to solve such cases and impose the appropriate penalties on the culprits’, created a Truth Commission with members nominated by the United Nations as the essential means to deal with such violations. The Truth Commission eventually only endorsed justice ambiguously, urging that in light of the ‘insurmountable difficulties’ it was facing, the institutional reform of the Salvadorian justice system should be given priority<sup>125</sup>. A general amnesty was accordingly

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<sup>123</sup> Reed Brody, ‘The United Nations and Human Rights in El Salvador’s ‘Negotiated Revolution’’, 8 *Harv. Hum. Rts. J.* 153 (1995).

<sup>124</sup> See, among others, S/1997/115 and S/1997/438

<sup>125</sup> Report of the UN Truth Commission on Salvador (S/25500, pp. 177-179; 181-182; 185).

adopted in 1993<sup>126</sup>, but the Security Council, which had otherwise been heavily involved in finding an outcome to the conflict, never went beyond deploring the lack of implementation of the Commission's recommendation<sup>127</sup>. That legacy would continue to plague El Salvador's human rights record<sup>128</sup>.

This probably made the decisions to create the International Criminal Tribunal for the Former-Yugoslavia<sup>129</sup> and the International Criminal Tribunal for Rwanda<sup>130</sup> to investigate and punish what were, essentially, gross abuses of human rights all the more remarkable. The creation of the Tribunals came after a number of resolutions and Presidential statements where the Council made it clear that those engaging in grave violations of international humanitarian law would be held liable<sup>131</sup>. The creation of the Tribunals was in itself a bold institutional move since Chapter VII of the Charter under which the Council was acting did not explicitly authorize the creation of subsidiary jurisdictional organs, and both a General Assembly Resolution or a treaty could have been chosen as alternative paths<sup>132</sup>. By linking international crimes to a breach of international peace and security, and framing the creation of the tribunals as a measure to remedy that breach, the Council could nonetheless take the initiative. The tribunals themselves would confirm that interpretation<sup>133</sup>. Their creation thus seemed to demonstrate that international criminal justice can become an integral part of the Security Council's multi-faceted interventions in favour of peace, even at the cost of straining accepted understandings of the Charter.

The Tribunals have similar mandates allowing them to try those responsible for the gravest international crimes, namely genocide, crimes against humanity and war crimes. Although this would extend beyond the scope of this study, both have been sources of a human rights jurisprudence (especially, but not only, on the right to a fair trial) in their own right<sup>134</sup>.

Subsequent experience of course has shown that the creation by the Security Council of an institution devoted to human rights enforcement does not guarantee that the Security Council itself or its members will cooperate with it fully. Indeed, aside from the persistent problem of lack of cooperation by some of the States whose nationals were indicted, it was a long time before NATO, despite its clear obligations to do so, would begin to act upon the ICTY's indictments by arresting suspected war criminals. The Tribunals moreover, have at

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<sup>126</sup> Ley de Amnistía, Decreto Legislativo número 486, Diario Oficial número 56, Tomo 318, del 22 de marzo de 1993.

<sup>127</sup> S/RES/792 (1992).

<sup>128</sup> See, in particular, Human Rights Committee, Comments on El Salvador, CCPR/C/79/Add.34 (1994).

<sup>129</sup> S/RES/827 (1993).

<sup>130</sup> S/RES/955 (1994).

<sup>131</sup> The 'need to bring to justice, in an appropriate manner, individuals who incite or cause violence against civilians' is something which has been frequently recalled, for example, by the president of the Security Council. See S/PRST/1999/6.

<sup>132</sup> S/25704, par. 18-30.

<sup>133</sup> See ICTY, Prosecutor v. Dusko Tadic a/k/a 'Dule' Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995. ICTR, Prosecutor v. Kanyabashi, Decision on Jurisdiction, 10 August 1995.

<sup>134</sup> See La Rosa, Anne-Marie, A tremendous challenge for the International Criminal Tribunals: reconciling the requirements of international humanitarian law with those of fair trial, 321 Int'l Review of the Red Cross 635, (1997).

times run into considerable administrative difficulties<sup>135</sup>, and have been criticized for their remoteness from the crimes they are supposed to judge<sup>136</sup>.

Notwithstanding these criticisms, which tend to be focussed on the tribunals' role rather than specifically the Security Council's part in supporting them, it remains a remarkable fact that both Tribunals seem well on the way to judging many of those principally responsible for the crimes committed in the former-Yugoslavia and Rwanda. Indeed the irony is that while they may not have reached their proclaimed goal of re-establishing international peace and security, they may end up having a lasting influence on human rights, in and beyond the territories over which they have jurisdiction.

The Security Council's apparent embracing of international criminal justice as an extension of its tools to deal with threats to international peace and security, however, was never an unambiguous affair. Even as it created the international criminal tribunals, the Security Council went on endorsing amnesties in countries where it was involved despite evidence that grave human rights violations had been committed. In the case of Cambodia, for example, despite the genocide that was committed in that country, the Security Council did not object to the Paris agreement's discreet approach to the issue of punishment<sup>137</sup>. In Haiti, where grave human rights violations had been committed, the Security Council endorsed the Governor's Island agreement<sup>138</sup> followed by the New York Pact<sup>139</sup> even though these specifically encouraged amnesty. The Council subsequently simply ignored the Truth Commission's Report<sup>140</sup>. In Angola, the Security Council welcomed the Lusaka Accords without reservations, even though these notably urged all Angolans 'to forgive and forget the offences committed in the course of the Angolan conflict' and went on to require a general amnesty<sup>141</sup>.

Two explanations can be adduced to explain why in some cases the Security Council chose to intervene judicially, and in others declined to do so. One is that in some of the above cases, the Security Council was not acting under Chapter VII, and therefore may have lacked the sense of ongoing urgency that eventually prompted it to take a more proactive stance in the former-Yugoslavia and Rwanda to deter violations. This is the familiar line that not all human rights violations in themselves constitute threats to international peace and security. But clearly in some cases (e.g.: Haiti) the Security Council was acting under Chapter VII even as it went on to endorse amnesties. This suggests that even in what is otherwise a Chapter VII situation, not all grave violations of human rights are considered to warrant a strong Security Council stance against impunity. Specifically, it would seem that the Council's 'grave concern' over the 'continuing escalation (...) of systematic violations of civil liberties' in Haiti<sup>142</sup> would have to be distinguished from the grave violations of international humanitarian law, genocide or crimes against humanity which the Security Council feared or determined had occurred in Rwanda and the former-Yugoslavia. At any rate, it remains difficult to determine the Council's precise intervention threshold when it

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<sup>135</sup> That criticism remains true particularly of the ICTR. See International Crisis Group, *International Criminal Tribunal for Rwanda: Justice Delayed*, Report, 7 June 2001.

<sup>136</sup> Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda,' 24 *Yale J. Int'l L.* 365-483 (1999).

<sup>137</sup> S/RES/880 (1993).

<sup>138</sup> S/26063, S/RES/940 861 (1993).

<sup>139</sup> S/26297 (Annex, article 4 (ii)). S/RES/940 (1994).

<sup>140</sup> Rapport de la Commission Nationale de Vérité et Justice. <http://www.haiti.org/truth/table.htm>.

<sup>141</sup> S/1994/1441 (1994), p. 27.

<sup>142</sup> S/RES/940/1994.

comes to international justice, or even to posit that such a normative threshold exists outside the circumstantial and evolving politics of members<sup>143</sup>.

These tensions were bound to come to the fore with the question of Sierra Leone. This was a clear-cut case of a threat to international peace and security *and* a situation where particularly horrendous violations of human rights had been committed throughout a decade of war. Indeed, the Security Council had itself at one point ‘urge[ed] the appropriate authorities to investigate all allegations of [grave human rights) violations with a view to bringing the perpetrators to justice’<sup>144</sup>. Yet by the time the Lomé agreements which anticipated an amnesty for all those involved the conflict had been signed, the Security Council’s stance was characteristically ambiguous. On the one hand, the Council did seem to include a token reference to the ‘urgent need (...) to foster accountability and respect for human rights in Sierra Leone’ and took note of the Secretary General’s qualms<sup>145</sup> about the issue of amnesty<sup>146</sup>. On the other hand, it stressed the equally urgent need ‘to promote peace and international reconciliation’<sup>147</sup>, and seemed to welcome the Lomé accords unreservedly<sup>148</sup>.

In view of the Lomé accords’ wording, this could only be seen as a discreet endorsing of amnesty and was treated as such by human rights NGOs which soon criticized the Council for its failure to encourage punishment of those responsible for atrocities. This eventually prompted the Council to change its position. In resolution 1215, it ‘reaffirmed’ what had been the basis of the creation of the ad hoc tribunals, namely that ‘persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice’ and that ‘a credible system of justice and accountability (...) would contribute to the restoration and maintenance of peace’.

Rather than create a new subsidiary organ such as an international criminal tribunal, the Security Council proposed the creation of an ‘independent special court’ whose details were worked out by the Secretary General and the Sierra Leone authorities<sup>149</sup> and subsequently endorsed by the Council<sup>150</sup>. This ‘treaty-based sui-generis court of mixed jurisdiction and composition’<sup>151</sup> as the Secretary General described it, has jurisdiction over ‘the persons most responsible’ of ‘crimes against humanity, war crimes and other serious violations of international humanitarian law’, regardless of the Lomé amnesty, and is to be

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<sup>143</sup> After all, the Security Council has itself noted that in the case of Haiti, the ‘violations of civil liberties’ in question involved ‘numerous instances of extra-judicial killings, arbitrary arrests, illegal detentions, abductions, rape and enforced disappearances, the continued denial of freedom of expression, and the impunity with which armed civilians have been able to operate and continue operating’. S/RES/917 (1994).

<sup>144</sup> S/RES/1231 (1999).

<sup>145</sup> The Secretary General had instructed his Special Representative to enter a reservation stating explicitly that ‘the amnesty cannot cover international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law’ and pointed out to the Council that an amnesty would be ‘difficult to reconcile with the goal of ending the culture of impunity, which inspired the creation’ of the ad hoc tribunals S/1999/836 (1999), par. 54.

<sup>146</sup> S/RES/1260 (1999).

<sup>147</sup> Ibid.

<sup>148</sup> See S/RES/1270 (1999), par. 17 and S/RES/1289 (1999), par. 17, where the Security Council urges the Sierra Leone government to establish the Truth and Reconciliation Commission, the Human Rights Commission and the Commission for the Consolidation of Peace established under the Lomé Agreement.

<sup>149</sup> S/2000/915.

<sup>150</sup> See S/2000/1234, S/2001/40 and S/2001/95.

<sup>151</sup> Ibid.

composed of both ‘international’ and Sierra Leonean judges. Confronted with the Sierra Leone government’s inertia, the Security Council urged it to ‘expedite’ the effective establishment of the Court<sup>152</sup>.

The special Court is not faultless and its limited temporal jurisdiction has been criticized<sup>153</sup>, but its creation did seem to inaugurate a middle-way between purely domestic justice and international criminal tribunals where the Security Council, while solemnly reaffirming the need for justice, displayed a greater sensitivity to the need for local adaptation. Most importantly, the Council’s stance in favor of the Special Court seemed to put an end, as far as the Security Council is concerned and in cases where it has itself denounced the commission of international crimes, to the hesitations about the relative values of amnesties and justice in cases of international crimes.

The issue of what the Security Council’s attitude to problems of accountability for international crimes should be, however, eventually resurfaced through an unexpected route. Early on in the 1990s, the old idea of establishing an International Criminal Court had been rekindled, and throughout the decade significant efforts were launched to create such a Court, culminating with its creation in 1998 and entry into force in 2001. Whereas the ad hoc tribunals had been very much creations of the Security Council, the idea of an ICC, although often emerging from UN quarters, was by no means a Security Council initiative, and the Council as such was hardly involved in the drafting of the Statute.

One of the key questions which drafters of the Statute had to confront however was what the relationship of the ICC to the Security Council should be. This was particularly important in the case of a crime such as aggression which seemed to have a very close bearing on the issue of threats and breaches to international peace and security. But it was more generally important precisely because both the drafters of the Statute (which included most UN members) could not fail to see that there might be a tension between the demands of a permanent system of international criminal justice, and the Security Council’s historic and Charter mandated responsibility in ensuring international peace and security.

Even though the Security Council was not involved qua Council in the drafting of the Statute, most States had a view on what the ICC-SC relationship should be, not least the Permanent Members who arguably stood most to lose from a strong ICC encroaching on the Council’s prerogatives. The negotiations leading to Rome and the subsequent practice of both the Council and the Court are therefore interesting manifestations of how the Council’s role has been perceived by the international community, and specifically whether the role that the Council can have in enforcing some of the international system’s central human rights-oriented norms.

The drafters of the Rome Statute which created the ICC could have elected to not deal with the issue explicitly, leaving it to the Council and Court to develop their own practice on the basis of the default rules of the international legal order. Presumably this would have given the Security Council the upper hand, on the basis of the superiority of the UN Charter to all treaties concluded subsequent to it.<sup>154</sup> More was at work, however, in the lead to the adoption of the Rome Statute, and clearly some states sought this as an opportunity to redefine more generally and fundamentally the relationship between international peace and security, on the one hand, and international criminal justice on the other. Whether it was truly open for the States assembled in Rome and the parties to the ICC Statute, which only

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<sup>152</sup> S/RES/1346 (2001), par. 14

<sup>153</sup> See Amnesty International, SIERRA LEONE, Renewed commitment needed to end impunity, ai-index AFR 51/007/2001 24/09/2001.

<sup>154</sup> See Article 103 of the UN Charter.

represent a portion (albeit an increasingly significant one) of the international community, to redefine the prerogatives of the Council indirectly through the adoption of the Rome Statute is an interesting question of supra-national constitutionalism, although one that is rarely treated as such. Indeed, most commentators seem to assume that, at least under the relatively self-contained legal system created by the Rome Statute, it was open for the states drafting the Statute to dictate the conditions under which the Council would relate to the ICC. States in Rome, at any rate, successfully managed to put the Council before the *fait accompli*, and the Council's lack of strong protest may suggest partial acquiescence.

The resulting balance is an interesting one. As seen through the lens of the Rome Statute, the Security Council's role, when it comes to fundamental issues of justice and rights is both that of an indispensable facilitator, and of a potentially significant obstacle. The Council has in practice stood for a good measure of both.

On the positive side, the ICC Statute formalizes the possibility of harnessing the Council's power to achieve international criminal justice. Under Article 13 of the Statute, a the Council may refer "a situation in which one or more of such crimes appears to have been committed" to the ICC Prosecutor. In this scenario, the state upon whose territory the "situation" is occurring need not be a State party to the Rome Statute. To the extent that the Council is convinced the commission of an international crime is also a threat to international peace and security, therefore, it can bypass what would otherwise be one of the main limits of the ICC, namely its inability to prosecute crimes committed on the territory or by nationals of non-state parties.

It seemed unlikely initially that the Council would avail itself of that possibility, given that three out of the five permanent members of the Council were not party to the Rome Statute (China, Russia, US), had no intention of becoming party to it and, in the case of at least one (the US), was conducting a vigorous campaign to undermine the Court. Yet in 200, following adjustments in US policy, the Council referred the situation in the Sudanese region of Darfur to the Court. As has already been emphasized, Darfur was the scene of the commission of many atrocities, which the Council had already determined amounted to a threat to international peace and security. The referral was seen as a victory of policy pragmatism over ideology. US foreign policy had been torn between its strong stance in defense of victims in Sudan (amounting to at least crimes against humanity), and its vigorous opposition to the Court. It is testimony to how the fortunes of international peace and security and international criminal justice have become intertwined that this unexpected move was at least conceptually so natural. For a while, the US suggestion had been that a separate tribunal should be created for Darfur (or the mandate of the ICTR extended), but this was a somewhat extravagant suggestion in view of the existence of the ICC.

Of course, the fact that a situation has been referred to the Council hardly solves international criminal justice's many dilemmas, but it does provide the Prosecutor with an added legitimacy, especially in a context where the international criminal justice may in other cases be increasingly accused of compromising international peace and security (Uganda being a case in point). Another considerable advantage of Security Council referral is that, ideally, it will provide a stronger backing than the Assembly of state parties (the ICC's governing body), since the Security Council is in that hypothesis the body that is to deal with non-cooperating states<sup>155</sup>. In the case of Darfur, however, this

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<sup>155</sup> See Article 87.5 b) and 87. 5. 7. of the Rome Statute.

Although the Council can have an extremely positive role in favor of international criminal justice it can also be a significant hindrance to it. In the run-up to the Rome conference, permanent Security Council members in particular, even whilst accepting some of the fundamental orientations of the ICC, felt that pursuing accountability vigorously might in some circumstances be antithetical to international peace and security, and complicate the Council's mandate. The Council was thus granted the power to defer prosecutions for a renewable period of 12 months.<sup>156</sup> This was an improvement from previous suggestions that the Council could freeze prosecutions indefinitely, or even that no prosecution could be launched without a prior Council green light. But one can see how it might have the potential to largely upset the logic of international criminal justice, if it were to be periodically held up at the Council's whim.

It is true that it may have seemed unlikely in 1998 that the Council would muster the sort of unity that would lead all five of its permanent members (which includes two states – the UK and France – which are officially keen supporters of the Court) to vote (or at least abstain from vetoing) a deferral. Nonetheless, it was not long after the Statute entered into force that the Council availed itself of its deferral power, in circumstances that had been largely unforeseen by the Statute drafters. On 12 July 2002, the Council voted Resolution 1422 (2002) which prevented the ICC from exercising its jurisdiction over persons involved in UN peacekeeping operations if they were not nationals of State parties to the ICC. The resolution was only voted as a result of an almost hysterical US administration, insistent that no US soldier should ever be prosecuted by the ICC (something which might happen in theory if they committed crimes in the territory of a state party). It occurred at a time when the Prosecutor had not shown the slightest sign of investigating peacekeepers, a possibility that seems remote in the best of cases. More worryingly, it led to blatant political bullying, as the US threatened to veto the renewal of the UN Mission in Bosnia and Herzegovina (UNMIBH) and all other UN peace-keeping operations. A year later, the deferral was renewed for another year by resolution 1487. So artificial were resolutions 1422 and 1487, that after two deferrals and faced with momentous opposition at the Council (several states had threatened to abstain making a majority unlikely), the US administration abandoned its efforts to obtain a third deferral, and the practice was discontinued. But in 2005 (resolution 1593), the US obtained anew, in exchange for agreeing to a referral of the Darfur situation to the ICC, that nationals of non-states parties operating in Sudan as part of a Security Council authorized mission would be immune from the Court's jurisdiction (even though no US troops were involved).

It is quite likely that resolutions 1422 and 1487 went beyond the letter and spirit of the ICC Statute. Both claimed to be acting under Chapter VII (as required by the ICC), but neither set out a specific threat to international peace and security, merely stating that 'it is in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the Security Council'. This was simply another way of saying that international peace and security should really trump international criminal justice, a flagrant and somewhat pathetic reversal of what had otherwise seemed to be the Council's consistent position since the 90s. As to resolution 1593, it is very unlikely that the Rome Statute allows the Security Council to simultaneously refer a situation (Darfur) and exclude certain individual cases (peacekeepers) from it.

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<sup>156</sup> Article 16 of the Rome Statute.

## D. Power as Responsibility: Holding the Security Council Accountable to Human Rights Standards

One assumption underlying the work of the Security Council in human rights is that although it could be accused of not doing enough, it could not be suspected of actually violating human rights. The last series of issues raised by the Council in relation to human rights, however, is linked to the intriguing possibility that, through its actions, the Council may violate human rights. If one were to spin the image of ends and means a little further, one could argue that the issue is whether the Council's *means* may not conflict with some of its evolving (and, as we have seen, increasingly human rights-oriented) *ends*.

This is a relatively new area which has been the object of little comprehensive study,<sup>157</sup> but it is also quite symptomatic of the evolution of the Council's role, one in which the Council is increasingly taking decisions that directly affect the rights of human beings. In the traditional view of the Security Council's action, the Council was first and foremost, almost exclusively even, dealing with *states*. That the Council's actions had some ulterior motive that was less state oriented mattered little, as states could ultimately be the only real object of the Council's attention. In conditions of globalization, however, particularly in the contexts where the Council is more and more likely to intervene, states or the state is often strikingly absent, opening up spaces where the Council is increasingly having an impact – and increasingly incapable of pretending it is not having an impact – directly on human beings, whose rights may as a result be affected.

A number of practices linked to SC ordered operations (I), embargoes (II), the fight against terrorism (III) have highlighted this problem.

### ***I. The Applicability of International Humanitarian Law and International Human Rights Law to Security Council-mandated Operations***

Chapter VII of the UN Charter only allows the Security Council to use force if and to the extent necessary. Although some Security Council members' interpretation of use of force authorization has at times been open to criticism<sup>158</sup>, this probably in itself imposes a minimal humanitarian constraint on its action at the level of *jus ad bellum* by ensuring that the use of force is proportional to the objectives sought.

This general proportionality, however, is distinct from the *jus in bello* question of whether SC ordered operations should respect IHL. Clearly, however, respect for international humanitarian law by the Security Council bears on the capacity of populations to enjoy some of their basic rights. This is a question that arose as early as the Korean war when the Security Council claimed a human rights exception to the repatriation of prisoners<sup>159</sup>, but which has acquired renewed prominence in the wake of the Gulf War when

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<sup>157</sup> See more generally Mégret & Hoffmann, 'The UN as a Human Rights Violator: Some Reflections on the United Nations Changing Human Rights Responsibilities', 25 *Human Rights Quarterly* 314 (2003).

<sup>158</sup> One has in mind here the continued small-scale bombing raids (notably 'Operation Desert Fox' in 1998) carried out by US and UK aircraft in response to alleged non-cooperation with the UN weapons inspection scheme which rest on a dubious interpretation of Security Council resolutions.

<sup>159</sup> See Mayda, 'The Korean Repatriation Problem and International Law', 47 *AJIL* 414 (1953). Also report of the Committee of the A.S.I.L. on Legal Problems of the United Nations, 'Should the Laws of War Apply to UN Enforcement Action', 46 *Proc. Am. Soc. Int. L.* 216-20 (1952).

concerns were raised that the allies' strategic bombing had caused unnecessary civilian casualties<sup>160</sup>.

The Security Council's position for a long time was that it was not bound by international humanitarian law as such – most notably by the Geneva Conventions – because it was not a State and could not be considered a party to the conflicts in which it intervened. The UN nonetheless made it clear that it would abide by customary international law as regards the use of force. This meant, typically, that rules relating to peace operations would contain a clause referring to need to respect the 'principles and spirit' of international humanitarian law. For the rest, however, it was clear from various SOFA agreements that it was troop-contributing States who remained ultimately responsible for enforcing the laws of war.

The UN's growing intervention in the domestic conflicts generated by the end of the Cold War, by blurring the distinction between peace-keeping and peace-enforcement missions, has since made it necessary to clarify the precise standing of Security Council mandated troops. Indeed, a number of incidents in Somalia involving blue helmets raised worries that peace-keepers might at times commits crimes in violation of international humanitarian and human rights law<sup>161</sup>. It was at the behest and under the pressure of the ICRC that the UN agreed to re-examine its position. A minor turning point came through an unexpected route when the Convention on the Safety of United Nations and Associated personnel which, as its name indicates, was designed primarily to protect peacekeepers, conceded in its Article 20(a) that the Convention did not affect '[t]he applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards'.

It was another four years and numerous consultations later before the Secretary General finally issued a bulletin on the 'Observance by United Nations forces of international humanitarian law'<sup>162</sup> purporting to make the applicability of international humanitarian law to UN troops unambiguous. Article 1 of the bulletin sets out clearly the applicability of 'the fundamental principles and rules of international humanitarian law (...) in situations of armed conflict [UN troops] are actively engaged in as combatants, to the extent and for the duration of their engagement'. For the Secretary General this means, notably, that they are applicable not only in 'enforcement actions' but also 'in peacekeeping operations when the use of force is permitted in self-defence'. Although the bulletin does not encompass all rules applicable in armed conflict, it does stress the applicability of the most important ones for the purposes of Security Council action, including the principle of distinction between military and civilian targets, or the need to minimize so-called collateral damage. The legal status of such a bulletin is of course open to question, but it at least has the merit of binding UN forces internally and will settle for most purposes what had been a long-lasting doctrinal controversy, involving sensitive questions about the UN's role and responsibilities.

New directions have since been taken in the case of Security Council mandated international administrations. In the absence of conflict, international humanitarian law

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<sup>160</sup> See Human Rights Watch, *Needless Deaths in the Gulf War* (1991), 95-316. A United Nations survey undertaken after hostilities ended found that most means of modern life support in Iraq had been destroyed or rendered 'tenuous', including the supply of food, water, and other necessities S/22366, 20 March 1991 (Report of Secretary-General's mission to assess humanitarian needs).

<sup>161</sup> African Rights, *Somalia: Human Rights Abuses by the United Nations Forces* (1993).

<sup>162</sup> ST/SGB/1999/13, 6 August 1999.

seemed ill-adapted to international administrations' large civilian components. This may be why the international administrations, under the supervision of the Security Council, have made it clear, in what must surely be seen as a ground-breaking evolution, that all personnel involved in UNTAET and UNMIK should comply with the highest standards of international human rights law<sup>163</sup>. Indeed, UNMIK's ombudsman even had jurisdiction over the international administration itself<sup>164</sup> and could receive complaints directed towards the UN's own human rights performance.

## **II. The Effect of Embargoes and Blockades on Civilian Populations**

The effect of embargoes and blockades on the human rights of populations is perhaps one of the more vexing issues surrounding Security Council activity in the past years. The Security Council is authorized by Article 41 of Chapter VII of the United Nations Charter to impose economic sanctions and has done so many times in its history as a remedy against perceived threats to international peace and security, sometimes with notable success as in the case of the South African apartheid regime. Of course, Council-imposed sanctions and embargos are primarily aimed at undercutting the material and financial sustenance of a particular conflict which, in the long run, should serve to protect the civilian population. Apart from the issue of their effectiveness, however, increasing awareness has been raised in the 1990s as to the potentially dire effect embargoes can have on civilian populations and the enjoyment of elementary rights<sup>165</sup>. Although the hardship caused on populations by embargoes was already evident in Haiti and Yugoslavia, it has been nowhere clearer than in the case of the Iraq boycott.

To a large extent the continued imposition of sanctions is attributable to the government of the States being sanctioned, but in cases where the population has no or little democratic say, it is hardly as if the Council can ignore the adverse consequences of its actions. Indeed, it would be wrong to say that the Council has been insensitive to the humanitarian dilemma arising from economic boycotts and related non-military sanctions. It has sought to shield civilian populations to some degree by allowing exemptions for humanitarian needs, generally for medical supplies and 'in humanitarian circumstances, foodstuffs'<sup>166</sup>. To this end, it formulated procedures to administer the humanitarian exceptions and to supervise trade transactions for that purpose. The 'Oil for food' programme stands out as one attempt to administer various humanitarian exceptions to an otherwise particularly inflexible embargo<sup>167</sup> even though the fact that it has fallen prey to the worse sort of corruption is worrisome.

These measures, while of some value, have not sufficed to overcome widespread

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<sup>163</sup> See articles 2 of Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo, Unmik/reg/1991/1, 23 July 1999 and Regulation No. 1999/1 on the Authority of the Transitional Administration in East Timor, Untaet/reg/1991/1, 27 November 1999.

<sup>164</sup> Regulation No. 2000/38, On the Establishment of the Ombudsperson Institution in Kosovo, UNMIK/REG/2000/38.

<sup>165</sup> On the issue in general, see Damrosch, 'The Civilian Impact of Economic Sanctions' in *Idem.* (ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (1993); see also Provost, 'Starvation as a Weapon: legal Implications of the UN Food Blockade against Iraq and Kuwait', 30 *Columbia J. Transnat'l L.* 577 (1992); see the Symposium on: 'The Impact on International Law of a Decade of Sanctions against Iraq', with contributions by different authors, published in 13 *EJIL* 1-321 (2002).

<sup>166</sup> As regards Iraq see S/RES/661 (1990) and S/RES/687 (1991); as regards Yugoslavia see S/RES/757

<sup>167</sup> S/RES/986 (1995).

criticism for the hardship caused by economic embargoes to people in the targeted State as well as in third States. This is partly because of a certain inflexibility by Security Council members in interpreting exceptions, but also because it may be in the nature of embargoes, as a rather blunt policy tool, that their effect on civilian populations can never be radically reduced, be it only because of the technical problem of so-called ‘dual-use’ products. A panel commissioned by the Security Council in 1999 found that the humanitarian situation in Iraq was dismal and that this was to a large extent attributable to the UN sanctions<sup>168</sup>.

In the 2000s, there has been a renewed willingness in the Security Council to discuss the issue. The Council has accepted, for example, that humanitarian impact assessments of proposed sanctions should be conducted prior to their adoption<sup>169</sup>: an indication that the Council has now accepted that it bears part of the responsibility for the plight of the populations negatively affected by sanctions. One of the concrete methods in which the negative side-effects of sanctions can be minimized is by better targeting them from the start. Indeed, the idea of “smart sanctions” became increasingly prominent towards the end of the 90s. In 1997 and 1998, for example, travel and financial restrictions were imposed on members of UNITA.<sup>170</sup> Subsequently, the Security Council sought to target the trade of diamonds which was used to finance the conflicts in Angola, Sierra Leone, the Democratic Republic of Congo, and Liberia<sup>171</sup>. As the Secretary General emphasized it, a ‘more prompt and effective response to present and future threats to international peace and security’ was needed, ‘designed so as to maximize the chance of inducing the target to comply with Security Council resolutions, while minimising the effects of the sanctions on the civilian population...’.<sup>172</sup>

### **III. Terrorism**

Although the Security Council’s dealing with terrorism raises some of the same issues that arise as a result of sanctions more generally, the focus on terrorism since 9/11 and the almost paradigmatic shift this has caused in the work of the Council warrant an independent treatment. The Security Council has undertaken very significant steps against terrorism, not exclusively but particularly after 9/11. Although these steps are only part of a considerable international effort, both domestic and regional, to tackle terrorism, it has been a very influential and authoritative part of that effort with cascading implications for many levels of governance.<sup>173</sup>

The relative success of targeted sanctions (see *supra*) has made them a preferred tool in the fight against terrorists. Sanctions adopted by the UN initially focussed against both the

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<sup>168</sup> See S/1999/356.

<sup>169</sup> For a suggestion by the Secretary General and its endorsement by a Security Council Presidential Statement see, respectively see S/1998/147 and S/PRST/1999/34.

<sup>170</sup> As is well known smart sanctions have been the object of study in the context of a joint diplomatic and scholarly effort to assess their efficacy and design their implementation. See: T. Biersteker, *Targeted Financial Sanctions: a Manual for the Design and Implementation. Contributions from the Interlaken Process* (Providence, RI, 2001); M. Brzoska, *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions: Results of the Bonn-Berlin Process* (Bonn, BICC), 2001; P. Wallenstein, C. Staibano, M.Eriksson, *Making Targeted Sanctions Effective Guidelines for the Implementation of UN Policy Options* (Uppsala, Uppsala University Press, 2003)

<sup>171</sup> See S/RES/1295 (2000), S/RES/1306 (2000), S/RES/1342 (2001).

<sup>172</sup> Report of the Secretary-General on the Work of the Organization, A/55/1, at 13, para. 100.

<sup>173</sup> Tappeiner, ‘The fight against terrorism. The lists and the gaps’, *Utrecht Law Review*

Taliban and Al-Qaida, but by the time that former had been destroyed, Al-Qaida remained as the only target of the sanctions. These initial sanctions, which had already been adopted before 9/11, were indeed “targeted” in that only a select group of individuals (Al-Qaida members and associates) were concerned. Resolution 1267 set up a sanctions Committee whose role is to supervise the administration of sanctions through a state reporting mechanism. Identification of entities associated with Al-Qaida is through states contributing information to that effect. Designation as a terrorist entails an obligation for all UN state members to, inter alia, freeze the assets of the relevant groups.

The relatively narrow focus of resolution 1267, however, was significantly changed with the adoption of resolution 1373 in the wake of the attacks that had struck the New York World Trade Centre, which is at the source of a much more comprehensive effort at dealing with terrorism in all its forms. States are required by the resolution to freeze all funds and other financial assets or economic resources of terrorists, but the resolution is open-ended in both time and space, and does not include being a list of what persons or entities fall under that resolution. Instead, the Council defers largely to States to determine who is affiliated with a group already established as terrorist, but to actually designate who and what is terrorist. Resolution 1390 thus appears as a general regime dealing with terrorism, in which targeted sanctions are applied increasingly directly to a variety of non-state actors.

Resolution 1267 was already not without problems in itself, but the extension of the terrorist sanction regime to a potentially unlimited number of “terrorist” groups, has raised many substantial human rights concerns, even though this issue has surfaced relatively late in the more general debate on sanctions (which is typically more interested in their efficacy).<sup>174</sup> Clearly, the consequences for individuals or organizations of being blacklisted by the Sanctions Committee are likely to be considerable. If one follows international human rights jurisprudence, due process rights should be guaranteed as soon as the object of a procedure is the determination of “civil rights”.<sup>175</sup> Although it would seem that it is mostly property that is affected (and the right to property, although protected by the UDHR, has a problematic status in international human rights law), through property it is a host of other rights can be put in danger (privacy, presumption of innocence). The inability to challenge the freezing of assets, moreover, would seem to in itself be a violation of the right to access a court and the right to an effective remedy, to the extent that human rights have been violated.

Despite this, it seems that these consequences are not matched by a correspondingly and appropriately protective regime. Procedurally, some safeguards are generally built into UN sanctions systems. For example, decisions by the Sanctions Committee are by consensus and a review of one’s case is possible (leading to a ‘delisting’) through one’s state of residence or citizenship. Notwithstanding, designation as terrorist or the review process are at best administrative processes, bereft of any of the due process guarantees that would seem to be applicable when the goal is effectively to impose sanctions. The process, furthermore, is quite confidential and no information is given publicly, for example, on why a person or entity were added to the list. Much of the information giving rise to a decision to categorize as terrorist was taken is covered by national security concerns for secrecy. The Sanctions Committee moreover relies entirely on states to forward names of terrorism implicated individuals or organizations, so that a very real fear arises that it may simply rubber-stamp

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<sup>174</sup> See I. Cameron, ‘UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights’, 72 *Nordic Journal of International Law* (2003) 159-214. The article is based on a report that the author wrote for the Swedish Foreign Office.

<sup>175</sup> See Article 6 of the ECHR.

state abuses. As to the possibilities for review, they remain quite theoretical since they are dependent on the very state who, most of the time, will have provided the information allowing an person or organization to be blacklisted.

From a substantive perspective, there is something paradoxical about the fact that the Security Council is engaged in strong initiatives to combat terrorist, even whilst the UN still seems incapable of adopting a comprehensive definition of the phenomenon. The designation of terrorists by the Sanctions Committee has thus been criticized as based on a rather vague definition, and even subsequent clarifications<sup>176</sup> have not alleviated fears that the net may occasionally be cast too broadly.<sup>177</sup> One of the problems is that the Security Council targets not merely the most active terrorists but also various individuals which have arguably supported them. This creates difficulties at the periphery, especially since it is in the nature of terrorist networks such as Al-Qaida to be nebulous and only loosely organized. The standard of proof required to determine that an entity is terroristic in nature. States are only required to provide “relevant information”, and the Sanctions Committee is supposed to “include to the extent possible, a narrative description of the information that forms the basis or justification for taking action”. Both of these are quite mysterious.

That very real human rights dangers arise of the Council’s opaque dealing with terrorism is something that has been recognized by the UN itself:

‘... the Security Council must proceed with caution. The way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions.’<sup>178</sup>

However, it is unclear, despite some of the many worthwhile and pragmatic suggestions that have been made by commentators to alleviate concerns about human rights,<sup>179</sup> that the Security Council seems committed to do much about the problem. The Council is, after all, composed of states, many of which will at varying times be involved in the repression at home of groups or movements which they will brand as “terrorist”. In view of the considerable emphasis that has now been put on terrorism as a threat – possibly the major threat in the eyes of some – to international peace and security, it seems likely that the Council will not escape the huge pressure that has come to bear on human rights almost everywhere as a result of the fight against terrorism. Indeed, the Security Council may amplify concerns about terrorism and set precedents of inscrutability which may well be interpreted as an objective encouragement to deal with terrorists without unduly encumbering themselves with rights concerns.

On rare occasions, sanctions adopted as a result of Security Council resolutions have been challenged before courts on human rights grounds. The immunity of the UN means that the Security Council’s actions are very unlikely to be challenged domestically. This still leaves open the possibility, at least theoretically, that a state or a regional organization’s measures in implementing the UN sanctions regime could themselves be attacked. Indeed

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<sup>176</sup> S/RES/1617 (2005).

<sup>177</sup> Second report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to resolution 1526 (2004) concerning al Qaeda and the Taliban and associated individuals and entities, 15 February 2005, S/2005/83, 11.

<sup>178</sup> See: ‘A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change’, A/59/565, para. 152.

<sup>179</sup> See in particular, the suggestions made by Cameron, *supra* note 174, pp. 196-213.

One concern is that, regardless of whether the Council is committing human rights violations or not, its resolutions, because they oblige state parties, may lead these to violate certain human rights guarantees to which they have subscribed. In such cases, the superiority of international law, of the UN Charter or of Chapter VII adopted resolutions is of little comfort to the states involved and the Council may in the future come under indirect legal challenges from below, as it were.<sup>180</sup>

Most of the challenges have been heard in various European contexts. The European Court of Justice has tended to defer to the authority of public international law and the power of the Council. In the case of the *Bosphorus*<sup>181</sup>, the Court accepted the possibility that Security Council resolutions might end up curtailing individual rights on the ground of the fundamental public interest of the international community. The Court of First Instance of the European Communities (CFI) has also heard two cases brought about by individuals who had suffered, via the EU, from UN financial sanctions as a result of being allegedly associated with Usama bin Laden. The Court declined to review the lawfulness of the Security Council's decision on the basis of fundamental human rights per se, although interestingly it did consider that member states (of the Community) would not be bound by a Security Council resolution which violated *jus cogens* norms (only to find, however, that no *jus cogens* norm had been violated). At the date of writing, both decisions were being appealed.<sup>182</sup>

## Conclusion

The Council's impact on human rights appears at the same time potentially formidable and problematic in practice.

There is perhaps no more revolutionary trend in the Council's development (and therefore, in the UN's and, beyond it, in international relations) than the slow but unmistakable and possibly even irreversible redefinition of international peace and security in terms of how it relates to human rights. To a large extent, it is as if the Council had played apprentice sorcerer with human rights: initially human rights concerns were probably introduced somewhat opportunistically to add legitimacy to measures that were really adopted for other reasons; little by little, however, human rights considerations, by creating certain expectations, have tended to acquire an inertia of their own, so that ultimately it has been possible to oppose them to Security Council members. No aspect of the Security Council's activity illustrates this better than the path of international criminal justice. From international criminal tribunals created by the Council itself, to the very ambivalent position in which the Council now finds itself in relation to the ICC, international criminal justice, which was initially seen very much as a means, has tended to emancipate itself and become an end in itself, which is increasingly seeking to constrain the Council's action.

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<sup>180</sup> If these legal challenges come to nothing legally, they may at least have the effect of modifying the policy of some of the states involved internationally, and encourage them to seek reforms of the sanctions mechanisms that would allow them to respect Security Council resolutions and still comply with their other international obligations.

<sup>181</sup> ECJ 30 July 1996, Case C-84/95 *Bosphorus* The case involved the seizure by Irish authorities of an aircraft which belonged to a Yugoslav airline company. The seizure was based on Security Council ordered sanctions. The Turkish charter company which had leased the plane in good faith challenged the seizure.

<sup>182</sup> For a more general comment see Bulterman, 'Fundamental Rights and the United Nations Financial Sanction Regime: The Kadi and Yusuf Judgments of the Court of First Instance of the European Communities', 19 *Leiden Journal of International Law* 753-772 (2006).

Of course, it is certainly not the case that the Council has replaced international peace and security as its main justification for action with human rights. But human rights have arguably won much ground as a decisive factor in steering the Council into action. Although the Council's behaviour has far from always been resolute, it has at least managed to largely reformulate the terms of the debate and it may find it increasingly difficult – or at least costly politically – to not stand up to its now proclaimed norms.

The Council's activities in favour of human rights have also led it to resort increasingly to human rights action as a *sui generis* way of improving international peace and security. This is testimony to the idea that the linkage between the two concepts is not merely rhetorical: the Council actually takes human rights seriously enough that it will occasionally incorporate them in its own actions. The creation and support of international criminal tribunals, in this respect, stands as a rather startling example of the diversification of the Council's activities.

Together, these developments suggest a fairly rosy view where ends and means are increasingly seen as inseparable: human rights are the means to a lasting peace that has respect for human rights as one of its foundations. In the most optimistic of scenarios, and whilst acknowledging that the process will be one of stop-and-go, the Council can be seen as gradually pulling itself up by the boot-straps: its actions in favour of human rights today will provide the standards to which it can be held tomorrow so that, through an ever accumulating exercise of self-binding, the Council will eventually 'corner' itself into being as strong a human rights upholder as it has the potential to be.

Although this certainly seems a long way off, one could imagine a situation where the equation between international peace and security and human rights would be pushed so far that the former would be at least partly absorbed by the latter, so that any situation of grave violations of human rights would become *ipso facto* a threat or breach to international peace and security. Indeed, one can even imagine that international peace and security may become defined in terms of how it affects human rights, so that certain traditional threats to international peace and security (e.g.: an interstate conflict) might be recast as no longer threats to international peace and security at all - to the extent that they had as their goal the protection of human rights.

By the same token, at least four, not necessarily compatible, major concerns arise in relation to the Council's increased interest with human rights, which cast a very long shadow on the Council's role.

First is perhaps the principal concern, namely that, despite its very significant evolution, the Council is (still) not doing enough. The Rwandan genocide was probably an all time low in the history of the United Nations, and much of this could be blamed on the Council's inability to rise to the occasion. More than a decade later, and despite the immense effort that has gone into thinking about these shortcomings, particularly since the Kosovo episode, the Darfur crisis is a reminder that for all its rhetoric, the Council continues to have tremendous difficulty in transcending its divides and in taking resolute action where it would be most needed. Behind these shortcomings lies the reality that, for example, states are often quicker to vote for strong-worded resolutions than contribute troops. More generally, the tension between the demands of human rights and respect for sovereignty, even though it has been powerfully mediated by 'international peace and security', remains a particularly resilient one.

That must surely be because 'international peace and security' itself remains an inherently contested concept. Human rights may be conducive to international peace and security, even often so; but there may be times when achieving international peace and

security means at least on the short term having human rights concerns take second place. The predicament in which the ICC seemed to be by 2006 in relation to its Uganda indictments seemed to highlight that point. The complex balancing act that goes on at the Council between competing values, as a result, never seems to be capable of anything more than an ad hoc resolutions. That this is eminently frustrating from a human rights point of view is not surprising, but underscores the continuing prevalence of political logics based on what is achievable rather than what is ideally desirable.

One can wonder, nonetheless, how long the Council can remain in the intractable situation of not being able to rise to the lofty normative ambitions it has arguably set itself. At the heart of this contradiction, is a tension between a vision of the Council increasingly bound by its precedents and acting as a law enforcer itself bound by the law it has created, and a vision of the Council as merely a decision-making mechanism endlessly tied to the contingent interests of its members, that cannot muster the requisite political consensus even when it is most needed. The mutation of the Council from the latter into the former would herald a tidal change at the UN, but it is at present the least probable scenario.

A second, related, concern is that what the Council is doing, it is doing inconsistently. In that view, the problem is not so much or at least not strictly that the Council is not doing enough, but that it seems to be doing so much in some cases, and so little in others. For each circumstance where human rights have been taken into account by the Council, there are many if not more when it was not even though a strong argument existed that it should<sup>183</sup>. Whereas restoring democracy for example was a major ground for intervention in Haiti, this Council precedent has not been matched by similar action in any other context; although the Security Council created the ICTY and the ICTR and usefully deferred the Darfur situation to the ICC, it has at the first opportunity used its deferral power vis-à-vis the ICC to block prosecutions of peacekeepers of non-state parties, a hopelessly counterproductive move. Although certain African states, for example, seem to make relatively easy targets to Security Council intervention, Chechnya, Tibet, or Israel remain largely off-limits in terms of Council action, even though a clear link exists between violations of human rights and a threat to international peace and security, and even when the UN human rights machinery is otherwise doing its best to bring attention to violations in these regions.

Behind that reality lies the fact that the Council, for all its promises, remains a body composed of a small fraction of states and dominated by a few big powers whose commitment to human rights at home and abroad is either very low or volatile. All of the permanent members (although mostly China, the Russia and the US) are to blame for this state of fact. It is worrying, in this context, that none of the reform projects seem set to tackle the veto issue or that there has been so little willingness by Permanent members to acknowledge that the veto is not simply a privilege but also a responsibility.

A third concern is that the Council is interested in human rights in certain areas of its activities, but has often failed to see the negative human rights impact that it has in other areas, especially as it takes on more and more governance responsibilities. In quantitative terms, no type of measure has done more harm to the Council's claims that it cares for human rights than embargoes, in Iraq and beyond. The behaviour of peacekeepers or enforcers under Council mandate and the risk of rights violations arising out of the regime set up to deal with terrorism are probably less significant concerns, but nonetheless point in worrying directions.

A fourth and somewhat different concern is that the Council may already be doing...

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<sup>183</sup> See generally, David Wippman, Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict, 27 *Colum. Human Rights L. Rev.* 435 (1996).

too much. Although rarely articulated comprehensively, this sort of concern is not to be treated lightly. Indeed, it remains to be seen whether, even were the Security Council to adopt a higher human rights profile, this is something that should be welcomed as an unmitigated blessing. Criticism has been raised by some human rights scholars, for example, of the Council's ever-burgeoning concept of international peace and security. There is certainly a sense that after years of expansion, the concept may end up becoming synonymous with so much that it becomes virtually inoperative<sup>184</sup>.

There are institutional concerns as well. Pushed to their extreme, the Council's forays into human rights could bring the Charter's interpretation to a breaking point. For example, if the Council were to become, for the sake of argument, the principal focal point within the UN for human rights matters, this would involve a significant transfer of power from other bodies (most relevantly the Human Rights Council), which might end up being relatively marginalized as a result. Although the Security Council could always argue that it was only casting condemnation on human rights practices because a breach to international peace and security was involved, that might end up appearing as a thinly disguised pretext, displacing the mechanisms that have been put in place to justify collective human rights action (and which in the case of the HRC typically involve a more representative body and deliberation process). It is hardly evident that such a process would be desirable.

Linked to this concern but broader than it, is the idea that whilst the Security Council may be a tremendous ally of the cause of human rights in times of crisis, it remains a body deeply unsuited to the ordinary conduct of human rights affairs. As has been seen in this Chapter, the Council obviously has a tremendous potential to promote rights. But in doing so inconsistently it may create expectations that it cannot honor, subject human rights to an even worse form of political horse-trading than the sort that has historically so damaged the cause of human rights at the UN, and unduly narrow the scope of deliberation that human rights issues should rightly be the object of.

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<sup>184</sup> David, 'Rubber Helmets: The Certain Pitfalls of Marshalling Security Council Resources to Combat AIDS in Africa', 23 Human Rights Quarterly 560 (2001).