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SPECIAL TOPIC— INTERNATIONAL HUMANITARIAN LAW

The Security Council of the United Nations and the Implementation of International Humanitarian Law

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I. INTRODUCTION

For the first twenty years of its existence, the United Nations played no particular role in the implementation of international humanitarian law. The main reason for this lack of action, it has been argued, was the fear that such involvement could be misinterpreted as an admission of failure on the part of the United Nations to achieve its most important objective, the maintenance of international peace and security, and as undermining to some extent the fundamental principle of non-use of force enshrined in Article 2, paragraph 4 of the United Nations Charter.¹

The reality of the use of force and the great number of armed conflicts could not continue to be overlooked. Thus, since the Middle East Crisis of 1967, the United Nations has taken various actions regarding the implementation of international humanitarian law,² of which the most re-

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1. On the basis of this argument, the International Law Commission of the United Nations refused to include in its program of work the topic of the laws of war. Report of the International Law Commission to the UN General Assembly, *included in* Y.B INT'L L. COMMISSION ¶ 18 (1949). See also Abi-Saab, *The Implementation of Humanitarian Law*, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 310, 333 (A. Cassese ed., 1979); Sassoli, *Mise en oeuvre du Droit International Humanitaire et du Droit International des Droits de l'Homme: Une Comparaison*, in 1987 *ANNUAIRE SUISSE DE DROIT INTERNATIONAL* 24, 48.

2. The United Nations, moreover, from that period on engaged itself in developing this body of law. Following the International Conference on Human Rights in 1969, the General Assembly adopted a number of resolutions; see, e.g. Respect of Human Rights in Armed

cent expression is the adoption of several resolutions by the Security Council on the Persian Gulf crisis.

This article will focus on the role of the Security Council in the implementation of humanitarian law. This is not to say that the activities in this field of other United Nations organs, such as the General Assembly and the Secretary-General, the Commission on Human Rights, and relief bodies, are of a lesser importance. Each merits a full, independent discussion. The Security Council, however, is the organ entrusted under the Charter with the primary responsibility for the maintenance of international peace and security. It appears recently to finally be performing its functions as envisaged by the drafters of the Charter. Most importantly, it is the only organ which can make binding decisions.

Part II of this article briefly outlines various means of implementing international humanitarian law treaties. Part III presents an analysis of the actions of the Security Council to date in that field. Part IV evaluates the measures adopted so far by the Council and examines other possible actions that it can take under international law in cases of armed conflicts. The article focuses on the responses of the Council to actions by states and thus does not address the question of the implementation of humanitarian law by United Nations forces sent by the Security Council, which is a separate issue.³

Conflicts, G.A. Res. 2444 (XXIII), 1748th mtg. (Jan. 13, 1969). The Secretary-General, in response to the Assembly's request, prepared two reports on the topic, which *inter alia* contained suggestions for the development of humanitarian law; see U.N. Doc. A/7720 (1969); U.N. Doc. A/8052 (1970). However, the process of development remained at the time largely outside the framework of the United Nations. Thus, the 1977 Protocols Additional to the Geneva Conventions of 12 August 1949 were elaborated on by a Diplomatic Conference convened by Switzerland, on the basis of draft texts prepared by the International Committee of the Red Cross. See the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Second Geneva Convention]; the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Third Geneva Convention]; the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Fourth Geneva Convention]. See also Protocol Additional to the Geneva Conventions of Aug. 12, 1949, Relating to the Protection of Victims of International Armed Conflicts, 11255 U.N.T.S. 3 [hereinafter Protocol I]; the Protocol Additional to the Geneva Conventions of Aug. 12, 1949, Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 3 [hereinafter Protocol II].

3. See, e.g., Schindler, *United Nations Forces and International Humanitarian Law*, in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET* 521 (C. Swinarsky ed., 1984) [hereinafter *STUDIES AND ESSAYS*]; Komenov, *The Origin of State and Entity Responsibility for Violations of International Humanitarian Law in Armed Conflicts*, in *IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW* 169 (F. Kalshoven and Y. Sandoz eds., 1989). In this connection, the Secretary-General has drawn attention to the need to reflect on the questions of "mechanisms required for the Council to satisfy itself that . . . the rules of humanitarian law applicable in armed conflicts are complied with" when the use of force has been authorized by the Council, U.N. GAOR, Supp. No. 1, U.N. Doc. A/46/1, at 3 (1991). The Model Agreement between

II. OVERVIEW OF THE MEANS OF IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW TREATIES

Most instruments codifying the laws of war are classical treaties largely leaving implementation to each Party. The Geneva Conventions of 1949, however, in order to ensure their implementation, rendered mandatory the institution of Protecting Powers which had been widely resorted to in practice, but left the activation of the procedure to the states concerned.⁴ In the absence of Protecting Powers, the following "substitutes" are available to fulfill their duties: "an organization which offers all guarantees of impartiality and efficacy,"⁵ "a neutral State or such an organization,"⁶ or "a humanitarian organization, such as the International Committee of the Red Cross."⁷ As for Additional Protocol I, it further strengthened the above system by expressly stating the legal obligation, implicit in the Geneva Conventions, that the Parties have the duty to appoint a Protecting Power, and by providing for various means to ensure such an appointment or that of a substitute.⁸ The Geneva Conventions also provide for the institution of an enquiry concerning alleged violations thereof, at the request of a Party. The actual procedure is again left to the Parties or, in the absence of agreement, to an umpire chosen by them.⁹ Protocol I institutionalizes this process with an optional clause on compulsory resort to an International Fact-Finding Commission established under Article 90 to enquire into allegations of violations of the Conventions and the Protocol, to "facilitate, through its good offices, the

the United Nations and Member States contributing personnel and equipment to United Nations peace-keeping operations, recently prepared by the Secretariat, provides that such operations "shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel." U.N. Doc. A/46/185 art. X (1991).

4. Common article 8 of the First, Second, and Third Geneva Conventions and article 9 of the Fourth Geneva Convention provide that "[t]he present Convention shall be applied with the co-operation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict." For a discussion of the history and role of the institution of Protecting Powers, see Abi-Saab, *supra* note 1, at 311. The co-operation of the Protecting Powers in the execution of the treaty is also envisaged in the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, art. 2, 249 U.N.T.S. 240.

5. Common article 8, ¶ 1 of the First, Second, and Third Geneva Conventions and article 9 of the Fourth Geneva Convention.

6. Common article 8, ¶ 2 of the First, Second, and Third Geneva Conventions and article 9 of the Fourth Geneva Convention.

7. Common article 8, ¶ 3 of the First, Second, and Third Geneva Conventions and article 9 of the Fourth Geneva Convention. Unlike the first alternative for a substitute, which is decided upon by the High Contracting Parties, it is the Detaining Power that has the obligation to choose between the last two alternatives in the absence of Protecting Powers or a substitute organization under paragraph 1, or to accept the offer of a humanitarian organization. See, e.g., Abi-Saab, *supra* note 1, at 318.

8. Protocol I, art. 5.

9. Common article 52 of the First Geneva Convention, 53 of the Second, 132 of the Third and 149 of the Fourth. This procedure has never been used.

restoration of an attitude of respect for the Conventions and th[e] Protocol."¹⁰

An innovative element of the Geneva Conventions and Protocol I is the obligation for the High Contracting Parties not only to respect but also to ensure respect for the relevant instruments.¹¹ This covers two types of obligations: a Party must adopt the necessary measures to ensure the implementation of the instrument by itself, particularly integration into its municipal law; it must also, irrespective of whether it is a party to the conflict, endeavor to bring another Contracting Party which has violated the treaty back to an attitude of respect for that treaty.¹²

This rather sophisticated legal system of implementation did not succeed in averting violations of international humanitarian law. Before 1949 the principle of reciprocity and the right to reprisals worked to some extent as a deterrent for such violations. It left open, however, the very real possibility of the lawful violation of humanitarian law against a party to the conflict which had violated this law first — hardly a satisfactory solution. Therefore, the Geneva Conventions and Protocol I prohibit reprisals against protected persons and objects.¹³ Moreover, the 1969 Vienna Convention on the Law of Treaties prohibits reciprocity with regard to the application of treaties of humanitarian character.¹⁴ As for the institution of Protecting Powers:

The assumption which prevailed during the elaboration of the Conventions that States would never hesitate to appoint and accept, or to serve as Protecting Powers was . . . disproved in practice.¹⁵

10. The International Fact-Finding Commission was established on 25 June 1991, after twenty High Contracting Parties made declarations recognizing its competence under Article 90 of Protocol I. ICRC Press Release, No. 10, June 27, 1991.

11. Common article 1 of the First, Second, Third, and Fourth Geneva Conventions; and Protocol I, art. 1.

12. COMMENTARY TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949. art. 1 (J. Pictet ed., 1958) [hereinafter COMMENTARY]. For more details on the obligation to ensure respect for the Conventions and Protocol I see, e.g., Condorelli and Boisson de Chazournes, *Quelques remarques à propos de l'obligation de 'respecter et faire respecter' le droit international humanitaire 'en toutes circonstances'*, in STUDIES AND ESSAYS, *supra* note 3, at 17; Levrat, *Les conséquences de l'engagement pris par les Hautes Parties contractantes de 'faire respecter' les Conventions humanitaires*, in IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 3, at 263.

13. First Geneva Convention art. 46, Second Geneva Convention art. 47, Third Geneva Convention art. 13, ¶ 3, Fourth Geneva Convention art. 33, ¶ 3; Protocol I art. 20, art. 51, ¶ 6, art. 52, ¶ 1, art. 53, ¶ c, art. 54, ¶ 4, art. 55, ¶ 2, and art. 56, ¶ 4. As a matter of fact, reprisals against prisoners of war have been prohibited since 1929. Convention Relative to the Treatment of Prisoners of War, July 27, 1929, art. 2, ¶ 347, T.S. 846. Furthermore, the Convention for the Protection Of Cultural Property in the Event of Armed Conflict, May 14, 1954, also prohibits reprisals against protected cultural property, *supra* note 4, at art. 4, ¶ 4. See also Abi-Saab, *supra* note 1, at 310.

14. Vienna Convention on the Law of Treaties art. 60, ¶ 5, 1155 U.N.T.S. 331 (1969).

15. Abi-Saab, *supra* note 1, at 324. Resort to Protecting Powers has been limited to three instances: the 1956 Suez crisis, the 1961 Goa incident and the Indo-Pakistani conflict of 1971.

In contrast, the International Committee of the Red Cross (ICRC) has been playing a crucial role in the implementation of humanitarian law, given its right of initiative to undertake humanitarian activities, subject to the consent of the Parties,¹⁶ in addition to specific mandates attributed to it under the Geneva instruments.¹⁷ Its flexible and discrete way of operating has greatly contributed to its success.

It is difficult to evaluate the extent to which States fulfilled their obligation "to ensure respect" for international humanitarian law, due to the necessarily discrete nature of diplomatic demarches to that effect. Such practice does not, however, seem to be overwhelming as far as bilateral contacts are concerned.¹⁸ What then about multilateral means "to ensure respect" for international humanitarian law?

Unlike the Geneva Conventions, Protocol I expressly mentions the United Nations in relation to the implementation of international humanitarian law. Article 89, entitled "Co-operation," reads:

In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.

Nevertheless, the scope of this provision is much more limited than certain proposals on the role of the United Nations put forward before the adoption of the Protocol.¹⁹

Aside from the "system" of the Geneva Conventions and Protocols, two other treaties relating to international humanitarian law involve the United Nations in their implementation. The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction provides that a State Party may lodge a complaint regarding the violation of the Convention by another State Party with the Security Council, which may carry out an investigation on the matters.²⁰ The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification

16. Common article 9 of the First, Second and Third Geneva Conventions and article 10 of the Fourth with respect to international armed conflicts, and Common article 3 with respect to non-international armed conflicts.

17. See, e.g., Third Geneva Convention art. 126, and Fourth Geneva Convention art. 143, relating respectively to visits to prisoners of war and civilian internees and relief assistance.

18. Condorelli, *supra* note 12, at 27; Levrat, *supra* note 12, at 291.

19. In particular, proposals were made to the effect that an organ established by the United Nations assume the duties of the Protecting Powers. See Abi-Saab, *supra* note 1, at 339.

20. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological, Biological and Toxin Weapons and Their Destruction art. VI, G.A. Res. 2826 (XXVI), Dec. 16, 1971, annex [hereinafter Convention on the Prohibition of Toxin Weapons].

Techniques contains a similar provision.²¹ Both Conventions moreover provide that consultation and co-operation between States Parties relating to the application of the Conventions may also be undertaken through appropriate international procedures within the framework of the United Nations.²²

Before concluding this brief survey of means of implementation of international humanitarian law treaties, mention should be made of one important non-legal means for ensuring their implementation: public opinion. Public statements and appeals by states, international organizations, non-governmental organizations and the ICRC may in certain cases have an impact, because no party to an armed conflict is indifferent to its public image.²³

III. THE PRACTICE OF THE SECURITY COUNCIL

The United Nations has taken decisions on the implementation of international humanitarian law since 1967. Security Council activity in this regard is quite extensive and is increasing.

The first express mention by the Security Council of the Geneva Conventions was not couched in strong terms. By Resolution 237, relating to the Middle East, the Security Council recommended "to the Governments concerned the scrupulous respect of the humanitarian principles governing the treatment of prisoners of war and the protection of civilian persons in time of war contained in the Geneva Conventions of 12 August 1949."²⁴

Subsequently, the Security Council has taken a large number of actions with respect to the implementation of international humanitarian law. These can be divided into several categories.²⁵

A. *Calls and Demands for Respect of International Humanitarian Law*

Demands for respect of international humanitarian law have been unequivocal. Thus, the relevant operative paragraph of a Security Council Resolution either calls for respect of certain rules of international humanitarian law expressly mentioned, usually by citing conventions,²⁶ or calls

21. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, art. V, G.A. Res. 31/72, Dec. 10, 1976, annex [hereinafter Convention of Prohibition of Military Environmental Techniques].

22. *Id.*; see also Convention on the Prohibition of Toxin Weapons, *supra* note 20, at art. V.

23. Veuthey, *Pour une politique humanitaire*, in STUDIES AND ESSAYS, *supra* note 3, at 998.

24. S.C. Res. 237, U.N. SCOR, 1361st mtg., ¶ 3 (June 14, 1967).

25. The categorization below is made for the purposes of the analysis. Several types of actions can, of course, be taken under the same resolution.

26. See, e.g., S.C. Res. 307, ¶ 3, U.N. SCOR, 1621st mtg. (Dec. 21, 1971) on the situation in the India/Pakistan subcontinent, which reads:

[The Security Council. . .] calls upon all those concerned to take all measures

for the cessation of specific actions, characterized — often in the preamble — as violations of international humanitarian law.²⁷ In the last few

necessary to preserve human life and for the observance of the Geneva Conventions of 1949 and to apply in full their provisions as regards the protection of the wounded and sick, prisoners of war and civilian population.

See also the following resolutions on the Middle East: S.C. Res. 271, U.N. SCOR, 1512nd mtg. (Sep. 15, 1969) (which calls upon Israel to observe the Geneva Conventions and international law governing military occupation); S.C. Res. 484, U.N. SCOR, 2260th mtg. (Dec. 19, 1980); S.C. Res. 672, U.N. SCOR, 2948th mtg. (Oct. 12, 1990) (which calls upon Israel to comply with the Fourth Geneva Convention); U.N. Doc. S/21363 (June 19, 1990) (the statement of the President of the Security Council which calls upon Israel to comply with the Fourth Convention); S.C. Res. 512, U.N. SCOR, 2380th mtg. (June 19, 1982); S.C. Res. 513, U.N. SCOR, 2382nd mtg. (July 4, 1982); S.C. Res. 520, U.N. SCOR, 2395th mtg. (Sep. 17, 1982); S.C. Res. 521, U.N. SCOR, 2396th mtg. (Sep. 19, 1982) (calling for respect for the rights of the civilian populations). See also the following statements by the President of the Security Council regarding the conflict between Iran and Iraq: U.N. Doc. S/16454 (1984), statement of Mar. 30, 1984, whereby the members of the Council called on the parties to adhere to the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of the Bacteriological Methods of Warfare of June 17, 1925, 94 L.N.T.S. 2138, at 65 [hereinafter "1925 Geneva Protocol"]; U.N. Doc. S/17130 (1985) (urging the parties to observe international humanitarian law); S.C. Res. 598, U.N. SCOR, 2750th mtg. (July 20, 1987) (urging that POWs be released and repatriated without delay after the cessation of hostilities between Iran and Iraq, in accordance with the Third Geneva Convention). As can be seen, the terminology of the Council's request or exhortation varies slightly from case to case.

27. See, e.g., S.C. Res. 452 U.N. SCOR, 2159th mtg., ¶ 3 (July 20, 1979) in which the Security Council "[called] upon the Government and people of Israel to cease, on an urgent basis the establishment, construction and planning of settlements in the Arab territories occupied since 1967, including Jerusalem," an action characterized in the preamble as constituting a violation of the Fourth Convention. See also the statements of the President of the Security Council of May 26, 1976 and Nov. 11, 1976, 31 U.N. SCOR *Resolutions and Decisions of the Security Council* (1976), at 4 [hereinafter "*Resolutions and Decisions*"], and S.C. Res. 446, U.N. SCOR, 2134th mtg. (Mar. 22, 1979) calling on Israel to abide by the Convention and, accordingly, to rescind its measures relating to the establishment of such settlements and desist from any further such actions; S.C. Res. 465, U.N. SCOR, 2203rd mtg. (Mar. 1, 1980), which makes a similar call, having determined in the operative part that the above actions are a flagrant violation of the Fourth Geneva Convention; S.C. Res. 476, U.N. SCOR, 2242nd mtg. (June 30, 1980), calling on Israel to desist from policies and measures affecting the character and the status of Jerusalem, which are qualified in the operative part as flagrant violations of the Fourth Geneva Convention; S.C. Res. 471, U.N. SCOR, 2226th mtg. (June 5, 1980), determining that Israel has failed to provide adequate protection to the civilian population in the occupied territories in accordance with the Fourth Geneva Convention and calling upon Israel to comply with that Convention; S.C. Res. 605, U.N. SCOR, 2777th mtg. (Dec. 22, 1987), which calls upon Israel to desist from policies and practices which violate the human rights of Palestinians and the above Convention; S.C. Res. 468, U.N. SCOR, 2221st mtg. (May 8, 1980) and S.C. Res. 469, U.N. SCOR, 2223rd mtg. (May 20, 1980), calling upon Israel, as the occupying Power, to rescind illegal measures of expulsion of Palestinians in contravention of the Fourth Geneva Convention, which is recalled in the preamble; S.C. Res. 636, U.N. SCOR, 2870th mtg. (July 6, 1989) and S.C. Res. 641, U.N. SCOR, 2883rd mtg. (Aug. 30, 1989), which call upon Israel to ensure the safe and immediate return of deported Palestinians and to desist from such deportations, a violation of articles 47 and 49 of the Fourth Geneva Convention, which are recalled in the preamble; S.C. Res. 694, U.N. SCOR, 2989th mtg. (May 2, 1991), which declares in its operative part that the deportation by the Israeli authorities of four Palestinians is in violation

years, the Security Council has used stronger wording, "demanding"²⁸ or "requesting"²⁹ respect for international humanitarian law. In the Iraq-Kuwait crisis, moreover, the Security Council expressly acted under Chapter VII of the Charter of the United Nations. Its resolutions requesting Iraq to comply with international humanitarian law, and particularly with the Fourth Geneva Convention, were thus clearly binding.³⁰ In that case, Iraq was under a double obligation: to apply the Fourth Geneva Convention as a party thereto, and to comply with Article 25 of the Charter as a Member of the United Nations.³¹

These calls for the respect of international humanitarian law, as well as the actions discussed below, are based on the competence of the Security Council under Article 24 of the Charter, i.e. the maintenance of international peace and security. The Security Council is certainly competent to deal with the implementation of international humanitarian law, which is applicable in situations affecting the maintenance of international peace and security, namely armed conflicts.³²

Regarding the Geneva Conventions, one could argue, given their virtually universal acceptance,³³ that the Security Council is a means of fulfilling the obligation embodied in Common Article 1 to ensure that the

of the Fourth Geneva Convention and reiterates that Israel refrain from such acts; S.C. Res. 540, U.N. SCOR, 2493rd mtg. (Oct. 31, 1983) on the situation between Iran and Iraq, which calls for the immediate cessation of all military operations against civilian targets, a violation of international humanitarian law; S.C. Res. 612, U.N. SCOR, 2812nd mtg. (May 9, 1988), which expects Iran and Iraq to refrain from the future use of chemical weapons, in accordance with the 1925 Geneva Protocol.

28. See U.N. Doc. S/17932 (1986) (the Presidential statement of March 21, 1986, "demanding" the respect of the 1925 Geneva Protocol); U.N. Doc. S/18863 (1987) (the statement of May 14, 1987 "emphatically demanding" the same).

29. See S.C. Res. 607, U.N. SCOR 2780th mtg. (Jan. 5, 1988), "strongly requesting" Israel to comply with the Fourth Geneva Convention; see also S.C. Res. 608, U.N. SCOR, 2781st mtg. (Jan. 14, 1988); U.N. Doc. S/20156 (1988) (the Aug. 26, 1988 presidential statement "requesting" Israel to desist from deporting Palestinians, a violation of the above-mentioned Convention).

30. S.C. Res. 674, U.N. SCOR, 2951st mtg. (Oct. 29, 1990). S.C. Res. 664, U.N. SCOR, 2937th mtg. (Aug. 18, 1990) does not specifically mention the Fourth Geneva Convention, but it deals also with the right for aliens to leave the territory of a party to a conflict, enshrined in article 35 of the Convention. In S.C. Res. 666, U.N. SCOR, 2939th mtg. (Sept. 13, 1990), the Security Council "expected" compliance with S.C. Res. 664 (1990) and affirmed the responsibility of Iraq for the well-being and safety of third state nationals in accordance with international humanitarian law, including the Fourth Geneva Convention.

31. Article 25 reads "[t]he members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

32. The actions of the Security Council discussed in this article are cited in the *Repertoire of the Practice of the Security Council* under the chapter dealing with the "Consideration of Questions under the Council's Responsibility for the Maintenance of International Peace and Security". See, e.g., *Repertoire of the Practice of the Security Council, Supplement 1969-1971* at 94, regarding S.C. Res. 307, *supra* note 26.

33. In 1968, 111 out of 126 Member States were parties to the four Conventions. In early 1991, 157 out of 159 Member States were parties to the Conventions. All five permanent members of the Security Council are parties to the Conventions.

Geneva Conventions are respected when the Council calls for such respect by the parties to the conflict. The High Contracting Parties which are members of the Security Council would thus act through the Council to ensure respect of the Conventions. This does not seem to be the case. Article 89 of Protocol I, in requiring the High Contracting Parties to co-operate with the United Nations — albeit only in the case of “serious violations” — clearly envisages independent actions by the U.N., in the latter’s own name and not as a channel for the Parties, which are the only addressees of Common Article 1. One type of action by the United Nations is to make such calls for respect of international humanitarian law.³⁴ The Security Council made this clear in one recent instance where it issued an appeal not only to the Parties in conflict, but also called upon the High Contracting Parties to the Fourth Geneva Convention, “to ensure respect by Israel, the Occupying Power, for its obligations under the Convention in accordance with article 1 thereof.”³⁵ In so doing, the Security Council clearly recognized that the obligation to ensure respect is incumbent, under the Convention, upon the High Contracting Parties themselves, independently of the Council’s own actions to the same effect. The Security Council’s calls for respect of international humanitarian law are, however, an important substitute to the inactivity of the High Contracting Parties, as well as an expression of the position of the international community regarding the implementation of humanitarian law.

B. Determination That Certain Acts Constitute Violations of International Humanitarian Law

The Security Council has also explicitly determined that certain acts or measures undertaken by states violate international humanitarian law, usually in combination with calls for respect of the law.³⁶ The importance of such a pronouncement by the Council lies in the public pressure it creates on the country in question. It makes it very difficult for a state to convincingly claim that its actions do not violate international humanitarian law when an authoritative body such as the Security Council declares that they do. And, last but not least, such a determination, which amounts to a formal designation as a wrong doer, may lead the Council to

34. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 1035 (Y. Sandoz, C. Swinarski, B. Zimmermann eds., 1987).

35. S.C. Res. 681, U.N. SCOR, 2970th mtg. (Dec. 20, 1990). See also U.N. Doc. S/20156 (1988); U.N. Doc. S/21363 (1990) (the statements by the President).

The Security Council’s calls upon the High Contracting Parties to ensure respect for the Conventions also covers states which are not members of the United Nations. Indeed, U.N. CHARTER art. 2, ¶ 6 stipulates that

The Organization shall ensure that states which are not Members of the United Nations act in accordance with [its] principles so far as may be necessary for the maintenance of international peace and security.

36. See *supra* note 27, as well as S.C. Res. 674, *supra* note 30, indicating that certain actions by Iraq against third-state nationals and Kuwaitis violated the Fourth Geneva Convention.

adopt more severe measures vis-a-vis the violating state.

C. *Fact-finding and Implementation Monitoring*

In order to make the factual determination whether there has been a violation of international humanitarian law, the Security Council relies on information received from other principal organs,³⁷ the Member States and the media. In certain cases, however, the Council has itself initiated fact-finding activities and investigations.

The Security Council may request additional information on the implementation of international humanitarian law primarily from two sources. The most common is requesting the Secretary-General to follow-up on the implementation of a resolution on respect for international humanitarian law and to report thereon to the Council.³⁸ On the basis of that report, the Security Council may then take further actions. For example, the Security Council, having considered the report of the Secretary-General on the implementation of Resolution 497, called an emergency special session of the General Assembly on the situation in the occupied Arab territories.³⁹

The practical aspects of the follow-up are normally left to the Secretary-General. It may happen, however, that the Secretary-General encounters difficulties in the fulfillment of his fact-finding activities, due to lack of co-operation from the state concerned. In particular, that state may refuse to accept a representative of or a fact-finding mission of the Secretary-General on its territory, or set unfavorable conditions. In such a situation, the Council may request the state concerned to reconsider its refusal and to co-operate with the Secretary-General.⁴⁰ Whether the decision of the receiving state would thus be changed depends in the end on the moral and political persuasion of the Council, regardless of the legal weight of its decisions. It is difficult to understand the refusal of a state to accept a fact-finding mission sent by the Secretary-General, particu-

37. For example, reports of fact-finding missions sent by the Secretary-General on his own initiative to investigate allegations of the use of chemical weapons in the conflict between Iran and Iraq.

38. See S.C. Res. 237, *supra* note 24; S.C. Res. 248, U.N. SCOR, 1407th mtg. (Mar. 24, 1968); S.C. Res. 259, U.N. SCOR, 1454th mtg. (Sept. 27, 1968); S.C. Res. 271, *supra* note 26; S.C. Res. 307, *supra* note 26; S.C. Res. 468, *supra* note 27; S.C. Res. 469, *supra* note 27; S.C. Res. 478, U.N. SCOR, 2245th mtg. (Aug. 20, 1980); S.C. Res. 484, *supra* note 26; S.C. Res. 497, U.N. SCOR, 2319th mtg. (Dec. 17, 1981); S.C. Res. 512, *supra* note 26; S.C. Res. 520, *supra* note 26; S.C. Res. 521, *supra* note 26; S.C. Res. 605, *supra* note 27; S.C. Res. 681, *supra* note 35. In this last resolution, the Council entrusted the Secretary-General for the first time with ongoing responsibilities for the implementation of international humanitarian law with respect to the Palestinian civilians under Israeli occupation. U.N. Doc. S/22472, ¶ 3 (1991).

39. S.C. Res. 500, U.N. SCOR, 2330th mtg. (Jan. 28, 1982).

40. See S.C. Res. 259, *supra* note 38. See also S.C. Res. 673, U.N. SCOR, 2949th mtg. (Oct. 24, 1990), relating to a mission initiated by the Secretary-General himself and endorsed by the Council in S.C. Res. 672.

larly in the field of international humanitarian law, since the result of that refusal is most likely to be negative publicity. Moreover, acceptance of a fact-finding mission is also an exercise of sovereign rights, which does not exclude the sovereign right to conduct one's own investigation and have it publicized.

The Security Council has also established *ad hoc* fact-finding bodies to examine the implementation of international humanitarian law. In 1979, the Council established a commission consisting of three of its members "to examine the situation relating to settlements in the Arab territories occupied since 1967, including Jerusalem."⁴¹ The Commission concluded that the settlement policy of Israel constituted a violation of the Fourth Geneva Convention,⁴² a conclusion endorsed by the Council.⁴³ It appears, however, that there is a strong preference, at least among some members of the Council, to entrust the Secretary-General rather than an inter-governmental fact-finding body with the task of investigating allegations of violations of international humanitarian law. A recent example is the veto by the United States of a resolution attempting to establish another commission of three Council members to examine the situation in the occupied territories. The United States argued that such a commission "would too easily become a vehicle which could be misused to generate more needless controversy and dispute in this area," while the sending of a representative of the Secretary-General would be the "best way to serve the interests of the United Nations in examining the situation in the occupied territories," without setting back the peace process.⁴⁴ If one looks merely at the humanitarian rather than the political aspects of the question, experience has proven indeed that the more discrete a humanitarian mission, the greater its chances of success. The method of work of the ICRC and its achievements are clearly a case in point.

D. Determination Regarding the Applicability of Humanitarian Conventions

The Security Council has made several pronouncements on the applicability of the Fourth Geneva Convention.⁴⁵ This Convention does not, as

41. S.C. Res. 446, *supra* note 27.

42. U.N. Doc. S/13450 ¶ 226 (1979).

43. S.C. Res. 452, *supra* note 27. In that resolution, the Council requested a second report, which the Commission produced later in the year, along the same lines. U.N. Doc. 13679 (1979). This report was endorsed by S.C. Res. 465.

44. U.N. Doc. S/PV.2926, at 37 (1990).

45. See the following resolutions and statements by the President of the Security Council on the territories occupied by Israel: *Resolutions and Decisions*, *supra* note 27, at 4; S.C. Res. 446, *supra* note 27, at preamble; S.C. Res. 465, *supra* note 27, at preamble; S.C. Res. 471, *supra* note 27, at preamble; S.C. 478, *supra* note 38; S.C. Res. 484, *supra* note 26; S.C. Res. 497, *supra* note 38; statement of Jan. 26, 1984, U.N. Doc. S/16433 (1984); S.C. Res. 605, *supra* note 27; S.C. Res. 607, *supra* note 29; statement of Aug. 26, 1988, U.N. Doc. S/20156 (1988); S.C. Res. 636, *supra* note 27; S.C. Res. 641, *supra* note 27; statement of June 19, 1990, U.N. Doc. S/21363 (1990); S.C. Res. 672, *supra* note 26; statements of Jan. 4, 1991,

one may have expected from the elaborate and unique implementation system of international humanitarian law described in Part II above, provide for a body to determine the circumstances in which it is applicable; neither do the Hague Conventions, nor the other Geneva Conventions for that matter.⁴⁶ Thus, the Security Council fills an important gap in expressing the view of the international community on the actual legal situation in question, which might otherwise remain unclear.⁴⁷

The Fourth Geneva Convention also covers the situation in occupied territories. The Security Council has so far raised the issue of the applicability of the Fourth Geneva Convention only with regard to situations involving what it expressly characterized as "occupations," namely the territories occupied by Israel, and Iraqi occupied Kuwait. Whether a territory is occupied or not is of course quite often a controversial question, and that is where the above-mentioned clarity on the legal situation is essential.⁴⁸ It must be noted, however, that the Council did not make similar determinations in all cases of occupations it has been confronted with. For example, the Council has not expressly pronounced itself on the applicability of the Fourth Geneva Convention to northern Cyprus, although the General Assembly has characterized the territory as occupied.⁴⁹

The effect of the determination by the Security Council that the Fourth Geneva Convention is applicable to a territory, which, in its view is "occupied," may have important consequences. For instance, the Security Council, having previously determined that Jerusalem is part of the "occupied territories,"⁵⁰ considered the enactment by Israel in 1980 of the "basic law" changing the status of Jerusalem as null and void, and as not affecting the application of the Fourth Geneva Convention.⁵¹

The importance that the Security Council attaches to the issue of the applicability of the Fourth Geneva Convention is further evidenced by Resolution 681, in which the Security Council, rather than making a sim-

U.N. Doc. S/22046 (1991); statements of Mar. 27, 1991, U.N. Doc. S/22408 (1991); S.C. Res. 694, *supra* note 27; S.C. Res. 726, U.N. SCOR, 3022nd mtg. (Jan. 6, 1992). See the following resolutions on the occupation of Kuwait: S.C. Res. 670, U.N. SCOR, 2943rd mtg. (Sep. 25, 1990); S.C. Res. 674, *supra* note 30, at preamble.

46. See Roberts, *What is a Military Occupation*, in 1984 BRIT. Y.B. INT'L L. 249, 301 (1989).

47. Other international bodies, such as the General Assembly, the Organization of African Unity, and the ICRC have expressed such a view. *Id.*

48. Obviously, if the Security Council mentions a humanitarian convention in any instance, it implies that the convention is applicable to that situation. The legal issue of the applicability of the Fourth Geneva Convention has been addressed by the Security Council only when it was felt necessary to do so expressly. See *supra* note 45.

49. See, e.g., G.A. Res. 37/253 (May 13, 1983). See also Roberts, *supra* note 46, at 302.

50. See, e.g., S.C. Res. 446, *supra* note 27.

51. S.C. Res. 478, *supra* note 38. See also S.C. Res. 497, *supra* note 38, in which the Security Council "[decided] that the Israeli decision to impose its laws, jurisdiction and administration in the occupied Syrian Golan Heights is null and void and without international legal effect."

ple determination, urged the government of Israel "to accept the *de jure* applicability of the Fourth Geneva Convention, of 1949, to all the territories occupied by Israel since 1967 and to abide scrupulously by the provisions of the said Convention." Ultimately, it is only when a state does not deny the applicability of a particular international obligation incumbent upon them that there is hope that violations thereof may cease. States always try to put forward justifications when accused of a breach of an international obligation which they otherwise accept. If they do not even accept that they are bound by that obligation, it is unreasonable to expect compliance.

E. Condemnation and "Quasi-condemnation" of Violations of the Rules of International Humanitarian Law

After the call for respect of international humanitarian law and the determination that a state has breached that law, the next step the Security Council can take is to condemn such actions. There are various degrees of such condemnations, in terms ranging from "regrets"⁵² or "deplores"⁵³ to "strongly condemns."⁵⁴ The choice of words is, of course, a question of politics, including the degree to which the Security Council wants to put public pressure on the state concerned.

F. Requests to States to Take Specific Actions as a Consequence of the Violation of International Humanitarian Law

The Security Council may request states violating international humanitarian law to take certain corrective actions. Such measures include the cessation of the violation, but the Security Council can go further in

52. See e.g. S.C. Res. 636, *supra* note 27, in which the Security Council "deeply regrets" the deportation of Palestinians by Israel. A milder terminology, such as "expresses deep concern" is found in S.C. Res. 471, for example. S.C. Res. 471, *supra* note 27.

53. See e.g. S.C. Res. 582, U.N. SCOR, 2666th mtg. Feb. 24, 1986) and the statement of the President of the Security Council of Dec. 22, 1986, U.N. Doc. S/18538 (1986), where the violation of international humanitarian law in the Iran-Iraq war is "deplored;" S.C. Res. 641, *supra* note 27 and S.C. Res. 681, *supra* note 35, where deportations of Palestinians by Israel are "deplored;" the statement of the President of the Security Council of Nov. 11, 1976, where certain measures taken by Israel in the occupied territories are "strongly deplored," *Resolutions and Decisions, supra* note 27, at 4; S.C. Res. 465, *supra* note 27, which contains a similar provision, and the statement of Jan. 4, 1991, U.N. Doc. S/22046 (1990), where certain actions of the Israeli security forces are deplored.

54. See S.C. Res. 540, *supra* note 27, and the Mar. 30, 1984 statement of the President, U.N. Doc. S/16454 (1984), where all violations of international humanitarian law in the Iran-Iraq war are "condemned." See also statements made April 25, 1985, U.N. Doc. S/17130 (1985), Mar. 21, 1986, U.N. Doc. S/17932 (1986), and Jan. 16, 1987, U.N. Doc. S/18610 (1987), where the use of chemical weapons in the same conflict is "strongly condemned." See S.C. Res. 612, *supra* note 27, where the same action is "vigorously condemned" and S.C. Res. 620, U.N. SCOR, 2870st mtg. (Aug. 26, 1988), where it is "resolutely condemned;" S.C. Res. 674, *supra* note 30, condemning, in the preamble, certain actions by Iraq against third-state nationals and Kuwaitis which were in violation of the Fourth Geneva Convention and S.C. Res. 762, *supra* note 45, where the decision of Israel to resume deportations of Palestinian civilians from occupied territories is "strongly condemned."

prescribing remedial actions, as in the following example. In Resolution 471 of 5 June 1980, the Council determined that Israel had failed to provide adequate protection to the civilian population in the occupied territories, as provided for in the Fourth Geneva Convention. Indeed, there had been assassination attempts against three mayors in the area. In light of these facts, the Security Council called upon Israel to "provide the victims with adequate compensation for the damages suffered as a result of" the attempts.

The Security Council can moreover address itself to the other states. Thus, the Security Council has called for "international assistance in the relief of suffering and the rehabilitation of refugees" in the conflict between India and Pakistan.⁵⁵ It has called upon "all States not to provide Israel with any assistance to be used specifically in connexion with settlements in the occupied territories,"⁵⁶ which it regards as illegal. The Council also called upon all states "to continue to apply or to establish strict control of the export . . . of chemical products serving for the production of chemical weapons" to Iran and Iraq, since use of such weapons during the conflict had been established.⁵⁷ As mentioned above, the Security Council has also called upon the High Contracting Parties to fulfill their obligation to ensure respect of the Fourth Geneva Convention.⁵⁸ A practical way of abiding by this obligation, as suggested by the Secretary-General, would be the support by the High Contracting Parties having consulates in the occupied territories for the efforts of the ICRC and the United Nations.⁵⁹

G. Decisions Regarding Liability for Grave Breaches of International Humanitarian Law

The invasion and occupation of Kuwait by Iraq is not the only instance where grave breaches of international humanitarian law were committed, but it is the first case where the Security Council, acting expressly under Chapter VII of the Charter, particularly dealt with the legal consequences of those breaches. As early as 25 September 1990, the Security Council affirmed that Iraq was under an obligation to comply fully with all the terms of the Fourth Geneva Convention, and that Iraq was "liable under the Convention in respect of the grave breaches committed by it, as [were] individuals who commit[ed] or order[ed] the commission of grave breaches."⁶⁰ These breaches included the mistreatment of third-State nationals, in particular hostage-taking, the transfer of hostages to military

55. S.C. Res. 307, *supra* note 26. That resolution also authorized the Secretary-General to appoint a special representative for dealing with humanitarian problems.

56. S.C. Res. 465, *supra* note 27; S.C. Res. 471, *supra* note 27.

57. S.C. Res. 612, *supra* note 27.

58. See *supra* note 36 and accompanying text.

59. U.N. Doc. S/22472, ¶ 4 (1991).

60. S.C. Res. 670, *supra* note 45.. This provision was reaffirmed in the preamble of S.C. Res. 674.

targets, and mistreatment of Kuwaitis.

One member of the Security Council, Cuba, contended that the Council did not have "the power to make decisions as to liability or to determine compensation or restitution," since such matters could, under the Charter, only be addressed by the International Court of Justice, the principal judicial organ of the United Nations.⁶¹ The point is indeed well taken that the Security Council cannot determine amounts of compensation, and in fact the Council did not. However, the Council is clearly competent to merely affirm what the Fourth Geneva Convention stipulates, namely that a state is liable for grave breaches committed by it. In fact, under the Convention, a state remains liable for any grave breaches committed by it even if those individuals who committed those breaches have been punished, as required by the Convention.⁶² The pronouncement of the Council does not add anything to the obligations of Iraq as a High Contracting Party; it simply highlights them.

Article 89 of Protocol I provides for the co-operation between the High Contracting Parties and the United Nations in "situations of serious violations of the Conventions" or Protocol I. It is presumably in that spirit that the Security Council, in Resolution 674, invited States to "collate substantiated information in their possession or submitted to them on the grave breaches by Iraq . . . and to make this information available to the Security Council."⁶³ Neither this Resolution, nor the records of the meeting at which it was adopted, are very clear on the use the Council would make of this information. Of course, information on the persistence of grave breaches would allow the Council to take further measures against these violations; however the request for information covers not only future but also past breaches perpetrated prior to the adoption of Resolution 674. This invitation should also be read in conjunction with the preambular paragraph of the Resolution reaffirming that Iraq is liable under the Fourth Geneva Convention in respect of the grave breaches committed by it. One may thus wonder whether, had the crisis been peacefully resolved, this Resolution could not have served as a basis for the establishment by the Security Council of a compensation mechanism for these grave breaches.

Such a mechanism was established by the Gulf War Cease-fire Resolution.⁶⁴ In that Resolution, the Council reaffirmed the liability of Iraq "for any direct loss, damage, including environmental damage and the depletion of any natural resources, or injury to foreign Governments, nationals and corporations as a result of Iraq's unlawful invasion and occu-

61. U.N. Doc. S/PV. 2951, at 58 (1990).

62. Fourth Geneva Convention, art. 148. See COMMENTARY, *supra* note 12 at 602.

63. The term "grave breaches" in S.C. Res. 674 appears to cover not only grave violations of international humanitarian law, but also grave violations of international diplomatic law.

64. S.C. Res. 687, U.N. SCOR, 2981st mtg. (April 8, 1991).

pation of Kuwait."⁶⁵ Clearly such damage and injury were due, *inter alia*, to grave breaches of international humanitarian law. These violations were committed both before and during the war, with the mistreatment of third-State nationals, the oil spill into the Gulf, the burning of oil wells, the indiscriminate use of Scud missiles against civilian populations, etc. In accordance with the cease-fire resolution, all claims are to be examined by a Commission established to administer a fund which will pay compensation for such claims.⁶⁶

The cease-fire resolution does not deal with the obligation of Iraq under the Geneva Conventions to punish or extradite the perpetrators of these grave breaches, although penal sanctions for grave breaches are at least as important as monetary compensation. However, as long as Saddam Hussein remains in power, it is quite unlikely that he or his high officials would be tried in Iraqi courts for war crimes. The question is then whether another state would prosecute him or whether an international criminal tribunal would be established to try him. A number of states, particularly European states, were in favor of the latter approach.⁶⁷

H. *Recognition of the Special Role of the ICRC with Respect to the Implementation of International Humanitarian Law*

The special role of the ICRC in the implementation of international humanitarian law has been recognized by the Security Council on a number of occasions. In particular, the Security Council has tried to facilitate the work of the ICRC. The Council has, for instance, called for allowing units of the ICRC into a conflict area to evacuate the wounded and provide humanitarian assistance,⁶⁸ or for facilitating the dispatch and distribution of aid by the ICRC.⁶⁹ In the Gulf War Cease-fire Resolution 687 of 3 April 1991, the Security Council requested Iraq to co-operate with the ICRC for the repatriation of all Kuwaiti and third country nationals, by providing lists of such persons, facilitating access to those persons by the ICRC and facilitating the search by the ICRC of unaccounted persons.⁷⁰

65. See also S.C. Res. 686, U.N. SCOR, 2978th mtg. (Mar. 2, 1991).

66. The Commission was formally established by S.C. Res. 692, U.N. SCOR, 2987th mtg. (May 20, 1991). For more details on the functioning of the compensation mechanism, see, e.g., the *Report of the Secretary-General pursuant to paragraph 19 of Security Council resolution 687 (1991)*, U.N. Doc. S/22559 (1991), and the *Letter Dated 2 August from the President of the Governing Council of the United Nations Compensation Commission to the President of the Security Council*, U.N. Doc. S/22885 (1991), Security Council resolutions 705 (1991), 706 (1991) of 15 August 1991, and 712 (1991) of 19 September 1991.

67. U.N. Press release DH/869 of April 16, 1991, referring to a decision taken by the European Community to put Saddam Hussein on trial for war crimes.

68. S.C. Res. 436, U.N. SCOR, 2089th mtg. (Oct. 6, 1978), dealing with the situation in Lebanon.

69. S.C. Res. 512, *supra* note 26, also relating to Lebanon. In the same resolution, the Security Council also appealed to Member States to provide the most extensive humanitarian aid possible.

70. See also S.C. Res. 686, *supra* note 65.

The Security Council has also underscored the role of the ICRC with respect to prisoners of war.⁷¹ The Council urged that a comprehensive exchange of prisoners of war between Iran and Iraq be completed shortly after the cessation of hostilities, in co-operation with the ICRC;⁷² the Council also demanded that Iraq arrange for immediate access to and release of all prisoners of war under the auspices of the ICRC, even before the formal cessation of the Gulf War.⁷³ Moreover, the Security Council has encouraged the co-operation between the United Nations and the ICRC for humanitarian aid, for example for the distribution of foodstuffs in Iraq and Kuwait,⁷⁴ and the repatriation of Kuwaiti and third country nationals after the Gulf War.⁷⁵ Finally, on a number of occasions, the Security Council has paid tribute to the work of the ICRC, particularly in providing emergency humanitarian assistance.⁷⁶

Apart from the specific tasks entrusted to the ICRC under the Geneva Conventions, the Committee is more generally considered to be the "guardian" of the Geneva Conventions.⁷⁷ Thus, it was involved in major developments concerning the Conventions, such as the adoption of the Additional Protocols.⁷⁸ Another such development was the proposal by the Secretary-General that the Security Council call for a meeting of the High Contracting Parties to the Fourth Geneva Convention to discuss possible measures that might be taken by them under the Convention to ensure its implementation.⁷⁹ It was therefore quite appropriate that the Security Council requested the Secretary-General to develop the idea further "in co-operation with" the ICRC.⁸⁰

71. The special position of the ICRC in this respect is recognized, *inter alia*, by the Third Geneva Convention, art. 125.

72. S. C. Res. 582, *supra* note 53.

73. S.C. Res. 686, *supra* note 65. As far as Iraqi POWs are concerned, the Council simply "welcomed" the decision of Kuwait and the Allied Forces to release them in accordance with the Third Geneva Convention, under the auspices of the ICRC. *Id.*

74. S.C. Res. 666, *supra* note 30.

75. By S.C. Res. 687, *supra* note 64, the Security Council invited the ICRC to keep the Secretary-General informed of its activities in this respect. This co-operation was again mentioned in S.C. Res. 706, U.N. SCOR, 3004th mtg. (Aug. 15, 1991). The relevant information from the ICRC is included in a report from the Secretary-General submitted pursuant to the latter resolution. U.N. Doc. S/23012 (1991). See also U.N. Doc. S/23514, Annex, sec. D (1992) for additional information from the ICRC.

76. See the statement of the President of Nov. 11, 1983, U.N. Doc. S/16142 and S.C. Res. 542, U.N. SCOR, 2501st mtg. (Nov. 23, 1983), both relating to Lebanon.

77. Report submitted to the Security Council by the Secretary-General in accordance with resolution 672 (1990), U.N. Doc. S/21919, ¶ 24 (1990).

78. See *supra* note 2.

79. U.N. Doc. S/21919, ¶ 24 (1990). It should be mentioned that Protocol I, art. 7 provides that the depositary

... shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon the approval of the majority of the said Parties, to consider general problems concerning the application of the Conventions and of the Protocol.

80. S.C. Res. 681, *supra* note 35. Pursuant to that resolution, the Secretary-General has indeed engaged in consultations with the ICRC on the matter. U.N. Doc. S/22472, ¶ 6

I. Resolution 688

All the cases mentioned so far relate to international armed conflicts. The Security Council broke new ground in the aftermath of the Gulf War. On April 5, 1991, the Council adopted Resolution 688 regarding the repression by Iraq of part of its civilian population, particularly Iraqi Kurds, and the need for humanitarian assistance to that population.⁸¹ This of course raised the general issue of the respect for human rights, but also, in as far as parts of the population had begun an internal struggle against the regime, the question of compliance with international humanitarian law. Resolution 688 did not expressly characterize the Iraqi actions as violations of the rules of international humanitarian law applicable to non-international armed conflicts. However, the United Kingdom, Belgium and Luxembourg made this point in their statements before the Council.⁸²

The problem for the Security Council is Article 2, paragraph 7 of the Charter, which precludes the United Nations from intervening in "matters which are essentially within the domestic jurisdiction of any state." This provision was mentioned in Resolution 688. The Council circumvented Article 2, paragraph 7 by characterizing the consequence of the repression of the Kurds, namely their massive flight from Iraq to neighboring countries, as a threat to international peace and security. This is of course an issue outside the scope of Article 2, paragraph 7, one the Council is competent to address.

Another argument is that once an area, previously exclusively regulated by municipal law, is also covered by international law, then activities within such an area can no longer be characterized as "matters essentially within the domestic jurisdiction." This argument is used particularly with respect to human rights, but is also valid for the international regulation of internal armed conflicts. Nevertheless, states are clearly very reluctant to accept any infringement on issues they consider within their sovereignty. Moreover, the characterization of a situation as an internal armed conflict, triggering the application of humanitarian law, is in most cases very controversial.

(1991).

81. This resolution was further interpreted as providing a legal basis for the establishment by the United States and its allies of safe havens for the Kurds in northern Iraq. For a discussion of the legal arguments, see Lewis, *Legal Scholars Debate Refugee Plan, Generally Backing U.S. Stand*, N.Y. TIMES, April 19, 1991, at A8. The United Nations subsequently assumed responsibility for the relief centers, in accordance with an agreement reached between the United Nations and Iraq on April 18, 1991. U.N. Doc. S/22513 (1991). Moreover, units of United Nations guards were deployed in order to strengthen the humanitarian presence of the Organization. U.N. Doc. S/22663 (1991).

82. U.N. Doc. S/PV.2982, at 66, 67, 73 (1991). All three speakers referred to the Geneva Conventions, Common article 3 of which provides that certain minimum rules apply in the case of an armed conflict not of an international character. These minimum rules include the humane treatment of civilians.

IV. EVALUATION AND POSSIBLE FUTURE MEASURES

Until the Gulf War, the actions of the Security Council with regard to the implementation of international humanitarian law have been primarily of a declaratory and hortatory nature. The Council called attention to a number of breaches of humanitarian law by states, and even condemned them. This in itself could bring some political pressure on the state concerned. Unfortunately, it did not prove particularly effective, and the violations did not always cease. The Security Council, with the assistance of the Secretary-General, monitored developments in specific cases, such as the occupied territories in the Middle East, but it did not resort to Chapter VII of the Charter of the United Nations to achieve respect for international humanitarian law until the invasion of Kuwait. In this case as well, the violations of Iraq were admittedly not stopped by the Council, but the Security Council devised measures to deal with the consequences of these acts in particular by establishing a mechanism for monetary compensation.

One declaratory measure adopted by the Security Council with regard to the implementation of international humanitarian law has been, however, quite important. Indeed the repeated statements on the applicability of the Fourth Geneva Convention in certain situations have provided a consistent assessment by the international community of the illegality of certain acts over the years. Moreover, as discussed, such statements have generally characterized a territory as occupied, which has substantial legal and political implications.

The Security Council has focused primarily on the implementation of the Fourth Geneva Convention, in particular with respect to illegal settlements and deportations, but it has also, when necessary, used the 1925 Geneva Protocol and the Third Geneva Convention, as well as general international humanitarian law, including to some extent the right to relief. Thus, *ratione materiae*, the scope of the Security Council's actions has been relatively broad. This is not the case with respect to the situations addressed. Indeed, the Security Council has been quite selective in this regard. It has dealt with three cases primarily: the Middle East and the occupied territories, the conflict between Iran and Iraq, and the invasion of Kuwait. Consequently, the Security Council has pointed the finger at only a few of the states which have committed breaches of humanitarian law in all these years.

The Security Council's role in the implementation of international humanitarian law, while important and necessary, has been limited by significant shortcomings. The political and moral effect of the Council's actions has been far greater than their practical impact in preventing human suffering. The question thus arises: What else could the Council do when states violate international humanitarian law?

The Security Council has the power to adopt binding measures under Chapter VII of the Charter of the United Nations. Such measures include complete or partial economic sanctions as well as the use of force. This

latter method is both disproportionate and inappropriate for stopping violations of humanitarian law. But are sanctions adequate responses to violations of international humanitarian law?

The answer depends on the kind of violations involved. In cases of the use of prohibited means of warfare and/or indiscriminate attacks on civilian population, an arms embargo appears appropriate. As already mentioned, when the use of chemical weapons had been established in the Iran-Iraq war, the Security Council called upon states to apply export controls for products serving for the production of chemical weapons.⁸³ Why not go further and declare a comprehensive and binding arms embargo which would include products with potential military use? It would seem appropriate for the international community to target sanctions at the very means of perpetrating atrocities. Undeniably, the moral effect of an arms embargo weighs more than a simple request by the Security Council to cease the violations. As for the practical effect, presumably, the state involved would have enough arms to continue its violations of international humanitarian law, at least for some time. In an extended war, though, the import of arms would indeed be needed eventually.

This solution, however, is not easily applicable to all cases. For example, what would happen if only one of the parties to the conflict is, to the best of the Council's knowledge, using prohibited means of warfare? An arms embargo against all parties to the conflict would unfairly penalize those states which respect international humanitarian law. An arms embargo against only that state which has violated humanitarian law may involve the Council in unduly disturbing the military balance between the parties. These points may be hypothetical, since it is more likely that all those involved violate international humanitarian law, rather than one state only, but this underscores the difficulty of prescribing adequate responses for the Security Council.

As for the duration of the arms embargo, it seems reasonable to maintain it until the end of the conflict. Although designed to punish a state for its use of prohibited weapons or its indiscriminate attacks on civilians, an arms embargo would hopefully in most cases also curtail the duration of the conflict.⁸⁴

In a case of violation of humanitarian rules governing occupation, the response should be different. In one instance of illegal settlements by the occupying power, the Security Council has called upon all states not to provide the occupying power with any assistance which would be used specifically in connection with those settlements.⁸⁵ In this case, the Council's decision was not binding. Couldn't the Council go one step further

83. See *supra* note 57 and accompanying text.

84. This was also the motivation of the Council when it declared an arms embargo against Yugoslavia "for the purposes of establishing peace and stability in Yugoslavia." S.C. Res. 713, U.N. SCOR, 3009th mtg. (Sep. 25, 1991).

85. See *supra* note 56 and accompanying text.

and render such measures binding on all states? This type of economic sanction, which targets the precise scope of the violation, seems more appropriate than a comprehensive economic embargo. The latter, apart from being a disproportionate response, would most likely cause unjust suffering to the population of both the state concerned and that of the territory it occupies. On the contrary, a "tied" economic sanction may result in the desired cessation of illegal acts to the extent that these depend on financial assistance.

What could the Council do, however, in the case of mistreatment of nationals of an occupied territory or aliens? It is not possible to give a general answer. Economic sanctions would probably not have the potential direct effect described above of stopping these actions, at least not in the short term. They may, however, be justified on other grounds.⁸⁶

Most commentators would share the view that the Security Council has recently shown an ability to innovate. Given the evidence of its record, as outlined in this article, it will hopefully find new ways of ensuring respect for international humanitarian law, and consequently strengthen the role it has played so far.

86. For instance, the Security Council decided to apply economic sanctions on Iraq by Resolution 661 (1990) of 6 August 1990, as a response to the invasion of Kuwait. The issue of Iraqi violations of international humanitarian law in Kuwait was raised by the Council at a later stage. *See supra* note 30 and accompanying text.

