

INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW
INSTITUT INTERNATIONAL DU DROIT HUMANITAIRE
ISTITUTO INTERNAZIONALE DI DIRITTO UMANITARIO



**APPLICATION OF INTERNATIONAL HUMANITARIAN LAW, HUMAN RIGHTS AND
REFUGEE LAW: UN SECURITY COUNCIL, PEACEKEEPING FORCES, PROTECTION OF
HUMAN BEINGS IN DISASTER SITUATIONS**

International Conference, Sanremo, 8-10 September 2005

~ PROCEEDINGS ~

TABLE OF CONTENTS / TABLE DE MATIÈRES / INDICE

International Conference

8-10 September, Sanremo

OPENING SESSION

Welcome Message

Prof. Jovan PATRNOGIC, President of the International Institute of Humanitarian Law

Messaggio

Angelo Card. SODANO, Segretario di Stato della Città del Vaticano

STATEMENT

Keynotes Address

Application of International Humanitarian Law, Human Rights and Refugee Law: UN Security Council, Peacekeeping Forces, Protection of Human Beings in Disaster Situations

Dr. Jakob KELLENBERGER, President of the International Committee of the Red Cross

Humanitarian Assistance in Africa

Don Juan Manuel SUAREZ DEL TORO RIVEIRO, President of the International Federation of the Red Cross and Red Crescent Societies

“Application of International Humanitarian Law, Human Rights and Refugee Law: UN Security Council, Peacekeeping Forces, Protection of Human Beings in Disaster Situations - OHCHR Statement”

Mrs. Lucie VIERSMA, Human Rights Officer of the United Nations High Commissioner for Human Rights

Allocuzione del Sottosegretario agli Affari Esteri On. Margherita Boniver alla Conferenza Internazionale su “L’Applicazione del Diritto Internazionale Umanitario, dei Diritti dell’Uomo e del Diritto dei Rifugiati: il Consiglio di Sicurezza delle Nazioni Unite, le Operazioni per il Mantenimento della Pace, la protezione delle Popolazioni nelle Situazioni di Disastro”.

On. Margherita BONIVER, Sottosegretario agli Affari Esteri della Repubblica Italiana

Role of the International Criminal Court and International Humanitarian Law

Mr. Philippe KIRSCH, President of the International Criminal Court

**THE INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW AFTER 35 YEARS – YESTERDAY,
TODAY, TOMORROW**

Diffusion et Enseignement par l'Institut International de Droit Humanitaire

Dr. Jaques MOREILLON, Promotion, membre du CICR

**Promotion, Dissemination and Teaching of International Humanitarian Law, Human Rights and
Refugee Law: Experience of the International Institute of Humanitarian Law**

Ms Anne Grethe NIELSEN, Head, Department of International Affairs, Federal Office for Migration,
Switzerland

**RESEARCH WORK – SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO
ARMED CONFLICTS AT SEA.**

How to Update the San Remo Manual

Prof. Dr. Wolff HEINSTSCHEL VON HEINEGG, University of Frankfurt

**The United Kingdom's Manual of the Law of Armed Conflict and the San Remo Manual: Maritime
Rules compared**

Dr. Steven HAINES, British Royal Navy

UNITED NATIONS – 60 YEARS: TODAY

**United Nations Security Council Resolutions and the Application of International Humanitarian Law,
Human Rights and Refugee Law**

Mr. John BELLINGER, Legal Advisor of the U.S. State Department

**Le Conseil de Sécurité et la Mise en Place des Tribunaux ad hoc pour l'Ex-Yougoslavie, le Rwanda et
la Sierra Leone**

M. Adam DIENG, Greffier du Tribunal Pénal International pour le Rwanda

Interpretation of International Humanitarian Law by the UN Security Council

Prof. Marco SASSOLI, University of Geneva

The Reform of the United Nations Organisations and the Establishment of a Mechanism to implement International Humanitarian Law

Mr. Jawaher AL-SABAH, Attachée in Kuwait Mission of Geneva

Intervention

Mr. Azad JAFAROV, Third Secretary of the Permanent Mission of Azerbaijan to the UN Office and other International Organisations in Geneva

Le Rôle du Conseil de Sécurité dans la Mise en Oeuvre du Droit International Humanitaire (Notamment au Travers de son Pouvoir Coercitif)

M. Mathieu NABOT, Stagiaire de l'Institut International de Droit humanitaire

UNITED NATIONS PEACEKEEPING FORCES

UN Peacekeeping Operations and International Humanitarian Law

Prof. Ove BRING, University of Stockholm

The ICRC's Perspective: Applicable Law and Operational Interaction

Mrs. Emanuela-Chiara GILLARD, Legal Adviser of the International Committee of the Red Cross, Geneva

United Nations Peacekeeping Operations

M. Eric STEINMYLLER, Chef du Bureau de Droit des Conflits Armées, Chef des affaires légaux du Ministère de la Défense , France

THE PROTECTION OF HUMAN BEINGS IN DISASTER SITUATIONS – THE TSUNAMI TRAGEDY – INTERNATIONAL SOLIDARITY

Panel on “*The Protection of Human Beings in Disaster Situations – The Tsunami Tragedy – International Solidarity*”

Mrs. Yvette STEVENS, United Nations Assistant Emergency Relief Coordinator & Director, Office for the Coordination of Humanitarian Affairs (OCHA), Geneva

The Protection of Persons Displaced by Natural Disasters

Prof. Walter KÄLIN, Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons

The Protection of Human Beings in Disaster Situations - the Tsunami Tragedy - International Solidarity

Ms. Janet LIM, Director of the Bureau of Asia and the Pacific of the United Nations High Commissioner for Refugees

The Protection of Human Beings in Disaster Situations – The Tsunami Tragedy – International Solidarity

Mr. Johan SCHAAR, Special Representative of the Secretary-General for the Tsunami Operations, IFRC

Some Reflections on International Disaster Relief Law

Mr. Bosko JAKOVLJEVIC, Member of the International Institute of Humanitarian Law

WELCOME MESSAGE

Prof. Jovan PATRNOGIC,

President of the International Institute of Humanitarian Law

Excellencies, Ladies and Gentlemen, Friends,

Welcome to the International Institute of Humanitarian Law, which celebrates its 35th Anniversary this year, or rather this month to be more precise.

35 years ago, here in Sanremo, the Promotional Committee for the Creation of the International Institute of Humanitarian Law, which was composed of Paolo Rossi, Giancarlo Lombardo, Ugo Genesio and myself, organised the first World Congress on International Humanitarian Law in the presence of eminent scholars from all over the world. At the end of this Congress, Professor Jean Graven, the then Rector of the University of Geneva, officially announced the foundation of the Institute,

The document establishing the creation of the Institute, which was signed by 33 founders, defined its objectives in the following simple way:

- to promote the development and dissemination of International Humanitarian Law at the national and international level,
- to operate at all levels to secure its implementation,

Since its foundation in 1970, the International Institute of Humanitarian Law has always reserved a special place for Alfred Nobel. In fact, Villa Nobel, the inventor's residence in Sanremo, is considered to be the symbolic headquarters of the Institute's philosophy and consequent mission to promote, teach and disseminate International Humanitarian Law.

What can we say today, after 35 years of Humanitarian Activity? Allow me to express myself in number. In the period between 1970 and 2005 we organised more than 300 events with an overall attendance of more than 15.000 people.

In my view, the Institute has become one of the most active promoters of International Humanitarian Law, Human Rights Law and Refugee Law within the International Humanitarian Community. By providing education and training to military officers we have grown to be a unique institution. Once more we would like to publicly express our very warm gratitude to organisations that have assisted us in our missions, in particular: the International Committee of the Red Cross and the United Nations High Commissioner for Refugees. These organisations have

greatly co-operated in our common efforts to promote the respect and implementation of fundamental Humanitarian Rules around the world.

The Institute was founded in a period where Human Activity, in all spheres, was growing rapidly, accompanied by very complex humanitarian problems. These problems, such as: armed conflicts, internal disturbances and tensions, persecution, violence and the denial of basic Human Rights, natural or man-made disasters, extreme poverty and underdevelopment, disease, etc., were affecting great numbers of people in various parts of the world. Regardless of the causes, the people affected were in need of humanitarian protection and assistance. Even though humanitarian action was not always possible or was often inadequate to deal effectively with certain situations, assistance was provided in most cases to alleviate the suffering of many.

Crisis prevention and dealing with the difficulties of those in need of humanitarian assistance were of great concern for all those who felt that humanitarian issues were of highest priority deserving the full attention of the International Community. Even though growing humanitarian problems were becoming a characteristic feature of the contemporary world, the main players on the International Scene were primarily interested in either political, security and economic problems, or in the growing use of force to solve disputes. They did not pay the appropriate attention to the Humanitarian Matters that consequently arose.

People concerned with Humanitarian Issues, therefore, had to try to draw attention to these problems. They highlighted the need for effective reinforcement of Humanitarian Action. New ways had to be devised to place Humanitarian Action high on the agenda of the International Community.

Today, Humanitarian Issues are still complex and the line between Military Intervention and Intervention for Humanitarian Reasons in Armed Conflict has become very narrow. Problems related to asylum, irregular migration, refugee and displacement, protection issues constitute growing challenges to governments and institutes alike. Humanitarian Law and Humanitarian Institutions such as the International Institute of Humanitarian Law have considerable potential to maintain the balance where both human security are priority issues on all political and humanitarian agenda.

Our Institute endeavors to pursue its traditional activity by serving as a forum for analysis and discussion in a time where the escalation of the “*war against terrorism*” and the difficulty of considering organised terrorist groups as “*parties*” challenge the applicability of International Humanitarian Law and the role of Humanitarian Organisations.

In the “*war against terrorism*”, there are a number of un resolved problems. The lack of legal mechanisms to handle this kind of threat and the use of certain new methods and means in this

tragic situation are cause for concern. Naturally, torture, in all ugly forms, must be ruled out. It is not enough to say what measures must be taken by Law Enforcement Agencies. We also have to be in a position to tell them what legal means and methods are available in Conflict Situations.

What about the influence of Humanitarian Assistance in wartime as well as in peacetime? There is much talk about this, but little hard law ensuring such as assistance by the International Community.

In this context, what are the guidelines for offering assistance? There are many new players in the field and not all of them believe that the traditional principles which have guided the Red Cross and Red Crescent Movement should be observed. Do we not need a code of behaviour which would be binding for all those active in this area? Moreover, should we not pay more attention to what the UN Security Council is doing in favour of International Humanitarian Law and should we not try to co-operate more closely with the Security Council as well as co-ordinate our activities according to its role and position?

In my view our Institute does well to face these challenges by organising this Conference as, by so doing, it also contributes to the efforts of the United Nations and other International Organisations which are dealing with these crucial problems of International Law.

The problem of strengthening respect for and the implementation of International Humanitarian Law lies at the root of our main activities. Our Institute has existed for 35 years: not a single year has gone by without our having to address the issue. The reason for this is simple: even if the Law is perfectly clear, well formulated and universally disseminated there are always circumstances in which at least one party to an Armed Conflict – sometimes both parties – chooses to stray from the accepted norm, pleading one excuse or another. Since the interpretation of International Humanitarian Law is not always perfectly clear, and it is not universally disseminated, alas, its implementation leaves a lot to be desired.

Indeed, the Institute's purpose is not to solve very complex Humanitarian Problems which are dealt with directly by competent bodies concerned, but rather to identify and define those problems, weigh up the arguments, examine the relevant legal instruments, assess the action taken or to be taken, and come up with new ideas for future development in this field.

I am confident that our role in the development and affirmation of International Humanitarian Law has not diminished: if anything, the challenge has grown and we intend to prove, with your help, that we are up to that challenge.

Excellencies, Ladies and Gentlemen, my friends,

Today , we have the choice of either not facing the real problems lying in our path, or following the traditional way of our Institute, and stand side by side, to identify, discuss and try to resolve these problems with an open friendly, and free dialogue,

MESSAGGIO

Angelo Card. SODANO
Segretario di Stato della Città del Vaticano

Egregio Presidente,

Il Santo Padre, informato della celebrazione del 35° anniversario della fondazione dell'Istituto Internazionale del Diritto Umanitario, mi ha incaricato di far giungere a Lei, Signor Presidente e, per Sua cortese tramite, ai Membri dell'Istituto, agli Organizzatori ed ai Partecipanti alla Conferenza Internazionale in programma a Sanremo, dall'8 al 10 settembre 2005, i suoi cordiali auguri, con uno speciale incoraggiamento a proseguire il vostro importante lavoro.

Dal 1970 codesto Istituto rappresenta un opportuno e qualificato foro per la promozione, la diffusione e la formazione al diritto umanitario internazionale ed al rispetto dei diritti umani e del diritto dei rifugiati.

Attraverso molteplici attività, esso ha proseguito il proprio alto compito, sapendo cogliere le mutevoli esigenze connesse con la tutela della persona, della famiglia e dei beni culturali nei casi di emergenza umanitaria e di conflitto armato ed affrontare, con equilibrio e competenza, tematiche la cui rilevanza trascende la sfera puramente giuridica. Come già indicava il Papa Giovanni Paolo II, rivolgendosi ai Membri dell'Istituto:

“anche nei secoli passati, la visione cristiana dell'uomo ha ispirato la tendenza a mitigare la tradizionale ferocia della guerra (...). Ha reso un contributo decisivo all'affermazione (...) delle norme di umanità e giustizia che sono ora, in forma debitamente precisata, i nucleo delle odierne convenzioni internazionali”.

Oggi ci confrontiamo con nuove emergenze, con nuove forme di attacco e di conflitto, che mirano a colpire anche luoghi della vita quotidiana e non solo obiettivi militari, nel quadro di una guerra dichiarata. Il terrorismo è una triste realtà, che sconvolge la società civile di vari Paesi.

Di fronte a queste nuove emergenze, occorrerà certo pensare all'adozione di misure adeguate. E' nondimeno necessario coltivare un maggiore senso morale nelle relazioni internazionali e nelle relazioni interpersonali, nel segno della solidarietà e della giustizia, affinché la famiglia umana possa ritrovare la pace.

Da parte loro, le religioni sono chiamate ad offrire un contributo determinante all'affermazione di una cultura di pace ed alla moltiplicazione di gesti di riconciliazione. E' poi auspicabile un loro reciproco dialogo, anche sui temi del diritto umanitario, per meglio servire l'uomo, in cui è riflessa l'immagine di Dio.

L'Organizzazione del Nazioni Unite è, nell'attuale situazione storica, mezzo indispensabile per il mantenimento della pace mondiale e della sicurezza comune: occorre, pertanto, studiare come rafforzare per il futuro questo importante ruolo.

Da parte sua, il Sommo Pontefice assicura ai Membri dell'Istituto, agli Organizzatori e ai partecipanti alla Conferenza Internazionale il suo ricordo nella preghiera ed invoca su di essi le più elette benedizioni del Signore.

Anche da parte mia, desidero esprimere sentimenti di vivo compiacimento per l'attività sino ad oggi svolta dall'istituto Internazionale di Diritto Umanitario e formulo voti di un proficuo lavoro, auspicando che esso porti nuovi impulsi per l'impegno umanitario.

Gradisca, Signor Presidente, i miei più distinti ossequi.

Cordialmente
Angelo Card. Sodano
Segretario di Stato di Sua Santità

STATEMENT

KEYNOTES

APPLICATION OF INTERNATIONAL HUMANITARIAN LAW, HUMAN RIGHTS AND REFUGEE LAW: UN SECURITY COUNCIL, PEACEKEEPING FORCES, PROTECTION OF HUMAN BEINGS IN DISASTER SITUATIONS

Dr. Jakob KELLENBERGER

President of the International Committee of the Red Cross

Your Excellencies, Ladies and Gentlemen,

I thank the Institute for having invited me to this opening session. Since the number of topics on the Agenda is considerable, I had to make a choice in order to avoid abusing your time or speaking in overly general terms. Therefore, my observations will focus on the relations of the ICRC with the humanitarian system of the United Nations in the light of the ongoing discussion on the reform of the UN. You will find my comments on the observance of international humanitarian law by peace-keeping forces in the written text.

We are gathered to celebrate the 35th anniversary of the founding of the International Institute of Humanitarian Law. On this important occasion I wish first of all to convey to the Institute and its President the heartfelt congratulations of the International Committee of the Red Cross.

The ICRC has strongly supported the Institute from its founding in 1970 to the present day. Among the Institute's many activities, the ICRC attaches special importance to the military courses: these courses have achieved world-wide fame and constitute an important forum for the dissemination of international humanitarian law among armed forces.

In addition, the annual round tables organised by the Institute provide valuable opportunities to discuss pressing issues of humanitarian concern, whether in the field of law or in terms of practical action, and to meet friends and experts.

In terms of research conducted under the auspices of the Institute one project deserves to be mentioned in particular: the elaboration of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea to which the ICRC contributed significantly.

The anniversary of the Institute this year coincides with the 60th anniversary of the founding of the United Nations. Both in the field and at headquarters level the cooperation between the UN system and the ICRC has grown and intensified. Cooperation and dialogue took a leap forward when the International Committee of the Red Cross obtained observer status with the UN in 1990: this status made it possible for the ICRC to entertain regular contacts with the Security Council, to be active in the General Assembly and other meetings as well as to take part in the elaboration of treaties and other instruments. The Security Council is increasingly engaged in efforts to ensure respect for international humanitarian law. The

obligation to ensure respect for humanitarian law is, as we are all aware, an obligation for all States, and not just for those involved in armed conflicts.

It is therefore not surprising that the ICRC is following interest proposals for the UN reform in general, the reform of the humanitarian system in particular. As far as the first point is concerned we pay particular attention to the discussions on the creation of a Peacebuilding Commission and a Council of Human Rights. We shall have to define our relationship with these bodies once decisions have been taken. Since many of our humanitarian operations take place in so called transitional periods or "*post conflict*" situations, regular contacts with the Commission will be important and useful for both sides. We can only welcome the ambition to pay more attention to the careful steering of the particularly delicate phase intended to lead from peace agreements to consolidated peace. My additional hope would be that the existence of such a Commission would also be helpful for better coordination between exit strategies of humanitarian organisations and entry strategies of other organisations, development agencies in particular.

The ICRC strongly welcomes the ongoing discussions on the reform of the UN humanitarian system and has participated in the debate in the Inter-Agency Standing Committee and its working group. It will continue to participate in this debate in the spirit and framework I shall set out below. The ICRC also made a substantial input to the Humanitarian Response Review commissioned by the Emergency Relief Coordinator, by documenting its capacities in the different fields of activity under consideration. How do we approach this reform debate which we see first and foremost as a debate on the UN-humanitarian system, but which has implications for humanitarian actors outside this system?

1. The ICRC is resolutely positive about this debate because it is no luxury at all to work seriously on the efficiency of the UN-humanitarian system and the whole of the humanitarian network. It is a long-standing request of the ICRC that coordination efforts have to be based on real capacities in the field and not, as has happened too often in the past, on the basis of ambitions for positioning purposes. We welcome therefore a more serious approach to coordination. This is a question of responsibility and accountability. We trust this debate will focus on improved effectiveness and not the positioning of individual organisations.
2. The ICRC is ready to intensify its dialogue and cooperation with the humanitarian UN-system and other humanitarian actors to the extent compatible with its own identity and its modes of operation.
3. The ICRC is willing to play an active role in the efforts to improve inter-operability between the UN system, the Red Cross and Red Crescent network and the NGO community. Numerous forms of cooperation already exist between actors belonging to the three circles but there might be scope for more transparent and more efficient arrangements, always to the benefit of those in need of protection and assistance. How can we improve inter-operability ? By measures facilitating the cooperation between the joint UN logistic centre, the ICRC and other logistic centres, by developing common criteria to assess needs, express activities, measure impact, to mention just a few examples.
4. There are limits as to how far we can go. These are set by the fact that the ICRC is not part of the UN system, that it has its own specific mandate and modes of action and that it has to assume the

role of lead agency in relation to the relief operations of the other components of the Red Cross and Red Crescent Movement engaged in situations of armed conflict. The ICRC is determined to remain a credible independent, neutral and impartial humanitarian actor whose preferred mode of operation is to work bilaterally with States and armed groups involved in armed conflicts. As such it cannot participate in UN integrated missions; it cannot assume tasks such as coordinating other agencies in specific sectors of activity for which it would be accountable to the UN system. Likewise, it cannot be part of funding mechanisms, that are currently being discussed, ranging from "pooled funding" to an expanded Central Emergency Revolving Fund to be managed by the Emergency Relief Coordinator which would provide humanitarian grants for rapid response to quick-impact activities in emergency situations. I would like to stress that we are not questioning the merits of these approaches and we do not see ourselves as the teachers on how humanitarian action should be carried out. We do believe, however, in the value added of independent and neutral humanitarian action as represented by the ICRC, remaining fully aware of the challenge it means to prove this added value in today's world. In Darfour, I think, we met and we are meeting this challenge.

As has been the case in previous years the present Round Table addresses international humanitarian law, human rights and refugee law. These branches of international law are complementary bodies of law that share a common goal, namely the protection of the lives, health and dignity of persons. They form, as we saw two years ago, a complex network of complementary protections that interact in practice.

Let me therefore say a few words about the ICRC's contacts with the UN bodies entrusted with the promotion of refugee law and human rights, which are represented here today.

Many of our activities in the field provide internally displaced people and refugees with protection and assistance. It is therefore natural for us to have close contacts with the Office of the UN High Commissioner for Refugees often working in the same context. This cooperation can be on legal matters. In recent years, for example, we have worked together to determine the legal framework regulating the separation and internment of combatants who cross borders with refugees in situations of mass influx and the development of guidelines for its implementation. We regularly train one another's staff in international humanitarian and refugee law.

Obviously, our cooperation is close in operational contexts as it must be in order to ensure a coherent and comprehensive response on the ground. Such interaction can be quite formal and take the form of a Memorandum of Understanding like the one concluded in March 2003 to allocate responsibilities and tasks for possible population flows from Iraq. Interaction also takes place on a day to day basis in the field. In Iraq today, where UNHCR currently does not have an expatriate presence, we are working together to try to find practical ways of dealing with third country nationals in hands of multinational forces who cannot be released in Iraq and who have indicated their fear of being repatriated. If the UNHCR, inside the UN system, should assume additional responsibilities with regard to internally displaced persons, the cooperation between the UNHCR and the ICRC, which has important responsibilities in the field of protection and

assistance of IDPs, will no doubt further intensify. Given the good experience in working together with the UNHCR, I like this perspective.

The Office of the UN High Commissioner for Human Rights, monitoring bodies and the Commission on Human Rights, where the ICRC has observer status, are increasingly addressing international humanitarian law in both country and thematic work. Where appropriate, the ICRC provides informal expert advice on international humanitarian law. To give but one example, earlier this year the Commission on Human Rights adopted the basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law. The ICRC participated in the expert meetings leading to the adoption of this instrument and provided legal input on the international humanitarian law dimension. To the extent the Office of the Commissioner for Human Rights is extending its field presence, dialogue and cooperation will no doubt intensify in order to ensure complementarity in situations where both are being active. My feeling is that the High Commissioner Louise Arbour and myself see eye to eye on this issue.

Given the extent of our relief operations, I should not close this overview without mentioning our cooperation with the World Food Programme, with whom the ICRC has a good and long-standing relationship. Through a new exchange of letters in 2004, the World Food Programme and the ICRC have reinforced their level of cooperation and exchange among their respective experts and staff in charge of operations.

I now come to my final point: peacekeeping operations mandated by the Security Council and in particular how international humanitarian law applies to them.

All parties to an armed conflict are bound by international humanitarian law. The principle that civilians must be spared from the effects of hostilities is set out and developed in numerous clear and categorical prohibitions. These prohibitions are, however, all too frequently wilfully violated.

It is frequently in situations of widespread attacks on the civilian population that peacekeeping forces are deployed to prevent further violations. As long as these forces are not drawn into the fighting, they too are protected and should not be targeted. In its dialogue with warring parties the ICRC regularly reminds them of the provisions protecting civilians and peacekeepers.

As recognised by the High-level Panel on Threats, Challenges and Change, the distinction often drawn between Chapter VII peace-enforcement operations and Chapter VI peacekeeping operations is to some extent misleading. Admittedly, in the former there is an expectation from the outset that the robust use of force is integral to the mission, while in the latter there may be a reasonable expectation that force may not be needed at all.

The reality is, however, to quote the High-level Panel, "*that even the most benign environment can turn sour*". In these circumstances, the multinational forces, if themselves drawn into violence of a duration and intensity amounting to armed conflict, are also required to respect international humanitarian law in responding to the attacks against them. As always, the nature of the situation and, consequently, the

applicable law must be determined on the basis of the facts on the ground rather than the formal mandate given to the force by the Security Council.

If the violence in which the multinational force is involved amounts to an armed conflict the provisions of international humanitarian law apply. The ICRC therefore believes that it is essential for personnel deployed in peacekeeping missions – and *a fortiori* in peace-enforcement missions – to be adequately trained in international humanitarian law. In this respect I would like to highlight the value of the Bulletin on “*Observance by United Nations Forces of International Humanitarian Law*” – issued by the Secretary-General in 1999. This instrument summarises the key principles and rules of international humanitarian law and declares these to be applicable to UN troops engaged in enforcement actions or in peacekeeping operations when the use of force is permitted in self-defence.

Let me now briefly leave the theme of the day to mention a priority issue for the ICRC and the entire International Red Cross and Red Crescent Movement. I refer to the proposal to adopt a Third Additional Protocol introducing an additional emblem whose main purpose is to reach universality of the Movement. A next round of consultations, convened by Switzerland, as depositary of the Geneva Conventions, will take place beginning next week in Geneva. I sincerely hope that they will comfort the convictions of those who feel that the time is ripe to hold the foreseen diplomatic conference at the end of October. I equally hope that those who feel time is not ripe will explain why they feel time is not ripe. Looking at the issue from an exclusively humanitarian angle, and fully aware and respectful of the different feelings this issue arouses and the different ways of looking at it, I have the strong conviction that time is ripe. The issue has remained unresolved for too long. It can and must be resolved now.

Ladies and Gentlemen, I do sincerely hope that the discussions in the coming days will enhance our understanding of the challenges ahead and strengthen our resolve to work on a humanitarian response that will protect and assist all those in need as efficiently as possible. Thank you for your attention.

HUMANITARIAN ASSISTANCE IN AFRICA

Don Juan Manuel SUAREZ DEL TORO RIVEIRO

President of the International Federation of the Red Cross and Red Crescent Societies

It is an honour for me to address this International Conference. Let me take this opportunity to also congratulate you on the occasion of the 35th anniversary of the foundation of the International Institute of Humanitarian Law in Sanremo.

The title of this conference refers to the "*Application of International Humanitarian Law, Human Rights and Refugee Law: UN Security Council, Peacekeeping Forces, Protection of Human Beings in Disaster Situations*". In some such situations, all three of these "*big three*" fields of international law most associated with human dignity and protection may be brought to bear.

This was demonstrated in the December 2004 tsunamis, which struck areas with recent or ongoing armed conflicts and existing refugee issues, and whose aftermath also raised a number of questions on basic human rights. We therefore look forward to the discussions at this conference on means to enhance the implementation of these areas of law where they are applicable to disasters.

However, there are many other disaster situations where these "*big three*" fields of law leave basic questions unanswered. In the absence of armed conflict and displacement across borders, what rules and principles apply in the wake of a disaster such as a tsunami, a drought or a nuclear accident?

This past August has been wrought with natural catastrophes and disasters. These tragedies have resulted in thousands of deaths and victims. The devastating Hurricane Katrina, after ravaging Florida, left a trail of chaos, pain and damage in the States of Mississippi, Louisiana and Alabama.

This torrid month of August has also devastated part of Spain with fires, and deluged Central Europe with floods: Austria, Switzerland, Slovenia, Croatia and Germany witnessed the overflowing of main rivers and the weakening of dams and canalizations, bringing about the horror of death and destruction of homes and livelihoods. In many places, the intervention of emergency teams prevented the disasters from producing a higher death toll.

Is there a right to humanitarian assistance in such situations? What principles remain where emergency conditions allow for the limitation or derogation of human rights standards? Is there an obligation on governments to seek outside assistance if they are not able to meet the needs of those affected with domestic resources? Is there a corresponding duty of the international community to provide such assistance when it is requested?

As far as the Red Cross Movement is concerned, and long since affirmed by the International Conference of the Red Cross and Red Crescent, it is clear that there is a fundamental right of all people to both offer and receive humanitarian assistance in non-conflict disasters and that our Movement and the individual national societies have a corresponding duty to provide relief to all disaster victims impartially

and neutrally on the basis of need (Principles and Rules for Red Cross and Red Crescent Disaster Relief, XXIst International Conference, as revised).

This duty requires us to offer assistance to our own communities and beyond our borders, on the basis of our Fundamental Principles and in a spirit of full cooperation with public authorities and local communities themselves.

More urgent, then, from our point of view, is the need for answers to the mundane questions about precisely how disaster assistance should be facilitated, coordinated and regulated. Without a single overarching framework governing this area, we have found that legal and administrative barriers to the entry of international relief personnel, goods and equipment, uncertainty as to the legal status of international actors acting in affected countries, and ambiguous standards as to the quality, transparency and appropriateness of international assistance remain consistent challenges to our own work and to the effectiveness of international disaster assistance in general.

The growing concern of the international community with regard to the actions of States in cases of natural or technological disasters is clear. Furthermore the work that the International Movement of the Red Cross and Red Crescent has developed and continues to carry out in such cases since its inception, is well known.

Experience in disaster situations has revealed the need to improve the international legal framework to facilitate intervention activities in disaster situations. Long customs procedures for authorizing the entry of rescue material, difficulties in obtaining fly-over and landing rights, and restrictions in communications and for obtaining visas are just a few of the obstacles that need to be surmounted in order to carry out urgent relief activities in cases of disaster.

The Federation has therefore embarked on an exploration of the area of "*International Disaster Response Laws, Rules and Principles*" (or "*IDRL*") in order to clarify and raise awareness of the existing norms in this area as well as to identify gaps.

IDRL is not and will never be "*another IHL*" because the premises and needs are so different when armed conflict is involved. Yet, IDRL has a similar potential to vastly improve the situation of persons made vulnerable by vast forces over which they have no control. I hope that there will be an opportunity to discuss this potential at this Conference in addition to the contribution the more established areas of international law can make.

We can say that the development of legislation for disaster prevention and response does not just fulfil a legal role, but a social and ethical one as well, insofar as it helps forge what some refer to as a disaster prevention culture.

There must be a frame of reference clarifying the competences of the various bodies, and above all, establishing the rights of victims of natural disasters. Let me now stress how relevant the work currently being conducted by the International Red Cross and Red Crescent Movement towards the adoption of the Third Protocol Additional to the Geneva Conventions is in disaster situations.

The Movement is becoming more and more internationalised in the way it works. The willingness of people in all countries to support people in others was demonstrated to an amazing degree after the Tsunami. This led to a very large number of our National Societies offering their assistance to their sister Red Cross and Red Crescent Societies in the affected countries.

The response showed the world how global our network of National Societies has become, which is an important factor in the humanitarian purpose of the proposed Third Protocol.

I would therefore like to conclude by emphasizing the point that our Movement has made throughout the debate on the draft Third Protocol, that its humanitarian purpose is paramount.

“APPLICATION OF INTERNATIONAL HUMANITARIAN LAW, HUMAN RIGHTS AND REFUGEE LAW: UN SECURITY COUNCIL, PEACEKEEPING FORCES, PROTECTION OF HUMAN BEINGS IN DISASTER SITUATIONS – OHCHR STATEMENT”.

Mrs. Lucie VIERSMA

Human Rights Officer of the United Nations High Commissioner for Human Rights

Ladies and Gentlemen,

The High Commissioner for Human Rights, Ms Louise Arbour, asked me to present this statement on behalf of the Office of the High Commissioner. She also asked me to convey her words of deep appreciation to the organizers of this important Conference for their effort to bring together this group of eminent specialists to discuss vital aspects of the application of international humanitarian law, human rights law and refugee law. She firmly believes that all the three branches of international law are complementary, and only as such can they demonstrate their full potential and effectiveness.

The High Commissioner sincerely regrets that she is not able to be here in person. But, she wishes you an inspiring and successful meeting and looks forward to your conclusions.

Ladies and Gentlemen,

In my intervention, I would like to focus on some aspects of the current developments in our Office that are relevant to this Conference.

This discussion is timely for OHCHR and the United Nations as a whole. The Secretary-General, in his report “*In larger freedom*” called for more effective United Nations action on the ground during times of crisis and for compliance of the international community with its responsibility to protect. He also stressed that “*We will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights*”. Looking in this context at the capacities of the UN human rights programme, the Secretary-General in his report pointed to the urgent need for a better equipped OHCHR in order to enable our Office to respond to the needs defined by the aforementioned role of human rights, including a more active role to be played by the High Commissioner in the deliberations of the Security Council and the proposed Peacebuilding Commission. “*OHCHR’s Plan of Action: Protection and Empowerment*” recently presented to the General Assembly, outlines the High Commissioner’s vision of how this situation should be addressed.

Protection and empowerment will be two central goals of the Office. The protection of human rights must be at the core of policies to address conflict. The Plan of Action does not recognize human rights protection as a specific tool or approach but rather refers to a desired outcome — where rights are

acknowledged, respected and fulfilled by those under a duty to do so. Human rights protection results when, through specific actions, individuals who otherwise would be at risk or subject to deprivation of their rights, are able to fully exercise them. It necessarily focuses on both immediate responses where people are threatened, and on longer term work to build and strengthen laws and institutions that protect rights.

Empowerment is essential for the effective enjoyment of human rights. It means that right holders are in the position to assert and claim their rights. Empowerment is also about equipping those with a responsibility to implement human rights with the means to do so.

Some view human rights as relevant only when conflict ends. However, the protection of human rights and empowerment, if understood in the described way, are relevant at all stages of conflict and other crisis situations.

Country engagement, involving cooperation with partners - ranging from governments through international and non-governmental organisations to civil society - should be one of the main vehicles and key strategies to pursue the goals of protection and empowerment and thus, to close the human rights implementation gaps. It should be based on multifaceted approaches, tailored to the implementation needs of specific countries and drawing on the potential of human rights mechanisms and programmes.

In principle, OHCHR should engage with countries under all circumstances and all times, on the assumption that nobody is free of human rights concerns. But, particular attention will be paid to response to crisis situations, including the following forms of engagement:

First - field presences: OHCHR is committed to deploy human rights officers through its own stand-alone missions or through reinforcing human rights components in United Nations peace operations as appropriate, depending on the needs on the ground.

There are currently 16 human rights components within the United Nations peace operations. OHCHR works closely with these human rights components from their design, through their establishment and implementation of mandated activities. There are also recent examples of another form of engagement. This May, OHCHR opened its office in Nepal to monitor the observance of human rights and international humanitarian law, including investigation and verification. In June, the OHCHR set up a human rights presence in Uganda to deal with protection issues in relation to the conflict afflicting the northern and eastern parts of the country.

Second - fact-finding and investigative missions: it is to be noted that OHCHR has increasingly been called upon, including by the Security Council, to provide support and legal expertise for commissions of inquiry investigating allegations of serious violations of human rights and international humanitarian law or to carry out fact-finding missions. During the last 12 months, commissions of inquiry have been established for Côte d'Ivoire and Darfur. Fact-finding missions have been carried out in connection to the events in Andijan, Uzbekistan and in Togo. Such investigative missions usually have a comprehensive mandate. For example, the International Commission of Inquiry on Darfur was established by Security Council Resolution 1564 adopted under Chapter VII of the United Nations Charter in September 2004 "*to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties*"; "*to determine*

also whether or not acts of genocide have occurred"; and *"to identify the perpetrators of such violations"* *"with a view to ensuring that those responsible are held accountable"*. The Commission reported back on their findings to the Secretary-General and provided him with a sealed file containing the names of 51 individuals suspected of committing international crimes in Darfur to be handed over to a competent prosecutor. The Commission of Inquiry was supported by some 30 legal and human rights researchers, investigators, military analysts, and experts in gender violence and forensic experts. The Commission and the investigative team provided by OHCHR, visited and closely examined a total of approximately 40 sites and locations in Darfur and travelled to Chad and Eritrea. They interviewed hundreds of victims and witnesses. A database was developed to organize 20,000 pages of material and to record the incidents' analysis. The Commission noted in its report that both the Government of Sudan and the rebel groups have willingly accepted to cooperate with the inquiry. On the basis of the Commission's findings, the Security Council in its Resolution 1593 (2005), decided to refer the situation in Darfur to the Prosecutor of the International Criminal Court. As you know, on 1 June 2005, the ICC Prosecutor decided to open an investigation into the situation in Darfur. I am referring to this example in some detail, to demonstrate the importance and complexity of this evolving responsibility of our Office.

Third - engagements of OHCHR with the Security Council: increasing links to the Security Council have proven to be an important way not only to give human rights issues greater prominence but also to effectively enhance the protection of individuals. Most recently, in July, the High Commissioner briefed the Council on her mission to West Africa. She traveled to Côte d'Ivoire, Liberia and Sierra Leone to witness the ongoing efforts to build effective systems of human rights protection in societies that have suffered from strife. All three countries host major United Nations peace operations which include human rights components. She reported to the Council that the human rights situation in Côte d'Ivoire was deteriorating and that the situation in Liberia and Sierra Leone remained worrying. The causes for this state are similar throughout the region: bad governance, impunity, absence of the rule of law and widespread use of power for personal enrichment. A more concerted effort is required to hold those in power accountable. The High Commissioner requested the human rights components in these three missions to collect and document individual responsibility for human rights violations and to do more public reporting on issues of great concern in these countries. This dialogue with the Security Council was appreciated by its members who also called for a more systematic approach by the Council to human rights.

These are only three short illustrations of OHCHR response to the need for protection of individuals in crisis situations as envisaged by our Plan of Action. In our Office, we attach great importance to cooperation with all our partners and friends in the framework of complementarity of international human rights law, international humanitarian law, and international refugee law to the benefit of those who should be protected. We hope that this Conference and other form will support such cooperation.

ALLOCUZIONE DEL SOTTOSEGRETARIO AGLI AFFARI ESTERI ON. MARGHERITA BONIVER ALLA CONFERENZA INTERNAZIONALE SU “L’APPLICAZIONE DEL DIRITTO INTERNAZIONALE UMANITARIO, DEI DIRITTI DELL’UOMO E DEL DIRITTO DEI RIFUGIATI: IL CONSIGLIO DI SICUREZZA DELLE NAZIONI UNITE, LE OPERAZIONI PER IL MANTENIMENTO DELLA PACE, LA PROTEZIONE DELLE POPOLAZIONI NELLE SITUAZIONI DI DISASTRO”.

On. Margherita BONIVER

Sottosegretario agli Affari Esteri della Repubblica Italiana

Signor Presidente, signore e signori,

Sono molto lieta ed onorata di rappresentare il Governo Italiano all’annuale Conferenza internazionale organizzata a Sanremo dall’Istituto Internazionale di Diritto Umanitario. Questa Conferenza costituisce sempre un momento di riflessione ed approfondimento molto atteso e di vasta risonanza internazionale. Quest’anno essa è incentrata su una problematica, quale quella dell’intervento umanitario nei suoi vari aspetti, che conosce senza dubbio un periodo di grande attualità.

La Conferenza affianca e completa in maniera assai efficace l’intensa attività dell’Istituto, dedicata principalmente ai corsi di alta specializzazione, di cui in questi anni hanno beneficiato addetti ai lavori provenienti da numerosi paesi europei ed extraeuropei, tra i quali vale la pena in particolare menzionare la Cina ed alcuni stati arabi. Quest’anno inoltre essa acquista un rilievo peculiare perché ha luogo nel 35° anniversario della fondazione dell’Istituto di Sanremo, che coincide con il 60° anniversario delle Nazioni Unite.

La mia presenza qui pertanto ha oggi un significato ben preciso: essa vuole marcare il riconoscimento dell’attività che da 35 anni l’Istituto svolge nel campo del diritto umanitario nonché manifestare il convinto sostegno ed il vivo interesse del Governo Italiano per i lavori della Conferenza che iniziano oggi e che toccano settori di particolare rilievo per la politica estera italiana.

Le cronache di tutti i giorni mostrano alle opinioni pubbliche di tutto il mondo in maniera molto più approfondita e trasparente che non in passato la realtà e complessità delle relazioni internazionali, così come l’emergere di conflitti, crisi, minacce di nuova ed inedita natura. D’altra parte le relazioni tra Stati vanno acquistando sempre più caratteristiche nuove e poco tradizionali, mentre appaiono sulla scena mondiale attori influenti che non appartengono alle categorie dei soggetti internazionali classici. L’emergere del fenomeno del terrorismo e le reazioni della comunità internazionale ne sono un esempio. Nuove prospettive si aprono quindi allo sviluppo della solidarietà internazionale mentre nuove minacce si vanno profilando

secondo un intrecciarsi di connessioni più o meno palesi ed evidenti. Ciò richiede in molti casi una ridefinizione giuridica e politica dell'insieme degli strumenti internazionali.

Di queste complesse evoluzioni e della esigenza di adeguamento degli strumenti che da esse ne consegue è immediata testimonianza la riforma in corso del sistema delle Nazioni Unite, impegno epocale di tutta la Comunità, che deve essere certamente ben presente a tutti noi che operiamo, con modalità di volta in volta specifiche, sul piano internazionale.

In questo contesto in continua evoluzione anche l'Istituto Universitario di Diritto Umanitario acquista un ruolo nuovo e molto importante, di cui il Governo italiano è ben consapevole. Trattandosi di un ente molto attivo nel settore dell'alta formazione indipendente, esso si proietta verso un futuro in cui avrà compiti ed impegni crescenti in rapporto alle nuove sfide, cui potrà far fronte grazie al suo capitale di conoscenze, al suo know how di esperienze, al patrimonio di esperti civili e militari provenienti dagli ambienti accademici come dalla politica, dalla diplomazia come dalle agenzie internazionali e dalle organizzazioni non governative. E' un contributo molto impegnativo quello che ci si attende dall'Istituto, ma è certamente consono alla sua natura ed al suo mandato.

La Conferenza odierna si inserisce certamente in questo ambito, essendo dedicata all'approfondimento del diritto umanitario, dei diritti dell'uomo e del diritto dei rifugiati non in astratto bensì attraverso il prisma di situazioni molto attuali quali le operazioni di peacekeeping, e gli interventi di emergenza umanitaria in eventi di conflitti armati, crisi politiche, disastri economici, eventi naturali.

Signor Presidente, signori e signore,

L'Italia è impegnata seriamente su molti di questi fronti, e per questo motivo è grata all'Istituto per aver organizzato la riunione di questi giorni. Senza entrare nel merito delle specifiche iniziative italiane nei vari settori, desidero accennare, quale introduzione ai temi oggetto delle varie sessioni di questa Conferenza, ad alcune riflessioni dettate dall'esperienza italiana di questi ultimi tempi.

Il Presidente Kirsch illustrerà tra poco il ruolo della Corte Penale Internazionale. Io desidero ricordare quanto l'Italia abbia creduto fin dagli inizi in una giurisdizione sovranazionale cui gli Stati sovrani liberamente acconsentano a sottoporsi. I tremendi eventi degli anni Novanta in numerose parti del mondo, incluso nel nostro continente europeo – genocidi, uccisioni di massa ecc. – che continuano purtroppo a riprodursi anche in questi anni – ricordo qui solo quanto da tre anni avviene in Darfur sotto gli occhi della comunità internazionale – hanno suscitato la necessità di una istanza superiore di giustizia che non lasci impuniti alcuni crimini particolarmente efferati. A tal fine il Governo italiano si è in questi anni molto adoperato presso numerosi Stati partners per l'adozione quanto più diffusa possibile dello Statuto di Roma.

La riforma delle Nazioni Unite è un processo molto laborioso che impegna da molti mesi la comunità internazionale. Comunque essa si concluda – e a tutt'oggi non è ancora dato prevederla se non per grandi linee – le relazioni internazionali, la prassi e la dottrina ne saranno profondamente coinvolte. La

diplomazia italiana è impegnata su vari fronti, avendo chiara la prospettiva di un sistema onusiano più rispondente ai tempi.

Il governo italiano ritiene che i temi afferenti ai diritti umani debbano attraversare tutta l'attività delle Nazioni Unite e condivide l'appello dell'Unione Europea per lo *“human rights mainstreaming throughout the system”*. La riforma dovrà in particolare produrre il tanto auspicato Consiglio per i Diritti Umani, che rifletta al livello istituzionale la centralità ed universalità dei diritti dell'uomo, e possa trattare nel modo più sollecito ed efficace ogni grave situazione di crisi in questo settore. L'Ufficio dell'Alto Commissario per i Diritti dell'Uomo, che ha un ruolo strategico, deve essere rafforzato anche dal punto di vista finanziario.

L'imminente Vertice delle N.U. dovrà altresì costituire la piattaforma su cui costruire il rafforzamento della risposta umanitaria, il rispetto per i principi di umanità, indipendenza, neutralità ed imparzialità, la tempestività degli interventi finanziari in tale settore, la possibilità di misurare la performance umanitaria attraverso benchmarks ben precisi.

Settori ulteriori della riforma rilevanti nel contesto di questa Conferenza sono quelli del *“peacebuilding, peacekeeping”* e della *“responsibility to protect”*. In essi un posto speciale spetta al capacity building, di cui anche l'Istituto di Sanremo si fa carico, e su cui ci aspettiamo parole illuminanti dal dibattito nella sessione di domani.

Ma esiste un collegamento diretto tra i meccanismi concernenti i diritti dell'uomo, il diritto umanitario ed il Consiglio di Sicurezza, perché ogni conflitto è invariabilmente preceduto da un periodo di crescenti violazioni dei diritti umani. Questa Conferenza dedicherà infatti un'intera sessione a questo tema. La riforma del Consiglio di sicurezza, quindi, ne dovrà tenere ampiamente conto. L'Italia è molto impegnata, nell'ambito di un movimento nato spontaneamente in seno alla membership delle Nazioni Unite – il movimento *Uniting for Consensus* – affinché si possa riorganizzare quella istituzione nell'unica prospettiva per cui valga la pena portare avanti la riforma: la prospettiva del bene comune, al di là di protagonismi nazionali e di ambizioni circoscritte a singoli gruppi. Noi auspichiamo fortemente che alla fine dei dibattiti e degli esercizi redazionali prevalga l'esigenza di attuare una riforma che incontri veramente l'interesse di tutti, e con questa speranza continuiamo a lavorare.

Ed infine vorrei accennare brevemente all'esperienza italiana rispetto a quello che è l'ultimo tema di discussione della nostra Conferenza, non certo in ordine di importanza: la protezione delle popolazioni in situazioni di disastro, con particolare riferimento agli interventi in occasione della drammatica ed inedita calamità dello tsunami. L'Italia si è impegnata da subito compiendo un grosso sforzo diplomatico, finanziario, ed umanitario per contribuire a restituire alla normalità intere popolazioni che hanno perso tutto, e per soccorrere i numerosi connazionali che si trovavano nelle zone colpite.

Molte lezioni si possono trarre a livello internazionale da quella esperienza. A distanza di vari mesi dall'accaduto, quando ancora continuano l'opera di riconoscimento di migliaia di vittime senza nome nonché gli sforzi della ricostruzione, è possibile porre l'accento su alcuni preliminari concetti emersi con evidenza nel corso di questi mesi.

Innanzitutto è risultato molto importante che gli stessi paesi colpiti mantenessero la ownership dell'opera di ricostruzione, beninteso con il contributo fondamentale della Comunità internazionale, soprattutto nella delicata fase di passaggio dall'aiuto di emergenza alla ricostruzione e riabilitazione. Pur nell'immensità della catastrofe, i Paesi colpiti hanno reagito abbastanza tempestivamente per individuare congiuntamente con gli operatori internazionali gli specifici settori d'intervento, permettendoci quindi di calibrare da subito le nostre iniziative sulle effettive necessità.

Inoltre fondamentale si è rivelato il coordinamento della risposta internazionale a livello di G8, Nazioni Unite, Unione Europea, singoli Stati, Agenzie internazionali e Organizzazioni non governative, affinché l'assistenza fornita potesse avere il massimo impatto possibile.

Signor Presidente, signore e signori,

nell'esprimere l'augurio del Governo italiano e mio personale per l'ottimo svolgimento ed il felice esito dei lavori di questa Conferenza, desidero concludere con un incoraggiamento rivolto a tutti coloro, Stati, Organizzazioni internazionali, enti ed istituti di ricerca, che in vario modo possono beneficiare dall'attività dell'Istituto Internazionale di Diritto Umanitario di Sanremo, affinché vogliano impegnarsi a continuare a sostenere l'Istituto che siamo orgogliosi di ospitare nel nostro Paese.

ROLE OF THE INTERNATIONAL CRIMINAL COURT AND INTERNATIONAL HUMANITARIAN LAW

Mr. Philippe KIRSCH
President of the International criminal Court

I. INTRODUCTION

It is my pleasure to speak to you today. I would like to thank the President of the Republic of Italy and the esteemed organizers for the opportunity to address this Conference. Thirty-five years ago, the very first Congress held here adopted the Declaration of Sanremo which “*urge[d] that violations of the rules contained in conventions of a humanitarian nature be penalized by impartial international tribunals*”

Thirty-five years later, there are now several such tribunals in existence – each with its own mandate. Today, I would like to speak to you about the most significant development among such tribunals, the International Criminal Court [ICC].

I will focus my remarks on three issues:

- the specific role of the ICC;
- the place of the ICC within international law; and
- how the ICC interacts with other actors to achieve common objectives.

I will conclude with a brief update on the Court today.

II. ROLE OF THE ICC

Speaking first about the role of the ICC, it must be emphasized that the primary responsibility to respect and ensure respect for humanitarian law belongs to States. This obligation is expressed in Common Article 1 to the Geneva Conventions and in Article 1 of Additional Protocol I.

There are many means of enforcement. When it comes to genocide, crimes against humanity and war crimes, holding individuals criminally responsible is essential. The obligation of States to punish international crimes is well-established.

The Rome Statute which created the ICC recalls, “*it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*”.

Ordinarily, States investigate and prosecute international crimes through a combination of civilian courts and military justice systems. Unfortunately, national jurisdictions have not always been willing or able to act. In such cases, international courts are needed to prevent impunity. The first international tribunals were *ad hoc* tribunals, created first at Nuremberg and Tokyo after World War II and more recently in response to events in the Former Yugoslavia and Rwanda. These *ad hoc* tribunals suffered from several limitations:

Only a few States participated in their creation. The Nuremberg and Tokyo tribunals were set up by the victorious Allied powers. The Yugoslavia and Rwanda Tribunals were created by the Security Council.

- The *ad hoc* tribunals are limited to specific geographic locations.
- They exercise jurisdiction only over crimes committed within a particular time frame.
- Their establishment involved extensive costs and delays.
- Their creation depended on the political will of the international community to act in each specific situation.
- The *ad hoc* tribunals have had primacy over national courts.
- The ICC was established to overcome these limitations.

First, The ICC was created through a treaty process. All States were able to participate in establishing the treaty, as well as the subsidiary Rules of Procedure and Evidence and Elements of Crimes. This also allowed States to freely consent to the Court through ratification. 99 States have so far become Parties. More ratifications will come. Second, the Court's jurisdiction is not limited to predetermined situations. Its jurisdiction is defined by its Statute without reference to particular situations. Third, the ICC is immediately available. Fourth, its jurisdiction is prospective. Fifth, the ICC is founded on the principle of complementarity. The Court will not intervene when national judicial systems function properly. The Court will only act when States are unwilling or unable genuinely to investigate or prosecute genocide, crimes against humanity or war crimes.

The ICC is thus designed as a Court of last resort, to prevent impunity where national courts cannot or will not act. In doing so, it is hoped that the ICC will effectively contribute to the deterrence of serious international crimes. Because of the principle of complementarity, the ICC will also contribute to deterrence by encouraging States to investigate and prosecute crimes.

III. THE ICC AND INTERNATIONAL LAW

I would like to turn now to the relationship between the ICC and international law. In this context, I would like to speak about three aspects of the Court, namely:

The crimes within the Court's jurisdiction; the geographic and personal jurisdiction of the Court; and the procedural law of the Court

A. Crimes

The ICC may exercise its jurisdiction over the most serious crimes of concern to the international community, namely genocide, crimes against humanity and war crimes. The Rome Statute contains the most detailed definitions of these offences of any international tribunal. These definitions are supplemented by a text setting out the elements of each offence. The Elements of Crimes were adopted by consensus by all States participating in the Preparatory Committee for the ICC. This subject matter jurisdiction of the ICC is related to conventional and customary international law, in particular humanitarian law, in three ways.

First, the definitions of crimes were drawn from conventional and customary international law. The drafters had recourse to definitions in multilateral treaties, the statutes of prior international tribunals, and indicators of customary international law – including military manuals and codes of military justice. In the case of genocide, the definition in the Rome Statute was taken from the 1948 Convention on the Prevention and Punishment of Genocide. This definition is also widely considered to be customary law. In defining crimes against humanity, as there was no comprehensive convention, States drew largely on the statutes of prior international tribunals and customary law. The Geneva Conventions and Additional Protocols formed the basis for many of the definitions of war crimes. Of particular interest to this Conference, I note that intentionally directing attacks against humanitarian assistance or peacekeeping missions is also considered a war crime in both international and non-international armed conflicts.

Second, the judges may apply humanitarian law in cases before the Court. Under the Rome Statute, judges may refer to the established principles of the international law of armed conflict as a secondary source of law when appropriate.

Third, the establishment and operation of the ICC may spur the codification and further development of international humanitarian law in three ways. First, the detailed definitions of crimes against humanity and war crimes could crystallize customary law. Second, the jurisprudence of the ICC will likely be used in determining the content of international law. The famous Article 38 of the Statute of the International Court of Justice provides that judicial decisions may be used as subsidiary means for determining rules of law. In the context of humanitarian law specifically, the recent study by the Red Cross of customary humanitarian law suggests that findings by international courts may be evidence of the existence of a rule of customary law. Third, many States

have used the adoption of the Rome Statute as an opportunity to also adopt or amend their legislation governing the domestic prosecution and punishment of international crimes. Others are in the process of doing so. This legislation might also comprise evidence of State practice relevant to determining customary law.

B. Jurisdiction

I would like to turn next to the personal and geographical jurisdiction of the Court. Here too, we can see how the Court sits within the existing framework of international law. Under customary international law, there may be five possible bases for a court to exercise jurisdiction. These are:

- Territoriality –i.e. if the offence occurred on a State’s territory;
- Nationality of the accused;
- Nationality of the victim;
- The protection of certain State interests; and
- Universal jurisdiction over certain offences.

At the Rome Conference, a number of different bases for jurisdiction were considered. In the end, the States chose to limit the Court’s jurisdiction to the two bases of jurisdiction universally recognized by all States. The Court has jurisdiction over:

- Crimes committed on the territory of a State Party; or
- Nationals of States Parties accused of a crime.

The jurisdictional scheme of the Court also recognizes the special responsibility of the Security Council in maintaining and restoring international peace and security.

The Security Council may refer a situation to the Court irrespective of the nationality of the perpetrator or the location of the alleged crime. In March 2005, the Security Council referred the situation in Darfur, Sudan – a non-State Party – to the Court. The Security Council may also defer an investigation or prosecution for one year.

B. Procedural Law

The third area of relationship between the Court and international law I would like to address is the Court’s procedural law. The ICC is not a human rights court. However, human rights law informs the procedural law of the Court.

The Statute directly incorporates the fundamental principles of a fair trial and the rights of the accused which are guaranteed in the International Covenant on Civil and Political Rights and enshrined in regional human rights conventions.

By way of example, the following are a few of the many rights explicitly guaranteed by the Statute:

- The right to be presumed innocent until proven guilty beyond reasonable doubt;
- The right to be informed promptly and in detail of the nature, cause and content of the charge;
- The right to counsel; and
- The right not to be compelled to testify or to confess guilt.

In addition, the definitions of crimes must be strictly construed. In case of ambiguity, the definitions must be interpreted in favour of the person being investigated, prosecuted, or convicted. As an overarching requirement, the law must also be interpreted and applied consistently with internationally recognized human rights.

The principles of criminal responsibility under the Statute are well-established in customary international law and most military justice systems. These include:

First, the responsibility of military commanders and other superiors for acts of their subordinates; and second, superior orders do not constitute a defence to genocide or crimes against humanity. Such orders are considered manifestly unlawful. For war crimes, superior orders can provide a defence only under strict circumstances.

Recent initiatives in human rights to provide remedies to victims of gross human rights abuses also have parallels in the ICC. Victims are able to participate directly in proceedings and claim reparations.

IV. COMPLEMENTARITY AND RELATIONS WITH OTHER ACTORS

I would now like to turn to the last of my themes, the relationship between the Court and other actors. The Court will not be able to establish accountability acting all by itself. Its success will depend upon the support and commitment of States, international organisations and civil society.

Because the Court is complementary to national jurisdictions, States will continue to have the primary responsibility to investigate and prosecute crimes. Because the Court's jurisdiction is limited to the nationals and territory of States Parties, continued ratification of the Statute is essential.

Where the Court does act, it will require cooperation from States at all stages of proceedings, such as by executing arrest warrants, providing evidence, and enforcing sentences of the convicted.

International organisations support the Court in a number of ways. The support of the United Nations is particularly important in this regard.

In October of last year, the UN Secretary-General and I concluded a relationship agreement on behalf of our institutions.

This agreement provides for effective cooperation while recognizing the independent, judicial nature of the Court. Civil society is instrumental to the work of the Court. Civil society has played a large role in urging ratification of the Statute and in assisting States to develop legislation implementing the Statute.

One of civil society's most important roles is in disseminating information about and building awareness of the ICC. The promotion, dissemination, and teaching about the Court – such as is done by this Institute – is critical to an informed understanding and awareness.

V. THE COURT TODAY AND IN THE FUTURE

Before finishing, allow me to update you on where the Court stands today.

The early development of the Court has occurred more rapidly than anyone could have envisaged. Just two years after the judges and Prosecutor took office, the Court is in the judicial phase of its operations.

The Prosecutor has received approximately 1500 communications from individuals and organisations.

Four situations have now been referred to the Court. Three States Parties – Uganda, Democratic Republic of Congo and Central African Republic – have referred situations on their territory. The Security Council has referred a situation on the territory of one non-State Party – Darfur, Sudan. The Prosecutor has commenced investigations in three of the situations referred:

- Uganda;
- Democratic Republic of Congo; and
- Darfur, Sudan.

The Pre-Trial Chambers have held the first hearings and issued a number of decisions. Decisions and other judicial developments not of a confidential nature are made available on the Court's web site. Not all of the work of the Chambers is available due to reasons of confidentiality.

VI. CONCLUSION

The ICC is a very new institution. Yet, its place in the international legal order has long been foreseen. This Conference marks the 60th anniversary of the creation of the United Nations. This year is also the 60th anniversary of the Nuremberg and Tokyo tribunals – the predecessors of the ICC.

In his opening statement at the Nuremberg Tribunal, the American prosecutor Robert Jackson made an important statement about the Tribunal which applies equally to the ICC. Jackson told the Tribunal “*The usefulness of this effort to do justice is not to be measured by the law or your judgment in isolation. This trial is part of the great effort to make the peace more secure*”. In his view, and those of many of his contemporaries, the United Nations organisation and international criminal tribunals were to be two essential, interrelated parts of the reestablishment of international order.

The creation of international criminal tribunals was foreseen by the UN, for example in Article 6 of the Genocide Convention and in the early work of the International Law Commission. Yet, after the founding of the UN, the Cold War and other political factors prevented the establishment of a permanent international criminal court. That has now changed. With the advent of the ICC comes new hope – not just for the Court, but for the broader legal order.

The ICC fills a glaring void in the landscape of international law. Yet, as I have stressed today the ICC is not in itself a panacea. Our collective challenge is to ensure the effective integration of the efforts of the ICC with those of other actors – States, the United Nations, the ICRC, and this Institute – to put an end to impunity and establish a culture of accountability.

**THE INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW AFTER 35 YEARS – YESTERDAY,
TODAY, TOMORROW**

**DIFFUSION ET ENSEIGNEMENT PAR L'INSTITUT INTERNATIONAL DE DROIT
HUMANITAIRE**

Dr. Jaques MOREILLON
Membre du CICR

Mesdames et Messieurs, chers Amis,

Avant de passer la parole à quatre experts qui le sont bien plus que moi, je voudrais à la fois porter témoignage et rendre hommage, en cet anniversaire, à l'Institut International de Droit Humanitaire pour le rôle véritablement historique qu'il a joué dans l'élaboration du DIH contemporain et tout particulièrement des Protocoles additionnels de 1977 aux Conventions de Genève de 1949.

Je l'affirme pour en avoir été le témoin privilégié et pour l'avoir vérifié dans les archives du CICR en préparant cette brève introduction: les Protocoles additionnels ne seraient très probablement pas ce qu'ils sont sans les négociations informelles qui eurent lieu sous l'égide de l'Institut de Sanremo dès 1971, tant ici même qu'à Milan, Florence ou Menton et ceci jusqu'en 1976, avant dernière des quatre années de la Conférence sur la Réaffirmation et le Développement du Droit International Humanitaire (DIH), la Centre de Defense de Droit Humanitaire (CDDH) dont sont issus ces fameux Protocoles additionnels.

Je dis bien "*dès 1971*" car c'est à Sanremo, à l'initiative du Prof. Patrignic en septembre de cette année-là, qu'eut lieu l'amorce d'un dialogue qui devait aboutir six ans plus tard au paragraphe 3 de l'Article 44 du Protocole I sur les combattants irréguliers et, plus tard encore (quoique plus indirectement) à l'institution de la Cour Pénale Internationale; cette amorce se situa dans le cadre d'un "*Colloque international sur les Règles humanitaires et instructions militaires*" au cours duquel Michel Veuthey – "*déjà lui*", direz-vous, et pourtant toujours aussi fringant 34 ans plus tard! – fit une mémorable présentation sur les "*Instructions militaires relatives au traitement des prisonniers dans des situations de guérilla*", alors sujet de sa thèse de doctorat. Et c'est – selon le rapport de Frédéric de Mulinen du 27 septembre 1971 – en raison de "*la participation de nombreux magistrats judiciaires militaires italiens*" que "*la question de la répression des infractions au droit humanitaire*" domina ce colloque, même si ce thème n'était pas celui de la réunion. Il faut dire aussi qu'aux côtés du Prof. Patrignic et du Général Orecchio, il y avait, pour mener ce dialogue, le personnage inoubliable de G.I.A.D. Draper, grand témoin du procès de Nuremberg dont il semblait la conscience avec son intelligence brillante et sarcastique emprisonnée dans son corps souffrant. Et je ne résiste pas, en ce jour anniversaire, à citer – ici, dans le pays du traité de Rome – une partie des conclusions des 109 représentants de 28 pays et 9 organisations à ce colloque, qui estimaient "*que l'adoption d'un système de juridiction et de contrôle de l'application des règles essentielles du droit humanitaire et de sanctions des violations éventuelles de celles-ci, mettant en cause la responsabilité pénale des individus,*

d'une part – et la responsabilité de l'État et, éventuellement, des organisations internationales, d'autre part – serait susceptible d'assurer la prévention et la répression de ces violations".

Cet heureux "*détournement*" du thème du colloque me fait beaucoup penser à Henry Dunant qui fit adopter, en septembre 1863 grâce à son ami le Dr. Basting, le principe de la neutralité du personnel sanitaire en temps de guerre ... à un Congrès de statistiques à Berlin! Qu'importe l'occasion, pourvu que la conclusion soit bonne!

Je n'ai d'ailleurs pas parlé que de la ville de Sanremo mais aussi d'autres lieux où l'Institut organisa des réunions fondatrices du DIH moderne; ainsi c'est à Milan qu'en octobre 1973 l'Institut de Droit Humanitaire organisa un colloque, cette fois-ci sur "*l'assistance spirituelle et intellectuelle dans les conflits armés et dans les troubles intérieurs*", dont les conclusions influencèrent directement le contenu des Protocoles additionnels en la matière et où M. de Breucker joua un rôle déterminant.

Dans le même esprit et avec des effets semblables, je me dois de mentionner le colloque que l'Institut organisa à Menton, en 1972 déjà, sur "*la protection des journalistes en missions périlleuses dans les situations de conflits armés*" ainsi que la Conférence d'experts de juin 1973, à Florence, sur "*le regroupement des familles dispersées*".

Ce n'est pas à la légère que j'ai parlé de "*négociations*" à Sanremo, tout en précisant d'ailleurs qu'elles furent "*informelles*" ... c'est-à-dire d'autant plus efficaces! Car les débats qui eurent lieu ici en 1974, 1975 et 1976 furent de véritables négociations entre les principaux acteurs – tant comme États que comme individus – de la CDDH. Ainsi, à la Table Ronde de septembre 1974, une cinquantaine de participants à la première session de la CDDH se réunirent à Sanremo pour y discuter de thèmes aussi importants pour les projets de Protocoles que celui des "*combattants irréguliers*", que l'on appelaient la "*nouvelle catégorie de prisonniers de guerre*", pour lesquels c'est à cette occasion que les Occidentaux renoncèrent au signe distinctif pour autant que les armes soient portées ouvertement; ou encore la question, liée à la précédente, de ce que l'on nommait alors "*l'adhésion d'entités belligérantes non étatiques aux instruments internationaux humanitaires*", c'est-à-dire les "*mouvements de libération*", ainsi que celle du renforcement des "*mesures d'application*" (puissances protectrices, etc.) et celle des conflits armés non internationaux, le tout sous la présidence du Professeur Sultan, d'Égypte. Et si je parle de "*véritables négociations*" ce n'est pas seulement que ces questions furent discutées dans le cadre de la Table Ronde de 1979 (laquelle se tenait donc entre les première et deuxième sessions de la CDDH), mais c'est aussi que celle-ci fut prolongée par une réunion informelle d'un petit groupe de pénalistes qui se constituèrent néanmoins, et *de facto*, en comité de rédaction pour la révision du projet du CICR tel qu'issu de la première session de la CDDH, et ceci sur des questions aussi précises que celles des infractions graves, l'interdiction des maux superflus et de la perfidie, la sauvegarde de l'ennemi hors de combat, la nouvelle catégorie de prisonniers de guerre, plusieurs articles relatifs à la protection de la population civile et même au Protocole II, tout cela sous l'angle des sanctions pénales. Certes ce groupe était petit et ses conclusions n'étaient destinées qu'au seul CICR, mais quand on saura qu'il était composé du Colonel Prugh pour les États-Unis, de G.I.A.D. Draper pour la Grande-Bretagne, des Professeurs Sultan et Shah pour l'Égypte et le Pakistan et du Professeur Graefrath pour la République

démocratique d'Allemagne et quand on sait que chacun de ces hommes – même s'il s'exprimait à titre personnel et pour le seul CICR – représentait en fait une des principales tendances planétaires représentées à la CDDH, on appréciera l'importance historique de telles discussions.

La Table Ronde de septembre 1975 vit participer quasiment tous les ténors de la CDDH (à l'exception de l'URSS, mais avec une forte présence des pays de l'est) et traita de la question des "*représailles*", des "*sanctions pénales*", des "*nouvelles catégories de prisonniers de guerre*", des conflits armés "*non internationaux*" et du "*rôle de la Croix-Rouge*" dans les Protocoles additionnels, c'est-à-dire des principales questions encore en suspens à la CDDH. (J'ajouterai ici, sur un plan plus personnel, que pour le jeune successeur de Jean Pictet à la tête du département de la Doctrine et du Droit que j'étais à cette session, ce fut l'occasion pour moi d'être ébloui par la sagesse et les connaissances de ce grand penseur auquel aujourd'hui est aussi une occasion de rendre hommage).

L'année suivante, en septembre 1976, la Table Ronde de Sanremo reprit certaines de ces questions et y ajouta celles des "*armes conventionnelles*", des "*réserve*"s, des "*mercenaires*" et des "*réfugiés*" dans les conflits armés.

Quant à la Table Ronde de septembre 1977, les Protocoles additionnels ayant été adoptés trois mois auparavant, elle se lança d'emblée dans une thématique qu'elle allait souvent reprendre et dont nous allons encore parler cet après-midi: les efforts pour la ratification et la mise en œuvre des Protocoles additionnels.

En conclusion, vous comprendrez que j'aie souhaité saisir l'occasion de cette introduction à nos débats, pour que reste une trace écrite et officielle qui reconnaisse le rôle clé que joua l'Institut de Sanremo – et donc bien sûr de son Président le Professeur Patrignone – dans l'élaboration de ces deux grands piliers du droit humanitaire contemporain que sont les Protocoles additionnels de 1977.

**PROMOTION, DISSEMINATION AND TEACHING OF INTERNATIONAL HUMANITARIAN
LAW, HUMAN RIGHTS AND REFUGEE LAW: EXPERIENCE OF THE INTERNATIONAL
INSTITUTE OF HUMANITARIAN LAW.**

(Migration Courses)

Ms Anne Grethe NIELSEN

Head of Department of International Affairs, Federal Office for Migration, Switzerland

This conference marks the 35th anniversary of the International Institute of Humanitarian Law. Over these 35 years the Institute has positioned itself as a renowned institute in the field of humanitarian law. I am sure that many of you ask yourself the question what Migration Law Courses have got to do with the activities of the Institute, how does this fit into the field of humanitarian law? My task here today is to try to explain to you and convince you in or confirm your belief that there are several reasons why this should be so.

Globally seen, more and more people move and the reasons why they move are manifold. They are – often, unfortunately – related to forced migration (war, violations of human rights, natural disasters etc.) or they can be purely economic, but in most cases the reasons are a mixture of various causes.

As we have just heard from Erika Feller, the Refugee Law Courses of the Institute have become a very important activity of the Institute and complements very well its traditional role. I can confirm that myself in my role as President of the Refugee Law Commission. The Commission is composed of renowned specialists within the area of international refugee law and all members are very keen to contribute to the continuation of the high standard of the refugee law courses.

It has always been a priority for the Institute to offer a framework within which experts, whether they be from international organisations, academia, NGOs or governments, can reflect in an open manner on actual and pressing problems within the area of humanitarian issues. Because of the independent role which the Institute enjoys and which is so important, it has always been possible for the Institute to organize special meetings or seminars also around new and controversial issues.

Migration – and here I mean migration in its entirety – is today a key challenge, first of all to governments as they are the key players in the management of migration, but also to international organisations, NGOs and academia.

Orderly and humane management of migration is recognized today as a prerequisite for migration to be beneficial to both societies and migrants. In pursuing this objective, States have the responsibility to protect the rights of migrants and nationals, and to take into consideration the interests of both, within the parameters set by international principles, standards and norms (globally referred to as international migration law).

As far as refugees are concerned, the legal situation is regularized, first of all, of course, through the 1951 Geneva Convention on the Status of Refugees and its 1967 Protocol, as well as through a variety of other instruments. In the area of migration which falls outside the field of refugees, the situation is quite different. Many conventions exist at the universal and regional levels dealing with various aspects of migration, first of all on the rights and duties of migrants. But there is no central point where they all come together or a central source where overall information is easily accessible, and there is little attempt to understand the relationship of each of these instruments to the others.

This disparity or dispersion of norms contributes to the widespread belief that there are important gaps in the set of norms protecting migrants and/or regulating migration. Moreover, there is sometimes uncertainty about the exact content or intent of these instruments and lack of knowledge as to the status of their ratification and implementation by States. A further related issue is the still insufficient dissemination of information about the rights and duties to be enjoyed or respected by all migrants and, at all levels in national administrations, of the international norms to be applied by migration officials.

In legal terms, it is important to keep the distinction between refugees and migrants in general. Refugees are a group of persons that needs special attention by the international community as they can no longer avail themselves of the protection of their country of origin or residence. They need international protection.

Migrants that are not refugees are in a different position. They have not been deprived of the protection of their country of origin or residence, but can in any given moment go back to their home country and while being outside that country they continue to have all their rights as citizens under the national legislation. Let me here mention a practical example of the Philippines being a country that has set up very substantial programmes to take care of their own nationals being abroad.

Now this seems to be very easy, on the one side you have the refugees and on the other side the migrants, and each of them should be attributed to two distinct legal regimes. But in reality, to carry out this distinction is maybe one of the most difficult questions to deal with for governments and other partners, because a substantial number of people on the move fall into the grey zone between refugees and migrants and it is a very complex task to define in which of the two groups a person falls. However, it is imperative to attempt at such a distinction because of the very special needs of refugees. Firstly, it is crucial to identify who is a refugee and who is not in order to safeguard the refugee and asylum system, also because States have well defined special legal obligations towards refugees and other people in need of protection. Secondly, it is important to counter the effects of irregular migration, especially concerning migrant smuggling and trafficking in persons.

This is of course one of the reasons why the courses on refugee law are so important, but I would also like here to welcome very much that the Institute now introduces courses on migration law. As I have just said, the management of migration is important in order to promote orderly migration. Migration is a phenomenon that affects and concerns most countries all over the world. It is recognised today that all countries can be countries of origin, countries of transit and countries of destination. To make a distinction

between countries of the North and countries of the South in this respect is no longer appropriate. The dialogue between policy makers is therefore extremely important, but as important is the professional training of persons dealing with migration in practical terms in their daily work in order to promote the understanding of the phenomenon and how to deal with it in a professional way.

We all know the historical background for the definition of a refugee according to the 1951 Convention and that – if subject to a favourable interpretation – it can be applied to many of the contemporary refugee situations. However, it is also recognized today that it cannot stand alone. This is also why one of the conclusions of the Executive Committee of UNHCR will this year deal with contemporary forms of protection. However, even with the concept of contemporary forms of protection we might not quite have exhausted the grey zone which I just mentioned. It is therefore also for this reason that it is essential that migration practitioners are trained within the area of human rights of migrants who are not recognized as being in need of international protection.

The Institute offers a most suitable platform for the legal training. It is well-renowned, it has a large network of experts, it has a well functioning infrastructure and last, but not least, it provides the link to refugee law and other related areas.

The first course will take place already later this month, from 20 – 23 September. It is being organized by the Institute in close co-operation with the International Organisation for Migration (IOM) and funded by the Swiss Federal Office for Migration. My Office has over the last years been actively involved in the promotion of the dialogue on migration. As far as refugees are concerned we organized together with UNHCR in December 2001 the first international conference of States having ratified the 1951 Convention of the Status of Refugees and/or the 1967 Protocol in order to celebrate the 50th anniversary of the 1951 Convention. As far as migrants in general are concerned we organized last year in December an international conference within the framework of the Berne Initiative where we gathered more than 300 migration experts from about 120 countries in order to further the dialogue on migration not being protection related. The Chairman's summary of this conference as well as the International Agenda for Migration – being the product of the conference – and a note on the actual situation on the Berne Initiative are being distributed at this conference. The funding of the first migration law course of the Institute has to be seen as a follow-up activity to this conference.

Later this year the Global Commission on International Migration will publish its report. Switzerland – which together with Sweden – responded to the request by the Secretary-General of the UN to set up such an independent Commission and we are therefore looking very much forward to the recommendations entailed in the report of GCIM.

As you will see from the programme for the Migration Law Course – also being distributed at this conference – it entails topics including rights and obligations of States as well as rights and obligations of the migrants themselves. Both aspects for states as well as for migrants themselves seem to me to be highly important also in view of the sometimes alarming signals of xenophobia that are manifesting themselves in far too many countries. There is often a tendency to talk more about the obligations of States and the rights

of migrants, but for both players it is a two-way road and I find it important to be honest and have this discussion, starting on the objective level with legal issues.

Other important topics are Smuggling and Trafficking as well as Security. It goes without saying the Labour migration will constitute an important subject at the course.

In conclusion, I am convinced that the Migration Law course is a very timely initiative and that it should be continued as a most welcome new element in the programme of the Institute, because it will further the understanding of migration in legal as well as in general terms. Moreover its link to refugee and humanitarian issues will contribute to the dissemination of international migration law and thus to a better management of migration, including refugee matters, and implicitly herein, contribute to greater respect for human rights for persons being outside their own country, but without being in need of protection. It can also contribute to an informed national debate on migrants and thus to a reduction of xenophobia.

Before I close I would like to wish the Institute a lot of success in its further work. I would also like to thank my friends Professor Patrnoic and Stefania Baldini as well as their collaborators for the good collaboration that exists between the Institute and my Office. Thank you for your attention.

**RESEARCH WORK – SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO
ARMED CONFLICTS AT SEA.**

HOW TO UPDATE THE SAN REMO MANUAL

Prof. Dr. Wolff HEINTSCHEL VON HEINEGG

University of Frankfurt

I. INTRODUCTORY REMARKS

The 1994 San Remo Manual has met widespread approval as a contemporary restatement of the principles and rules of international law applicable to armed conflicts at sea. In view of the fact that many of its provisions are but a compromise between the differing views within the group of international lawyers and naval experts some of its provisions may be far from perfection. Still, this has not prevented a considerable number of States from adopting most of the Sanremo rules in their respective manuals or instructions for their naval armed forces. Surprisingly, there is an increasing number of both operators and lawyers, criticizing parts of the San Remo Manual as outdated and as an unreasonable obstacle to the success of their operational or strategic goals. They, *inter alia*, refer to the provisions on measures short of attack and on methods and means of naval warfare, especially on blockade and operational zones. In their view those provisions do neither meet the necessities of modern operations, as e.g. maritime interception operations (MIO) or non-military enforcement measures decided upon by the UN Security Council, nor do they offer operable solutions to the naval commander.

Of course, the San Remo Manual does not prioritise military or operational necessity. Rather it imposes legal restrictions on naval commanders that may prove to be inconvenient in view of the means available and in view of the task of the respective mission. The said criticism, however, goes beyond such general complaints about legal rules. It is based upon the belief that when it comes to interference with third States' shipping by naval forces, it is permissible only if it is in accordance with the law of naval warfare, i.e. with the provisions of the San Remo Manual. Then it would be difficult, indeed, to maintain that, e.g., MIO within the framework of the Global War on Terror are legal. It would be similarly difficult to explain the legality of measures enforcing an embargo if they had to be judged in the light of the law of blockade alone.

However, the said criticism is based upon an erroneous understanding of the law of naval warfare and of its scope of applicability. Maritime interception operations aimed at combating trans-national terrorism or the proliferation of weapons of mass destruction and related components do have a legal basis that is independent from the law of naval warfare. The same holds true with regard to enforcing an embargo – either with or without the authorization of the UN Security Council. Therefore, neither the law of naval warfare nor the San Remo Manual as its most recent restatement pose an insurmountable obstacle to such naval operations. The San Remo Manual's provisions apply exclusively to situations of international armed

conflicts. MIO have to be based upon that body of law only if they take place during an armed conflict between two or more States.

Still, the said criticism is justified insofar as it maintains that the San Remo Manual does no longer properly reflect the realities of modern naval operations. Moreover, some of its provisions are quite ambiguous and, thus, may be misinterpreted. This lack of legal clarity may ultimately render obsolete the great progress achieved by the San Remo Manual. I will therefore try to identify those rules of the Manual that could or even should be reconsidered. However, this critical approach to the Manual is not to be understood as a fundamental criticism of the Manual but rather as an endeavour to maintain and enhance its impact on State practice.

II. THE UNDERSTIMATED AERIAL ELEMENT

Modern naval operations are not conducted in a purely maritime environment any longer. Naval battles proper more or less belong to the past. Today naval forces operate jointly with other forces, especially with air forces. Being an integral part of these joint operations naval forces can no longer be considered bound by only one set of rules specifically and exclusively designed for them. Moreover, even if naval operations were confined to the maritime environment they would always imply the use of aircraft and of missiles because these assets are among the most effective weapons against enemy naval forces.

Of course, the San Remo Manual does not follow the limited approach of the treaties of 1907 or of 1936. Its provisions are not limited to naval platforms but also relate to military aircraft, civil aircraft, and to missiles. Thus, the San Remo Manual has broadened – or at least clarified – the scope of the term “*law of naval warfare*” which covers not only ship-to-ship but also ship-to-air and air-to-ship operations, including the use of missiles, as well as “*prize measures*”, and the protection of vessels, aircraft, objects and persons at sea, on land, and in the air.

While the San Remo Manual addresses many of the issues arising from the interaction of naval and air warfare its provisions sometimes give reason to assume that naval warfare still has been regarded in isolation. At least one cannot entirely escape the impression that the aerial element of (naval) operations as well as the possible impact of aircraft on (naval) operations has been dealt with only marginally.

With paragraph 45 stating that “[s]urface ships, submarines and aircraft are bound by the same principles and rules”, the San Remo Manual starts from the premise that when it comes to methods and means of naval warfare there is no need to distinguish between the vehicles or platforms employed. In view of the basic principles of the law of armed conflict that apply to all methods and means of warfare this approach seems to be logical and cogent. Still, the question remains whether this approach will lead to operable and viable provisions for the conduct of modern naval operations. The Manual’s rules on mine warfare and on blockade, e.g., do not seem to meet that test. The same holds true with regard to those rules dealing with enemy and neutral aircraft.

A. Aerial Threat

Aircraft have always posed, and continue to pose, a considerable threat not only for naval platforms. Accordingly, especially the conditions rendering civil aircraft legitimate military objectives need to be reconsidered. An aircraft approaching naval surface forces can inflict damage to a warship by the use of comparably cheap and non-sophisticated means. Moreover, it may gain and transmit information that is vital to the success of the military operation in question. The drafters of the 1923 Hague Rules did understand this and, accordingly, agreed upon Articles 33, 34, and 35 that would have enabled belligerents to deal with those threats adequately. Therefore, paragraph 63, lit. (f), of the San Remo Manual is too restricted. According to that provision an enemy civil aircraft is a legitimate military objective if it, *inter alia*, is “armed with air-to-air or air-to-surface weapons”. This excludes, as emphasized in the “*explanations*”, “*light individual weapons for defence of the crew, and equipment that deflects an attacking weapon or warns of an attack.*” But it remains an open question of what weapons can be qualified as falling into the categories of para. 63 lit. (f). Moreover, this formulation leaves out of consideration the possibility that the aircraft as such is used as a weapon. The way modern warships are constructed would not enable them to sustain a hit by an aircraft. In this context one should not think of “*Kamikaze*” aircraft used as a pattern of an unsuccessful military tactic or strategy. What needs to be considered are scenarios similar to that of the USS Cole incident.

B. Mine Warfare

One consequence of the equation of warships and military aircraft is that the latter would also be obliged to “*record the locations where they have laid mines*” (para. 84). States disposing of advanced military equipment may be in a position to comply with that obligation – e.g. by equipping air delivered mines with a system that would transmit their location without the enemy belligerent profiting from the respective signals. The majority of States will, however, hardly be in a position to acquire such systems. As the practice of World War II demonstrated the recording of minefields laid by aircraft is a most difficult undertaking and the respective obligation does not seem to reflect customary international law.

Closely related is the problem – at least for a considerable number of States – of how to provide “*safe alternative routes for shipping of neutral States*” (para. 88) in case the mining is executed by military aircraft. The minelaying belligerent will, in many cases, only be in a position to identify the mine area as such but not routes through the minefield that would be sufficiently safe.

C. Blockade

Regardless of the distinction between economic and strategic blockades there is today general agreement that a blockade need not be enforced exclusively against seagoing vessels but that it may also be enforced against aircraft. Moreover, and in view of the importance of aerial reconnaissance, a blockade may be maintained and enforced “*by a combination of legitimate methods and means of warfare*” (para. 97), including military aircraft.

The San Remo Manual’s provisions on blockade, however, lack any express reference to aircraft. Of course, an interpretation of paras. 96 and 97 justifies the conclusion that a blockade may be maintained and enforced by military aircraft, too. In most cases these aircraft will belong to a warship that will serve as their operational base. It is, however, also possible that the aircraft entrusted with the enforcement of a blockade are deployed on airfields on land. Still, while there seems to be general agreement over the lawfulness of the enforcement of a blockade by military aircraft, two questions remain unanswered:

- Is the presence of a warship or its operational control of the military aircraft necessary for a blockade to be lawful, or may a blockade be enforced by aircraft (and mines) alone?
- What criteria have to be met in order for a blockade to be effective if it is maintained and enforced by aircraft?

In most cases the aircraft entrusted with the enforcement of a blockade need not be dependent upon a warship, i.e. they are not necessarily under the operational control of a warship. However, the answer to the first question becomes a little complicated if one takes into consideration the following scenario: A merchant vessel or a neutral warship may be damaged or in another distress situation. Therefore it will have to access the blockaded coast or port but the blockade is maintained by mines and aircraft only. How will the blockading power be able to comply with its obligation to allow ships in distress entry into the blockaded coastline if no warship is in the near vicinity? Accordingly, there is at least one argument against the legality of a blockade that is enforced and maintained without any surface warship present in, or in the vicinity of, the blockaded area.

As regards the second question, one may be inclined to point at the well-established rule according to which the “*question whether a blockade is effective is a question of fact*”. While it is clear that “*effectiveness*” can no longer be judged in the light of the state of technology of the 19th or the beginning of the 20th century and while the view is widely held that effectiveness continues to be a constitutive element of a legal blockade it may not be left out of consideration that there are no criteria that would make possible an abstract determination of the effectiveness of all blockades. It is maintained here that the activities of aircraft in connection with a naval blockade are effective only to the extent that they do in fact dominate the respective air space. In any event, aircraft will be used for the enforcement of a blockade only if the respective belligerent has gained air superiority. Otherwise the use of aircraft would be too dangerous.

A further aspect regarding blockade as dealt with in the San Remo Manual is whether this method of naval warfare is necessarily restricted to vessels or whether it may also be enforced *vis-à-vis* aircraft. Again, the provisions of the San Remo Manual are silent on this issue. The “*explanations*” reveal that the legal and naval experts, in the context of the effectiveness of a blockade, considered that question only indirectly. While it may be correct that a (purely) naval blockade may not be considered to have lost its effectiveness for the sole reason that a considerably small number of aircraft continue to land within the blockaded area this is but one aspect. Although traditionally blockades have been viewed upon as a method of naval warfare proper there is no reason why it may not be extended (or even restricted) to aircraft. In this context the argument that “*transport by air only constitutes a very small percentage of bulk traffic*” is not absolutely convincing. The blockaded belligerent State, either alone or together with its allies, may dispose of a considerable air fleet. As the example of the “*blockade of Berlin*” shows – although the cargoes only served humanitarian purposes – a considerable percentage of bulk traffic can be transported by air over a considerable period of time.

III. DEFINITIONS

At first glance, the list of definitions in para. 13 seems to be comprehensive and reflective of customary law. The latter is certainly true. Still, this does not necessarily mean that the definitions continue to reflect modern State practice, e.g., there is a certain tendency in State practice to crew warships with civilians or at least to make use of civilian contractors who work on board the ships. Partly, the latter’s contribution is essential for the operation of the ships or of its weapons systems. Therefore, either para. 13 or some other provision should clarify whether and to what extent the presence of civilian mariners or of civilian contractors affects the legal status of a warship. In addition, there is the problem of unlawful combatants. Do civilian mariners and civilian contractors belong to one of the categories of Article 4A Geneva Convention III or have they lost their privileged status by some form of “*direct participation in hostilities*”?

Apart from that, para. 13 lacks a definition of unmanned – aerial or submarine – vehicles. This issue is raised here because such vehicles could be considered an integral part of the platform they are operated from. While this would be without prejudice to the relationship of belligerents it may well be of importance with regard to the rights and duties of neutral States. If an unmanned vehicle shares the legal status of the controlling platform it may enjoy sovereign immunity at least in international airspace or in the high seas. Accordingly, neutral States would under no circumstances be allowed to interfere with them.

IV. THE “DUE REGARD”-PRINCIPLE

The rules on regions of operations have adopted the approach underlying the UN Law of the Sea Convention not only with regard to the determination of “*neutral waters*” but also with regard to the obligations of belligerents at sea to pay due regard to the legitimate rights of coastal States – when operating within their EEZ – and of third States – when operating in high seas areas. Unless specified, the “*due regard principle*” will only be paid lip service to or – even worse – it will be abused by coastal States in order to camouflage acts of unneutral service.

V. “HOSTILE ACTIONS”

Para. 15 of the San Remo Manual stipulates that “[w]ithin and over neutral waters [...] hostile actions by belligerent forces are forbidden”. Para. 16 contains a – non-exhaustive – list of activities that are covered by the term “*hostile actions*”. This enumeration predominantly refers to traditional naval operations during armed conflict. Of course, the term “*hostile action*” as well as one of the activities listed – “*use as a base of operations*” – would be broad enough to also cover other activities, as e.g. the use of means for electronic warfare (EW), target acquisition, or reconnaissance purposes. Such an interpretation would, it is maintained here, certainly be in accordance with customary international law. However, the examples following that term could cast doubt on whether such activities would also be covered by the prohibition of using neutral waters and neutral airspace as a base of operations. One way of avoiding such cases of doubt would be the deletion of all examples. In order to contribute to legal clarity, however, it seems preferable to add to the examples listed a formulation similar to that of Article 47 of the 1923 Hague Rules that provides:

*“A neutral state is bound to take such steps as the means at its disposal permit to prevent within its jurisdiction aerial observations of the movements, operations or defenses of one belligerent, with the intention of informing the other belligerent.
This provision applies equally to a belligerent military aircraft on board a vessel of war.”*

Such a clarification also seems appropriate with regard to combat rescue operations in neutral territory. Such rescue operations are not specially protected under the law of armed conflict. Rather they are to be considered military operations that also fall into the category of “*hostile action*”.

VI. PRECAUTIONS IN ATTACK

The Manual's rules on precautions in attack are directly taken from the 1977 Additional Protocol I (AP I). This as such does not necessarily pose problems – even though we are all aware that AP I is far from being recognized by all States in the world. However, it remains unsettled whether and to what extent Articles 58 and 59 AP I reflect customary law when it comes to naval warfare. Moreover, it is far from clear whether the Manual's para. 46 offers operable solutions for the conduct of hostilities at sea. The criticism raised against that provision is certainly not unjustified. And again, the danger of mere lip service being paid to it or of a politically motivated abuse may not be left out of consideration either.

VII. SURRENDER OF VESSELS AND AIRCRAFT

The rules referring to the surrender of warships and of military aircraft certainly reflect customary international law. Still, in a modern battlefield visual identification is rather the exception than the rule. Therefore, an effort should be undertaken to specify the different possibilities of how warships and military aircraft can surrender at all.

VIII. ZONES

In some respects the provisions of the San Remo Manual on “zones” lack the necessary clarity. On the one hand, there is no statement on the legitimate purpose a “zone” may serve. On the other hand, it is difficult to distinguish such “zones” from similar concepts, like warning zones/areas, security zones/areas, defensive zones, or the “*immediate vicinity of naval operations*”. Moreover, aircraft are referred to in the context of free and safe passage only. The latter aspect does, however, not create insurmountable problems. It becomes clear from the wording and its context that “zones” may be established, maintained and enforced by aircraft and against aircraft. But where does the intrinsic value of that conclusion lie if the purpose of “zones” remains as obscure as the distinction of such “zones” from other concepts?

A comparison between paragraphs 105-108 and paragraph 75 makes it possible to distinguish a “zone” from the “*immediate vicinity of naval operations*” or from an “*area of military activities potentially hazardous to civil aircraft*”. Obviously, a belligerent is entitled to temporarily impose sea and air traffic restrictions in the latter areas, including an absolute prohibition of overflight for neutral civil aircraft. In view of the hazards such vessels and aircraft will be exposed to, if they approach or enter an area of military activities, a belligerent is (or rather should be) entitled to temporarily establish and enforce a true exclusion zone or “*no fly zone*”. Moreover, as laid down in Article 34 of the 1923 Hague Rules, enemy civil aircraft are liable to be fired upon in the immediate vicinity of military operations. There is no convincing reason why this rule should not apply to merchant vessels, if firing upon it is the only remaining choice to counter a

suspected threat. All this, however, presupposes that military operations/activities in fact occur in the area in question.

Similar considerations apply with regard to “*safety zones*” that serve the sole purpose of protecting high value or extremely hazardous targets, like oil platforms. The space affected would, of course, be rather limited.

Still, the legitimate purpose of “*zones*” remains unclear. Neither the San Remo Manual nor recent military manuals (e.g. of the UK and Germany) provide an answer to that question. Thus, it is rather difficult to establish which measures a belligerent will be allowed to take against merchant vessels and civil aircraft. Probably, an answer can be deduced from the Commander’s Handbook on the Law of Naval Operations of the U.S. Navy whose paragraph 7.9 reads:

“[...] To the extent that such zones serve to warn neutral vessels and aircraft away from belligerent activities and thereby reduce their exposure to collateral damage and incidental injury (see paragraph 8.1.2.1), and to the extent that they do not unreasonably interfere with legitimate neutral commerce, they are undoubtedly lawful. However, the establishment of such a zone does not relieve the proclaiming belligerent of the obligation under the law of armed conflict to refrain from attacking vessels and aircraft that do not constitute lawful targets. In short, an otherwise protected platform does not lose that protection by crossing an imaginary line drawn in the ocean by a belligerent”.

While there is general agreement that a “*zone*” may never be a “*free-fire zone*” and while it would be in accordance with the law to establish a zone for the purpose of limiting the geographic area of naval warfare a “*zone*”, according to NWP 1-14 could also serve the protection of neutral aviation (and shipping). Then, however, the question arises as to the distinction of a “*zone*” from the “*area of military activities*”/ “*immediate vicinity of naval operations*”. In view of the present difficulties brought about by the lack of specifying the legitimate purposes of “*zones*” they should be defined in a way that would enable belligerents and neutrals alike to appropriately cope with the risks connected with that method of naval warfare.

IX. DECEPTION

Finally, the rules on deception are too vague to provide the necessary guidance for naval commanders. On the one hand, it is rather difficult to distinguish “*active simulation*” (para. 110) from “*passive simulation*”. The capabilities of modern technologies could open a vast grey area and, consequently, could render the provision obsolete. On the other hand, there should be a definition of legitimate ruses amended by a non-exhaustive list of permitted ruses that should be drafted with a view to modern technology.

Closely connected is the question of the use of encryption by hospital ships – a subject that will be dealt with by Professor Dalton.

X. CONCLUDING REMARKS

The above criticism is not to be misunderstood as a rejection of the San Remo Manual. As already stated it has contributed in an invaluable way to a clarification of the law applicable to naval warfare and maritime neutrality. We do, however, live in a time of rapid technological development that certainly has a deep impact upon military doctrine and on the conduct of hostilities. Disregarding that development and the way modern armed conflicts are fought would marginalize the San Remo Manual and could even make it obsolete. While thanks to Yoram Dinstein considerable efforts are being undertaken to close the Manual's gaps with regard to the aerial issues involved, the other issues addressed here should be thoroughly scrutinized and ultimately solved.

**THE UNITED KINGDOM'S MANUAL OF THE LAW OF ARMED CONFLICT
AND THE SAN REMO MANUAL: MARITIME RULES COMPARED**

Dr. Steven HAINES
British Royal Navy

I. INTRODUCTION

A not untypical question asked in examinations for degree courses dealing with the law of armed conflict goes something like this:

“The Laws of War at Sea are an outdated throwback to the 1856 Paris Declaration¹ and the tactical and technological realities of the late-nineteenth century maritime strategic environment.” Discuss.

When Natalino Ronzitti compiled a collection of documents on the law of naval warfare in 1988, the Editor's introduction consisted of a spirited critique of the lack of adequate modern development in this important area of the law of armed conflict². Ronzitti's concern was easily understood. Despite the occurrence of two world wars in the interim, the law had not developed in any significant way since the Hague Conference had attempted to codify and develop aspects of the laws of war at sea through a series of eight international conventions in 1907³. Over thirty years after the Hague Conference, when the German Navy Captain Langsdorff took his pocket battleship “*Graf Spee*” into the South Atlantic and Indian Oceans

¹ See Roberts, A., Guelff, R., *Documents on the Laws of War*, 3rd Ed, Oxford, 2000, pp.45-52. The *Paris Declaration* was agreed by the seven states attending the Congress of Paris, following the conclusion of the Crimean War, and reflected a previous agreement between Britain and France intended to mollify neutrals during that war. It was then rapidly acceded to by a further 44 states, many of which were minor Central European principalities soon to disappear as sovereign states following the unification of Germany in the wake of the 1871 Franco-Prussian War.

² See Ronzitti, N., “*The Crisis in the Traditional Law Relating International Armed Conflicts at Sea and the Need for its Revision*” in Natalino Ronzitti (Ed), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentary*, Martinus Nijhoff, Dordrecht, 1988, pp.1-58.

³ See the full list of *1907 Hague Conventions* dealing with war at sea as follows: VI (*On the Status of Enemy Merchant Ships*), VII (*On the Conversion of Merchant Ships to Warships*), VIII (*On the Laying of Automatic Submarine Contact Mines*), IX (*On Bombardment by Naval Forces*), X (*On the Protection of Wounded, Sick and Shipwrecked at Sea*), XI (*On the Exercise of the Right of Capture*), XII (*On an International Prize Court*), XIII (*On the Rights and Duties of Neutral Powers in Naval War*). Only six of these retain their relevance; *Hague Convention X* was superseded by the *1949 Geneva Convention II* and *Hague Convention XII* did not enter into force (see Roberts, A., Guelff, R., *Documents on the Laws of War*, as Note 4, p.67 and pp.95-138).

in the first weeks of the Second World War, and when Commodore Henry Harwood⁴ and Vice Admiral Sir Henry McCall⁵ of the Royal Navy sought to trap him in Montevideo and the River Plate Estuary in December of 1939, they were all famously utilising the legal regime that those who had drafted the “1907 Hague Conventions” would have well recognised.⁶ As the Second World War developed into “total war” the naval war involved a number of departures from the apparently honourable conduct⁷ of Langsdorff, Harwood and McCall, but in substance the accepted law relating to naval warfare was not modified as a consequence.⁸ Since 1945 the only international agreement relating exclusively to the subject has been “1949 Geneva Convention II”⁹ which merely served to replace “1907 Hague Convention X”. Well informed students responding to the examination question above would, until recently, have almost certainly concluded their discussions with emphatic support for its quoted assertion.

The lack of any review of the law of naval warfare since 1945 became increasingly unsatisfactory as the twentieth century reached maturity. The establishment of the United Nations, the resultant modification and debate as to what is understood by “neutrality”, the emergence of a new and radically extended treaty regime of coastal state jurisdiction (through the three UN Law of the Sea Conferences between 1958 and 1982), the use of naval forces to enforce UN Security Council resolutions since the first economic embargo operation off the port of Beira in the 1960s and 1970s, and significant developments in technology and naval weaponry (in particular ship launched missile systems and related sensors and communications systems), have all represented serious challenges to the legal *status quo*. It was this general backdrop that prompted the International Institute for Humanitarian Law in Sanremo to initiate, in 1987, a process of informal review of the laws of war at sea that resulted in the drafting of the “San Remo Manual”, published just ten years ago this year, in 1995.

The “San Remo Manual” has been a significant milestone in the development of the law of armed conflict applicable at sea. Indeed, in describing the state of the law over the last 150 years or so one might usefully employ it as a point of reference as significant in a temporal sense as the “1856 Paris Declaration”, the 1907 Hague Conference, and the Second World War. That is surely what many of those engaged in working up

⁴See Commander of Force G, the South American Division, consisting of HM Ships *Exeter* and *Ajax* and HM New Zealand Ship *Achilles*.

⁵See British Naval Attaché, Montevideo (Uruguay).

⁶See Roskill, S. W., *The War at Sea 1939-1945 Volume I The Defensive*, HM Stationery Office, London 1954, pp.112-121 and O’Connell, D.P., *The Influence of Law on Sea Power*, Manchester University Press, 1975, pp.27-39.

⁷ Only ‘apparently’ because while the law was used by both sides it was probably only pursued as it was because wider political considerations rendered it prudent. See the legal account of the Battle of the River Plate in O’Connell, D.P., *op cit.*, as Note 9.

⁸ One early and related episode was the “Altmark” incident, when the “*Graf Spee*”’s tender, proceeding back to Germany, with British prisoners onboard, passed through Norwegian territorial waters and into internal waters as the Royal Navy breached international law, following Churchill’s direct instructions, in its successful attempt to liberate the crews of the “*Graf Spee*’s *guerre de course*” operations. See O’Connell, D.P., *Op. Cit.*, as Note 9, pp.40-44.

⁹ “1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea” (see Roberts, a., Guelff, R., *Documents on the Laws of War, op cit.*, as Note 4, pp.221-242).

the manual between 1987 and 1995 expected it to become. When introducing the law of armed conflict at sea to his students, the present author refers to the “*Paris Declaration*” as a convenient starting point, moves to 1907 and then to the state of the law in 1939, before emphasising the lack of adequate development in thinking in the post-Second World War, or UN, era. He concludes by posing the question: “*are we now in the Sanremo era?*” That is really what this present discussion is about. Is the “*San Remo Manual*” an adequate legal framework for the conduct of maritime operations during conflict, as we leave the violent twentieth century behind? In attempting to answer this question it is important also to consider two further influences that may well serve ultimately to determine the fate of the Sanremo process.

The first of these is undoubtedly the current state of the global security environment. The geo-strategic and political fallout from the ending of the Cold War in the late-1980s and early-1990s is something that was by no means entirely clear when the participants in the Sanremo process carried out their work. Even if the major political events that signalled the end of the Cold War, already in train during that period, were beginning to have an influence on their thinking, they could certainly not have predicted with any degree of accuracy the full range of consequences emerging as a result of the new security challenges thrown up by events since then. Instability in the Balkans, in Africa and in the Middle East, as well as the compelling need to tackle the threat from the current manifestation of international terrorism, all represent additional dimensions to the global strategic environment. Law has to develop in response to the political and social environment in which it is applied if it is to remain both relevant and influential. Law relating to conflict at sea also has to take account of the nature of maritime operations. In naval terms¹⁰ we have witnessed significant shifts in emphasis and focus. While much of the body of the traditional laws of war at sea was devoted to the conduct of economic warfare, today that has much less of an influence on the crafting of naval or maritime doctrine. The major purpose of naval operations is no longer to constrain the economic activities of enemy belligerents. Today, the principal naval focus is on direct combat between naval forces and on power projection operations, either directly against enemy land targets or in support of friendly forces both entering and operating in a theatre of conflict ashore.

The principal purpose of this paper is to highlight and explain the differences between the “*San Remo Manual*” and Chapter 13 of the “*UK Manual*”. However, an important secondary purpose is to include

¹⁰The terms “*maritime*” and “*naval*” are often regarded synonymously but do have slightly different meanings in relation to military operations. “*Maritime*” forces consist of all those military forces that operate in the maritime environment. “*British Maritime Doctrine*” defines Maritime Forces as those “*whose primary purpose is to conduct military operations at and from the sea. The expression includes warships, and submarines, auxiliaries, chartered shipping, organic aircraft, fixed seabed installations, fixed shore installations (such as batteries) for defence of seaways, shore based maritime aircraft and other shore based aircraft assigned to maritime tasks*”. (see UK Ministry of Defence, “*British Maritime Doctrine*”, 3rd Ed, London, The Stationery Office, 2004, p.271.) It also includes marines and land forces deployed as part of a maritime amphibious force. “*Naval*” forces, on the other hand, implies those forming a part of the naval service of a belligerent – so an aircraft operated by a belligerent’s air force may well be a part of the “*maritime*” force but would not be regarded as a “*naval*” asset. Naval operations are those conducted by naval units. Maritime operations include those conducted by navies but also those conducted by air and land forces at sea or in what is described as the “*littoral*” (itself defined in “*British Maritime Doctrine*” (at p.268) as “*Coastal sea areas and that portion of the land which is susceptible to influence or support from the sea*”.

additional comment on the future relevance of the “*San Remo Manual*” to naval/maritime operations as the strategic environment develops over time. What follows first describes the background to the production of the “*Maritime Warfare*” chapter before going on to comment in detail on the differences between it and the relevant parts of the “*Sanremo*” text. As the discussion will demonstrate, much of the latter was simply repeated in the former. However, some of the “*Sanremo*” articles were modified before their inclusion in the “*UK Manual*”¹¹ while some were excluded altogether. This is reflected in the structure of the paper, which deals first with the most significant differences and then goes on to explain the wording of those “*San Remo Manual*” rules that were adapted to reflect the UK position on their subject. Then, given the geo-strategic developments that have occurred since the mid-1990s and the shift in the emphasis of naval and maritime doctrine away from economic warfare towards power projection operations, it attempts to assess the future for the “*San Remo Manual*”.

In producing this paper the author has to cope with something of an identity crisis. He was a serving Royal Navy officer working within the Policy Area of the Ministry of Defence Central Staff when he chaired the “*UK Manual’s*” Editorial Board. The Board bore the responsibility for producing Her Majesty’s Government’s (HMG’s) official statement on the body of law discussed in the manual. As its chairman the author had to steer the production of the text in a manner consistent with UK interests and was involved in an inter-departmental process of consultation and negotiation involving officials in, principally, the Ministry of Defence and the Foreign and Commonwealth Office. All involved had to take into account previous and current policy in relation to treaty negotiations as well as official legal advice provided during the conduct of relevant past operations. The resultant text is not, therefore, necessarily the author’s personal view on the law. In the first parts of this paper, in which the text of the “*UK Manual*” is compared with that of the “*San Remo Manual*”, the explanation provided is an attempt to describe the official reasoning behind the differences. However, in the later comments of the paper the author allows free rein to his own personal views, which should certainly not be regarded in any way as reflecting the official view of the UK Ministry of Defence or other departments of HMG.

II. THE BACKGROUND TO THE PRODUCTION OF THE MARITIME WARFARE CHAPTER OF THE *UK MANUAL*

Four years after the appearance of the “*San Remo Manual*”, in the summer of 1999, two then recent events had prompted a surge of effort within the UK to produce a new reinterpretation of the UK’s position on the full body of law relating to armed conflict. The first was the UK’s ratification of the “*1977 Additional Protocols*” in January 1998; the second was NATO’s action against Serbia over Kosovo in 1999. Ratification of the “*Additional Protocols*” brought with it an obligation and a substantial need to urgently amend the UK’s officially promulgated legal advice. The Kosovo campaign highlighted the difficulties of

¹¹ Where this is the case the “*Sanremo Manual*” is footnoted in the text of the “*UK Manual*” with the words “*Adapted from the SRM*”.

mounting a major combat operation without adequate legal reference. This latter factor, in particular, prompted the then Vice Chief of Defence Staff, Admiral Sir Peter Abbott, to place responsibility for the “*UK Manual*” with the newly established Joint Doctrine and Concepts Centre (JDCC)¹².

When the JDCC assumed that responsibility, the then existing draft “*UK Manual*” consisted of a variety of draft chapters compiled over a number of years by military lawyers, who had also consulted with legal colleagues in the armed forces of a number of allied states¹³. Those drafts notwithstanding, it is somewhat surprising to reflect on the fact that the UK in the late 1990s had no officially extant manual dealing in any comprehensive manner with the law of armed conflict applicable at sea. It needs, perhaps, to be pointed out that the classic 1950s vintage UK manual dealing with the law of armed conflict, drafted by Sir Hersch Lauterpacht and Gerald Draper, had been commissioned by the Army Board as a manual dealing with land warfare; it did not cover either maritime or air warfare except in so far as they had an impact on war on land¹⁴. The Royal Navy’s closest equivalent “*manual*” was essentially merely a “*handbook*” that had appeared in successive editions over many years. The “*Guide to Maritime Law*” had originally been published within the Royal Navy with a “*CONFIDENTIAL*” security classification¹⁵. Its first revision after the Second World War had incorporated changes required by the coming into force of the four law of the sea conventions negotiated at the First UN Conference on the Law of the Sea in 1958. It was designed to be more a sea-going commander’s brief handbook than a legal adviser’s manual. By the mid-1990s this had been declassified and re-written to reflect developments in the law of the sea since the 1950s.¹⁶ It contained only brief details of the essential rules relating to the law of armed conflict and was by no means an authoritative source of advice for use at all levels of command during the conduct of maritime operations.¹⁷

Some time before the UK ratified the “*1977 Additional Protocols*”, in January 1998, a decision had been taken which would effectively put right this shortcoming in promulgated legal advice on maritime operations during armed conflict. The outcome was to be the comprehensive joint service manual (the “*UK Manual*”

¹²The present author was aware of the need for the manual to be completed and recommended that the JDCC, which he was then involved in establishing, should take on the task of driving the project forward. The possibility that the UK’s staffing of operational law issues might be included in the responsibilities of the organisation also responsible for developing strategic and operational joint doctrine, was too good to miss.

¹³The draft was inherited by the present author and the JDCC from Colonel Charles Garraway of Army Legal Services, whose efforts to get the land warfare elements into shape had been considerable and who remained on the Manual’s Editorial Board. A new General Editor, Major General (Retd) A P V Rogers (a former Head of Army Legal Services), was recruited under contract to carry the work forward under the Editorial Board’s direction.

¹⁴See The War Office, “*Manual of Military Law Part III: The Law of War on Land*”, HM Stationery Office, London, 1958.

¹⁵ It first appeared in 1929 under the title “*Notes on Maritime International Law*” and had the alpha-numeric designator ‘CB3012’ – ‘CB’ indicating its ‘charge book’ security status.

¹⁶ And had been re-designated as a mere ‘reference book’ as ‘BR3012’.

¹⁷ The present author compiled an entirely new edition of BR3012 under the title “*Commanders’ Handbook on the Law of Maritime Operations*” which was produced in electronic form and promulgated to the Fleet and relevant operational headquarters immediately before the commencement of hostilities against Iraq in 2003. This was able to make reference to an advanced (but unratified) draft of the new “*UK Manual*” on LOAC, which was also distributed for reference by in-theatre military lawyers during operations against Iraq. BR3012 is now undergoing further substantial review in the light of experience since 2003.

published in 2004). By 1999, several chapters had already been drafted dealing with maritime operations. However, in reviewing all of the available draft chapters in 1999, the Editorial Board concluded that the draft maritime chapters were generally unsatisfactory in several respects, including structure, style and content. Rather than go for a series of chapters dealing with different aspects of maritime operations, it was decided, if possible, to produce a single dedicated chapter. A significant part of the outcome of this review was a decision to draw substantially on the “*San Remo Manual*” in producing what eventually became Chapter 13 of the “*UK Manual*” dealing with “*Maritime Warfare*”.

The decision to base the “*Maritime Warfare*” chapter of the “*UK Manual*” substantially on the “*San Remo Manual*” was, on the one hand, entirely to be expected. The “*San Remo Manual*” was rapidly established as an important reference on the subject as soon as it was published, together with its commentary, in 1995. The project to produce it had included a wide range of prominent naval officers and lawyers, many of whom, despite providing input in a “*personal*” capacity, were clearly involved because of the official positions they held in their own countries’ armed forces or government departments. The British contributors included successive Royal Navy Chief Naval Judge Advocates (CNJA) Captain Jonathan Langdon, Captain Shaun Lyons and Captain Jack Baylis, all of whom attended the working sessions during their periods as CNJA. Sir Frank Berman, the Legal Adviser in the Foreign and Commonwealth Office was also an Associated Expert for Sanremo. UK based academic input had been provided by Professor Christopher Greenwood, who was both a Rapporteur and an Author for the Sanremo project. Greenwood was also the principal Academic Adviser to the “*UK Manual’s*” Editorial Board. Finally, Commodore Jeff Blackett, the in-post CNJA in 1999, chose to invite Professor Vaughan Lowe to provide advice on the drafting of the “*Maritime Warfare*” chapter; Lowe had also been an Associated expert for Sanremo. So it was understandable that the Sanremo text be chosen as the basis of the “*Maritime Warfare*” chapter.

However, the Editorial Board was also inclined to be cautious, once the “*first working draft*” had been produced by repeating virtually word for word the text of the “*San Remo Manual*”. Clearly it was necessary to question the status of the “*San Remo Manual*” and by far the most important starting point was to establish which elements of it were repeating treaty law and which were reflecting customary law. The “*San Remo Manual*” is described in its own introduction as “*a contemporary restatement of the law, together with some progressive development which takes into account recent state practice, technological developments and the effect of related areas of the law*”¹⁸. Very obviously it is not, nor ever will be, a treaty, although elements of it do undoubtedly repeat rules contained in treaty law, in particular that contained in the “*1907 Hague Conventions*” on maritime warfare. But nor is it simply an informal codification of the customary law relating to war at sea. Aspects of it may well be that, but it would be quite incorrect to assert that the Sanremo project was an attempt merely to identify the customary law on the subject. It is important to stress this point because more recently it has been claimed that one of the reasons why the “*ICRC Customary Law*

¹⁸ See *San Remo Manual, Op. Cit.*, p.ix.

*Study*¹⁹ did not cover aspects of maritime warfare was because this had already been achieved effectively through the work on the “*San Remo Manual*”²⁰. The Sanremo project relied on a mix of treaty law, interpretations of what constituted customary law at the time of its drafting, and ideas for ways in which the law might be developed to reflect modern conditions. It was important, therefore, for the Editorial Board of the “*UK Manual*” to select carefully and to take care not to include Sanremo rules that were not already law or ran counter to UK interests.

Subsequent drafts of the “*Maritime Warfare*” chapter differed, therefore, from the precise text of the “*San Remo Manual*” and the full range of differences is dealt with in detail in the following section. Nevertheless, the Editorial Board was keen to acknowledge the importance of the *San Remo Manual* and the extent to which it had provided a basis for the final version of the “*Maritime Warfare*” chapter. A short passage explaining its importance was included in the Introduction to Chapter 13, as follows:

*“The San Remo Manual is a valuable reference work and much of the present chapter reflects its content. When appropriate and possible the text of the San Remo Manual has been repeated in this chapter. However, where necessary the wording used in this chapter departs from the precise Sanremo text either because that text does not reflect United Kingdom practice or because the Sanremo text requires clarification or amplification”*²¹

Table 1 below lists all *San Remo Manual* articles and categorises them depending on their use or non-use in the “*Maritime Warfare*” chapter. As hinted above, Chapter 13 clearly relies heavily on the *San Remo Manual* with most of its text repeated without any change necessary in the wording, with the exception of very minor editorial amendments of no substantive significance. While this paper does not include comment on those Sanremo articles covered in the “*Air Operations*” chapter or elsewhere in the *UK Manual*, it is clear that a further significant number of articles are also repeated.

¹⁹See Henckaerts, J. M., Doswald-Beck, L., *Customary International Law Volume I Rules and Volume II Practice*, Cambridge University Press for the International Committee of the Red Cross, 2005 (hereafter *ICRC Customary Law Study*).

²⁰See, for example, the comment contained in the Introduction to the *ICRC Customary Law Study* at p.xxx: “It was decided not to research customary law applicable to naval warfare as this area of law was recently the subject of a major restatement, namely the *San Remo Manual on Naval Warfare*.”

²¹ See *UK Manual, Op. Cit.*, as Note 1, p.348.

Table 1: The Status of San Remo Manual Articles in the UK Manual²²

SRM Articles, the wording of which is repeated precisely in the Maritime Warfare chapter of the <i>UK Manual</i> ²³	13(b), (e), (g), (h), 14-17, 19, 20, 22-25, 27-29, 32, 37-46, 49-52, 61, 65, 66, 69, 78-94, 96, 97, 99-104, 106-109, 112-115, 117, 118, 120-124, 135-138, 140, 146-150, 152, 159, 161-164, 166, 169, 171-173.
SRM Articles whose wording was modified for inclusion in the Maritime Warfare chapter of the <i>UK Manual</i>	10, 30, 34, 36, 47, 60, 67, 95, 98, 105, 110, 119, 139, 160, 165, 167, 170.
SRM Articles covered in the Air Operations chapter of the <i>UK Manual</i>	13(f), (j), (k), (l), (m), 18, 53-58, 62-64, 70-77, 125-134, 141-145, 153-158, 174-183.
SRM Articles covered in other chapters of the <i>UK Manual</i> or the content of which is unnecessary to state.	2-9, 13(a), (c), 31, 33, 59, 68, 168.
SRM Articles not included in the Maritime Warfare chapter due to their inconsistency with the UK position	1, 11, 12, 13(d), 21, 26, 35, 111, 116, 151.

III. DIFFERENCES OF SIGNIFICANCE BETWEEN THE *SAN REMO MANUAL* AND THE *UK MANUAL*

What follows is comment only on the subjects of those articles either excluded because of some measure of inconsistency with the UK position or amended in some substantial way prior to their inclusion. Only eight of the San Remo Manual articles were rejected completely for inclusion and these are dealt with first. This is followed by comment on the further eighteen articles which were included in amended form.

²²In the commercially published version of the “*UK Manual*” an editorial error led to the text containing reference to SRM Arts. 17, 18, 19, 20 and 22 being left out. The official version of the manual, a loose leaf edition, was published later with those articles covered (as Paras. 13.9A-E).

²³Notwithstanding minor editorial changes to the text to make it compliant with editorial policy for the “*UK Manual*”. These articles have not had their substantive meaning altered in any way.

A. Applicability of the Law of Armed Conflict

The Editorial Board rejected the wording of SRM Art.1 which states that the “*rules of international humanitarian law (apply) from the moment armed force is used.*” Paragraph 3.1 of the “*UK Manual*” prefers to define the applicability of armed conflict thus: “*The law of armed conflict applies in all situations when the armed forces of a state are in conflict with those of another state or are in occupation of territory*”. There are clearly circumstances falling short of armed conflict in which the armed forces of one state are used, but not against the armed forces of another, including when force is required for the purposes of law enforcement, which are characterised as “constabulary operations” in current British maritime doctrine²⁴. The “*San Remo Manual*” in its Explanation behind SRM Art.1 makes reference to Common Article 2 of the “*1949 Geneva Conventions*”, as well as to the “*ICRC Commentary on Geneva Convention II*”²⁵ However, neither of these two references establishes the rule as described in SRM Art.1 and it is potentially misleading for the Explanation to use it in support. Particular law enforcement or constabulary operations will admittedly often occupy a position on the spectrum of force that abuts the point at which conflict might be deemed to have broken out, but it will not necessarily result in the outbreak of armed conflict. The law of armed conflict will not, therefore, necessarily apply.

B. Areas of Naval Warfare

The exhortation to belligerents, contained in SRM Art.11, “*to agree that no hostile actions will be conducted in marine areas containing rare or fragile ecosystems or the habitat of depleted, threatened or endangered species or other forms of marine life*” is neither customary law nor worded in a way that suggests any form of obligation whatever. The fact that the parties to a conflict are merely “*encouraged to agree*” and that no absolute obligation is being inferred, is fully acknowledged in the “*San Remo Manual’s*” explanatory section, which goes on to refer to it as a “*soft law guideline*”²⁶. The Editorial Board felt that the “*UK Manual*” should be a comprehensive treatment of the UK’s legal rights and obligations during armed conflict and that statements more akin to policy should not ordinarily be included within its text. It is also the case that the UK is concerned to avoid absolute suggestions that coastal states’ activities within their zones of jurisdiction beyond territorial limits have necessary priority over traditional high seas freedoms protected under the current law of the sea. While SRM Art.11 may well not contain any restrictive obligation, if the message it conveyed converted over time into practice then it may also develop customary credentials. The

²⁴ “*British Maritime Doctrine*” (as Note 11) defines the application of force for constabulary purposes as follows: “*The use of military forces to uphold national or international law, mandate or regime in a manner in which minimum violence is only used in enforcement as a last resort and after evidence of a breach or intent to defy has been established beyond reasonable doubt. The level and type of violence that is permitted will frequently be specified in the law, mandate or regime that is being enforced. Also called policing*”.

²⁵See Pictet, J. S., *Commentary on Geneva Convention II*, ICRC, Geneva, 1960.

²⁶See *San Remo Manual, Op. Cit.*, p.83.

Editorial Board did not feel it to be in the UK's interests at this stage to provide any measure of endorsement and decided to leave the article out altogether.

The Editorial Board also chose to reject SRM Art.12, largely because it seemed superfluous. The need for belligerents to pay due regard to the rights and duties of neutrals in the latter's exclusive economic zone or in those waters above their continental shelves, is included in SRM Art.34 and repeated in the "*UK Manual*" at Paragraph 13.21. Other relevant neutral rights and duties are dealt with adequately in other parts of the "*San Remo Manual*" and then covered as well within Chapter 13; it therefore seemed quite unnecessary to repeat this general statement, even though it was not one with which the Editorial Board felt obliged to raise substantive objection.

C. Neutrality

In considering the definitions included in SRM Art.13, that defining "*neutral*" ("*any state not party to the conflict*") was rejected as being insufficiently considerate of the nature of neutrality in the UN era. The explanation contained in the "*San Remo Manual*" acknowledges that the definition used in SRM Art.13 is that "*traditionally used in international law*" and goes on to relate how the issue was dealt with during its drafting process²⁷. The principal issue for the Sanremo participants was that of self defence and the application of Article 51 of the "*UN Charter*", which arguably authorises states to take action to assist the supposed "*victim*" of aggression in ways that would breach traditional neutrality conditions. This is clearly one potential issue, although the "*San Remo Manual*" explanation dismisses it as not affecting its own text. However, the "*UN Charter*" generates one other concern over neutrality which the "*UK Manual's*" Editorial Board had to address. This is over the rights and duties of all states during an armed conflict that is being conducted as a consequence of a UN Security Council resolution under Chapter VII of the "*UN Charter*". Briefly put: is it even possible to be "*neutral*" in a conflict being waged by one side, authorised by the UN Security Council, against another that has been judged by that body to have threatened international peace and security?

While the Sanremo participants could perhaps quite easily dismiss the definition of "*neutral*" in the context of their own text, that was a luxury the "*UK Manual's*" Editorial Board could not afford. The members of the board had to address the full body of law relating to armed conflict and they were also producing an official document that would be likely to be quoted as an authorised source of UK practice for years to come²⁸. It was extremely important that it contained an agreed position on neutrality, therefore.

²⁷See *San Remo Manual, Op. Cit.*, pp.87-88.

²⁸This is inevitably the case despite the inclusion in the "*UK Manual's*" preface that "*it does not commit Her Majesty's Government to any particular interpretation of the law*". The law is as accurately described as it could be at 1 July 2004 (its date of publication) but, as the preface went on to add, while "*every effort has been made to ensure the accuracy of the Manual at this date.....it must be read in the light of subsequent developments in the law*". Nevertheless, its content has a major significance that cannot be denied and the Editorial Board was clearly under a heavy responsibility to ensure its authority. In terms of practice, the "*UK Manual*" is clearly evidence of "*verbal*" as distinct from "*physical*" practice but is likely to be regarded

Indeed, early drafts of the manual included a separate chapter on “*The Law of Neutrality*” and it would have been quite inappropriate to proceed without reaching some conclusion as to the issues of self defence and UN authorised enforcement operations. The “*Maritime Warfare*” chapter also acted as a spur for action on the subject as no area of conflict is so affected by the rights and duties of neutral states as war at sea. While a decision was made to dispense with a separate chapter on neutrality, it proved impossible to proceed with the drafting of Chapter 13 until some agreement had been reached within the Editorial Board that would be acceptable to the FCO and likely to get the eventual blessing of the Attorney General (whose approval was required before publication of the manual could go ahead)²⁹.

The Editorial Board met in the summer of 2001 in St Antony’s College, Oxford and considered the issue in detail, coming up with a form of words that was then referred to the Legal Adviser in the FCO. Eventually the FCO Legal Advisers drafted what is now contained in Chapter 1 of the “*UK Manual*”. In dealing with the relationship between neutrality and the “*UN Charter*” it says:

“Since the end of the Second World War and the establishment of the United Nations, the traditional law of neutrality has been affected by and, to a large extent, superseded by the UN Charter. First, the conduct of armed conflict is subject to the limitations imposed by the Charter on all use of force. Secondly, UN member states are required to give the UN every assistance in any action it takes, and refrain from giving assistance to any state against which the UN is taking preventive or enforcement action. UN members are further bound to accept and carry out the decisions of the UN Security Council and join in affording mutual assistance in carrying out the measures decided upon by the Security Council under Chapter VII of the Charter.”³⁰

The difficulty that this conclusion produces, in relation to the “*San Remo Manual*” definition of neutrality, is that the UN Charter’s implications are such that all states not directly involved in the fighting may well be obliged to be ‘partisan’ in complying with UN Security Council binding resolutions. What exactly is meant by “*party to the conflict*” and what actions taken by states is likely to be used to determine the extent to which they are or are not a “*party*”? It is certainly by no means the case that all states not actually contributing fighting forces for a UN authorised enforcement action will, by definition, be neutral. Indeed, they are legally obliged not to be. However, neutrality is not entirely moribund as a concept either; far from it in fact. When the UN Security Council has not yet reached any conclusion as to the precise source of a threat to international peace and security, two states may be engaged in a conflict (neither having been

as a significant source despite that. Given that its illustrious predecessor, the Lauterpacht Manual from 1958, is still quoted as a source of the law, despite not having been updated since the late-1960s, its influence could be long standing, especially as it is due for eventual annual review.

²⁹ The FCO is the lead government department for international law within HM Government. The Attorney General had to agree to the publication of the UK Manual given its status, but did so, of course, with the caveat contained in the Preface and quoted in Note 31 above.

³⁰See *UK Manual, Op. Cit.*, paragraph 1.42.2.

judged by the Security Council to be in the right or the wrong) while all others will be able to decide for themselves whether they become parties or remain neutral³¹. In such cases, neutrality will still be applicable in something close to its traditional sense.

Nevertheless, the eventual conclusion of the debate within the Editorial Board about neutrality was that it could not be very simply defined in the manner employed by the “*San Remo Manual*”. For that reason SRM Art.13(d) had to be rejected and replaced by the section on neutrality in Chapter 1, from which the above quote is taken.

D. The “24 Hour Rule”

The “*UK Manual*” at paragraph 13.4 states that “*the United Kingdom takes the view that the old rule which prohibited belligerent warships from remaining in neutral ports for more than 24 hours except in unusual circumstances, is no longer applicable in view of modern state practice*”. This is a refutation of SRM Art.21 and of Article 12 of “*1907 Hague Convention XIII on the Rights and Duties of Neutrals*” (which the UK signed but never ratified³²). A literal interpretation of the rule, as restated in the *San Remo Manual*, is that it would prohibit visits to any neutral port regardless of its geographic location relative to the region in which the conflict is being waged and regardless also of the influence that a port stay may have on a belligerent state’s ability to conduct its operations against enemy armed forces. So, for example, during the recent war against Iraq, in theory British and US warships would have been forbidden from entering a neutral port in the Caribbean and remaining there for more than 24 hours for replenishment or repair. A visit of that sort would have had no impact at all on the conflict in the Gulf in 2003 and the rule is clearly quite unnecessary in that hypothetical circumstance. It is certainly not current UK state practice to restrict the ability of its warships to visit neutral states during UK involvement in conflicts in quite separate regions of the globe. During neither the Kosovo operations of 1999 nor the 2003 war against Iraq was such a policy adopted. If there is any sensible reason for maintaining the 24 hour rule, it must be related to the circumstances and to the geographical limits of the conflict during which it is to be applied. The very least that can be said about it, therefore, is that the rule ought to be reinterpreted in the light of modern conditions and state practice. In its current form it is contrary to UK interests to continue to support it and its explicit dismissal in the text of the “*UK Manual*” represents a considered assessment that it should not currently be regarded as a customary obligation.

³¹The Iran-Iraq War is a recent example of such a conflict. Interestingly, the UK resisted suggestions that the belligerents might exercise traditional rights of visit and search. See Captain S. Lyons, “Naval Operations in the Gulf” in Rowe, P., (Ed), *The Gulf War 1990-91 in International and English Law*, Routledge and Sweet and Maxwell, 1993, pp.155-170, p.160 and the further discussion below.

³² See the table listing states party and details on reservations etc in Roberts, A., Guelff, R., *Documents on the Laws of War, Op. Cit.*, as Note 4, pp.136-137.

E. Notice of Passage

The Editorial Board rejected SRM Art.26 because it is not a legal obligation for neutral states to give warning of their warships exercising rights of passage. While the first sentence of Article 26 was included in the “*UK Manual*” at paragraph 13.13, an additional paragraph (13.13.1) was incorporated as follows:

“There is no requirement for any ship, including warships, to give notice of intention to exercise rights of passage. However, there may be circumstances where it would be prudent to inform a state that a ship is undertaking such passage purely as a precautionary measure and without accepting that there is any legal obligation attached to the provision of that information.”

F. Notification of Mining in Neutral EEZs and in the Waters above Neutral Continental Shelves

The Editorial Board did not include SRM Art.35 in the text of Chapter 13. To a large extent the article was regarded as superfluous given the obligation to notify in general incorporated in SRM Art.83 and repeated in paragraph 13.55 of the “*UK Manual*”. However, SRM Art.35 went further than requiring mere notification by including also certain ‘relative duties’ in relation to both economic activities and the protection and preservation of the marine environment within these areas. While this may sound eminently sensible, it is by no means clear that this is as yet a legal obligation and it was not felt either appropriate or possible at this stage to give support to the emergence of a customary norm through its repetition in UK verbal practice.

G. Ruses of War and Perfidy

Deception at sea has been a feature of naval history. Warships were entitled to disguise themselves if they so wished by, for example, wearing other colours. In contrast, aircraft have never been permitted to bear false markings. The UK position is that the disguising of ships to appear to be different (for example, by using different lights or no lights at all) is permissible subject to certain restrictions as to the type of vessel that can be simulated³³. The “*San Remo Manual*” deals with ruses of war in Article 110. This states that ruses are permitted but prohibits warships from actively simulating the status of various vessels listed in the article. The Sanremo list of vessels not to be simulated during a ruse differs somewhat from the list of vessels that are exempt from attack contained earlier in SRM Art.47. The authors of the “*Maritime Warfare*” chapter considered SRM Arts. 47 and 110 together and saw no reason why the lists should be different, preferring instead to regard them together. In dealing with ruses of war, the *UK Manual* refers us back to its own paragraph 13.33 in which are listed those vessels exempt from attack. In this sense the *San Remo*

³³ See *UK Manual, Op. Cit.*, p.365, n.96.

Manual is not regarded as progressive enough and the Editorial Board was happy to establish the longer and more comprehensive list in UK verbal practice.

When it came to perfidy, however, it considered the “*San Remo Manual*” to go beyond treaty law. While stating in SRM Art.111 that “*perfidy is prohibited*”, the explanation of that article contains reference to Article 37(1) of “*1977 Additional Protocol I to the 1949 Geneva Conventions*”³⁴. The impression given is that Art.111 directly reflects Article 37(1) of “*Additional Protocol I*”. However, strictly speaking this is not the case. In stating that “*perfidy is prohibited*” SRM Art.111 goes beyond the wording of Article 37(1) which states more precisely that “*it is prohibited to kill, injure or capture an adversary by resort to perfidy*”. While it may be regarded as precision verging on pedantry, Article 37(1) leaves open the possibility that perfidy which does not involve killing, injuring or capturing an adversary may be permitted. The full text of the “*UK Manual’s*” paragraph 13.83 is as follows:

“It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead it to believe it is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, constitute perfidy. Perfidious acts include the launching of an attack while feigning: a.Exempt civilian, neutral or protected United Nations status; b. Surrender or distress by eg, sending a distress signal or by the crew taking to life rafts.”

H. Prize

One issue that attracted robust critical comment at the launch conference for the “*UK Manual*” was that of its treatment of prize law. In SRM Art.116 there is an unsurprising statement that prize is “*subject to adjudication*”. In SRM Art.151, adjudication is again mentioned, this time in relation to the destruction of vessels when their taking as prize is prevented by the military circumstances at the time. However, the authors of the “*Maritime Warfare*” chapter of the “*UK Manual*” rejected reference to adjudication in SRM Art.116 and left out SRM Art.151 altogether. Instead, when referring to SRM Art.116 they included a note to the effect that:

*“The United Kingdom has not used prize courts for many years and is unlikely to do so in the future. Where a vessel is captured by United Kingdom armed forces it may be deemed to be the property of Her Majesty’s Government.”*³⁵

³⁴ See *San Remo Manual, Op. Cit.*, p.186.

³⁵ See *UK Manual, Op. Cit.*, p.366, n.103

However, as Yoram Dinstein pointed out at the “*UK Manual’s*” launch conference, there is a long history of prize being subject to adjudication by prize courts. While “*1907 Hague Convention XII on the Establishment of an International Prize Court*” never entered into force, this failure did not negate the general rule that domestic prize courts should sit in judgement over prize. The United Kingdom has been a major influence on the development of prize law over the centuries. As Colombos records:

“The origin of the English Prize Court is intimately connected with the Admiral’s Court, and as far back as 1357, an example occurs where a claim by some Portuguese merchants in respect of goods taken as prize by English captors is described as having been “judicially prosecuted” before the Admiral.³⁶”

A relatively recent addition to the literature on prize gave a detailed account of the naval prize system in operation during the Revolutionary and Napoleonic Wars in the late-eighteenth and early-nineteenth centuries³⁷. This British practice was a fundamental influence on the development of the international law relating to prize and there is no question that it has been generally accepted as a norm of international law that naval prize be subject to domestic adjudication.

The brief statement in the “*UK Manual*” rejecting the likelihood of further prize courts being convened in the UK is, therefore, not surprisingly controversial. Since the publication of the “*UK Manual*”, the present author, who chaired its Editorial Board and was one of the authors of its “*Maritime Warfare*” chapter, has become increasingly conscious of the extent to which this issue was probably not investigated as thoroughly as it might prior to the dismissal of the likely convening of a prize court in the United Kingdom being included in the manual³⁸. While it is still quite possible that the comment in the “*UK Manual*” will prevail, it is this author’s conviction now that a fuller investigation of its legal consequences, both international and domestic, ought to be considered by the Ministry of Defence and the Foreign Office as part of the regular review process.

I. Amendments to Sanremo Articles Included in the *UK Manual*

Eighteen of the Sanremo articles were included in the “*UK Manual*” but had their wording and substantive meaning altered in some way, either in amplification or because a slight difference of meaning was required for them to reflect the UK’s position on the law.

³⁶ See Colombos, C. J., *The International Law of the Sea*, (6th Edition), Longmans, 1967, p.795.

³⁷ See Hill, R., *The Prizes of War: The Naval Prize System in the Napoleonic Wars 1793-1815*, Royal Naval Museum and Sutton Publishing, 1998. Richard Hill is a retired Royal Navy Rear Admiral who went on to become the Chief Executive of the Middle Temple, one of the Inns of Court in London. A noted naval strategist and historian he has also had a long interest in maritime legal matters.

³⁸ And fully accepts his own responsibility for the controversy generated by the inclusion of the brief footnote in Chapter 13

In relation to the areas of naval warfare, the “*UK Manual*” is substantially the same as the San Remo Manual, although SRM Art.10 was reworded and expanded upon in clarification. The point was particularly made that the continental shelf and the exclusive economic zone are both a part of the high seas and, even in the case of neutral states’ such zones, belligerents retain the right to conduct hostilities therein³⁹.

In including SRM Art.30 the *UK Manual* also includes the words “*normal modes of continuous and expeditious transit*”⁴⁰. In including SRM Art.34 the “*UK Manual*” adds mention of vessels engaged in fishing.⁴¹ In place of the wording of SRM Art.36, the “*UK Manual*” merely states that “*Hostile actions on the high seas shall be conducted with due regard for the rights of others in their use of the high seas*”.⁴² The two articles SRM Art.47 and 110 have been used/modified to produce a comprehensive list of vessels that are exempt from attack and which cannot be used in relation to ruses of war.⁴³

In dealing with instances in which enemy merchant vessels may be regarded as legitimate military objectives, the “*UK Manual*” adds to SRM Art.60 the need to consider the circumstances as well as the actions being taken.⁴⁴

The “*UK Manual*” expands the introduction to SRM Art.67 thus: “*Merchant vessels flying the flag of neutral states may only be attacked if they fall within the definition of military objectives. They may, depending on the circumstances become military objectives if they*”⁴⁵.

In addition to the SRM Art.95 wording on effective blockade, the “*UK Manual*” adds amplification thus: “*...and is of significance because of the need to distinguish between legitimate blockading activity and other activities (including visit and search) that might be carried on illegitimately on the high seas under the guise of blockade*”⁴⁶.

In including SRM Art.98 dealing with merchant ships running a blockade, the “*UK Manual*” adds the words “*if they are military objectives*”⁴⁷.

In including SRM Art.105 the “*UK Manual*” adds the following words before those in the “*San Remo Manual*”: “*Security zones may be established by belligerents as a defensive measure or to impose some limitation on the geographical extent of the area of conflict. However.....*”⁴⁸.

In including SRM Art.119, the “*UK Manual*” adds the words: “*...thereby obviating the need for visit and search. This does not imply that the vessel’s consent is required for the exercise of visit and search if that is deemed necessary*”⁴⁹.

³⁹See *UK Manual., Op. Cit.*, Paragraph 13.6.

⁴⁰*Op. cit.*, paragraph 13.17.

⁴¹*Op. cit.*, paragraph 13.21.

⁴²*Op. cit.*, paragraph 13.22.

⁴³ See also the discussion above under “*Perfidy and Ruses of War*”

⁴⁴*Op. cit.*, paragraph 13.41.

⁴⁵*Op. cit.*, paragraph 13.47.

⁴⁶*Op. cit.*, paragraph 13.67.

⁴⁷*Op. cit.*, paragraph 13.70.

⁴⁸*Op. Cit.*, paragraph h 13.77.

⁴⁹See *UK Manual., Op. Cit.*, paragraph 13.6

In including SRM Art.139 the “*UK Manual*” deletes the reference to adjudication (see comments above on prize)⁵⁰.

The “*UK Manual* includes” SRM Art.160 in its entirety but then adds a separate paragraph in amplification⁵¹. The content of SRM Art.165 is effectively covered by “*UK Manual*” paragraphs 13.119, 13.119.1 and 8.3.1. In including SRM Art.167 the *UK Manual* adds a reference to “*1977 Additional Protocol I*”⁵². In including SRM Art.170 the “*UK Manual*” adds the following: “*Crew members of hospital ships may carry light individual weapons for the maintenance of order and for their own protection*”⁵³.

L. Summary Comparison

The above analysis of the differences between the “*San Remo Manual*” and the “*UK Manual*” demonstrates very clearly that the latter has relied very heavily on the former. Of the 183 articles that go to make up the “*San Remo Manual*”, a total of 94 were included unaltered and 18 were included with modified wording. Only nine relevant Sanremo articles were rejected outright from the “*Maritime Warfare*” chapter. Of the remainder, 49 were excluded because they dealt with subjects more appropriately covered in Chapter 12 on “*Air Operations*”, and 13 were not included because their subjects were dealt with elsewhere in the “*UK Manual*”. So, on a numerical analysis of articles alone, only a very small percentage of the “*San Remo Manual*” was rejected completely by the “*UK Manual’s*” Editorial Board. While the analysis will not, strictly speaking, be either complete or accurate until a similar exercise is undertaken in relation to air operations, this represents a significant endorsement of the collective efforts put in by the 150 experts who contributed to the Sanremo process between 1987 and 1995. As a major maritime power the United Kingdom is an important judge of the current state of this vital element of the body of law regulating armed conflict in the international system and this level of acceptance has to be regarded as significant..

Issues that prevented a 100% endorsement have been dealt with above and do not substantially undermine the “*San Remo Manual’s*” overall position as a long overdue and extremely important contribution to both the restatement and progressive development of the law. Nevertheless, it is good that we are invited to consider what should now be done to move the process of development forward. For one thing, the “*San Remo Manual*” is not perfect. The areas of divergence between it and the “*UK Manual*” highlighted in this paper so far are clearly important ones. Their existence means that the UK, for one, could not conclude that the totality of the Sanremo rules should be regarded as customary law, for example. Other similar comparisons will add to an overall impression and the contribution of other major maritime powers to this process will also be important means of assessing the current state of the law. Indeed, the most likely means by which the law will be developed is through state practice, both verbal in the form of official manuals dealing with the law of maritime operations, and physical in the form of actual conduct during operations.

⁵⁰See *UK Manual., Op. Cit.*, paragraph 13.102.

⁵¹*Op. cit.*, paragraph 13.114.1.

⁵²*Op. cit.*, paragraph 13.121.

⁵³*Op. cit.*, paragraph 13.124.

Allowing the “*San Remo Manual*” to continue to have the influence that it has had so far is one way of proceeding. The progressive adoption of the Sanremo rules is already underway, as the experience of the “*UK Manual*” illustrates. Indeed, this is the route most likely to be favoured by governments, especially those of the major maritime powers⁵⁴. Suggestions that the Sanremo process of over a decade ago should now be repeated and a second revised edition of the resultant manual produced, are assessed as being unlikely to meet with official enthusiasm.

IV. THE FUTURE OF ECONOMIC WARFARE

What has been said in this paper so far is perhaps best described as a mainstream approach to the law of armed conflict applicable at sea. It appears as a balanced, pragmatic and largely uncontroversial discussion of the subject – it is certainly not radical. This is not at all surprising given the author’s background and his involvement in the development of the “*UK Manual*”. However, there is a radical side to his approach and from this point on the paper will step into more controversial territory. While what came before is reflective of the author’s former role as a staff officer within the Ministry of Defence, what follows should certainly not be regarded as reflecting the views of the British Government. It is included to stimulate serious discussion about where the law is likely to go in the future and how the law of armed conflict fits into the much broader body of operational law.

In the introduction to this paper mention was made of the famous confrontation between the “*Graf Spee*” and the Royal Navy’s South Atlantic Division in the first weeks of the Second World War. The orders under which Captain Langsdorff was acting when he took his ship into southern waters were related to Germany’s aim of attacking the United Kingdom’s ocean trading activities. In interdicting, stopping and sinking British shipping Langsdorff was conducting a form of warfare that had substantial precedents in previous maritime campaigns stretching back through modern history. This aspect of maritime warfare was traditionally regarded as a perfectly legitimate means of affecting the enemy’s ability to sustain its war effort at home. Notwithstanding the illegitimacy of Germany’s decision to wage aggressive war (a *jus ad bellum* issue), when it came to the conduct of those operations mounted in support of that aggression their legitimacy must currently be judged in relation to the *jus in bello* – the laws of war at sea. The “*Graf Spee*’s” activities were conducted largely within the bounds of legal acceptability, with the rights and duties of the belligerents generally respected by her captain. Expressed in simple terms, those British merchant vessels that the “*Graf Spee*” encountered on the high seas were legitimately challenged, ordered to stop, boarded, evacuated and then legitimately sunk rather than taken as prize. The crews were all treated with respect, were taken onboard

⁵⁴ This view is reflective of Roach, J A., *The Law of Naval Warfare at the Turn of Two Centuries*, in *The American Journal of International Law*, Vol.94, No.1 (Jan 2000), pp.64-77, pp.76-77. Roach, a prominent US official, refers to conclusions reached by, among others, the Russian and Netherlands governments and by Christopher Greenwood (Academic Adviser to the *UK Manual* Editorial Board).

the pocket battleship and subsequently transferred to the *Altmark*, the “*Graf Spee*’s” auxiliary, for eventual onward transportation back to Germany⁵⁵.

There are two related means in particular of waging economic warfare at sea. The first is that already mentioned, involving the legitimate interdiction of enemy merchant shipping as well as contraband being shipped under neutral flag. The region of operations is the high seas as well as the territorial waters of the belligerents. The second means is blockade, which has the same intent but is more obviously associated with the blocking off of enemy ports. The legal acceptability of both high seas *guerre de course* operations and the blockade of ports of entry is very well established in international law. This fact is reflected in the “*San Remo Manual*”, with a total of twenty six articles dealing with visit, search and capture of merchant vessels, both belligerent and neutral⁵⁶ and a further twelve articles devoted to blockade⁵⁷. This is a substantial proportion of the whole manual. And yet one has to question the general acceptability of these means of waging war over sixty years since they were last employed to any substantial degree in the total war conditions prevailing during the Second World War.

Economic warfare has not disappeared, of course. But it has arguably changed in character and in terms of the precise methods used and the means by which it is legitimised. The inclusion of economic sanctions in Chapter VII of the “*UN Charter*” is clear proof of the modern acceptability of economic warfare, even if we shun that phrase to describe it. It is a relatively easily prescribed method of putting pressure on states whose activities are judged by the Security Council to be a threat to international peace and security. Since the economic sanctions were imposed against Rhodesia during the late-1960s and early-1970s we have also had the employment of naval forces on something that on first sight may look suspiciously like a blockade, but which is more correctly referred to as a “*maritime embargo operation*”. So operations are mounted at sea, the purpose of which is to put states under pressure of sanction. However, these types of operation receive no mention in the “*San Remo Manual*”, which is more concerned with traditional means of applying economic pressure.

This seems something of a pity as those traditional methods seem to be somewhat out of fashion. The idea that it would today be generally acceptable for belligerent warships to trawl the oceans in search of belligerent merchant shipping and, when finding it, to destroy it, for the simple reason that it was not convenient to escort it back to their own ports as prize, is close to absurd. There is a need to be able to interdict shipping on the high seas but this is today more properly legitimised either through the UN Security Council or by way of bilateral agreements between flag states born of circumstances that are fundamentally different from those that lie at the heart of traditional *guerre de course*⁵⁸.

⁵⁵ The *Altmark* was eventually intercepted by British naval forces in Norwegian territorial waters on passage to its German base port. As already noted above (Note 11), the Royal Navy breached international law by entering the territorial waters of a neutral state (Norway) to attack the vessel.

⁵⁶ See *Sanremo Manual, Op. Cit.*, Articles 112-124, 135-140, 146-152, 93-104

⁵⁷ *Op. cit.*, Articles 93-104

⁵⁸ A pertinent current example is the series of agreements initiated by the US under the general heading of “*The Proliferation Security Initiative*” or PSI which is a measure intended to provide conditions for

If we take the issue of blockade one has to conclude that, while it remains theoretically an option in certain circumstances, it is by no means the favoured one and may even become absent from practice. Practice is at times difficult to pin down and when it comes to practice in relation to war we have to face the prospect that customary law cannot develop unless wars are fought to provide physical evidence. With blockade, however, there is recent evidence born of war that is potentially extremely significant.

During the Kosovo operation in 1999 there was concern in NATO capitals about the possibility of Serbia being supplied with essential goods through the Montenegrin port of Bar on the Adriatic coast. An armed conflict was in train and blockade would have been a perfectly legitimate operation to mount under the current law of armed conflict⁵⁹. However, there was a marked reluctance on the part of many within NATO, first to admit that NATO was actually in a state of war with Serbia and secondly that belligerent blockade was an acceptable way of controlling access to Bar. Attempts were made to cobble together a “*consent embargo regime*”, a somewhat absurd notion as, to be effective in a consensual sense, it would have required the approval of the flag state of those ships intent on entering the port; something that was so unlikely as to be inconceivable. No matter, staffs in ministries of defence and foreign affairs in the NATO capitals were still trying to put this regime together when Belgrade acquiesced seventy-eight days into the air campaign. So, on the most recent occasion when blockade would have been entirely fitting as a means of warfare, there was not only no effective support for it within NATO but staff were engaged in frantic efforts to find a way

of not using it⁶⁰. This has to be regarded as significant in terms of developing state practice. Indeed, it may even be suggested that blockade has effectively been superseded by economic embargo operations and that these are almost invariably authorised by the Security Council. It might seem strange, perhaps, that the “*San Remo Manual*” does not mention them at all. However, it is not strange because, of course, UN embargo operations are not a feature of ‘armed conflict’ so it would have been even stranger for it to have mentioned them.

If both traditional *guerre de course* operations and blockade are becoming markedly unacceptable, one needs to question their legitimacy in legal terms. One also needs to question the “*San Remo Manual*’s” treatment of them and of economic warfare in general.

conducting high seas board and search operations. However, this is not backed by specific UN Security Council authorisation and relies on the effective consent of flag states.

⁵⁹Contrary to the views of some; see, for example, Sands, P., *Oil Blockade Threatens International Law of the Sea* published by Reuters 28 April 1999 and available through *American Society of International Law Insight*.

⁶⁰This author was serving in the Ministry of Defence in London at the time and (although not working in a legal advisory capacity or directly involved in staffing the issue) was asked by operational planning staff for his views on what to do about Bar. His suggestion was to employ belligerent blockade as this would be both legitimate and effective. He was surprised and not a little frustrated by the marked reluctance in Whitehall to go that route and by the vain attempts to put in place the consent embargo regime. His conclusion was that if blockade was not even politically possible in those circumstances, one had seriously to question its modern relevance.

The world has changed in particular ways in the last half century. The United Nations, despite its shortcomings, has had a profound affect on perceptions of legitimacy. Changes in the nature and complexion of the modern international system have also had an inevitable influence on the ways that navies are employed. There can be little or no doubt about this; one only has to examine what navies have actually done in recent years to see that this is so. One difficulty that we experience in dealing with these changes in the context of the laws of armed conflict is that much of modern naval activity (indeed much of all military activity) is conducted in the grey area between peace and war. We are finding it extremely difficult to draw a clear line of distinction between something we call “*armed conflict*” and something else that falls short of it. If one looks at military doctrine there is often now not only a willingness but a perceived imperative to deal with circumstances that are neither war nor peace. The need to conduct operations in fluid circumstances makes the application of laws with strictly defined limits of applicability extremely difficult for those actually conducting operations. However, there is often reluctance, especially, it must be said, amongst lawyers who have a specialist interest in the laws of armed conflict, to come fully to terms with this new strategic environment.

It may sound surprising, but the community of practitioners and scholars working on the law of armed conflict applicable at sea seem often to be an innately conservative group. There is a body of law there, it is important that it be protected and that nothing be done substantially to change the status quo. And yet, if it remains the same it risks looking rather quaint and irrelevant. The San Remo process was long overdue. But it did not bring the law of naval operations fully into the contemporary era. It looked backwards to 1856 and 1907 rather than forwards to the modern era of naval operations. If the cautious approach, deemed most likely in the discussion about development above, is to be the order of the day, then a second revised edition of the “*San Remo Manual*” is neither necessary nor very likely. If, on the other hand, we feel it is time to bring the law relating to naval operations right up to date, the issue of economic warfare must be addressed and mention of belligerent blockade and *guerre de course* confined to the archives.

UNITED NATIONS

60 YEARS: TODAY

UNITED NATIONS SECURITY COUNCIL RESOLUTIONS AND THE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW, HUMAN RIGHTS AND REFUGEE LAW

Mr. John BELLINGER

Legal Advisor of the U.S. State Department

I am delighted to have an opportunity today to address one of the more current issues related to the development and implementation of international law – the inter-relationship between Security Council action and specialized bodies of international law such as the law of war and human rights law. At the outset, I'd like to thank the International Institute of Humanitarian Law and its staff, President Patrignic, and the Italian Government for hosting this conference and giving me an opportunity to address you today.

I. INTRODUCTION

We all know that the Council has traditionally played an important role in promoting the respect for and implementation of these specialized bodies of international law. However, over the course of the last twelve years, most significantly in the context of the international crises and armed conflicts such as those in former Yugoslavia, Rwanda and Iraq, an unmistakable trend has developed. In these situations, the Council has shown an increased willingness not only to stress the need to respect and implement these bodies of law, but – acting under Chapter VII authority when necessary to respond to threats to international peace and security – to create mechanisms that ensure accountability or to adapt and amplify these bodies of law to address the unique circumstances of the particular situation.

The United States has supported and encouraged this trend, and will continue to do so in appropriate cases. In taking such action, the Council is able – on a legal level – to forge flexible arrangements that are tailored to the problem at hand and overcome impediments that would otherwise exist if the operation were not taking place under a Chapter VII framework.

II. INTERNATIONAL LAW AND U.S. FOREIGN POLICY

Before turning to these questions, though, I want to make a few preliminary remarks about the U.S. Government's view of the critical importance of international law in regulating the behavior of the international community.

Strengthening the rule of law internationally and promoting the development of international law has been and remains a fundamental objective of the United States. The rule of law has been an essential element of America's democracy and a pillar of our foreign policy since the founding of our country.

The United States places great value on international law and institutions. Historically, the United States has been a key player in the negotiation of treaties and the establishment of international mechanisms for the peaceful resolution of disputes. We have always sought to expand respect for and adherence to the rule of law both in the domestic affairs of states and in their relations with each other.

Secretary Rice has repeatedly reaffirmed this commitment. In her words, “[o]ne of the pillars of that diplomacy is our strong belief that international law is vital and a powerful force in the search for freedom. The United States has been and will continue to be the world’s strongest voice for the development and defense of international legal norms”. One of Secretary Rice’s first addresses was to the American Society of International Law, the most important gathering of international lawyers in the United States.

President Bush recently reiterated his commitment to meeting our international treaty obligations following the ICJ’s decision in the case concerning Avena and other Mexican nationals by determining that state courts should give effect to the ICJ’s decision. Just last week the United States Government filed a brief in state court in Texas informing the court of the President’s determination.

Shortly after the President’s decision to comply with the Avena decision, the United States renominated Judge Thomas Buergenthal to the ICJ. Judge Buergenthal has impeccable credentials and has enjoyed a remarkable career as an international law professor and leader in the formation and development of the Inter-American Court of Human Rights. He is held in very high regard by the international community and his renomination reflects the importance the United States attaches to the work of the ICJ.

Even on issues such as those involving the ICC, where the United States has voiced political concerns, we have undertaken to work with the international community through the Security Council to a satisfactory resolution. Thus, Secretary Rice worked hard last spring to find an acceptable formula for a Security Council resolution to address the issue of accountability in Sudan. While the United States continues to maintain fundamental objections to the ICC, we did not veto UNSCR 1593, which referred the situation in Darfur to the ICC, because we recognized the need for the international community to work together to end the atrocities in Sudan and speak with one voice to bring to account the perpetrators of those crimes. The United States will continue to be a strong advocate of accountability and a critical contributor to peacekeeping and related humanitarian efforts in Sudan.

Both Secretary Rice and I have been speaking more frequently about the U.S. commitment to rule of law and international rules, and that is one reason why I wanted to join you today for this conference. In June, I visited the Hague to make the same points. I was privileged then to meet two of my co-panelists: Judge Koroma and Professor Pocar. It is to be expected that countries and lawyers will not always agree on the content of international law, but Secretary Rice and I want to state clearly that the United States is committed to honoring its international obligations and to ensuring respect for the rule of law.

III. THE SECURITY COUNCIL AND SPECIALIZED BODIES OF LAW

I'd like to turn now to our issue for today: the relationship between the Security Council and the development and implementation of international law, and in particular specialized bodies of law such as the law of war and human rights law. What trends have developed? Should the United States and others in the international community support these trends?

The Council has supported and shaped international law in a number of ways in recent years. First, the Council has played an important role in encouraging states to respect and implement the law of war and human rights law through regular statements in Council resolutions. In the context of addressing problems involving international peace and security, the Council regularly calls upon states to respect and implement their obligations under international law, including human rights law, refugee law, and the law of war.

Council activity in the law of war area also includes numerous resolutions related to children and armed conflict, the protection of civilians in armed conflict, and women and armed conflict. Largely, these resolutions have reiterated accepted norms established by various international instruments. Each resolution has also represented an opportunity for the Council to encourage, endorse, urge, and call upon states to respect and implement their obligations, often offering specific suggestions to promote implementation.

For example, since 1999 the Council has adopted a series of resolutions on the topic of providing better protection to civilians in armed conflict. These discussions have produced a series of resolutions, notably Resolutions 1265 and 1296, and Presidential Statements from the Council as well as Reports from the Secretary General. In the same timeframe, the Council has passed six resolutions addressing Children and Armed Conflict. While these resolutions reiterate the duties of states under the relevant international instruments, the Security Council offers suggestions for the effective implementation of the obligations. More recently, the Council adopted Resolution 1612, which in addition to taking steps such as the establishment of new reporting and monitoring mechanisms, takes a significant additional step forward by specifically contemplating the possibility of imposing sanctions aimed against parties to armed conflicts that are in violation of applicable international law relating to the rights and protection of children in armed conflicts.

Second, the Council has increasingly taken action to ensure the application of the law of war, human rights law and other specialized bodies of law by creating, under the authority of Chapter VII of the UN Charter, institutions or mechanisms that are competent to enforce the law or provide accountability.

The two most important examples of Council action in this regard are the creation of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to ensure that those responsible for committing war crimes, crimes against humanity and genocide on the territory of the former Yugoslavia and in Rwanda would be held accountable. These tribunals are obviously significant for their role in ensuring accountability, and they have produced an important body of decisions that will inform our interpretations of the law of war for decades to come.

A related example of this type of action is the approach taken by the Council in relation to the establishment of the Special Court for Sierra Leone in Resolution 1315. The “*Special Court for Sierra Leone*” was created jointly by the Government of Sierra Leone and the United Nations, through an agreement signed on January 16, 2002, but it is an “*international body that is independent of any government or organisation*”.

Finally, in the most recent development in this area, last March the Council adopted Resolution 1593 to refer the situation in Darfur to the ICC. From the U.S. point of view, important elements of the resolution included the provisions effectively excluding cases involving nationals of non-Rome state parties related to UN Security Council-established or authorized operations in Sudan, together with a political oversight role for the Council.

Finally, the Council has invoked its Chapter VII authorities to create specific legal frameworks to address threats to international peace and security. While these frameworks typically incorporate specialized bodies of law as part of the legal foundation of the Council’s response, there are cases in which the Council has adapted these bodies of law in order to meet the threat. This is a significant development.

Before turning to these cases, I want to pause on this proposition that Council action can have the effect of tailoring a specialized body of international law to better work in a specific set of circumstances.

The Council has authority under Chapter VII, when necessary for the maintenance of international peace and security, to authorize measures that may be inconsistent with otherwise applicable treaties. Under Article 103 of the UN Charter, “[i]n the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter prevail”.

The occupation of Iraq presents a good example of Council action in this area, and also provides an excellent illustration of the important role that the Council can play in resolving possible differences within the international community over what specific rules of international law govern the international community’s response to crisis.

Prior to the Iraq intervention, lawyers for the United States and its Coalition partners thoroughly analyzed a complex range of issues related to the expected occupation of Iraq. This review involved developing an understanding of how the law of occupation – in particular the Hague Regulations and Geneva Convention – would likely apply to Coalition activities. At the same time, there already existed a broad and complex range of Chapter VII Security Council resolutions addressing a number of issues, including Iraqi requirements to disarm, economic and arms embargos, and restrictions related to the production and sale of Iraqi petroleum products. As the Coalition analyzed the principles of occupation law, we were careful also to analyze the extent to which pre-existing Chapter VII resolutions included provisions that might themselves establish authorities or limitations that might interact with those otherwise applicable under occupation law.

In the course of this review, we found that we faced some difficult tasks in reconciling the legal rules. For example, how should authorities and limitations contained in the Hague Regulations related to the

right of an occupying power to produce and use natural resources, and to expend their sales proceeds, be evaluated in light of provisions in Security Council resolutions that by their terms clearly limited the sale of Iraqi oil and use of oil proceeds?

Such questions were ultimately addressed by the Security Council in its series of Iraq resolutions – Resolutions 1483, 1511 and, ultimately, 1546. Resolution 1483, adopted in May 2003 by the Security Council under Chapter VII of the UN Charter, provided for a distinct stage of transitional governance in Iraq prior to the assumption of authority by an internationally recognized, representative government. While Resolution 1483, in its preambular paragraphs, recognized the specific authorities, responsibilities and obligations under applicable international law of the United States and its Coalition partners as occupying powers, it also set forth specific rules to govern particular aspects of the occupation.

Two examples illustrate the ways in which these resolutions helped to clarify the Coalition’s legal authority in administering Iraq. First, returning to the question of administering Iraq’s oil resources, Resolution 1483 modified the legal framework contained in prior resolutions and specified the authorities related to the sale of Iraqi oil and use of proceeds. Oil sales and use of proceeds are specifically authorized – indeed, they are facilitated by a grant of immunity by the Security Council – and subject to international mechanisms to guarantee the transparent use of proceeds for the benefit of the Iraqi people. Thus, it seems clear that Resolution 1483 both clears away the previously existing Council limitations on oil sales and contemplates that oil proceeds may be used to fund long-term economic reconstruction projects to benefit Iraq (an activity that would at least arguably be outside the scope of authorities provided by the Hague Regulations).

A second example is the treatment of the political transformation of Iraq. Some commentators take the position that occupation law establishes limitations on the ability of the occupying power to alter institutions of government permanently or change the constitution of a country. Resolutions 1483, 1511 and 1546, however, remove any doubt that these are key objectives related to the political transformation of Iraq. The legal framework for political transition established by these resolutions has now taken Iraq through the occupation and two interim governmental stages, and – with the continued support of the international community – will hopefully culminate in the passage of a new Iraqi constitution on October 15.

The United Kingdom’s High Court of Justice has recently issued a significant judicial decision that specifically addresses another Iraq-related example of the phenomenon that we are discussing today – that of the authority of the Multi National Force (MNF) under Resolution 1546 to detain security internees and the relationship of that authority to existing human rights law. In the *Al Jeddah* case, an individual detained by British forces in Iraq challenged the detention as inconsistent with human rights guarantees provided under the United Kingdom’s domestic law implementing the European Convention on Human Rights. The UK High Court was specifically called upon to address whether the rules established by a resolution adopted under Chapter VII could apply in lieu of the rules applicable under such treaties.

In assessing the language of Resolution 1546, the Court in Al Jeddah concluded that internment was clearly authorized and, noting that the standard justifying detention is drawn from Article 78 of the Fourth Geneva Conventions, that the procedures contained in Article 78 govern the detention process.

The Court next turned to the question of whether the authorization provided by UNSCR 1546 could override the provisions reflected under the UK's domestic law implementing the ECHR. The Claimant argued that such an authorization could not supersede human rights law. Again, the Court disagreed, finding that the provisions of the UN Charter, in particular those authorities established under Chapter VII of the Charter, clearly allow the Security Council, when necessary to discharge its primary responsibility for maintaining international peace and security, to authorize detention for imperative reasons of security even if such detention were inconsistent with provisions in human rights treaties, and that actions taken in pursuance of UNSCR 1546 prevail over other treaty obligations such as Article 5 of the ECHR.

IV. CONCLUSION

To conclude, these examples represent a good illustration of the Security Council's increasing willingness to address threats to international peace and security by invoking its Chapter VII authorities to create mechanisms to ensure accountability for specialized bodies of law, and to tailor those bodies of law when specialized legal frameworks are needed to effectively address the problem.

There are no doubt legitimate questions that could be asked about how far to take such an approach. At the same time, we must recognize that – in order to address the most serious threats to international peace and security – the UN Charter clearly contemplates that the Council may need to specifically address matters normally within the sovereign control of states, or take action that has the effect of altering the obligations of states under international conventions. On this latter point, it is also worth mentioning that much of the conventional law of war – including the 1907 Hague Regulations and the 1949 Geneva Conventions – are based on concepts of conflict from the last century that do not necessarily address political and economic realities of the 21st century.

In this light, we believe that these authorities are critical if the Council is to be effective in dealing with some of the most difficult problems facing the world. We welcome the Council's approach in these situations and will continue to support the Council in these efforts.

LE CONSEIL DE SÉCURITÉ ET LA MISE EN PLACE DES TRIBUNAUX AD HOC POUR L'EX-YOUGOSLAVIE, LE RWANDA ET LA SIERRA LEONE*

Mr. Adam DIENG

Greffier du Tribunal Pénal International pour le Rwanda

I. INTRODUCTION

Dès les premières années de son fonctionnement, le Conseil de sécurité s'est référé à de nombreuses règles de droit international qui ne découlent pas nécessairement de la Charte des Nations Unies⁶¹. Il a parfois rappelé l'obligation de certains Etats à respecter les Conventions de Genève du 12 août 1949⁶² ainsi que d'autres règles du droit international humanitaire dont l'interdiction d'attaques délibérées contre des civils ou du personnel humanitaire⁶³. Il a de la sorte contribué et contribue, à divers degrés, au développement et au respect des droits de l'homme, du droit international humanitaire et du droit pénal international.

La fin de la guerre froide marque le regain d'activité du Conseil de sécurité. Son action n'est plus systématiquement menacée par l'exercice du droit de veto d'un de ses membres permanents. Un plus grand consensus devient possible en son sein. Cet organe aux pouvoirs exceptionnels jouit de la possibilité d'adopter de nouvelles mesures en vue de rétablir la paix et la sécurité internationales. Dans certaines situations conflictuelles particulièrement graves, le Conseil de sécurité ne se contente plus seulement de rappeler des règles de droit international. Il décide de franchir une étape supplémentaire en créant des juridictions pénales internationales *ad hoc* ou en appuyant leur création (1), contribuant de la sorte au développement du droit pénal international (2). Tel est l'objet de la présente contribution.

⁶¹ Pour plus de développements, voir notamment Denis, C., *Le pouvoir normatif du Conseil de sécurité des Nations Unies : portée et limites*, Bruxelles, Bruylant, 2004, p. 424.

⁶² Voir, par exemple, C.S./Rés. 237 (1967), 14 juin 1967, § 2 (Moyen-Orient) ; C.S./Rés. 670 (1990), 25 septembre 1990, § 2 (Irak/Koweït) ; C.S./ Rés. 672 (1990), 12 octobre 1990, § 3 (Moyen-Orient) ; C.S./ Rés. 674 (1990), 29 octobre 1990, 3^{ème} et 5^{ème} considérants, A, §§ 1 et 3 (Irak/Koweït) ; C.S./ Rés.686 (1991), 2 mars 1991, § 5 (Irak/Koweït). C.S./ Rés. 764 (1992), 13 juillet 1992, § 10 (Bosnie-Herzégovine); C.S./ Rés. 771 (1992), 13 août 1992, § 1 (Bosnie-Herzégovine); C.S./Rés. 1193 (1998), 28 août 1998, § 12 (Afghanistan) ; aussi C.S./ Rés. 1214 (1998), 8 décembre 1998, 12^{ème} considérant (Afghanistan) ; C.S./Rés. 1315 (2000), 14 août 2000, 6^{ème} considérant (Sierra Leone) ; C.S./Rés. 1344 (2001), 15 mars 2001, 3^{ème} considérant (Ethiopie/Erythrée).

⁶³ Voir, par exemple, C.S./Rés. 1265 (1999), 17 septembre 1999, § 2 ; C.S./Rés. 1296 (2000), 19 avril 2000, § 2 ; C.S./Rés. 1502 (2003), 26 août 2003.

II. LA CONTRIBUTION DU CONSEIL DE SECURITE A LA LUTTE CONTRE L'IMPUNITE DES AUTEURS DE CRIMES GRAVES DU DROIT INTERNATIONAL

Alors que les négociations sur la création d'une cour pénale internationale sont au point mort depuis plusieurs années, la communauté internationale doit faire face à des conflits sanglants au sein de plusieurs Etats tant sur le continent européen qu'africain. Face à l'opinion publique mondiale choquée par l'inhumanité et l'atrocité des actes commis lors de ces conflits, le Conseil de sécurité se doit de réagir. Il crée ainsi deux juridictions pénales internationales *ad hoc* en vertu du chapitre VII de la Charte des Nations Unies (ci-après chapitre "*VII de la Charte*") (1.1.). Quelques années plus tard et à la demande des autorités sierra-léonaises, il contribuera à la création d'une autre juridiction pénale – non plus en vertu du chapitre VII de la Charte – mais sur la base d'un accord négocié par le biais du Secrétaire général au nom des Nations Unies (1.2.).

A. La création de deux juridictions pénales internationales *ad hoc*

Le début des années nonante est marqué par des conflits fratricides sanglants dont principalement l'éclatement de l'ex-Yougoslavie et le massacre de la population civile au Rwanda. Face à la difficulté de mobiliser les forces militaires des Etats pour mettre fin à ces atrocités, le Conseil de sécurité opte pour une autre solution : la lutte contre l'impunité des auteurs de crimes les plus graves en droit international, espérant que de tels actes ne se reproduiront plus. Il crée ainsi successivement en 1993 et 1994 un Tribunal pénal international pour l'ex-Yougoslavie (ci-après "*T.P.I.Y.* ") (A) et un Tribunal pénal pour le Rwanda (ci-après "*T.P.I.R.* ") (B).

(i) Le Tribunal pénal international pour l'ex-Yougoslavie ("*T.P.I.Y.* ")

En 1993, après lecture du rapport de la Commission d'enquête faisant état de violations généralisées du droit international humanitaire sur le territoire de l'ex-Yougoslavie, le Conseil de sécurité décide de créer un Tribunal chargé "*de juger les personnes présumées responsables de violations graves du droit humanitaire international commises sur le territoire de l'ex-Yougoslavie entre le 1^{er} janvier 1991 et une date que déterminerait le Conseil après la restauration de la paix*"⁶⁴. En mai 1993, le Conseil de sécurité adopte en vertu du chapitre VII de la Charte, le Statut du T.P.I.Y. qui détermine et définit les crimes de droit international à l'égard desquels le Tribunal pourra exercer sa juridiction⁶⁵.

⁶⁴ C.S./Rés. 827 (1993), 25 mai 1993, § 2 ; voir également C.S./Rés. 808 (1993), 22 février 1993, § 1.

⁶⁵ C.S./Rés. 827 (1993), 25 mai 1993, 11^{ème} considérant et art. 2 à 5 du Statut (voir ci-après Annexe, 1).

La création d'une juridiction pénale en vertu du chapitre VII de la Charte n'a pas été sans soulever certaines interrogations et critiques au sein même du Conseil de sécurité⁶⁶. Il a cependant été rapidement admis qu'il s'agissait d'une mesure particulière en vue de répondre à une situation exceptionnelle. Au cours des débats tenus au sein du Conseil de sécurité, la grande majorité des Etats a affirmé que la création de cette juridiction constituait une mesure d'exception - un organe subsidiaire particulier - adoptée dans le cadre du chapitre VII pour faire face à une situation menaçant la paix et de la sécurité internationales⁶⁷. Lors de l'adoption de la résolution 808 (1993), le représentant espagnol résume ce point de vue en déclarant :

“[Le Conseil] s’efforce seulement de créer un mécanisme ad hoc qui, en appliquant le droit en vigueur, attribue les responsabilités découlant des actes commis dans un conflit en cours qui a déjà été reconnu comme représentant une menace à la paix et une rupture de la paix, et qui contribuera ainsi, grâce au recours à la justice et au châtement des coupables, à rétablir et à maintenir la paix, de façon à décourager la répétition d’actes semblables à l’avenir”⁶⁸.

Cette mesure exceptionnelle n'a cependant pas été limitée au seul cas de l'ex-Yougoslavie. Fort de sa première expérience et à la demande des autorités rwandaises, le Conseil de sécurité crée en 1994 une seconde juridiction pénale *ad hoc*.

(ii) Le Tribunal pénal international pour le Rwanda (“T.P.I.R.”)

En avril 1994, à la suite de la disparition du Président rwandais, le Rwanda est également le théâtre du massacre de milliers de personnes. Les Etats ne réussissent cependant pas à mobiliser leurs troupes militaires pour mettre fin à ces actes. A la demande du gouvernement rwandais, le Conseil de sécurité accepte de créer, un tribunal. Ce dernier sera “chargé[e] uniquement de juger les personnes présumées responsables d’actes de génocide ou d’autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d’Etats voisins, entre le 1er janvier et le 31 décembre 1994”⁶⁹.

⁶⁶ Voir les déclarations du représentant du Brésil et de la Chine (S/PV. 3175, 22 février 1993). Ces deux Etats n'ont toutefois pas voté contre l'adoption de la résolution et la création du Tribunal.

⁶⁷ Voir les déclarations du représentant du Brésil (S/PV. 3175, 22 février 1993, p. 4/5 ; S/PV. 3217, 25 mai 1993, p. 36), de la France (S/PV. 3175, 22 février 1993, p. 9/10 ; S/PV. 3217, 25 mai 1993, p. 11), Etats-Unis (S/PV. 3175, 22 février 1993, p. 13), Venezuela (S/PV. 3175, 22 février 1993, p. 17 ; S/PV. 3217, 25 mai 1993, p. 7), Hongrie (S/PV. 3175, 22 février 1993, p. 21 ; S/PV. 3217, 25 mai 1993, p. 19/20), Russie (S/PV. 3217, 25 mai 1993, p. 17), Nouvelle-Zélande (S/PV. 3217, 25 mai 1993, p. 22), Japon (S/PV. 3217, 25 mai 1993, p. 23), Cap-Vert (S/PV. 3217, 25 mai 1993, p. 29/30), Pakistan (S/PV. 3217, 25 mai 1993, p. 31).

⁶⁸ Voir S/PV. 3175, 22 février 1993, p. 22 (nous soulignons).

⁶⁹ Voir C.S./Rés. 955 (1994), 8 novembre 1994, § 1 (Annexe, 2).

Le Statut du Tribunal, largement calqué sur celui du T.P.I.Y. tout en incluant des spécificités propres au conflit rwandais, est adopté le 8 novembre 1994⁷⁰. Tout comme lors de la création du T.P.I.Y., le Conseil de sécurité situe son action dans le cadre du rétablissement de la paix et de la sécurité internationales, estimant que face à une situation aussi exceptionnelle, il est à nouveau contraint d'adopter une mesure particulière⁷¹. Malgré la réticence et les interrogations de certains Etats quant au pouvoir du Conseil de créer un tel organe, la résolution est adoptée à une importante majorité. Seul le Rwanda votera contre son adoption considérant que certains aspects non pas été pris ou suffisamment pris en compte dans l'établissement de cette juridiction⁷². Il n'en conteste cependant pas le principe.

Dans les deux cas, il ne s'agit pas de créer une juridiction à compétence générale ou permanente⁷³ - c'est une tâche qui est laissée à l'Assemblée générale⁷⁴ - mais de répondre à l'horreur de massacres commis et à prouver que l'impunité des auteurs de tels crimes graves n'est plus la règle. Le Conseil de sécurité crée de la sorte, "à titre de mesure coercitive prise en vertu du Chapitre VII, un organe subsidiaire au sens de l'Article 29 de la Charte"⁷⁵.

Le recours au chapitre VII de la Charte permet non seulement d'adopter une mesure rapide mais en outre d'imposer la primauté des deux Tribunaux *ad hoc* en matière de poursuites ainsi que l'obligation des Etats à coopérer avec ceux-ci⁷⁶. Cette solution ne sera toutefois pas retenue dans le cas du Tribunal spécial pour la Sierra Leone (ci-après "Tribunal spécial").

⁷⁰ Voir C.S./Rés. 955 (1994), 8 novembre 1994.

⁷¹ Outre le texte de la résolution, voir également les déclarations faites par les membres du Conseil de sécurité à l'époque (S/PV. 3453, 8 novembre 1994), spécialement celles du représentant de la Russie (p. 2), de la France (pp. 3-4), de la République tchèque (p. 7), du Pakistan (p. 10) et de l'Espagne (p.12). Voir aussi le Rapport du Secrétaire général conformément au paragraphe 5 de la résolution 955 (1994) du Conseil de sécurité, 13 février 1995 (ci-après « Rapport sur la création du T.P.I.R. »), spéc. §§ 2-9.

⁷² Voir S/PV. 3453, 8 novembre 1994, p. 14 et suivantes.

⁷³ Voir le Rapport du Secrétaire général établi conformément au paragraphe 2 de la résolution 808 (1993) du Conseil de sécurité, 3 mai 1993, S/25704 (ci-après « Rapport sur la création du T.P.I.Y. »), spéc. § 12.

⁷⁴ *Ibid.*, § 12.

⁷⁵ Voir Rapport sur la création du T.P.I.Y., p. 10, § 28 (nous soulignons). Voir également en ce sens, M. MUBIALA, "Le tribunal international pour le Rwanda: vraie ou fausse copie du tribunal pénal international pour l'Ex-Yougoslavie", *R.G.D.I.P.*, 1995/4, pp. 939-942. Voir les décisions rendues par les deux tribunaux confirmant la légalité de leur création en vertu du chapitre VII : T.P.I.Y., Chambre d'appel, *Le Procureur c. Tadic*, 2 octobre 1995, IT-94-1-AR72, pp. 17-19, extraits des §§ 34-36 et 38 ; T.P.I.R., Chambre de première instance 2, *Le Procureur c. Kanyabashi*, 18 juin 1997, ICTR-96-15-T, *Recueil des ordonnances, décisions et arrêts du T.P.I.R./ICTR Report of Orders, Decisions and Judgements*, 1995-1997, Bruxelles, Bruylant, 2000, pp. 243-247, §§ 17-29.

⁷⁶ Voir C.S./Rés. 827 (1993), 25 mai 1993, § 4.

B. L'appui à la création du Tribunal spécial pour la Sierra Leone

Depuis 1991, la Sierra Leone est déchirée par un conflit sanglant. En août 2000, à la suite de la conclusion de l'Accord de Lomé⁷⁷, le Président sierra-léonais sollicite l'aide des Nations Unies en vue de l'établissement d'un tribunal spécial *“qui serait chargé de traduire en justice les membres du Front uni révolutionnaire (FRU) et leurs complices pour les crimes qu'ils ont commis contre le peuple sierra-léonais et pour avoir pris en otage des Casques bleus de l'ONU”*⁷⁸. Le gouvernement sierra-léonais estime que la justice est un facteur essentiel pour garantir un retour à la paix et la démocratie dans son pays : il espère de la sorte rassurer sa population et *“adresser un message sans équivoque aux auteurs des crimes, les enjoignant de ne pas continuer à commettre des atrocités en comptant sur l'impunité”*⁷⁹.

Le 14 août 2000, le Conseil de sécurité charge le Secrétaire général de *“négocier un accord avec le gouvernement sierra-léonais de vue de créer un tribunal spécial indépendant”*⁸⁰. À l'issue de ces négociations⁸¹ et de divers échanges entre le Secrétaire et le Conseil de sécurité⁸², le 16 janvier 2002, le Conseiller juridique des Nations Unies, Hans Corell, et le ministre de la justice sierra-léonais signent l'accord portant l'établissement du Tribunal spécial. Au contraire des tribunaux pénaux internationaux *ad hoc* (*supra*), le Tribunal spécial constitue :

- a. une juridiction pénale de caractère mixte ;
- b. créée par un accord conclu entre les Nations Unies et la Sierra Leone ;
- c. des liens étroits nouent cependant les trois juridictions en vue d'une plus grande cohérence au niveau international

(i) Une juridiction pénale de caractère mixte

Dès l'origine, le gouvernement sierra-léonais a souligné sa préférence pour un *“tribunal national doté d'une forte composante internationale dans tous ses organes (juges, procureurs, avocats de la défense et personnel d'appui), avec une assistance internationale au niveau du financement, du matériel et de*

⁷⁷ Voir Accord de paix conclu entre le gouvernement de Sierra Leone et le Front révolutionnaire uni de Sierra Leone du 7 juillet 1999 (ci-après « Accord », annexe, 3), *D.A.I.*, 1^{er} septembre 1999, n°17, p. 703 et s.

⁷⁸ Voir Lettre datée du 9 août 2000, adressée au Président du Conseil de sécurité par le Représentant permanent de la Sierra Leone auprès de l'Organisation des Nations Unies, S/2000/786, p. 2.

⁷⁹ Voir Lettre datée du 9 août 2000, adressée au Président du Conseil de sécurité par le Représentant permanent de la Sierra Leone auprès de l'Organisation des Nations Unies, S/2000/786, p. 4.

⁸⁰ Voir CS/ Rés. 1315 (2000), 14 août 2000, §1, adoptée à l'unanimité.

⁸¹ Voir Rapport du Secrétaire général sur l'établissement d'un Tribunal spécial pour la Sierra Leone (ci-après « Rapport sur la création du Tribunal spécial »), 4 octobre 2000, S/2000/915.

⁸² Voir Lettre datée du 22 décembre 2000, adressée au Secrétaire général par le Président du Conseil de sécurité, S/2000/1234 ; lettre datée du 12 janvier 2001, adressée au Président du Conseil de sécurité par le Secrétaire général, S/2001/40 ; lettre datée du 31 janvier 2001, adressée au Secrétaire général par le Président du Conseil de sécurité, S/2001/95.

*l'expertise juridique*⁸³. Conformément à l'article 5 de son Statut et aux recommandations du Conseil de sécurité⁸⁴, le Tribunal spécial est compétent pour connaître de certains crimes en vertu du droit sierra-léonais⁸⁵. Il est habilité à juger les personnes accusées d'avoir commis des sévices sexuels contre des fillettes de 13 à 14 ans ou des enlèvements de celles-ci, en application de certaines dispositions de la loi sierra-léonaise de 1926 relative à la prévention de la cruauté à l'encontre des enfants⁸⁶. Des poursuites pourront également être engagées envers les auteurs d'incendies criminels ou d'actes de destruction gratuite commis contre des maisons, édifices publics ou autres édifices, tel que prévu par la loi sierra-léonaise de 1861 relative aux dommages volontaires⁸⁷. Il convient de noter que, selon le rapport du Secrétaire général, la mise en accusation d'individus fondée sur des crimes de droit sierra-léonais apparaît comme subsidiaire, visant à couvrir des faits qui ne seraient éventuellement pas « assez » ou pas du tout incriminés en droit international⁸⁸.

Le Tribunal est en outre doté d'une composition mixte. Le gouvernement sierra-léonais se voit ainsi reconnaître la compétence de nommer le Procureur adjoint⁸⁹, un juge au sein de la Chambre de première instance⁹⁰ et deux au sein de la Chambre d'appel⁹¹. Il est en outre consulté pour la nomination des autres juges⁹² et du Procureur⁹³. Enfin, il est entendu qu'une partie du personnel auxiliaire du Tribunal sera sierra-léonaise⁹⁴.

(ii) Une juridiction pénale créée par un accord entre les Nations Unies et la Sierra Leone

Le Conseil de sécurité ne recourt pas cette fois-ci à ses pouvoirs en vertu du chapitre VII de la Charte pour créer une troisième juridiction pénale *ad hoc*. En appuyant la conclusion d'un accord, il répond avant tout à la demande des autorités sierra-léonaises, mais sans aucun doute tire aussi les leçons du passé. Certains Etats ont en effet perçu négativement l'établissement des deux précédents tribunaux *ad hoc*, allant jusqu'à les qualifier de "*justice des vainqueurs*". La coopération des Etats avec les T.P.I. n'a pas non plus toujours été des meilleures. L'adoption d'un accord permettra sans doute de mieux répondre aux attentes des autorités sierra-léonaises et de s'assurer de leur pleine volonté de coopérer avec le Tribunal.

⁸³ Voir Cinquième rapport du Secrétaire général sur la Mission des Nations Unies en Sierra Leone, 31 juillet 2000, S/2000/751, p. 2, §9.

⁸⁴ Voir C.S./Rés. 1315 (2000), 14 août 2000, § 2.

⁸⁵ Voir Statut du Tribunal spécial pour la Sierra Leone, art. 5.

⁸⁶ *Op. cit.*, art. 5 a).

⁸⁷ *Op. cit.*, art. 5 b).

⁸⁸ Voir Rapport du Secrétaire général sur la création du Tribunal spécial, p. 5, § 19.

⁸⁹ *Op. Cit.*, art. 3, § 2.

⁹⁰ *Op. cit.*, art. 2, § 2 a).

⁹¹ *Op. cit.*, art. 2, § 2 b).

⁹² *Op. cit.*, art.2, §3.

⁹³ *Op. cit.*, art. 3, §1.

⁹⁴ Voir Rapport du Secrétaire général, p. 3, § 9; Statut du Tribunal spécial pour la Sierra Leone, art. 12 (implicitement).

L'absence de recours au chapitre VII de la Charte a toutefois pour effet de limiter les pouvoirs du Tribunal dans la mesure où l'accord en question ne lie que la Sierra Leone et les Nations Unies. Contrairement au T.P.I.Y. et T.P.I.R., le Tribunal spécial ne peut pas exiger le dessaisissement d'une juridiction d'un Etat tiers en vue de poursuivre un individu, à l'exception des tribunaux sierra-léonais⁹⁵. Le Tribunal ne peut pas non plus contraindre des Etats à lui fournir leur assistance en la matière. On notera toutefois que, sans pour autant être contraints, les Etats sont fortement encouragés par le Conseil de sécurité à coopérer avec le Tribunal⁹⁶.

C. Les liens entre les Tribunaux pénaux internationaux pour l'ex-Yougoslavie et le Rwanda et le Tribunal spécial pour la Sierra Leone

Lors de l'étude du projet par le Secrétaire général, les deux Tribunaux pénaux *ad hoc* ont été consultés⁹⁷. Le Statut du Tribunal spécial traduit les rapports étroits qui le lient à ces deux Tribunaux. En premier lieu, le contenu des incriminations est largement tiré des Statuts des deux tribunaux *ad hoc*. Ensuite, le Tribunal appliquera le Règlement de procédure et de preuve du T.P.I.R. en vigueur au moment de sa création⁹⁸. De même, pour fixer les conditions de l'emprisonnement, le Tribunal aura recours à la grille générale des peines d'emprisonnement appliquées par le T.P.I.R.⁹⁹ et, pour l'exécution des peines, il pourra recourir à la liste des Etats qui ont déjà conclu avec les deux tribunaux *ad hoc* des accords en la matière¹⁰⁰. Le Statut du Tribunal spécial prévoit en outre un mécanisme d'uniformisation de la jurisprudence des trois instances. Les juges de la Chambre d'appel devront en effet se laisser "guider par les décisions de la Chambre d'appel des Tribunaux internationaux pour l'ex-Yougoslavie et le Rwanda"¹⁰¹.

Enfin, outre ces éléments clairement établis dans le Statut, il semble inévitable que les liens entre les trois tribunaux se renforceront de façon très diversifiée. Ainsi, les deux tribunaux *ad hoc* se sont déjà engagés à prolonger la coopération avec le Tribunal spécial et à lui faire bénéficier de leur expérience. La possibilité de former le personnel, de détacher temporairement des fonctionnaires expérimentés et de tenir régulièrement des réunions sont autant d'éléments qui ont été mis en avant¹⁰². Cette relation étroite entre les trois juridictions contribue sans aucun doute à un développement cohérent du droit pénal international.

La création du T.P.I.Y., T.P.I.R. et du Tribunal spécial pour la Sierra Leone ont très certainement renforcé la lutte contre l'impunité des auteurs de crimes internationaux les plus graves, mais aussi le rôle de pédagogie, de catharsis et de mémoire de ces juridictions. Il est également indéniable que l'établissement des

⁹⁵ Conformément à l'article 8 du Statut, le Tribunal se voit uniquement reconnaître une primauté de juridiction sur les tribunaux sierra-léonais.

⁹⁶ Voir notamment C.S./Rés. 1562 (2004), 17 septembre 2004, 9^{ème} considérant ; C.S./Rés. 1610 (2005), 30 juin 2005, 6^{ème} considérant.

⁹⁷ Voir Rapport du Secrétaire général sur la création du Tribunal spécial, p. 10, § 45.

⁹⁸ Voir Statut du Tribunal spécial pour la Sierra Leone, art. 14.

⁹⁹ *Op. Cit.*, art. 19.

¹⁰⁰ *Op. Cit.*, art. 22.

¹⁰¹ *Op. Cit.*, art. 20.

¹⁰² *Op. Cit.*, p. 13, §§ 64-65.

tribunaux pénaux *ad hoc* a relancé les négociations relatives à une cour pénale internationale qui finalement verra le jour en 1998.

On notera toutefois que le Conseil de sécurité n'a plus joué un rôle aussi important dans la création d'un tribunal spécial pour le Cambodge. C'est en effet l'Assemblée générale qui a supervisé et appuyé les négociations menées par le Secrétaire général et les autorités cambodgiennes en vue de l'établissement de cette juridiction¹⁰³.

Comme nous allons le constater dans les lignes qui suivent, outre la contribution du Conseil de sécurité à la création d'organes de poursuites sur le plan international, l'établissement des tribunaux pénaux internationaux *ad hoc* a également constitué un apport substantiel fondamental. Ils ont été l'occasion de réaffirmer ou préciser certaines incriminations de droit pénal international.

III. LA CONTRIBUTION DU CONSEIL DE SECURITE A LA DEFINITION D'INCRIMINATIONS EN DROIT PENAL INTERNATIONAL

Les compétences *ratione loci, temporis* et *materiae* de chacune des trois juridictions précitées sont étroitement liées aux conflits en cause¹⁰⁴. Les infractions prévues dans les trois Statuts se veulent en outre la transposition du droit pénal coutumier applicable au moment des faits. Lors de la création du T.P.I.Y., le Secrétaire général a ainsi souligné « qu'en confiant au tribunal international la tâche de juger les personnes présumées responsables de violations graves du droit international humanitaire, le Conseil de sécurité ne créerait pas ce droit ni ne prétendrait "*légiférer*" à cet égard. "*C'est le droit international humanitaire existant que le tribunal international aurait pour tâche d'appliquer*"¹⁰⁵. Le Secrétaire général a veillé à appliquer ces mêmes principes lors de la création successive du T.P.I.R. et du Tribunal spécial pour la Sierra Leone¹⁰⁶.

Les incriminations des trois Statuts ont de la sorte été définies en s'inspirant en substance d'infractions de droit pénal international positif à l'époque des faits considérés. Le Statut du T.P.I.Y. contient des références au texte des Conventions de Genève du 12 août 1949 pour la protection des victimes de la guerre et à la Convention de La Haye (IV) concernant les lois et coutumes de la guerre sur terre et aux Règles y annexées du 18 octobre 1907 ; à la Convention pour la prévention et la répression du crime de génocide du 9 décembre 1948 et au statut du Tribunal militaire international du 8 août 1945 ainsi qu'à la loi No 10 du "*Control Council for Germany*". Le Statut du Tribunal pénal international pour le Rwanda s'inspire également du droit pénal international coutumier ainsi que du texte du Statut du T.P.I.Y. Quant au Statut du

¹⁰³ Voir le rapport du Secrétaire général sur le procès des Khmers rouges, 31 mars 2003, A/57/769.

¹⁰⁴ Voir les Statuts des trois Tribunaux ci-annexés.

¹⁰⁵ Voir le rapport du Secrétaire général établi conformément au paragraphe 2 de la résolution 808 (1993) du Conseil de sécurité, 3 mai 1993, S/25704, § 29 (nous soulignons).

¹⁰⁶ Dans son rapport sur la création du Tribunal spécial pour la Sierra Leone (p. 3, § 12), le Secrétaire général se fonde sur les principes de légalité, de *nullum crimen sine lege* et de non rétroactivité de la loi pénale, en concluant que les crimes énumérés sont ceux « considérés comme ayant revêtu le caractère de crime au regard du droit international coutumier au moment où ils auraient été commis ».

Tribunal spécial pour la Sierra Leone, il reproduit largement des infractions contenues dans les Statuts du T.P.I.R. et de la Cour pénale internationale. Il incrimine en outre les attaques délibérées contre des civils ainsi que les attaques délibérées contre le personnel et le matériel des missions d'assistance humanitaire ou de maintien de la paix, en se référant au droit pénal international existant, et en particulier à « la distinction la plus fondamentale établie en droit international humanitaire entre les civils et les combattants et l'interdiction absolue de diriger des attaques contre les premiers »¹⁰⁷, au Statut de la Cour pénale internationale¹⁰⁸ et à la Convention sur la sécurité du personnel des Nations Unies et du personnel associé¹⁰⁹.

Force est cependant de constater que certaines dispositions de ces trois juridictions peuvent apparaître comme innovatrices par rapport au droit pénal en vigueur. En agissant de la sorte, le Conseil de sécurité a ainsi prôné, selon les cas, une interprétation extensive (2.1.) ou restrictive (2.2.) du droit pénal international existant.

A. Interprétation extensive du droit pénal international existant

Dans certains cas, l'action du Conseil de sécurité contribue à montrer l'existence d'une pratique étatique affirmant le caractère coutumier de certaines infractions ou précisant leur contenu.

Ainsi, la définition du crime contre l'humanité contenue dans les Statuts du T.P.I.Y. et du T.P.I.R. incrimine de nouveaux faits (l'emprisonnement, la torture et le viol) par rapport à la seule définition coutumièrement admise jusqu'alors, celle du Statut du Tribunal militaire international de Nuremberg (ci-après T.M.I. de Nuremberg)¹¹⁰. L'incorporation explicite de ces faits n'en modifie cependant pas substantiellement cette définition. Le T.P.I.R. a ainsi estimé que la liste des crimes contre l'humanité est exemplative, et non pas exhaustive, de sorte qu'elle pourrait y inclure des faits d'emprisonnement, de torture ou de viol¹¹¹.

L'article 4 du Statut du T.P.I.R. qui incrimine les "*violations graves de l'article 3 commun aux Conventions de Genève du 12 août 1949 pour la protection des victimes en temps de guerre, et du Protocole additionnel II auxdites Conventions du 8 juin 1977*"¹¹² pourrait paraître plus progressiste. Les textes des

¹⁰⁷ Voir le rapport du Secrétaire général sur la création du Tribunal spécial, p. 4, §16.

¹⁰⁸ Voir le statut de la Cour pénale internationale, art. 8 e) i), qui consacre une règle coutumièrement admise.

¹⁰⁹ Voir la convention des Nations Unies sur la sécurité du personnel des Nations Unies et du personnel associé du 9 décembre 1994, art. 2 et 9, §1.

¹¹⁰ Voir le statut du T.M.I. de Nuremberg, art. 6 : "*c) Les crimes contre l'humanité : c'est-à-dire l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre, ou bien les persécutions pour des motifs politiques, raciaux ou religieux lorsque ces actes ou persécutions, qu'ils aient constitué ou non une violation du droit interne du pays où ils ont été perpétrés, ont été commis à la suite de tout crime rentrant dans la compétence du Tribunal, ou en liaison avec ce crime*". Voir à ce propos, les considérations émises par le T.P.I.Y., , spéc. §§ 619 et 621-622.

¹¹¹ Voir le T.P.I.R., Chambre de première instance 1, *Le Procureur c. Akayesu*, 2 septembre 1998, ICTR-96-4-T, *Op. Cit.*, p. 337, § 583.

¹¹² Voir le statut du T.P.I.R., art. 4.

Conventions de Genève n'incriminent en effet que les « infractions graves »¹¹³. Selon certains, les violations de l'article 3 commun ne sont incriminées ni par les Conventions de Genève ni le Protocole additionnel II. Ils ne pourraient donc pas donner lieu à des poursuites pénales¹¹⁴. À l'origine, la majorité des Etats auraient refusé toute idée de crimes de guerre dans le cadre d'un conflit armé non international¹¹⁵.

On notera que les tribunaux pénaux internationaux *ad hoc* ont traité de cette question. En vertu du principe *nullum crimen sine lege*, ces juridictions doivent veiller à ne pas poursuivre ni condamner un individu pour des faits qui ne constituaient pas un crime, au moment de leur commission¹¹⁶. Dès 1995, la Chambre d'appel du T.P.I.Y. conclut que "*le droit international coutumier impose une responsabilité pénale pour les violations graves de l'article 3 commun, complété par d'autres principes et règles générales sur la protection des victimes des conflits armés internes, et pour les atteintes à certains principes et règles fondamentales relatives aux moyens et méthodes de combat dans les conflits civils*"¹¹⁷. Le tribunal parvient à cette conclusion en se fondant principalement sur la pratique de certains Etats qui, selon lui, traduit l'intention des Etats de "*criminaliser des violations graves des règles et principes coutumiers relatifs aux conflits internes*"¹¹⁸. Le T.P.I.Y. se réfère ainsi aux manuels militaires allemand, néo-zélandais, américain et britannique, aux codes pénaux de la République socialiste fédérative de Yougoslavie et de Bosnie-Herzégovine, à la loi belge du 16 juin 1993, ainsi qu'à certaines résolutions du Conseil de sécurité qui traduirait, selon le tribunal, une *opinio juris* en la matière¹¹⁹. Quant au T.P.I.R., tantôt il conclut également au caractère coutumier de l'incrimination visée à l'article 4 de son Statut, en s'appuyant principalement sur la jurisprudence du T.P.I.Y., tantôt il estime que la question n'est pas pertinente en l'espèce dans la mesure où le Rwanda était partie aux Conventions de Genève et au Protocole additionnel II, au moment des faits, tantôt

¹¹³ Voir Art. 49/I, 50/II, 129/III, 146/IV.

¹¹⁴ Voir Condorelli, L., *La Cour pénale internationale: un pas de géant (pourvu qu'il soit accompli...)*, R.G.D.I.P., 1999/1, p. 11 ; Kirgis JR., L., *The Security Council's First Fifty Years*, A.J.I.L., 1995, vol. 89, n° 3, p. 524 ; Zemanek, K., *The Legal Foundations of the International System. General Course on Public International Law*, R.C.A.D.I., 1997, t. 266, p. 248. ; voir aussi Rapport du Secrétaire général sur la création du T.P.I.R., § 12 (nous soulignons) et voyez cependant la précision apportée à la note de bas de page 8 en relation avec ce passage où il note : « *Although the question of whether common article 3 entails the individual responsibility of the perpetrator of the crime is still debatable, some of the crimes included therein, when committed against the civilian population, also constitute crimes against humanity and as such are customarily recognized as entailing the criminal responsibility of the individual* » (nous soulignons).

¹¹⁵ Voir Condorelli, L., *Op. Cit.*, p. 11.

¹¹⁶ Voir, notamment, la décision du T.P.I.R. qui rappelle : « *En faisant application de l'Article 4 du Statut, la Chambre doit s'assurer que le principe nullum crimen sine lege n'est pas violé* » (T.P.I.R., Chambre de première instance 1, Le Procureur c. Rutaganda, 26 décembre 1999, ICTR-96-3-T, § 86).

¹¹⁷ T.P.I.Y., Chambre d'appel, Le Procureur c. Tadic, 2 octobre 1995, IT-94-1-AR72, p. 73, § 134. Voir également, T.P.I.Y., Chambre de première instance 2 quater, Le Procureur c. Delalic, Mucic, Delic et Landzo, 16 novembre 1998, IT-96-21-T, pp. 83 et 84; T.P.I.Y., Chambre de première instance 1, Le Procureur c. Blaskic, 3 mars 2000, IT-95-14-T, spéc. §§ 164-166 ; T.P.I.Y., Chambre d'appel, Le Procureur c. Tadic, 2 octobre 1995, opinion dissidente du juge G. Abi-Saab, IT-94-1-AR72, pp. 4 et s. ; T.P.I.Y., Chambre de première instance 1, Le Procureur c. Aleksovski, 25 juin 1999, opinion dissidente du juge A. Rodrigues, IT-95-14/1-T, pp. 19 et s.

¹¹⁸ T.P.I.Y., Chambre d'appel, *Op. Cit.*, p. 73, § 130.

¹¹⁹ *Ibid.*, §§ 131-133. Le T.P.I.Y. se réfère à deux résolutions adoptées par le Conseil de sécurité sur la situation en Somalie (C.S./Rés. 794 (1992), 3 décembre 1992 et C.S./Rés. 814 (1993), 26 mars 1993).

il indique que les crimes en question constituaient également des crimes au regard du droit rwandais, le principe *nullum crimen sine lege* étant ainsi respecté¹²⁰.

L'adoption du Statut du Tribunal spécial pour la Sierra Leone confirme le caractère coutumier de l'incrimination. Dans son rapport, le Secrétaire général indique que les violations graves de l'article 3 commun aux Conventions de Genève de 1949 et de l'article 4 du Protocole additionnel II auxdites Conventions de 1977, commises dans le cadre d'un conflit armé non international, engagent la responsabilité pénale individuelle des auteurs de tels actes¹²¹. Il estime qu'"il s'agit ici d'un acquis qui ne saurait être remis en discussion"¹²².

B. Interprétation restrictive du droit pénal international existant

Alors que le Conseil de sécurité a parfois prôné une interprétation extensive du droit pénal existant, il a également contribué à faire adopter des définitions restrictives de certaines infractions.

Ainsi, on pourrait s'étonner des divergences de définitions du crime contre l'humanité entre les Statuts des trois juridictions *ad hoc* et celle du Statut du T.M.I. de Nuremberg. Le Statut du T.P.I.R. introduit la condition d'une « attaque généralisée ou systématique » dans le cadre de laquelle le crime doit avoir été commis¹²³, alors que tant le Statut du T.M.I. de Nuremberg que celui du T.P.I.Y. exigent seulement que les actes soient dirigés contre une population civile. Ce même Statut prévoit en outre que les crimes doivent être commis contre une population civile "en raison de son appartenance nationale, politique, ethnique, raciale ou religieuse", tandis que le Statut du T.M.I. de Nuremberg et celui du T.P.I.Y. posent cette condition restrictive uniquement en ce qui concerne les persécutions. Quant au Statut du T.P.I.Y., il prévoit la poursuite des auteurs de crimes contre l'humanité uniquement lorsqu'ils sont commis au cours d'un conflit armé¹²⁴.

¹²⁰ Voir notamment T.P.I.R., Chambre de première instance 1, *Le Procureur c. Akayesu*, 2 septembre 1998, ICTR-96-4-T, *Op. Cit.*, pp. 351-353, §§ 611-617 ; T.P.I.R., Chambre de première instance 1, *Le Procureur c. Kayishema et Ruzindana*, ICTR-95-1-T, 21 mai 1999, § 156 ; T.P.I.R., Chambre de première instance 1, *Le Procureur c. Rutaganda*, 26 décembre 1999, ICTR-96-3-T, §§ 88-90 ; T.P.I.R., Chambre de première instance 1, *Le Procureur c. Musema*, 27 janvier 2000, ICTR-96-13, spéc. §§ 236-243.

¹²¹ Voir le rapport du Secrétaire général, 4 octobre 2000, S/2000/915, p. 4, § 14.

¹²² Voir Condorelli, L., *op.cit.*, p. 12.

¹²³ Voir le statut du T.P.I.R., art. 3 : « *Le Tribunal international pour le Rwanda est habilité à juger les personnes présumées responsables des crimes suivants lorsqu'ils ont été commis dans le cadre d'une attaque généralisée et systématique dirigée contre une population civile quelle qu'elle soit, en raison de son appartenance nationale, politique, ethnique, raciale ou religieuse : 1. Assassinat; 2. Extermination; 3. Réduction en esclavage; 4. Expulsion; 5. Emprisonnement; 6. Torture; 7. Viol; 8. Persécutions pour des raisons politiques, raciales et religieuses; 9. Autres actes inhumains* ».

Comp. avec la version anglaise du Statut « *widespread or systematic attack* » (nous soulignons) et l'interprétation de cette disposition par le Tribunal.

¹²⁴ Statut du T.P.I.Y., art. 5 : « *Le Tribunal international est habilité à juger les personnes présumées responsables des crimes suivants lorsqu'ils ont été commis au cours d'un conflit armé, de caractère international ou interne, et dirigés contre une population civile quelle qu'elle soit : 1. Assassinat ; 2. Extermination ; 3. Réduction en esclavage ; 4. Expulsion ; 5. Emprisonnement ; 6. Torture ; 7. Viol ; 8. Persécutions pour des raisons politiques, raciales et religieuses ; 9. Autres actes inhumains* ».

La jurisprudence a cependant apporté quelques précisions quant à ces divergences de définition. Ainsi, il est admis l'exigence d'une « attaque généralisée ou systématique » ne diffère pas de la définition admise jusqu'alors du crime contre l'humanité et recouvre en réalité les termes « actes dirigés contre une population civile ». Le T.P.I.Y. note à cet égard :

*"Le caractère "massif ou systématique" de l'incrimination ne figure pas dans les dispositions de l'article 5 du Statut, celles-ci ne faisant état que d'actes "dirigés contre une population civile quelle qu'elle soit". Il convient, toutefois, de noter que ces mots "dirigés contre une population civile quelle qu'elle soit", ainsi que certaines sous-qualifications énumérées dans le texte du Statut impliquent un élément de masse ou d'organisation, que ce soit quant aux actes ou quant aux victimes"*¹²⁵.

En revanche, la condition d'un conflit armé ou de celle de motifs discriminatoires apparaissent imposer une définition plus restrictive par rapport au droit de Nuremberg. Ainsi, le T.P.I.Y. a jugé que :

*"L'absence d'un lien entre les crimes contre l'humanité et un conflit armé international est maintenant une règle établie du droit international coutumier. [...] Ainsi, en exigeant que les crimes contre l'humanité soient commis dans un conflit armé interne ou international, le Conseil de sécurité a peut-être défini le crime de l'article 5 de façon plus étroite que nécessaire aux termes du droit international coutumier"*¹²⁶.

Dans son commentaire sur le futur article 5 du Statut du T.P.I.Y., le Secrétaire général notait déjà :

*"Les crimes contre l'humanité sont dirigés contre une population civile quelle qu'elle soit et sont interdits qu'ils aient ou non été commis au cours d'un conflit armé de caractère international ou de caractère interne"*¹²⁷.

¹²⁵ Voir T.P.I.Y., Chambre de première instance 1, *Le Procureur c. Blaskic*, 3 mars 2000, IT-95-14-T, § 202. Voir également T.P.I.Y., Chambre de première instance 2, *Le Procureur c. Tadic*, 7 mai 1999, IT-94-1-T, § 644. Voir aussi les déclarations interprétatives du Statut faites par les représentants de la France et des Etats-Unis, lors du débat relatif à l'adoption de la résolution 827 (1993), S/PV. 3217, 23 mai 1993, pp. 11 et 16. La France a réaffirmé cette interprétation lors du débat relatif à l'adoption du Statut du T.P.I.R., S/PV. 3453, 8 novembre 1994, p. 4.

¹²⁶ Voir T.P.I.Y., Chambre d'Appel, *Le Procureur c. Tadic*, 2 octobre 1995, IT-94-1-AR72, § 141 (nous soulignons). Voir également T.P.I.Y., Chambre de première instance 2, *Le Procureur c. Kupreskic*, 14 janvier 2000, IT-95-16-T, § 545 ; T.P.I.Y., Chambre de première instance 2, *Le Procureur c. Tadic*, 7 mai 1999, IT-94-1-T, § 618.

¹²⁷ Voir Rapport du Secrétaire général sur la création du T.P.I.Y., § 47 (nous soulignons).

La majorité de la doctrine se prononce également en ce sens, en considérant que, progressivement, après l'adoption du Statut de Nuremberg, il a été admis que les crimes contre l'humanité pouvaient être commis tant dans le cadre d'un conflit armé qu'en temps de paix¹²⁸. Le T.P.I.Y., tout en admettant qu'il ne s'agit pas d'une exigence du droit international coutumier, impose toutefois, en raison des termes de son Statut, la démonstration de l'existence d'un lien entre le crime contre l'humanité et le conflit armé, appliquant de la sorte une définition restrictive du crime contre l'humanité¹²⁹.

D'un autre côté, si le Statut du T.P.I.R. n'exige nullement que les crimes contre l'humanité soient commis dans le cadre d'un conflit armé, il précise en revanche que ces crimes doivent avoir été dirigés contre une population civile "en raison de son appartenance nationale, politique, ethnique, raciale ou religieuse". Il n'est pas certain que cette exigence cadre avec la définition admise jusqu'alors du crime contre l'humanité. Si le Statut du TMI de Nuremberg se réfère en effet à des motifs discriminatoires, on pourrait se demander si ce n'est pas seulement quant aux persécutions. L'article 6 c) de ce Statut vise en effet :

"c) Les crimes contre l'humanité : c'est-à-dire l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre, ou bien les persécutions pour des motifs politiques, raciaux ou religieux lorsque ces actes ou persécutions, qu'ils aient constitué ou non une violation du droit interne du pays où ils ont été perpétrés, ont été commis à la suite de tout crime rentrant dans la compétence du Tribunal, ou en liaison avec ce crime". [Nous soulignons.]

La conjonction de coordination « ou bien » semble opérer une distinction entre une série d'actes pour lesquels aucune intention discriminatoire n'est exigée, d'une part, et les persécutions, de l'autre¹³⁰. Le reste de la phrase s'inscrit en ce sens puisque la disposition fait référence, d'un côté, à "ces actes" ("l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre") et, de l'autre, aux persécutions. Tant le T.P.I.Y. que le T.P.I.R. ont souligné que ces motifs discriminatoires ne sont nullement exigés par le droit international coutumier pour l'ensemble des crimes contre l'humanité, mais uniquement pour les actes de persécutions¹³¹. Comme le conclut, le Tribunal pénal international pour le Rwanda :

¹²⁸ Voir Cassese, A., *Crimes against Humanity*, in Cassese, A., Gaeta, P., Jones, J. R.W.D. (dir.), *The Rome Statute of the International Criminal Court : A Commentary*, Oxford: Oxford University Press, 2002, p. 356.

¹²⁹ Voir, par exemple, T.P.I.Y., Chambre de première instance 2, *Le Procureur c. Kupreskic*, 14 janvier 2000, IT-95-16-T, §§ 545-546 ; T.P.I.Y., Chambre de première instance 2, *Le Procureur c. Tadic*, 7 mai 1999, IT-94-1-T, §§ 559-560.

¹³⁰ Voir Bettati, M., *Le crime contre l'humanité*, in Ascencio, H., Decaux, O. E., Pellet, A., *Droit international pénal*, Paris : Pedone, 2000, p. 306 ; Cassese, A., *Crimes against Humanity*, *Op. Cit.*, p. 354.

¹³¹ Voir, par exemple, T.P.I.R., Chambre de première instance 1, *Le Procureur c. Kayishema et Ruzindana*, ICTR-95-1-T, 21 mai 1999, § 130 ; T.P.I.Y., Chambre d'appel, *Le Procureur c. Tadic*, 15 juillet 1999, IT-94-1-A, §§ 287-305 ; T.P.I.R., Chambre de première instance 1, *Le Procureur c. Rutaganda*, 26 décembre 1999, ICTR-96-3-T, § 75.

*"Le Conseil de sécurité de l'O.N.U. adopte une définition plus étroite que celle du droit international coutumier en exigeant que les crimes contre l'humanité visés dans le Statut du Tribunal de céans aient été commis dans le cadre d'une attaque de caractère discriminatoire"*¹³².

Toutefois, estimant que sa compétence a été définie par le Conseil de sécurité dans son Statut, le T.P.I.R. exige l'établissement de motifs fondés sur l'appartenance nationale, politique, ethnique, raciale ou religieuse de la population civile visée dans le cadre des crimes contre l'humanité dont il est saisi¹³³. Tout comme le T.P.I.Y. qui exige l'établissement d'un lien entre le crime contre l'humanité et le conflit armé, le T.P.I.R., en exigeant des motifs discriminatoires applique une définition restrictive du crime contre l'humanité au regard du droit pénal coutumier en vigueur au moment des faits.

Le Conseil de sécurité adopte aussi une position restrictive lors de l'examen du Statut du Tribunal spécial, pour la Sierra Leone quant à la question de la conscription et de l'enrôlement des enfants de moins de 15 ans dans des groupes armés. Dans son rapport, le Secrétaire général reconnaît que l'interdiction de recruter des enfants de moins de 15 ans est établie en droit coutumier, il estime néanmoins que l'incrimination d'un tel fait n'est pas encore clairement déterminée en droit international et conteste notamment la définition donnée dans le Statut de la Cour pénale internationale (ci-après "*C.P.I.*") sur ce point¹³⁴. Il propose une incrimination plus large pour le Statut du Tribunal spécial : constituerait une violation grave du droit international humanitaire l'enlèvement et le recrutement forcés des enfants nonobstant toute formalité administrative¹³⁵.

Si l'interdiction de recruter des enfants de moins de 15 ans est établie dans le Protocole additionnel II¹³⁶ et confirmée par la Convention des Nations Unies sur les droits de l'enfant¹³⁷, son incrimination n'était pas

¹³² Voir T.P.I.R., Chambre de première instance 1, *Le Procureur c. Bagilishema*, 7 juin 2001, ICTR-95-1A-T, § 74 (nous soulignons). Voir également A. CASSESE, « Crimes against Humanity », *Op. Cit.*, p. 365.

¹³³ Voir T.P.I.R., Chambre de première instance 1, *Le Procureur c. Musema*, 27 janvier 2000, ICTR-96-13-T, § 211 ; T.P.I.R., Chambre de première instance 1, *Le Procureur c. Rutaganda*, 6 décembre 1999, ICTR-96-3-T, § 76.

¹³⁴ Voir le rapport du Secrétaire général sur la création du Tribunal spécial, pp. 4-5, §§17-18.

¹³⁵ Voir article 4 du Statut, tel que proposé par le Secrétaire général et avant modification par le Conseil de sécurité : "*Enlèvement et enrôlement forcé d'enfants âgés de moins de 15 ans dans des forces ou groupes armés en vue de les faire participer activement aux hostilités*".

¹³⁶ Protocole additionnel II de 1977 aux Conventions de Genève de 1949, art. 3, c) : « *les enfants de moins de quinze ans ne devront pas être recrutés dans les forces ou groupes armés, ni autorisés à prendre part aux hostilités* ».

¹³⁷ Voir la Convention des Nations Unies sur les droits de l'enfant du 20 novembre 1989, art. 38 : « [...] 2. *Les Etats parties prennent toutes les mesures possibles dans la pratique pour veiller à ce que les personnes n'ayant pas atteint l'âge de quinze ans ne participent pas directement aux hostilités.* 3. *Les Etats parties s'abstiennent d'enrôler dans leurs forces armées toute personne n'ayant pas atteint l'âge de quinze ans.* [...] ».

clairement établie en droit international jusqu'en 1998¹³⁸. Ce point fit l'objet d'âpres discussions et oppositions, certains Etats n'étant guère favorables à une extension de la protection des enfants en cas de conflit armé¹³⁹. À l'issue d'intenses négociations, ils s'accordèrent pour considérer comme constitutif de crime de guerre, en cas de conflit armé non international, « le fait de procéder à la conscription ou à l'enrôlement d'enfants âgés de moins de 15 ans dans les forces armées ou de les faire participer activement aux hostilités »¹⁴⁰. L'incrimination suppose donc une action de la part des forces armées pour enrôler les enfants : un acte administratif tel que l'inscription des noms sur une liste ou tout autre acte impliquant la reconnaissance officielle de l'enfant en tant que membre des forces armées¹⁴¹.

Si l'on peut comprendre les réticences du Secrétaire général à considérer cette disposition comme relevant du droit coutumier au regard des négociations de Rome, le Conseil de sécurité a dissipé tout doute sur la question. Ce dernier a en effet remplacé l'article 4 c) du Statut du Tribunal spécial, tel que proposé par le Secrétaire, par la formulation – plus restrictive – de l'article 8 e) vii) du Statut de la Cour pénale internationale. Le Conseil a précisé qu'il apportait cet ajustement "*pour que celui-ci soit conforme à l'état du droit en vigueur en 1996 et tel qu'accepté actuellement par la communauté internationale*"¹⁴².

IV. CONCLUSION

La création de juridictions pénales internationales contribue non seulement à lutter contre l'impunité des auteurs d'infractions graves du droit international mais aussi à renforcer les règles de droit pénal international. Il est indéniable que la création du T.P.I.Y. et ensuite du T.P.I.R. ont fortement contribué à relancer les négociations relatives à la création d'une cour pénale internationale et à l'adoption de son statut.

Les définitions des infractions contenues dans les trois Statuts ont également constitué des avancées significatives sur le plan du droit pénal international. On pourrait bien sûr s'interroger quant à la compétence du Conseil de sécurité à affirmer et à imposer l'existence d'une coutume internationale "*au nom de la communauté internationale*"¹⁴³. Il faut cependant admettre que son action en la matière a constitué un "*pas de géant*" - pour reprendre les mots du Professeur Condorelli – en droit pénal international.

¹³⁸ Voir Holmes, J. T., *The Protection of Children's Rights in the Statute of the International Criminal Court*, in Politi, Nesi, G., (éds.), *The Rome Statute of the International Criminal Court - A Challenge to Impunity*, M. Aldershot/Burlington USA, Ashgate/Dartmouth Publishing, 2001, p. 120.

¹³⁹ *Ibidem*

¹⁴⁰ Voir le statut de la CPI, art. 8 e) vii).

¹⁴¹ En ce sens, voir Holmes, J.T., *Op. Cit.*, p. 120.

¹⁴² Voir la lettre datée du 22 décembre 2000, adressée au Secrétaire général par le Président du Conseil de sécurité, S/2000/1234, p.2.

¹⁴³ Voir à propos le Statut du Tribunal pour la Sierra Leone *supra* (Lettre datée du 22 décembre 2000, adressée au Secrétaire général par le Président du Conseil de sécurité, S/2000/1234, p.2).

INTERPRETATION OF INTERNATIONAL HUMANITARIAN LAW BY THE UN SECURITY COUNCIL

Prof. Marco SASSOLI
University of Geneva

International law is to a large extent still a self-applied legal order in which the main subjects, States, are the main addressees, legislators and enforcers of the law. This blurs the distinction between interpretation, application, change and simple disrespect even more than in general legal theory. It is therefore impossible to deal only with the interpretation of International Humanitarian Law (IHL) by the Security Council. I shall nevertheless exclude from my remarks the very important role of the Security Council in enforcing IHL,¹⁴⁴ a role which is probably the most beneficial one in relation with IHL, as the Security Council is still, at least in our field, the only body which may take binding decisions and enforce them. Nor shall I deal with the controversial question of whether the Security Council may legislate, i.e. whether it may create by its resolutions new general rules applicable to all future situations.¹⁴⁵ Apart from the possibility that State practice in the Security Council may contribute to customary law, I do not think that the Council has such a legislative function.

As mentioned, it is often mainly a question of perspective whether in a given case the Security Council faithfully applies IHL, whether it interprets it more or less innovatively, or whether it or its member States contribute to the formation of a new rule of IHL.¹⁴⁶ In addition, Art. 103 of the UN Charter is generally understood as providing the Security Council the option of simply not respecting IHL (or obliging States not to apply it) in a given case without, I would argue, thereby contributing to a change of the rule. I am conscious that this is controversial insofar as most rules of IHL form part of *ius cogens*,¹⁴⁷ which many

¹⁴⁴ See Schwebel, S. M., *The Roles of the Security Council and the International Court of Justice in the Application of International Humanitarian Law*, 27 New York Univ. J. of Int'l Law and Politics, 1995, p. 731; Bourloyannis, C., *The Security Council of the United Nations and the Implementation of International Humanitarian Law*, 20 Denver J. Int'l Law and Policy, 1992, p. 335; Kooijmans, P. H., *The Security Council and Non-state Entities as Parties to Conflicts*, in Wellens, K., ed., *International Law: Theory and Practice: Essays in Honour of Eric Suy*, The Hague, Boston and Cambridge MA: M. Nijhoff Publishers, 1998, p. 339; Boisson de Chazournes, L., *Les résolutions des organes des Nations Unies, et en particulier celles du Conseil de sécurité, en tant que source de droit international humanitaire*, in Condorelli, L., La Rosa, A.M., Scherrer, S., (eds.), *The United Nations and International Humanitarian Law: Actes du Colloque International, À l'occasion du cinquantième anniversaire de l'ONU (Genève – 19, 20 et 21 octobre 1995)*, Paris: Pedone, 1996, pp. 149 at 164-173.

¹⁴⁵ See Talmon, S., *The Security Council as World Legislature*, 99 AJIL 175, 2005; Szasz, P. C., *The Security Council Starts Legislating*, 96 AJIL 901, 2002; see also Alvarez, J., *Hegemonic International Law Revisited*, 97 AJIL 873, 2003, p. 874.

¹⁴⁶ See the role of the Security Council in the development of IHL Boisson de Chazournes, L., *Op. Cit.*, *supra* note 1, pp. 149-164.

¹⁴⁷ See the International Law Commission in its Commentary to its Draft Articles on Responsibility of States for internationally wrongful acts, United Nations, International Law Commission, *Report on the work of its fifty-third session (23 April - 1 June and 2 July - 10 August 2001)*, General Assembly, Official Records,

consider may not be overridden by Art. 103.¹⁴⁸ In practice, however, it is impossible to determine that a certain resolution violates *ius cogens*. Who, in any case, could make such a determination and what would be the consequences of such a finding?¹⁴⁹

What adds to these difficulties, is that the Security Council understandably never clarifies whether, by a given resolution, it applies existing international law, it takes a purely political decision, it derogates from existing international law by virtue of Article 103 of the Charter, or it creates new rules.

As we all know, the Security Council has some handicaps as an interpreter of IHL. Some are due to political realities, some inherent in its role under the UN Charter.

All law has to be applied and interpreted impartially and according to objective criteria if it does not want to lose its credibility, normative character and foreseeability. For IHL, it is even more important that it is applied to both sides of a conflict even-handedly, and independently of any consideration pertaining to *ius ad bellum*.¹⁵⁰ The main role of the Security Council under the Charter is however to enforce *ius ad bellum*, that is, to maintain international peace and security. In case of an international armed conflict, this often implies the necessity to take sanctions against one of the States involved, while IHL equally applies to both. In case of non-international armed conflict, it is also conceptually difficult for the Security Council to be neutral between the government of one of the UN member States and a rebel movement. Political reality adds to those conceptual weaknesses of the Security Council as an applier and interpreter of IHL. The veto power of permanent members means that IHL can often be applied only against the others. The decision-making process is non-transparent and certainly not governed by anything like the rule of law. IHL is not applied even-handedly, which weakens its credibility (or at least the credibility of the Security Council as its enforcer) even where it is applied correctly. Who is able to explain what objective criteria lead the Security Council to be rightly concerned (unfortunately often more in words than in deeds) about violations of IHL in

Fifty-fifth Session, Supplement n. 10 (A/56/10), <http://www.un.org/law/ilc/reports/2001/2001report.htm>, p. 284 (para. 5 to Art. 40), referring to *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, July 8, 1996, ICJ Reports (1996) 226 at 257, para. 79. See also *Report of the International Law Commission on the work of its thirty-second session in Yearbook of the International Law Commission 1980*, vol. II, Part Two, p. 46, para. 28, and *Prosecutor v. Zoran Kupreskic and others*, Case No. IT-95-16-T, Judgment, (ICTY Trial Chamber, 14 January 2000) at para. 520.

¹⁴⁸ See the Separate Opinion of Judge Lauterpacht in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Provisional Measures, Order of 13 September 1993*, ICJ Reports (1993) 407 at 440-441, paras 100-102. See also Aleksander Orakhelashvili, "The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions" 16 *European J. Int'l Law* (2005) 59 at 63.

¹⁴⁹ See however the well reasoned thoughts of Orakhelashvili, *supra* note 5 at 78-88.

¹⁵⁰ On the need to separate *ius ad bellum* from *ius in bello*, see *Protocol [No. I] Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S. 3 – 434 at preambular para. 5; the US Military Tribunal at Nuremberg in the case of *Wilhelm List et al.* 8 July 1947 – 19 February 1948, *Law Reports of Trials of War Criminals*, vol. VIII (The United Nations War Crimes Commission) at 34-76 (see for this and other references Marco Sassòli & Antoine Bouvier, *How Does Law Protect in War?* (2nd ed., Geneva: ICRC, 2006) at 102-107, 1029, 1045-1046); Greenwood, C., *The Relationship Between jus ad bellum and jus in bello*, 9 *Review of Int'l Studies*, 1983, p. 221; Bugnion, F., *Guerre juste, guerre d'agression et droit international humanitaire*, 847 *Int'l Review Red Cross*, 2002, p. 523; Meyrowitz, H., *Le principe de l'égalité des belligérants devant le droit de la guerre*, Paris: Pedone, 1970.

African civil wars, but never to deal in one single resolution with the terrible carnage in Chechnya? Such selectivity leads too many people and governments to the wrong conclusion that IHL is just another means used by the powerful against the weak. This in turn is abused as an argument to justify non-compliance even with resolutions that interpret and apply IHL correctly.

The application and interpretation of IHL starts with the classification of the conflict. The Security Council has, for example, qualified the coalition presence in Iraq until June 2004 and the Israeli presence in the Palestinian territories (including East Jerusalem) as military occupation and it has called for the respect of the Fourth Geneva Convention by the occupying powers.¹⁵¹ In addition, every time the Council calls for the respect of IHL, it implicitly classifies the situation as an armed conflict. I would not go so far to argue that every time it calls for the respect of the Geneva Conventions, it classifies the conflict as international – because Article 3 common, applicable to non-international armed conflicts is also part of those Conventions.¹⁵² What is more delicate is that the Council has called several times for the repression of “grave breaches” in conflicts that were of a non-international character. This was clearly the case in Afghanistan in 1998¹⁵³ and arguably the case for some resolutions concerning the conflicts in the former Yugoslavia.¹⁵⁴ Was this an implicit classification as international armed conflicts, as grave breaches exist only in such conflicts?¹⁵⁵ Or was it implicit support for Judge Abi-Saab’s Separate Opinion in the *Tadic* case that grave breaches also cover non-international armed conflicts?¹⁵⁶ I rather think that this was simply one of the cases where the drafters did not understand the niceties of IHL. Going one step further, some might argue that by referring to the right of self-defence in the preamble of Resolution 1368 (2001) following the September 11, 2001 attacks, the Council implicitly and very controversially classified the situation as an international armed conflict. May the Council under Article 103 of the UN Charter, unlike the Queen in Parliament under English constitutional law, call a man a woman? I would simply submit that, if at all, such a conclusion should only be drawn if the Council explicitly and unambiguously states so, and not by inference.¹⁵⁷

¹⁵¹ On Israel and the Occupied Palestinian Territories, see SC Res. 1435 (2002) 24 September 2002 and SC Res. 1544 (2004) 19 May 2004; on the US and UK in Iraq, see SC Res. 1472 (2003) 28 March 2003 and SC Res. 1483 (2003) 22 May 2003. See generally Boisson de Chazournes, *supra* note 1 at 164-173.

¹⁵² See Sassòli, M., *The legal qualification of the conflicts in the former Yugoslavia: double standards or new horizons in international humanitarian law?*, in Tieya, W., Yee, S., eds., *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, London: Routledge, 2001, pp. 307 at 322-324.

¹⁵³ See Resolution 1993 (1998) of 28 August 1998, para. 12.

¹⁵⁴ See SC Res 764 (1992), para. 10; SC Res 771 (1992), para. 1; and SC Res. 780 (1992), para. 1.

¹⁵⁵ See Arts 2 and 50, 51, 130 and 147, respectively of the four Geneva Conventions [*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85; *Geneva Convention relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135; and *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287 and *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras 79-84 (ICTY, Appeals Chamber, 2 October 1995).

¹⁵⁶ See *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Separate Opinion of Judge Abi-Saab, Chapter IV (ICTY, Appeals Chamber, 2 October 1995).

¹⁵⁷ See Sassòli, M., *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 *European J. Int'l Law*, 2005, pp. 662 at 681-682 [hereinafter "*Legislation*"].

The next step is a correct interpretation of IHL. Such interpretation may obviously be innovative, but if it is, it must apply to all similar future cases. The Council began calling for individual criminal responsibility for violations of IHL in the conflicts in the former Yugoslavia, including in conflicts which could only be classified as non-international.¹⁵⁸ This was innovative and criticized by some as applying double standards. Since then, however, the Council has applied the same rule to non-international armed conflicts in Rwanda, Afghanistan, Sierra Leone and Sudan.¹⁵⁹ Chechnya and Sri Lanka are still missing. However, the rule that individual criminal responsibility exists also in non-international armed conflicts is now uncontroversial and the Council has greatly contributed to this result - indirectly by creating the two *ad hoc* tribunals, but also directly by its resolutions.

Another field of IHL in which the Security Council has in recent years played an interesting role between interpretation and change is the extent of the legislative powers of an occupying power.¹⁶⁰ Article 43 of the 1907 Hague Regulations limits such powers considerably. The UN Security Council may in my view mandate or authorize an occupying power to go further, to take certain additional legislative steps to create conditions in which the population of the occupied territory can freely determine its future, live under the rule of law and enjoy the respect of human rights. It may consider that this necessitates the establishment of new local and national institutions and legal, judicial and economic reform. Only Security Council resolutions can justify such fundamental changes.

In my view, any such derogation from IHL by the UN Security Council must be explicit. Its resolutions must be interpreted whenever possible in a manner compatible with IHL. First, as mentioned, even the Security Council must comply with *ius cogens*. Second, the mandate of the Security Council to maintain international peace and security consists of enforcing *ius ad bellum*. Just as a State implementing *ius ad bellum* by using force in self-defence or under UN Security Council authorization has to comply with IHL, it follows that any measure authorized by the Council must be implemented in a manner that respects IHL. A simple encouragement, in Security Council Resolution 1483 (2003), of international efforts to promote legal and judicial reform by an occupying power is certainly too vague to justify legislation by an occupying power beyond what IHL permits.¹⁶¹ I would similarly reject the claim by the UK Secretary of State for Foreign and Commonwealth Affairs that Security Council Resolution 1483 provides a legal basis for the controversial changes of Iraqi foreign investment laws introduced by the occupying powers.¹⁶² The resolution simply mentions among the responsibilities of the UN Special Representative the promotion, in

¹⁵⁸ See, e.g. for the behaviour of Croatian forces capturing the Krajinas, SC Res. 1019 (1995), para. 6.

¹⁵⁹ For Rwanda, see SC Res. 955 (1994), creating the ICTR; for Afghanistan, SC Res. 1193 (1998); for Sierra Leone, see SC Res. 1315 (2000), creating the Special Court for Sierra Leone; for Sudan, see SC Res. 1593 (2005), referring the situation in Darfur to the International Criminal Court. .

¹⁶⁰ See Sassòli, M., *Op. Cit.*, "Legislation", *supra* note 14 at 680-682.

¹⁶¹ Such justification is claimed in UK, Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford: Oxford University Press, 2004, at para. 11.11, footnote 15, based on SC Res. 1483, 2003, para 8 (i).

¹⁶² See *UK House of Commons Hansard (exerpts) Debates*, 20 November 2003, c. 1304W.

coordination with the occupying powers, of 'economic reconstruction and the conditions for sustainable development.'¹⁶³

A final step is the end of applicability of IHL. Here, Iraq has provided a rather unfortunate case of application. The question was when the devolution of governmental authority to a national government was sufficiently effective to end the applicability of IHL on belligerent occupation, although Art. 47 of Convention IV states that protected persons “*shall not be deprived*” of the benefits of IHL “*by any change introduced, as the result of the occupation of a territory, into the institutions or government of the ... territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power*”.

Many would make that end depend on the (democratic) legitimacy of a new national government, given that a democratic election cannot be considered as a change “*introduced*” by the occupying power, even if it was held under the latter’s initiative and supervision¹⁶⁴. That democratically elected government could then end the occupation, even though troops of the former occupying power remain present on the territory of the State, by freely agreeing to their presence. The legitimacy of the new government is however often controversial (as is the question of whether the new government’s consent to the continued presence of foreign troops is freely given)¹⁶⁵. Here, international recognition of such legitimacy, in particular by the UN Security Council, may offer a clearer indication.

In the case of Iraq, Security Council Resolution 1546 (2004), explicitly welcomed that “*by 30 June 2004, the occupation will end*”. In my view, this cannot be seen as an application of the rules of IHL on the end of application of the law of military occupation to the facts on the ground. Under IHL, the law of military occupation would have continued to apply.¹⁶⁶ The resolution was adopted when the US-led coalition itself admitted that it was still exercising effective control over Iraq and its wording does not make this determination dependent upon an effective change on the ground. As for the facts, more than 150,000 Coalition troops remain in Iraq¹⁶⁷, they are involved in daily fighting and they were not put under the direction of the Iraqi provisional government.

Resolution 1546 must rather be seen as a decision overriding the rules of IHL on the subject. Such a decision is valid under Article 103 of the UN Charter. It is nevertheless regrettable and a dangerous precedent to make thus the (end of) application of IHL dependant on criteria which are at best related to the

¹⁶³ SC Res. 1483 (2003), para. 8 (e).

¹⁶⁴ See, for example, Maizlish, D. A., *When Does It End? Problems in the Law of Occupation*, in Arnold, R., Hildebrand, P.A., eds., *International Humanitarian Law and the 21st Century's Conflicts: Changes and Challenges*, Lausanne: Edis, 2005, pp. 97 at 98.

¹⁶⁵ See Roberts, A., *The End of Occupation: Iraq 2004*, 54 Int'l and Comparative Law Quarterly, 2005, pp. 27 at 41. With regard to Afghanistan, see Maizlish, D.A., *Op. Cit.*, *supra* note 21 at 112.

¹⁶⁶ See Roberts, A., *Op. Cit.*, *supra* note 22 at 47; Brown, B.S., *Rethinking Reconstruction After Iraq: Intervention, Self-Determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq*, 11 U.C. Davis J. Int'l L. and Pol'y 23, 2004, p. 56; Ben Achour, R., *La résolution 1546 du Conseil de sécurité ou l'apogée de l'art de la fiction, Actualité et Droit International*, 30 juillet 2004, online: <http://www.ridi.org/adi/articles/2004/200407bac.htm>.

¹⁶⁷ See http://www.globalsecurity.org/military/ops/iraq_orbat.htm This was the official estimate at end December 2005..

desired legitimacy of the new government, as such consideration blurs the fundamental separation between *ius ad bellum* and *ius in bello*.

THE REFORM OF THE UNITED NATIONS ORGANISATIONS AND THE ESTABLISHMENT OF A MECHANISM TO IMPLEMENT INTERNATIONAL HUMANITARIAN LAW

Mr. Jawaher AL-SABAH

Attachée in Kuwait Mission of Geneva

The International Community began a debate on the reform of the United Nations Organisation and its Specialised Agencies and, as a result, an important number of reports and suggestions flew from all places of the World to help handle the complexity of this Organisation.

It is obvious that when we speak about the United Nations we are drawn to deal with the human rights issue which is an important subject addressed by this Organisation. The high-level Panel which was appointed by the Secretary-General, represented by distinguished personalities, pointed out, in its report¹⁶⁸ submitted to the Secretary-General, the reform of the Commission of Human Rights and the enhancement of human rights all over the world.

The Secretary-General, in his report entitled "*In Larger Freedom: Development, Security and Human Rights*"¹⁶⁹, raised the issue of promotion and respect of human rights. He affirmed that human rights should be included in the works of the Organisation, and that co-operation between both the High Commissioner for Human Rights and the Security Council should be encouraged. In addition, any future resolution issued by the Security Council dealing with international peace and security would have to take into account human rights issues.

On 7th April 2005, in his speech addressed to the 61st session of the Commission on Human Rights, the Secretary-General criticized Member States for not being serious when implementing human rights, saying that "*the era of declaration is now giving way, as it should, to an era of implementation*"¹⁷⁰. The Secretary-General suggested the creation of a smaller human rights Council to work more seriously on the issues of human rights, saying "*As you know, I have recommended that Member States replace the Commission on Human Rights with a smaller human rights Council*"¹⁷¹. The Secretary-General was very concerned with human rights issues but why did his report not refer to breaches of international humanitarian law and ways to promote this law? Is there any firm linkage between human rights law (Human Rights Basic Conventions: Civil and Political Rights, Economic and Cultural Rights, Abolishment of Racial Discrimination, Women's Rights, Child's Rights, Convention against Torture, The Rights of Migrants), and international humanitarian law (the Four Geneva Conventions of 1949 and Additional Protocols of 1977)?

¹⁶⁸ See <http://www.un.org/secureworld>

¹⁶⁹ See UNn-A/59/2005

¹⁷⁰ See <http://www.ohchr.org/English>

¹⁷¹ *Ibid*

Why are there so many breaches of international humanitarian law? Is it because the international community doesn't deal seriously with flagrant breaches of international humanitarian law? Or is the competence of the United Nations in the field of international humanitarian law limited since the International Committee of the Red Cross is the custodian of the 1949 Geneva Conventions? Does the ICRC have limited power to deal with independent States? If there is a real deficiency in that respect, why does the Security Council sometimes intervene to help people from those who infringe on humanitarian law and sometimes does not?

Sometimes, the United Nations Organisation takes the appropriate steps to ensure the respect of international law. In fact, when international peace and security is under threat, the Security Council adopts measures to restore it, by implementing either Chapter 6 or 7 of the Charter of the United Nations. However, when we look at the breaches of international humanitarian law we find no clear mechanism to ensure its respect.

The Iraqi occupation of the State of Kuwait in August 1990 is a good example of the violation of the rules of the Geneva Conventions i.e. violation of international humanitarian law. We find that the problem is not in the Convention itself but how to implement it effectively. The State of Kuwait turned to the Security Council which issued many resolutions under Chapter 7 of the United Nations' Charter addressing this violation. In such cases, how could we implement the Geneva Conventions? What position should the parties take if the Geneva Conventions are violated and what kind of measures should the international community adopt to address such violations?

Fifty years have passed since the adoption of the Geneva Conventions of 1949, and humanity has experienced an alarming number of armed conflicts affecting almost every continent during this period. The Four Geneva Conventions and their Additional Protocols of 1977 have provided legal protection to persons not, or no longer, directly involved in hostilities (the wounded, sick and shipwrecked persons and civilians deprived of their liberties for reasons related to armed conflict). Unfortunately, there have been numerous violations of these treaties, resulting in suffering and death. Might this have been avoided had international humanitarian law been better implemented?

The general opinion is that violations of international law are not due to the inadequacy of its rules but rather to an unwillingness to respect those rules, as a result of insufficient means to enforce them, uncertainty as to their application in some circumstances, and a lack of awareness on the part of political leaders, commanders, combatants and the general public¹⁷².

The initiative to create and implement a mechanism of international humanitarian law was obviously clear at the International Conference for the Protection of War Victims, convened in Geneva in August-September 1993. The ways to address violations of international humanitarian law, in particular, were discussed but there was no real suggestion to adopt a new mechanism concerning its implementation. In the Final Declaration, adopted by consensus, the Conference merely reaffirmed: "*The necessity to make the*

¹⁷² See Henckaerts, J.M., *Study on Customary International Law*, in *International Review of the Red Cross*, vol. 87, 2005, p. 2

implementation of International Humanitarian Law more effective” and called upon the Swiss Government “to convene an open-ended intergovernmental group of experts to study particular means of promoting full respect for and compliance with that law, and to prepare a report for submission to the States and to the next session of the International Conference of the Red Cross and Red Crescent”¹⁷³.

During the occupation of Kuwait the Iraqi forces violated international humanitarian law by committing the most awful and horrible crimes against humanity. The State of Kuwait called upon the ICRC, as the depository body of the Geneva Conventions of 1949, to put into effect the rules of these Conventions. The ICRC responded that the Committee did not have a mechanism to implement the Geneva Conventions when the occupying authority prevents the Committee from enforcing international humanitarian law.

With respect to all conventions, we notice that when these conventions are put into effect many drawbacks are revealed, and for that reason, protocols were added to address the problem. The main drawback of implementing international humanitarian law is the lack of a clear cut mechanism when a State refuses to implement the provisions of the convention.

Why doesn't the Security Council deal with breaches of the Geneva Conventions in the same way as it does when there is a breach of international law, particularly, when international peace and security are threatened ?

Nowadays, there is an increase in the number of States which violate international humanitarian law so there is a tendency among States to strengthen the Geneva Conventions by asking for the appropriate mechanism to deal with any violations. In the recent deliberations of the Committee of Human Rights, we have witnessed that the majority of the Member States have voted for the draft of the resolution, submitted by Egypt to the 61st session of the Commission on Human Rights in Geneva 2005 under item 17 of the agenda entitled: “*Protection and Promotion of Human Rights: Protection of the Human Rights of Civilians in Armed Conflict*”¹⁷⁴. The adoption by many Member States of the United Nations of this draft resolution reflected the need for establishing a mechanism to implement the Geneva Conventions.

Nevertheless, what kind of mechanism could we establish? Do we continue to allow the Security Council to continue its encroachment of the issue of international humanitarian law? Could we use a council similar to the Security Council? Could we use another body of the General Assembly of the United Nations to implement such a mechanism? Could the International Committee of the Red Cross create its own mechanism? Could we develop a new mechanism under the auspices of both the United Nations Organisation and the International Committee of the Red Cross?

These are questions aimed at creating a debate in order to seek ways and means to strengthen international humanitarian law.

¹⁷³ See *International Conference for the Protection of War Victims, Geneva, 30 August-1 September 1993, Final Declaration*, in *International Review of the Red Cross*, No. 296, 1993, p. 381

¹⁷⁴ See E/cn4/2005/1.82

INTERVENTION

Mr. Azad JAFAROV

Third Secretary of the Permanent Mission of Azerbaijan to the UN Office and other International Organisations in Geneva

I. INTRODUCTION

Human rights issues have already become imperative in current international relations. Today states are trying to be more vigilant with regards to human rights violations which not only affect the domestic interests of the state in question concerning its security and development but also the interests of the international community as a whole. That is because “*Not only are development, security and human rights all imperative; they also reinforce each other*”^{175 176}. More exactly, if they are the object of concern for the international community as a whole, running beyond the real boundaries of the state as well as its frontiers of national interests, then the domestic issue is no longer the concern of one single state.

Thus, it could be interesting to examine, in a very general way, the possibility of extending human rights application system within the old United Nations Organisation in the context of its Security Council Resolutions. We consider that a survey of the United Nations at this very crucial stage of its development and at a time it is facing the challenges of reforms and counter-reaction to the universalized human rights requirements, would be a kind of examination of what we have and how we act.

II. BEFORE ANSWERING SOME PRECISE QUESTIONS UNDER THE TITLE OF THIS TOPIC OF THE VERY ESSENCE OF THE UN SECURITY COUNCIL’S MANDATE AND ITS RAISON-D’ÊTRE HAVE TO BE CLARIFIED.

The Security Council is the principal organ of the United Nations, together with the General Assembly, Economic and Social Council (ECOSOC), the Trusteeship Council, the International Court of Justice (ICJ), and a Secretariat (Article 7 of the UN Charter)¹⁷⁷. It is conferred primary responsibility for the maintenance of international peace and security (Article 24 of the UN Charter)¹⁷⁸. Thus, UN Security Council, acting as one of the main bodies, has the mandate to maintain peace and security on a international level, regardless of boundaries and regions. In this respect, it should be noted that due to that very element of

¹⁷⁵ In larger freedom towards: development, security and human rights for all Report of the Secretary-General of the United Nations. See B. Larger freedom: development, security and human rights, para. 16.

¹⁷⁷ See <http://www.un.org/aboutun/charter/>

¹⁷⁸ *Ibid.*

internationalism or universalism envisaged in the UN Charter, the Charter is frequently called the Constitution of a world community.

A. Then what is the subject-matter of the resolutions of this body?

The responsibility for the maintenance of international peace and security is very abstract as such. At least, for the sake of clarity, the mandate of the UN Security Council (UN SC) described above should differ, in a very general way, from the subject-matter of its resolutions. In its relevant provisions, the UN Charter emphasises that the decisions (resolutions) of the UN SC are taken when international peace and security is endangered or threatened or when breaches of the peace and acts of aggression take place (Chapters VI and VII)¹⁷⁹ (decisions on procedural matters and other similar issues are not the object of this paper – A.C).

B. What is meant by danger to international peace and security or threat to peace, breaches of the peace and acts of aggression?

Accordingly, danger are all disputes, be they of an international or non-international character, the continuance of which is likely to endanger international peace and security (Article Chapter VI, Article 33)¹⁸⁰.

C. What is meant by a threat to peace and breaches of the peace?

As far as threats to peace is concerned the commission of crimes against the peace and security of mankind could be included as well as the situations brought to its attention, such as terrorism, disarmament, proliferation, human trafficking, trafficking in arms and ammunitions, etc. But one should keep in mind that this list does not intend to be an exhaustive list but rather an indication of the matter in question.

In our view breaches of the peace could mean those situations where crimes against the peace and security of mankind are committed, where there is no doubt as to their gravity, impact and seriousness. The following crimes¹⁸¹ are qualified as being “*the most serious crimes of concern to the international community as a whole by the International Criminal Court Rome Statute*”¹⁸²:

- Crime of aggression;
- Crime of genocide;
- Crimes against humanity;
- War crimes.

¹⁷⁹ <http://www.un.org/aboutun/charter/>

¹⁸⁰ *Ibid*

¹⁸¹ International Law Commission Report, 1996, Chapter II Draft. Code of Crimen agianst the peace and security of mankind Part II. Crimes against the peace and security of mankind

¹⁸² Rome Statute of the ICC. Article 5.

As the application of International Humanitarian Law (IHL), Human Rights (HR) and Refugee Law (RL) in the context of breaches is the primary concern of the UN SC Resolutions, we will try, with the help of some examples, to talk about this topic rather than the dangers affecting these fields of interest. Therefore, we would prefer to concentrate on clarifying the possible types of application in the context of the UN SC Resolutions adopted under Chapter VII and the primary goals thereof.

D. Who should deal with human rights - UN SC or UN ECOSOC/CHR?

We have to start from the Charter itself. In Article 1 it states that “*to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all*” is also one of the *inter alia* purposes of the United Nations. We do think that this very reference to the human rights issue has to be understood.

In the first case, we could conclude that the UN SC body under the UN Charter has to bear in mind human rights issues as Article 24 (II) defines the duties of the UN SC as being *in accordance with the purposes and principles of the UN*¹⁸³. In a limited sense, we can follow the idea that the task of dealing with human rights is entrusted to the CHR through ECOSOC’s direct mandate under Article 55 of the UN Charter¹⁸⁴. Thus, in either of the interpretations of the relevant provisions of the UN Charter the Security Council is obliged to take into account human rights¹⁸⁵. But the question is when (in case of violation or in case this violation breaches peace) and how (Under Chapter VI or VII)?

In theory, we can draw the line between the UN SC and UN CHR and entrust the first with dealing with human rights only if their continual violation endangers peace and security or if their violation directly threatens or breaches peace. In all other circumstances, UNCHR will deal with it. However, here we have to make the reservation that the consideration of an issue on human rights by one does not exclude the consideration of the same issue by another.

¹⁸³ See Gasser, H. P., 19-10-1995. The United Nations and International Humanitarian Law: The International Committee of the Red Cross and the United Nations' involvement in the implementation of international humanitarian law. International Symposium on the occasion of the fiftieth anniversary of the United Nations, Geneva, 19-21 October 1995 Paper presented by Dr Hans-Peter Gasser, Senior Legal Adviser, International Committee of the Red Cross (ICRC), Geneva

¹⁸⁴ See Robertson, A. H., Merrills, J. G., *Human Rights in the World*, 4th edition, Manchester University Press, Chapter 2, pp. 25-26.

¹⁸⁵ See The United Nations Blue Book Series, *The United Nations and Human Rights 1945-1995*, Vol. VII, Sales No. E. 95.I.21.

E. Does the UN Security Council deal with international humanitarian law?

It is not less challenging to determine for ourselves if UN SC is entitled to discharge its duties in the light of promotion and encouragement of respect for human rights and fundamental freedoms.

There are several arguments to pursue this conviction: 1) Reference to human rights and fundamental freedoms covers both human rights and international humanitarian law. Human rights law protects human rights in peaceful times and armed conflicts, whereas international humanitarian law is applicable only in armed conflicts. There is no doubt that the Charter's notion of "*human rights and fundamental freedoms for all*" also includes what the United Nations itself has called "*human rights in armed conflicts*", and what is referred to as "*international humanitarian law*"¹⁸⁶; 2) International Humanitarian Law does not fall within the competence of the UNCHR¹⁸⁷, which is mandated for "*submitting proposals, recommendations and reports to the Council (ECOSOC-A.C.) regarding (a) an international bill of rights, (b) international declarations or conventions on civil liberties, the status of women, freedom of information and similar matters, (c) the protection of minorities, (d) the prevention of discrimination on grounds of race, sex, language or religion*", and UNSC could and should deal with it; 3) Last but not least, it is enough to say that "*The purpose of the two criminal courts established recently by the Security Council - one for the former Yugoslavia and the other for Rwanda - is to prosecute persons responsible for serious violations of international humanitarian law in the armed conflicts in those countries*"¹⁸⁸. But the counter argument makes us conclude that such themes as the Palestinian occupied territories or Sudan could be qualified as the object of the IHL.

¹⁸⁶ See Gasser, P. H., 19-10-1995. The United Nations and International Humanitarian Law: The International Committee of the Red Cross and the United Nations' involvement in the implementation of international humanitarian law (Section: International criminal tribunals established by the UN). International Symposium on the occasion of the 50th anniversary of the UN, Geneva, 19-21 October 1995 Paper presented by Dr. Hans-Peter Gasser, Senior Legal Adviser, International Committee of the Red Cross (ICRC), Geneva. See also the ICJ advisory opinions The Legality of Nuclear Weapons (1996) and Israeli Wall (2004), as well as General Comment No.29 of the Human Rights Committee.

¹⁸⁷ However it is also questionable whereas there are a number of resolutions adopted by the CHR on purely IHL law issues such as occupied Syrian Arab Golan, occupied Lebanese territory, occupied Palestinian territories. "*It (UN – A.C.) focuses mainly on the practice of the rapporteurs appointed by the UN CHR to investigate the human rights situations in specific countries and on that of the thematic rapporteurs and working groups which the CHR has entrusted with monitoring specific types of serious human rights violations wherever they occur, in particular the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and the Representative of the Secretary-General on IDP, whose mandates most often lead them to examine abuses occurring in the context of armed conflicts*" 30-09-1998 International Review of the Red Cross No. 324, pp.481-503 by Daniel O'Donnell. "Trends in the application of international humanitarian law by United Nations human rights mechanisms", page 481.

¹⁸⁸ Ibid. 19-10-1995 by Hans-Peter Gasser The United Nations and International Humanitarian Law: The International Committee of the Red Cross and the United Nations' involvement in the implementation of international humanitarian law.

III. UN RESOLUTIONS ADOPTED UNDER CHAPTER VI OF THE UN CHARTER

The records prove that the object of the UN SC resolutions adopted under Chapter VI are the disputes between states as well as between states and non-state actors occurring because of reasons other than human rights, international humanitarian law or refugee law. Refugee law often acts as the consequence of serious inter-state disputes endangering international peace and security only if they are prolonged.

Whether IHL, HR or RL are the consequences or the direct essential object of the disputes mentioned above could be discussed. But the legal approach dictates the conclusion that, according to the letter and language of Article 33 (I) this cannot be considered as a serious human rights issue: 1) minor human rights issues cannot endanger the maintenance of international peace and security, to this end, SC is not mandated to deal with human rights issues as is the case with the CHR – consultative body of the UN ECOSOC (Article 55 of the UN Charter); 2) massive and flagrant violations of human rights followed by very serious crimes is not the concern of the particular parties to this dispute but rather is it the concern of the international community as a whole; 3) when the events previously mentioned in point 2 take place there is no time to see if its persistence endangers the maintenance of international peace and security. Moreover, according to Article 34 of the UN Charter

“The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security”.

To this end, the focal point of investigation or, in other words, of the resolution of the UN SC under Chapter VII is the dispute itself not its consequences.

Therefore, certainly the SC resolutions adopted under Chapter VI have secondary or consequent relevance with IHL, HR and RL.

International Humanitarian Law, Human Rights Law, Refugee Law and the application of their provisions during the *interim* period is in fact the measurement by which the UN SC determines whether or not the current situation is likely to act as a danger to peace and security at international level.

On the other hand, according to the legal interpretation of the relevant provisions, the very dispute, being the target of the UN SC resolution, should not exist any more after the expiry of a reasonable time following the adoption of the resolution stating that it should not continue. Continuance would prove that the dispute was serious enough and was consequently a danger to peace and security. But the gravity of the danger would depend on whether IHL had been well applied or HR violations had been carefully investigated, eliminated and compensated and the required remedies had been provided.

During the *interim* period states should make every effort to demonstrate their willingness to respect international obligations with regards to the norms of human rights, international humanitarian law and

refugee law. By so doing, the parties to the dispute could eliminate its consequences, and, above all, violations of human rights.

“The states which have to ensure respect for international human rights law and international humanitarian law and to take appropriate legislative and administrative and other appropriate measures to prevent violations shall investigate violations. Furthermore, states shall provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, irrespective of who may ultimately be the bearer of responsibility for the violation and provide effective remedies to victims, including reparation”¹⁸⁹.

In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, the continuance of which is likely to endanger the maintenance of international peace and security, states have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish him or her.

Moreover, in these cases, states should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

We have to mention that according to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the equal and effective access to justice, adequate, effective and prompt reparation for harm suffered, and access to relevant information concerning violations and reparation mechanisms as provided for under international law.

Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered¹⁹⁰.

Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property¹⁹¹.

¹⁸⁹ See CHR Resolution 2005/35 adopted at the CHR 61st session under agenda Item 11.

¹⁹⁰ *Ibid*

¹⁹¹ *Ibid.*

Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law. Rehabilitation and satisfaction should also be included in the cases of gross violations of international human rights law and serious violations of international humanitarian law¹⁹².

Specific guarantees should be ensured for the IDPs. But before specifying those guarantees we have to mention that while talking about human rights protection of the IDPs in the context of the UN SC Resolutions adopted under Chapter VI one should make a distinction between the IDPs who have been forced or obliged to flee or leave their homes or places of habitual residence and who have not crossed an internationally recognized state border, for reasons of armed conflict or violations of human rights, from IDPs who are such for reasons of natural or man-made disasters. So, for the purposes of this theme we will definitely touch upon the application of human rights of the IDPs of armed conflicts or human rights violations.

According to the CHR Resolution on the IDPs adopted at its 61 session¹⁹³ the situation of these people and the serious challenges they face are leading States to face their responsibilities and the international community to strengthen methods and means to better address the specific needs for protection and assistance of internally displaced persons. International cooperation should be strengthened in order to help them return voluntarily to their homes in safety and with dignity.

It is very interesting for the purpose of this paper that the situation of IDPs is considered from the perspective of the relevant norms of international human rights law, international humanitarian law and international refugee law. That is, a particular case where the three bodies of International Law have to be applied to improve the situation of the victims – IDPs - to suppress the situation endangering the maintenance of international peace and security if it were to continue. Of particular interest is why reference is also made to Refugee Law while surveying IDPs. The following reasons and similarities can be considered:

1. Most practitioners and scholars are claiming that Refugee law has to cover IDPs. At the same time, there are many provisions in the instruments of IHL concerning the protection of different types of civilians, including IDPs and refugees¹⁹⁴;
2. Refugees and IDPs as a very interrelated category of vulnerable groups could easily transform from one to another: refugees naturalized in hosting country could become IDPs if the aggression, or its different types, were activated instead of eradicated; the reverse process is theoretically also possible but rarely seen in practice;
3. The Durban Declaration and Plan of Action devoted to the root causes and avoidance of racism refer to IDPs in the same section where refugees are referred to as the victims of that scourge;¹⁹⁵

¹⁹² See CHR Resolution 2005/35 adopted at the CHR 61st session under agenda Item 11.

¹⁹³ See E/CN.4/2005/L.60 14 April 2005

¹⁹⁴ See Fourth Geneva Convention of 1949. Art. 45(4), 49 (1,2) and Art. 44,70 Second Additional Protocol. Art. 17 First Additional Protocol. Art. 85 (4)(a)

4. It is also not by chance that, in practice, IDPs are taken care of by the UN High Commissioner's Office for Refugees;
5. Both of them have the right to return to their native lands voluntarily, safely and with dignity¹⁹⁶.

The situation of IDPs represents a very serious threat whereas the Rome Statute of the International Criminal Court defines the deportation of population as a crime against humanity, and defines both the unlawful deportation of the civilian population and ordering their displacement as war crimes¹⁹⁷.

While talking about IHL application during the *interim* period following the adoption of the UN SC Resolution under Chapter VI, we have to mention an un-codified category of “*Missing persons*” which differs from the crime of enforced disappearance, which is another un-codified category in terms of criminals and victims. Mention should also be given to the timely conditions in peace time relevant to IHL or HR issues.

It is needless to say that almost in all post-conflict cases where IHL is applicable the “*missing persons*” problem is always present. Until now it is the crucial legal-humanitarian issue, which unfortunately does not find its reflection in International Humanitarian Law instruments. Thus, there is no binding mechanism to tackle it. Therefore, the issue of persons reported missing in connection with international armed conflicts, in particular, those who are victims of serious violations of international humanitarian law and human rights law, continues to have a negative impact on efforts to put an end to these disputes.

In this regard, one might refer to those resolutions adopted by the Commission on Human Rights of the United Nations¹⁹⁸. But it is regrettable that the efforts made by the CHR which is now facing reforming requirements were not enough to put an end to this legal uncertainty as no other legal mechanism was present. Furthermore, application of the IHL provisions in the context of the UN SC Resolutions under Chapter VI faces a very crucial challenge and even dead-lock. The real events prove that not only non-binding and *ad hoc* based mechanisms but also the norms of IHL, as part of international customary law, are mainly impossible to apply if the parties to the conflict/dispute are left alone and the international community pays no attention.

¹⁹⁵ See World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. Program of Action. Paragraph 34

¹⁹⁶ See E/CN.4/2005/L.60 14 April 2005. World Conference Against Racism, racial Discrimination, Xenophobia and Related Intolerance. Program of Action. Paragraph 185.

¹⁹⁷ See <http://www.un.org/law/icc/statute/romefra.htm>. Rome Statute of the International Criminal Court. Article 7.

¹⁹⁸ See the late adopted CHR Resolution 2004/50 on this issue at the CHR 60th session.

IV. UN SC RESOLUTIONS ADOPTED UNDER CHAPTER VII

A. Terrorism

So, the notion of threat refers to those situations where peace is about to be violated or breached by the above-mentioned acts, but not breached as yet.

Terrorism as a crime is specially emphasized above since there is no universal treaty defining the crime of terrorism. According to FISSEHA YIMER¹⁹⁹, Expert of the Sub-Commission on the promotion and protection of human rights this is because a universal definition of terrorism could always have lacunae.

But certainly we have to remember that defining an act as a threat or a breach is the discretionary right of the UN SC. Therefore, whatever we add to such a scourge as terrorism the list will not be an exhaustive one. So we will limit ourselves to mentioning those phenomena as possible subject-matter or object of concern for the UN SC resolutions under Chapter VII.

B. Breaches of the peace

As already mentioned, aggression, war crimes and others have been named as the most serious crimes of concern to the international community as a whole. The International Criminal Court (ICC) Statute also classified these crimes as being a violation of *jus cogens* norms. Legal literature discloses that the following international crimes are *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture²⁰⁰. Coherently, *jus cogens* or peremptory norms determine "*the obligations of a state towards the international Community as a whole*", in other words, the *erga omnes* obligations, the concept well established in the Barcelona Traction case²⁰¹. Moreover, The International Law Commission of the UN considers them to be crimes against the peace and security of mankind in its Articles on the draft Code of Crimes against the Peace and Security of Mankind adopted at its forty-eighth session.

So, by this very title and name, it is evident that these are the crimes that directly breach peace and security even when the word "threat" is used. They are the *jus cogens* crimes. At the same time, the commissions of these crimes are the violations of *erga omnes* obligations. Therefore, from our view-point, it goes without saying that the UN SC has to take action when such a situation arises.

¹⁹⁹ See United Nations Press Release. Sub-Commission on the Promotion and Protection of Human Rights. 55th session. 5th August 2003

²⁰⁰ See Law & Contemporary Problems (autumn 1996). International Crimes: Jus cogens and obligations erga omnes. M. Cherif Bassiouni.

²⁰¹ See Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).

C. Crime of aggression.

It is worthy to start from aggression. It should be noted that the word “*aggression*” along with the word “*terrorism*” has not been defined in the text of any universal treaty. Therefore, the UN SC has a kind of discretionary right to determine the existence of any act of aggression. It is not by chance that Article 5 of the ICC Statute, which entered into force on 1st July 2002, states that the Court has jurisdiction with respect to aggression (besides others – A.C.). But paragraph 2 of Article 5 reads that the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.

Meanwhile as our intention is very different we will stop here and not go into depth. We shall rather concentrate on defining whether or not the adoption of the UN SC resolutions on aggression is of great relevance to the application of IHL, HR and RL. The main universal document on the definition of aggression is still United Nations General Assembly Resolution 3314 (XXIX)²⁰². By that resolution the UN approved the definition of aggression, the text of which was attached as an annex to it. According to that Resolution “*Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations*”.

As can be seen, the sovereign rights of the subjects of international law are essential from the UN SC perspective. But in no way does it pretend that the human rights issue (be it IHL or RL) is not the object of concern, since:

1. the use of armed force results in a situation of armed conflict where IHL is applicable;
2. armed conflict produces a situation in which the protection of human rights does not cease to exist;
3. the loss of sovereignty, territorial integrity or political independence is the violation of international law, as well as a direct threat to human rights²⁰³;
4. armed conflict without exception creates the problem of refugees and IDPs, where the former is the object of Refugee Law. Moreover, due to the lack of a universal treaty on the IDPs their situation is becoming more crucial in the case of armed conflict since the state subjected to the use of armed force as a rule cannot tackle their humanitarian-socio-economic concerns alone;
5. human rights problems start from the very moment the use of force is practised.

So, it is clear that the application of human rights (all IHL, HR and RL) in this very case of aggression, being the object of concern of the UN SC Resolutions adopted under Chapter VII of the UN Charter is of primary importance. Furthermore, aggression could also lead to the commission of other international crimes resulting in the breach of peace, such as genocide, crimes against humanity, war crimes.

²⁰² See definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX). Committee: 6
Vote: Adopted without a vote

²⁰³ See recommendation 1606 (2003). Areas where the European Convention on Human Rights cannot be implemented. <http://assembly.coe.int>

Therefore, when an act of aggression takes place, be it the invasion or attack by the armed forces of a state of the territory of another state, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another state or part thereof, a complex of combined crimes is committed.

It is interesting to consider Article 2 of Resolution 3314 which reads “...that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity”. So, we can conclude that the gravity of violating human rights, IHL or RL provisions as very direct consequences does not make any difference as to the justification of aggression. That is, the very provision in the resolution favors human rights and gives it priority in case of the use of force.

One could possibly argue that the application of RL provisions in the mentioned context is a bit abstract compared to the application of IHL or HR. The difference is evident. But it does not mean that we should not mention RL. What is important is that the violation of IHL or HR is understood in relation to RL subjects, namely refugees, who are nationals “...owing to well-founded fear of being persecuted for reasons of race, religion, nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country”²⁰⁴. Refugees as well as IDPs and other vulnerable groups, including all other civilians whose human rights have been violated, are the object of concern in the UN SC resolutions that we have talked about above. The right not to be tortured, right to freedom of expression, right to freedom of thought, conscience and religion are examples of the rights of refugees, IDPs and all civilians and other vulnerable groups to be guaranteed.

In this connection it could be worthy to quote the particular citations from the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law²⁰⁵. In the preamble paragraph it states “...Recalling the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular the Universal Declaration of Human Rights at article 8, the International Covenant on Civil and Political Rights at article 2, the International Convention on the Elimination of All Forms of Racial Discrimination at article 6, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at article 14, the Convention on the Rights of the Child at article 39, and of international humanitarian law as found in article 3 of the Hague Convention of 18 October 1907 concerning the Laws and Customs of War and Land (Convention No. IV of 1907), article 91 of Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I), and articles 68 and 75 of the Rome Statute of the International Criminal Court”.

Moreover, paragraph 8 states that “For purposes of this document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic

²⁰⁴ See the Convention relating to the Status of Refugees. Article 1 (2). A Compilation of Human Rights Instruments. Volume I (Second Part) Universal Instruments. United Nations. New-York, 1993.

²⁰⁵ See CHR Resolution 2005/35 adopted at the CHR 61st session under agenda Item 11.

loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”.

This definition of a victim has been rightly formulated to cover, in a general way, all categories of vulnerable groups as well as other categories of civilians.

As to our conclusion, aggression is the case when a breach of peace takes place by means of an act of aggression itself or its different forms listed in Article 2 of the relevant UN GA Resolution accompanied by one or all of the different crimes, such as the crimes against humanity, war crimes, or crime of genocide.

D. The Crime of Genocide

Another example of the application of human rights within the frame of the adopted UN SC Resolutions is the unique case where the target is the crime of genocide. This crime, which in fact is the combination of different crimes (killing, causing harm), is the violation of several human rights (including the right to life, and the right not to be tortured).

One should not forget that genocide is a very serious crime to accuse someone of. Therefore, even the UN SC takes its time to come to a decision: *“Although evidence that genocide had been committed in Rwanda was abundant, the Security Council nevertheless decided to follow the step-by-step approach it had adopted in the establishment of the Yugoslav Tribunal, and requested the Secretary-General to establish a Commission of Experts to provide him with evidence of serious violations of international humanitarian law and acts of genocide committed in Rwanda.”*²⁰⁶

The Security Council adopted Resolution 955 (1994) establishing an international tribunal for the purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states.

The Statute of the International Tribunal for Rwanda was annexed to Resolution 955 (1994)²⁰⁷ adopted under Chapter VII of the United Nations Charter²⁰⁸.

Thus, that is the best example of the application of IHL, HR and without exception of RL by means of the UN SC Resolution adopted under Chapter VII of the UN Charter. Or more precisely, it is the UN SC action under the UN Charter to maintain or restore international peace and security when they are threatened or breached by the human rights violations of a very grave and serious nature.

²⁰⁶ See the international Criminal Tribunal for Rwanda. Daphna Shraga (Legal Officer, Office of the Legal Counsel, Office of Legal Affairs, United Nations) and Ralph Zacklin (Director and Deputy to the Under-Secretary-General, Office of the legal Counsel, Office of the Legal Counsel, Office of Legal Affairs, United Nations). <http://www.ejil.org/journal/Vol7/No4/art3.html>

²⁰⁷ See <http://www.un.org/Docs/scres/1994/scres94.htm>

²⁰⁸ See the International Criminal Tribunal for Rwanda. Daphna, *Op cit*.

We have to mention that there is no legal difference between the issues/disputes/conflicts being the object of the UN SC resolutions adopted under Chapter VI and those adopted under Chapter VII of the UN Charter. Placing the human rights issue second is just a political consideration depending on the approach of the UN SC. It is clear now why the international community is so sensitive about the importance of human rights in the whole human rights machinery and even their insertion into the work of the UN SC so that they would become of primary concern which is not the case under Chapter VI.

It is interesting to survey that the same breach of peace could also take place in case of disputes which are referred to in Chapter VI of the Charter, but the SC has the discretionary right to decide whether this particular case is a direct threat to or breach of the peace or just a case of cautioning against the continuance thereof.

V. CONCLUSION

The overview of the application of IHL, HR and RL in the context of the adopted UN SC Resolutions indicates the very specific nature of the SC Resolutions themselves.

The next problem is whether we are talking about the serious and grave violations of human rights be it IHL, HR or RL provisions.

The other major factor is whether the human rights issue is the main or secondary (consequence) goal/object of the SC resolutions. As a rule in the first case the human rights issue or violation is the object of concern of the UN SC Resolutions adopted under Chapter VI, whereas in the second case, under VII.

While talking about the application of human rights norms within the UN SC Resolutions adopted under Chapter VI it has to be noted that regardless of the existence of the dispute at the given time the non-avoidance of the violations and non-restoration of the violated rights, the endangering situation could not be considered to be overturned. This relates to the rights of the IDPs and refugees to returning to their native land, remedies and reparations for the gross and serious violations of international humanitarian law and human rights law, respectively, not to mention the problem concerning the missing persons, and other grave consequences of a humanitarian as well as a human rights nature.

The UN SC Resolutions adopted under Chapter VII is very different from the above mentioned type of SC Resolutions. In terms of human rights the Resolutions under Chapter VII directly target human rights violations and define them as a primary goal, while dealing with them as a threat or breach to peace. So, the consideration of crimes against humanity, war crimes etc. and the decision concerning the action to be taken cannot be postponed, or left to the disputing parties themselves.

We are convinced that in both first and second cases the international community should not be indifferent towards the disputes where human rights are concerned. The long standing violations of a massive and flagrant character, indifference towards the army of individuals waiting for the restoration of their violated rights, could cause new, more tragic results and more complicated human rights and humanitarian catastrophes.

**LE RÔLE DU CONSEIL DE SECURITE DANS LA MISE EN ŒUVRE DU DROIT
INTERNATIONAL HUMANITAIRE
(NOTAMMENT AU TRAVERS DE SON POUVOIR COERCITIF)**

Mr. Mathieu NABOT

Stagiaire de l'Institut International de Droit humanitaire

I. INTRODUCTION

L'histoire de la relation des Nations Unies avec le Droit International Humanitaire (ci après, "DIH") est caractérisée par la méfiance et l'ambiguïté²⁰⁹. Entre rejet et attraction, ces rapports ont cependant évolué au gré des modifications de la société internationale et des atteintes de plus en plus flagrantes et massives au droit des conflits armés. Il est ainsi possible d'établir une tripartition, certes formaliste mais néanmoins assez représentative, de l'implication des Nations Unies, et de son organe exécutif, le Conseil de sécurité, dans la mise en œuvre du DIH.

Durant les vingt premières années de leur existence, les Nations Unies n'ont pas joué de rôle particulier dans la mise en œuvre et l'application du droit international humanitaire. Cette relative léthargie trouvait son explication dans la crainte qu'une telle implication de l'organe principal du *Jus contra bellum* dans le *Jus in bello* ne soit interprétée comme la manifestation de l'incapacité de l'organisation à remplir son mandat, c'est-à-dire à assurer la paix et la sécurité internationales. Puisque l'objectif en 1945 était bel et bien de marginaliser, voire d'éradiquer, la guerre, il n'y avait pas lieu de se préoccuper de la mise en œuvre du droit applicable en pareille situation.

Avec le tournant décisif que constitue la conférence de Téhéran de 1968 sur les droits de l'homme, le processus d'absorption des préoccupations humanitaires dans la sphère de compétences du Conseil de sécurité se fait plus marqué. Le Conseil s'approprie de plus en plus la responsabilité de la mise en œuvre de ce droit en édictant de nombreuses résolutions dont l'objet et le but gravitent autour de son respect.

Enfin, depuis la crise du Golfe de 1990, le Conseil de sécurité, revitalisé et libéré des antagonismes paralysants liés à la Guerre froide, prend davantage le DIH en charge, jusqu'à doter les mesures prises pour sa mise en œuvre et son respect de "*tous les moyens nécessaires*" et donc de la force. En outre le Conseil n'hésite plus à faire sauter le verrou étatique pour s'approprier la gestion de crises humanitaires internes, parfois même en s'extrayant des contraintes posées par la Charte.

²⁰⁹ Voir Sandoz, Y., *Rapport général, Les Nations Unies et le droit international humanitaire*, Actes du Colloque international de Genève, Condorelli, L. et al. (éd.), octobre 1995, Paris : Pedone, 1996, p. 57.

L'enjeu de ces quelques pages sera donc tout à la fois d'identifier les mécanismes par lesquels le Conseil de sécurité est parvenu à s'immiscer puis à s'imposer sur la scène humanitaire, soit qu'il ait mis en relief des obligations incombant aux Etats, soit qu'il ait créé des structures contribuant au développement du DIH (1). Il nous incombera ensuite d'étudier plus avant la façon dont le Conseil de sécurité en est venu à faire des questions humanitaires, dans des contextes purement internes, le but unique, ultime et suffisant pour permettre un recours à la force (2). Enfin, nous délaisserons le point de vue descriptif au profit d'une approche plus critique et tenterons d'apprécier la légalité et la légitimité de l'intervention de l'organe principal de *Jus ad Bellum* dans le domaine du *Jus in Bello*. Entre utilité et dangers, une telle immixtion est loin d'être neutre et exempte de conséquences (3).

II. LES TECHNIQUES PAR LESQUELLES LE CONSEIL DE SECURITE A FAIT SIENNES LES PREOCCUPATIONS HUMANITAIRES

Avant d'aborder la question plus spécifique de l'utilisation, par le Conseil de sécurité, des prérogatives qui lui sont conférées par le chapitre VII de la Charte des Nations Unies, et notamment du pouvoir coercitif de l'article 42, il nous a semblé opportun de présenter quelques méthodes par lesquelles se manifeste son investissement dans la sphère du DIH. Loin d'être exhaustif, ce survol pour touriste pressé insistera surtout sur les aspects les plus révélateurs de la pratique normative et para-normative du Conseil de sécurité en matière de DIH.

A. Le Conseil de Sécurité lance des appels à respecter et à faire respecter le DIH

Les résolutions par lesquelles le Conseil de sécurité demande le respect du DIH ont le mérite d'être univoques et de ne laisser aucun doute quant à leur finalité. Les paragraphes opérationnels de ces résolutions appellent soit au respect de règles primaires de DIH, souvent explicitées par la référence au texte international qui les contient²¹⁰, soit à la cessation de comportements spécifiques que le Conseil de sécurité érige en violations du DIH²¹¹. Ces dernières années, le Conseil de sécurité a utilisé une sémantique « suggérant péremptoirement » aux Etats auxquels s'adressent les résolutions d'en respecter les termes²¹². En outre, le Conseil s'est mis à agir sous la bannière contraignante du chapitre VII. Les appels qu'il a ainsi lancés à l'Irak pour que celui-ci respecte le DIH, et notamment la 4^{ème} convention de Genève, faisaient clairement peser sur cet Etat une obligation de soumission, à la fois absolue et diligente, à ces dispositions. Dans la même optique, l'on peut citer la résolution 764 (1992) qui, dans le contexte du conflit en ex-

²¹⁰ Voir S/RES/307 (1971), par. 3, sur la situation entre l'Inde et le Pakistan.

²¹¹ Voir S/RES/452 (1979), par. 3, sur la situation dans les territoires arabes occupés par Israël depuis 1967.

²¹² Voir S/RES/607 (1988), par. 3, « demande de façon pressante à Israël, Puissance Occupante, de respecter les obligations que lui impose la convention »

Yougoslavie, réaffirme que “*toutes les parties sont tenues de se conformer aux dispositions découlant du [DIH], en particulier les conventions de Genève de 1949 (...)*”²¹³.

La question qu’il est légitime de se poser est alors celle de savoir si cette activité du Conseil de sécurité peut trouver à se justifier sur la base d’une disposition juridique. La réponse doit être affirmative puisque ces appels au respect du DIH se fondent sur l’article 24 de la Charte des Nations Unies. Cet article est en effet celui qui confère au Conseil la responsabilité principale en matière de maintien de la paix. Le Conseil est donc compétent pour s’occuper de la mise en œuvre du DIH dès que lors qu’il fait de cette finalité une condition du maintien ou de la restauration de la paix. De telles résolutions permettent en outre au Conseil de sécurité, ou plus exactement aux Etats qui le composent, puisque seuls ces derniers sont formellement parties aux Conventions de Genève, de satisfaire à leur obligation de « faire respecter le DIH ». En ce sens, “*The Security Council’s calls for respect of [IHL] 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*”²¹⁴.

B. Le Conseil de sécurité stigmatise certains comportements comme constitutifs d’une violation du DIH

Le Conseil de sécurité a dans certains cas, et en combinaison avec des appels au respect du DIH, affirmé que des mesures ou des actes d’Etats violaient ce droit. Un exemple particulièrement topique est constitué par la résolution 674 (1990) qui déclare que certaines actions entreprises par l’Irak à l’encontre de nationaux d’Etats tiers ou de nationaux koweïtiens, notamment les prises d’otages répétées, constituent des violations graves de la 4^{ème} Convention de Genève²¹⁵. L’importance d’une telle prise de position de la part du Conseil réside dans le fait que cela fait peser sur l’Etat concerné une pression publique propice à le pousser à stopper ces agissements. En effet, dès lors que le Conseil stigmatise un acte étatique en violation du DIH, il est difficile, pour ne pas dire impossible, pour l’Etat, compte tenu de l’autorité dont dispose le Conseil de sécurité, de clamer et de prouver que tel n’est pas le cas²¹⁶. Une telle constatation de la part du Conseil est en outre, souvent, le prélude à des mesures plus sévères à l’encontre de l’Etat concerné, y compris un recours aux mesures coercitives de l’article 42.

C. Le Conseil de sécurité qualifie le conflit

Le droit applicable dépend de la qualification de la situation qu’il a vocation à régir. Lorsqu’il rappelle aux parties à un conflit le droit applicable, le Conseil doit donc, en premier lieu, procéder à la qualification de la situation dont il traite. Cette opération est évidemment importante tant l’on sait que le

²¹³ Voir S/RES/764 (1992), par. 10.

²¹⁴ Voir Bourloyannis, C., *The Security Council of the United Nations and the implementation of International Humanitarian Law*, in *Denver Journal of International Law and Policy*, Vol. 20, 1992, p. 343.

²¹⁵ Voir S/RES/674 (1990), Préambule, par. 3.

²¹⁶ Voir en ce sens Bourloyannis, C., *Op. Cit.*, note 6, p. 343.

corpus de règles applicables varie selon qu'il s'agit d'un conflit armé, international ou non, ou d'une situation de troubles et tensions internes.

A ce titre, c'est certainement dans le contexte du conflit israélo-palestinien que l'action du Conseil de sécurité a été la plus marquée. Ainsi pour condamner la pratique des colonies de peuplement dans les territoires arabes occupés par Israël depuis 1967, le Conseil a, à plusieurs reprises, enjoint à Israël d'appliquer la 4^{ème} convention de Genève. Ce fut notamment le cas dans la résolution 681 (1990) qui demandait au gouvernement israélien de *“reconnaître l'applicabilité de jure de la Convention de Genève relative à la protection des personnes civiles en temps de guerre (...) à tous les territoires occupés par Israël depuis 1967 et à se conformer scrupuleusement aux dispositions de la Convention”*²¹⁷. Ce faisant, le Conseil de sécurité a sans aucun doute *“contribuer à objectiviser la situation d'occupation des territoires occupés comme conflit international au sens des Conventions de Genève”*²¹⁸. Il a ainsi élargi le champ de la protection dont peuvent bénéficier les personnes affectées par ledit conflit puisqu'en situation de conflit international les 4 conventions de Genève s'appliquent en combinaison avec le protocole additionnel n°1 de 1977 (pour les pays l'ayant ratifié). Le rôle du Conseil de sécurité dans la mise en œuvre et le respect du DIH est ici flagrante et connaît des répercussions pour le moins positives.

D. Le Conseil de sécurité prend des mesures concrètes pour faire cesser les violations du DIH et en améliorer le respect

Lorsque le Conseil de sécurité ne parvient pas à prévenir les violations du DIH, il essaie à tout le moins, sinon de les guérir, du moins de les atténuer ou d'en identifier les auteurs. Il met alors au service de sa volonté les moyens les plus appropriés pour en assurer le succès, c'est-à-dire qu'il place les résolutions contenant les mesures prises, sous le sceau du chapitre VII de la Charte des Nations Unies. Trois types de mesures mériteraient d'être mentionnées mais, eu égard à la délimitation ratione *materiae* du séminaire dans le cadre duquel s'inscrit ce travail, la création, par le Conseil de sécurité, de tribunaux ad hoc chargés de juger les auteurs des violations du DIH, sera éludée. Seuls les moyens non judiciaires seront évoqués, en particulier l'instauration de zones de sécurité et la mise sur pied de commissions d'enquête.

Concernant la première mesure évoquée, elle apparaît dans le contexte du conflit en ex-Yougoslavie. Dans sa résolution 819 (1993), le Conseil de sécurité exige que « toutes les parties et autres intéressés traitent Srebrenica et ses environs comme une zone de sécurité à l'abri de toute attaque armée et de tout autre acte d'hostilité. »²¹⁹. De même, dans la résolution 824 (1993), il exige que « la capitale de la République de Bosnie-Herzégovine, Sarajevo, ainsi que les autres zones menacées, en particulier les villes de Tuzla, Zepa, Gorazde, Bihac, de même que Srebrenica et ses environs [doivent] être traitées comme des zones de sécurité

²¹⁷ Voir S/RES681 (1990), par. 4.

²¹⁸ Voir Boisson De Chazournes, L., *Les résolutions des organes des Nations Unie, et en particulier celles du Conseil de sécurité, en tant que source du droit international humanitaire*, in *Les Nations Unies et le droit international humanitaire*, Actes du Colloque international de Genève, Condorelli L., et al. (éd.), octobre 1995, Paris : Pedone, 1996, p. 163.

²¹⁹ Voir S/RES/819 (1993), par. 1.

par toutes les parties concernées et être à l'abri des attaques armées et de tout autre acte d'hostilité. »²²⁰. Cette initiative du Conseil de sécurité vise à améliorer la protection des personnes qui ne participent pas ou plus aux hostilités. Elle cherche ainsi une application renforcée du DIH. Cela est d'autant plus remarquable que pour créer ces zones de sécurité le Conseil de sécurité s'est affranchi du modèle classique tel que décrit et développé dans l'article 14 de la 4^{ème} convention de Genève. Notamment, le Conseil est passé outre la condition de consentement de l'Etat du for en imposant de façon unilatérale ces zones à la République de Bosnie-Herzégovine. Cela traduit bien l'audace dont le Conseil de sécurité s'est autorisé à faire preuve pour l'amélioration du respect du DIH.

La deuxième mesure concrète dont notre étude traitera est la mise en place de commissions d'enquête par le Conseil de sécurité. Il s'agit là d'une technique d'appréhension du DIH qui n'a pas cessé de se développer depuis la fin de la deuxième guerre mondiale. Ces commissions ont été globalement utilisées de deux manières : soit comme première étape dans un processus de sanctions pénales pour des infractions au DIH (ce fut le cas des commissions instituées en Argentine, en ex-Yougoslavie, au Rwanda ou encore au Sierra Léone), soit comme substitut au procès pénal (El Salvador, Somalie, Haïti, Afrique du sud)²²¹. Elles n'ont cependant pas toutes été créées par le Conseil de sécurité, certaines l'étant par un acte de pouvoir interne (par exemple en Sierra Léone). C'est pourquoi nous nous contenterons de citer les commissions qui ont été mises en place par une résolution de l'exécutif onusien. Il s'agit en premier chef, par ordre chronologique, de la commission d'enquête chargée "*d'étudier la situation concernant les colonies de peuplement dans les territoires arabes occupés depuis 1967, y compris Jérusalem Est*"²²², établie le 22 mars 1979. C'est ensuite la commission d'experts chargée d'examiner les violations graves du DIH commises dans le cadre du conflit en ex-Yougoslavie et instituée par la résolution 780. C'est enfin la commission d'enquête créée au Rwanda. Par sa résolution 935 (1994) le Conseil de sécurité demanda au Secrétaire général de mettre en place une commission d'experts chargée de mettre en évidence les actes de génocide perpétrés au Rwanda en 1994.

Il n'est pas ici de notre ressort de procéder à une étude approfondie et exhaustive des mandats confiés à ces commissions. Néanmoins il nous semblait intéressant de soulever la question de la base juridique de la compétence du Conseil de sécurité pour créer de tels organes. D'emblée, il nous faut remarquer et souligner que le Conseil de sécurité n'a pas voulu fonder ses résolutions 780 et 935 sur l'article 34 de la Charte des Nations Unies²²³. Ce faisant il opte pour une interprétation restrictive de l'article 34²²⁴. Une enquête entreprise sous l'égide de l'article 34 est une mesure finalisée qui doit déterminer si la

²²⁰ Voir S/RES/824 (1993), par. 3.

²²¹ Voir Scharf, M. P., *The Case for a permanent international Truth Commission*, in *Duke Journal of Comparative & International Law*, vol.7, 1997, n°2, p.375,

²²² Voir S/RES/446 (1979), par. 4.

²²³ Voir la Charte des Nations Unies, article 34, "*Le Conseil de sécurité peut enquêter sur tout différend ou toute situation qui pourrait entraîner un désaccord entre nations ou engendrer un différend, afin de déterminer si la prolongation de ce différend ou de cette situation semble devoir menacer le maintien de la paix et de la sécurité internationales*".

²²⁴ Voir Vite, S., *Les procédures d'établissement des faits dans la mise en œuvre du droit international humanitaire*, Bruxelles : Bruylant, 1999, p. 109.

continuation de la situation surveillée est susceptible de menacer la paix et la sécurité internationales. Or cet objectif n'était ni celui de la commission pour l'ex-Yougoslavie, ni celui de celle pour le Rwanda puisque, précisément, le Conseil de sécurité avait déjà, pour pouvoir placer sa résolution sous les auspices du chapitre VII, stigmatiser l'existence d'une menace contre la paix. En outre le mandat de ces commissions d'enquêtes outrepassait largement ce que prévoyait l'article 34. En conséquence, c'est sur la base de son pouvoir général d'enquête et non sur celle de son pouvoir spécifique énoncé à l'article 34 que le Conseil de sécurité a adopté ses résolutions 780 et 935²²⁵. Néanmoins, si le chapitre VII énumère les mesures que le Conseil peut prendre dans le but de maintenir ou de restaurer la paix, aucune mention n'est faite de la possibilité de mettre en place des commissions d'enquête. Il semble que ce soit à ce stade que doit intervenir la fiction juridique des "*pouvoirs implicites*" du Conseil de sécurité. Consacrée par la CIJ²²⁶, cette théorie peut être synthétisée en considérant que "*les pouvoirs implicites sont ceux qui sont nécessaires pour l'accomplissement effectif des pouvoirs énumérés*"²²⁷. Dans la mesure où, comme le fait le Conseil de sécurité, l'on admet que des violations graves du DIH menacent la paix et la sécurité internationales, on peut en déduire que, dans la perspective d'une sanction pénale et d'une répression accrue, la mise en place de commissions d'enquête est nécessaire à la réalisation des objectifs fixés par le chapitre VII.

Les mesures employées par le Conseil de sécurité pour absorber les considérations humanitaires dans son ère d'action sont donc nombreuses et diversifiées. Au refus originel d'intégrer le DIH dans sa sphère de compétence, le Conseil a substitué une attitude plus compréhensive en prenant conscience de l'importance de son rôle. Afin de mieux comprendre ce processus d'assimilation, il nous faut maintenant analyser la manière dont le Conseil a mis le chapitre VII au service de l'amélioration de la mise en œuvre et du respect du DIH. De la prudence à l'audace, le Conseil de sécurité s'est octroyé une marge de manœuvre sans cesse plus importante en la matière.

III. EVOLUTION DE LA TECHNIQUE D'APPROPRIATION PAR LE CONSEIL DE SECURITE DES CRISES HUMANITAIRES : ENTRE RESPECT ET AFFRANCHISSEMENT DES CONTRAINTES JURIDIQUES, LE CHAPITRE VII DE LA CHARTE MIS AU SERVICE DU RESPECT DU DROIT INTERNATIONAL HUMANITAIRE

La gestion des affaires humanitaires, n'entraîne pas, à l'origine dans la sphère de compétence des Nations Unies. Deux événements ont cependant fait évoluer les choses en faveur d'une telle inclusion : le conflit au Moyen orient, à l'occasion duquel le Conseil a renforcé son interventionnisme à des fins humanitaires, puis la conférence sur les droits de l'homme qui s'est tenue à Téhéran, en 1968, et avec

²²⁵ Voir Vite, S., *Les procédures d'établissement des faits dans la mise en œuvre du droit international humanitaire*, Bruxelles : Bruylant, 1999, p. 110-111.

²²⁶ Voir *Réparations des dommages subis au service des Nations Unies, avis consultatif*, CIJ, Recueil 1949, par. 174-182.

²²⁷ Voir Bothe, M., *Les limites des pouvoirs du Conseil de sécurité*, in *Le développement du rôle du Conseil de sécurité*, Colloque de La Haye, 21-23 juillet 1992, Dupuy, R.J., (éd.), Dordrecht/Boston: Martinus Nijhoff Publishers, 1993, p. 74.

laquelle les préoccupations humanitaires sont officiellement entrées dans le panel d'activités de l'ONU. L'extension du champ de compétences *ratione materiae* du Conseil de sécurité se fit d'abord dans le strict respect des arcanes du droit : les “portes d'entrée” dans le chapitre VII, et notamment dans la sphère coercitive de celui-ci, furent poussées les unes après les autres (A) (B). Par la suite, le Conseil de sécurité fit preuve de plus d'audace pour s'arroger une légitimité d'intervention dans des contextes humanitaires normalement soustraits à sa compétence (C).

A. Le sésame à l'action sur chapitre VII du Conseil de Sécurité en matière humanitaire : l'assimilation des crises humanitaires à une menace à la paix et à la sécurité internationales

L'article 39 de la Charte des Nations Unies pose comme condition nécessaire, mais néanmoins suffisante, au déclenchement des pouvoirs du Conseil de sécurité, la constatation, par lui-même, notamment d'une “menace contre la paix”. Métaphorisé sous les contours d'une “porte d'entrée” sur le chapitre VII, cet article constitue en quelque sorte l'arcane incontournable par lequel le Conseil doit passer pour activer ses pouvoirs, que ces derniers lui soient expressément dévolus par la Charte ou qu'ils résultent, comme c'est le cas ici, d'une interprétation prétorienne de son champ de compétence *ratione materiae*.

Le recours à la “fiction juridique de la menace contre la paix”²²⁸ était donc la seule voie qui pouvait permettre au Conseil de sécurité de faire d'une situation de crise humanitaire un motif légitime d'action. Cela est d'autant plus vari que, rappelons le, il n'existe certainement pas, en droit, de concept plus polymorphe et protéiforme que la menace contre la paix : “une menace contre la paix au sens de l'article 39 est une situation dont l'organe compétent pour déclencher une action de sanctions décide qu'elle menace effectivement la paix”²²⁹. De cet axiome il s'infère que le Conseil de sécurité a qualifié des situations de catastrophes humanitaires de menaces pour la paix parce qu'il voulait s'approprier leur gestion. Il a ainsi pu affirmer : “La paix et la sécurité internationales ne découlent pas seulement de l'absence de guerre et de conflits armés. D'autres menaces de nature non militaire [...] trouvent leur source dans l'instabilité qui existe dans les domaines économiques, social, humanitaire ou écologique”²³⁰. Par conséquent, compte tenu du pouvoir discrétionnaire de qualification du Conseil et puisqu'une telle décision est motivée par le souci de maintenir ou de restaurer la paix et la sécurité internationales²³¹, toute glose quant à sa légitimité serait stérile. Il en va autrement de la réflexion relative à la légalité d'une telle assimilation. Dès lors, ressurgit le vieux démon de l'arbitraire du Conseil de sécurité : est-il libre de qualifier n'importe quelle situation de menace contre la paix uniquement pour assouvir ses vellétés interventionnistes ? A ce stade, il nous appartient de fournir des éléments plaidant en faveur de la couverture du droit humanitaire par le chapitre VII

²²⁸ Voir Sorel, J.M., *L'élargissement de la notion de menace contre la paix*, dans *Le chapitre VII de la Charte des Nations Unies*, Paris : Pédone, 1995, p. 42.

²²⁹ Voir Combacau, J., tel que cité dans Sorel, J.M., *Op. Cit.*, note 20, p. 10.

²³⁰ Voir Sorel, J.M., *Op. Cit.*, p. 12.

²³¹ Voir en ce sens Gaja, G., *Réflexions sur le rôle du Conseil de sécurité dans le nouvel ordre mondial*, *RGDIP*, 1993, p. 315. Voir également, *Certaines dépenses des Nations Unies, avis consultatif*, CIJ, Recueil 1962, p. 188.

de la Charte. Tout d'abord, cela doit permettre d'optimiser les mesures prises en faveur de la mise en œuvre et du respect du DIH en les dotant d'une force obligatoire que seul le chapitre VII est capable de leur conférer²³². Cette dimension contraignante est portée à son paroxysme lorsque le Conseil la double d'une modalité coercitive en autorisant le recours à "*tous les moyens nécessaires*". Il serait ainsi paradoxal de plaider en faveur d'une meilleure application du DIH tout en se privant du vecteur le plus efficace pour y parvenir. Ensuite, il s'agit pour le Conseil d'empêcher une interprétation abusive du devoir qu'ont les Etats de "*faire respecter*"²³³ le DIH²³⁴. En effet, en acceptant que le Conseil s'arroe un quasi monopole en matière de gestion de crises humanitaires, au besoin en utilisant la force, on évite que les Etats n'interprètent leur obligation comme les autorisant à utiliser, individuellement ou collectivement, la force contre l'auteur des violations du DIH. Cette approche est conforme à l'esprit du système de sécurité collective tel qu'il est conçu par la Charte des Nations Unies. Son ambition était en effet de centraliser le droit de recourir à la force pour l'extraire de toute appréciation subjective et opportuniste. Enfin, troisième argument en faveur de l'assimilation des crises humanitaires à une menace à la paix, cela permet de "*court-circuiter*" le principe de non intervention dans les affaires intérieures d'un Etat²³⁵ en activant l'exception à celui-ci dans les cas où la paix et la sécurité internationales sont mises en cause. Un Etat ne peut plus se dissimuler derrière l'exclusivité de sa souveraineté pour violer les règles les plus élémentaires du traitement humain. La communauté acquiert ainsi un droit de regard, de condamnation et de sanction plus efficace.

B. Le Conseil de sécurité a d'abord pris soin d'identifier un élément d'internationalisation pour justifier une intervention sous chapitre VII à des fins humanitaires

En reconnaissant que les préoccupations humanitaires pouvaient entrer dans son champ de compétences, le Conseil de sécurité avait déjà fait œuvre révolutionnaire. Il lui restait cependant à oser mettre les moyens dont il dispose en vertu de la Charte au service de la résolution de crises qui gangrènent un Etat, de l'intérieur. Même si la stigmatisation d'une menace à la paix lui permettait de faire sauter le verrou étatique en la matière, le Conseil a, au début de sa pratique tout du moins, rechigné à intervenir dans des contextes purement internes. Ainsi lorsqu'il a voulu se saisir de telles situations, il a dissimulé son action derrière la préoccupation générique de maintien de la paix internationale. Autrement dit, il n'a déclenché ses interventions en matière humanitaire que lorsque la situation, pourtant souvent interne, risquait d'avoir des répercussions trans-frontalières déstabilisantes pour une ère géographique plus importante. Ce fut par exemple le cas en Irak en 1991. Certes le Conseil de sécurité est ici intervenu à l'intérieur des frontières d'un Etat. Mais ce fut non sans avoir auparavant mis en exergue un élément d'internationalisation de la catastrophe humanitaire que représentait la répression des Kurdes par le régime de Saddam Hussein. Ainsi, la résolution 688 disposait-t-elle que "*la répression des populations civiles irakiennes dans de nombreuses*

²³² Voir la Charte des Nations Unies, article 25.

²³³ Voir l'article 1 commun aux 4 Conventions de Genève du 12 août 1949.

²³⁴ Voir Sandoz, Y., *Op. Cit.*, note 1, p. 70.

²³⁵ Voir la Charte des Nations Unies, article 2 § 7.

*parties de l'Irak, [...] a conduit à un flux massif de réfugiés vers des frontières internationales et à travers celles-ci à des violations de frontières qui menacent la paix et la sécurité internationales dans la région*²³⁶. De plus il convient de souligner que cette résolution intervient dans le cadre de la guerre du golfe : le critère du conflit interétatique reste le facteur déterminant pour justifier l'action du Conseil. Ce dernier n'ose pas encore faire de la finalité humanitaire la cause unique de son intervention sur le territoire d'un Etat souverain. Prise sur la base du chapitre VII, cette résolution marqua cependant le début d'une succession de résolutions du même genre pour des contextes semblables. Ainsi, dans sa résolution 1199, relative au conflit en ex-Yougoslavie, le Conseil de sécurité affirma que *“la détérioration de la situation au Kosovo constitue une menace à la paix et à la sécurité dans la région*²³⁷ après s'être déclaré *“profondément préoccupé par l'afflux de réfugiés dans le nord de l'Albanie, en Bosnie Herzégovine et dans d'autres pays européens*²³⁸. La résolution 1203 ira dans le même sens quelques temps plus tard. Là encore le débordement frontalier demeure un paramètre incontournable.

Force est donc de constater que le Conseil de sécurité n'a souvent consenti à intervenir à des fins humanitaires qu'en faisant des répercussions trans-frontalières des crises humanitaires internes le facteur d'absorption de celles-ci dans la très protéiforme notion de *“menace contre la paix*“. A ce stade de l'exposé, ce n'est encore que par un phénomène de ricochet que la violation du DIH motive l'activation du Conseil de sécurité. Les critères organiques de l'existence d'un conflit interétatique ou des risques de déplacements massifs de populations conservent une précellence certaine. Néanmoins un double pas allait être franchi avec les résolutions adoptées, par le Conseil de sécurité, dans les contextes bosniaque et somalien.

C. L'innovation : Le Conseil de sécurité s'affranchit parfois de l'élément d'internationalisation pour faire de la finalité humanitaire la raison d'être de son action coercitive

Cet intitulé à la formulation condensée cherche à traduire la double évolution que les résolutions 770 (1992) et 794 (1992) ont consacré dans l'action humanitaire du Conseil de sécurité. Si le Conseil s'attache encore à stigmatiser l'existence d'une menace à la paix et à la sécurité internationales, cette constatation doit désormais se contenter du rang de simple clause de style tant l'élément déterminant de son action se trouve désormais circonscrit à l'intérieur des frontières d'un Etat. La résolution 770 dispose ainsi que c'est *“la situation en Bosnie Herzégovine [qui] constitue une menace pour la paix et la sécurité internationales*²³⁹. De même la résolution 794 affirme que c'est²⁴⁰. A aucun moment il n'est fait mention d'un élément externe, tel un flux de réfugiés ou encore la propagation d'un conflit armé à une ère géographique plus étendue. L'on peut déduire de cette constatation, et c'est là le premier apport de ces deux

²³⁶ Voir S/RES/688 (1991), Préambule, par. 3.

²³⁷ Voir S/RES/1199 (1998), Préambule, par. 14.

²³⁸ Voir Ibidem, Préambule, par. 7.

²³⁹ Voir S/RES/770 (1992), Préambule, par. 5.

²⁴⁰ Voir S/RES/794 (1992), Préambule, par. 3.

résolutions, que désormais le Conseil n'hésite plus à faire de la préoccupation humanitaire le motif officiel et unique d'une action entreprise sur la base du chapitre VII. L'acheminement de l'aide humanitaire devient un vecteur essentiel de la restauration de la paix. Ainsi en atteste la résolution 770 selon laquelle *“l'aide humanitaire à la Bosnie-Herzégovine représente un élément important de l'effort que [le Conseil de sécurité] déploie en vue de rétablir la paix (...).”*²⁴¹. Le seul bémol que l'on pourrait apporter à l'esprit d'initiative manifesté par le Conseil de sécurité serait peut être celui d'avoir conservé l'intermédiaire de la menace contre la paix. En effet, et même s'il ne fait aucun doute que l'aspect humanitaire est prépondérant dans les deux situations évoquées, le Conseil n'érige pas encore le caractère tragique de la situation humanitaire en légitimation directe de son action. C'est parce que, selon lui, cette situation menace la paix qu'elle l'autorise à agir. C'est ici qu'il faut trouver l'ultime terrain d'évolution. Néanmoins il est déjà flagrant, comme nous l'avons déjà fait remarquer, que le recours à la notion de menace est plus un garde fou juridique destiné à ne pas heurter les défenseurs de la souveraineté étatique qu'une véritable clause opératoire.

Quant au deuxième apport majeur des résolutions susmentionnées, c'est la première fois que le Conseil autorise un éventuel recours à la force sans évoquer une réaction à une attaque militaire perpétrée par un Etat contre un autre²⁴². Le critère décisif permettant ici l'usage de la force est la nécessité d'acheminer l'aide humanitaire à ses destinataires nécessiteux. En d'autres termes le respect du *Jus in Bello* est érigé en levier d'actionnement du *Jus ad bellum*, en condition de sa légalité.

Les résolutions 770 (1992) et 794 (1992) consacrent donc la mise du pouvoir coercitif du Conseil de sécurité au service d'une meilleure application du droit humanitaire dans des contextes purement internes. Compte tenu du « séisme juridique » que cela représente dans le microcosme humanitaire, il importe de mettre en exergue les critères qui ont conduit le Conseil de sécurité à agir avec autant d'audace. Une systématisation trop abrupte serait bien entendu absurde au regard de la singularité de chacune de ces deux situations, le Conseil ayant qualifié la situation en Somalie de « cas unique » dont le *“caractère extraordinaire »* appelait une *« réaction (...) exceptionnelle »*²⁴³. Malgré tout, deux traits communs peuvent être identifiés.

Il s'agit tout d'abord de l'impossibilité pour l'aide humanitaire de parvenir à la population. Dans la résolution 770, le conseil de sécurité considère que *“la situation en Bosnie Herzégovine constitue une menace pour la paix (...) et (...) l'aide humanitaire à la Bosnie-Herzégovine constitue un élément important de l'effort qu'il déploie en vue de maintenir la paix (...).”*²⁴⁴. Dans la résolution 794, le même Conseil déclare que *“l'ampleur de la tragédie humanitaire causée par le conflit en Somalie, encore exacerbée par les obstacles opposés à l'acheminement de l'aide humanitaire constitue une menace à la paix (...).”*²⁴⁵. Ce faisant, le Conseil établit de manière générale un lien entre la nécessité d'acheminer l'aide humanitaire et le

²⁴¹ Voir S/RES/770 (1992), Préambule, par. 5.

²⁴² Voir Corten, O., Klein, P., *L'autorisation de recourir à la force à des fins humanitaires : droit d'ingérence ou retour aux sources ?*, *EJIL*, vol. 4, 1993, par. 2..

²⁴³ Voir S/RES/794 (1992), Préambule, par. 2.

²⁴⁴ Voir S/RES/770 (1992), Préambule, par. 5.

²⁴⁵ Voir S/RES/794 (1992), Préambule, par. 3.

maintien de la paix²⁴⁶. C'est précisément ce lien dynamique et quasi-consubstantiel entre l'assistance humanitaire et le rétablissement de la paix qui permet de passer à des actions coercitives lorsque la détérioration de la situation les rend nécessaires²⁴⁷.

Le principe de non intervention dans les affaires intérieures ne constitue plus un rempart efficace derrière lequel pourrait s'abriter un Etat pour violer le DIH. Ce serait, au demeurant une parodie de droit et une trahison au besoin universel de justice que le concept de souveraineté étatique puisse être invoqué avec succès face aux violations du droit des conflits armés. En quelque sorte, ces deux résolutions 770 et 794 uniformisent le droit en transposant au DIH ce que le Conseil de sécurité avait déjà entériné pour les droits de l'homme²⁴⁸.

Le deuxième critère sur lequel le Conseil a fondé sa position est la perte grave d'autorité du gouvernement en place. La mise en avant de cet état de fait participe de la même précaution que la stigmatisation de l'existence d'une menace à la paix dont elle est d'ailleurs un élément constitutif. Au demeurant, ce deuxième critère pourrait être vu comme superfétatoire dans la mesure où de toute façon l'intervention des Nations Unies sur le territoire d'un Etat, sans son consentement, est justifié par la seule identification d'une menace à la paix et par l'entrée successive dans le chapitre VII. Toujours est-il que dans la résolution 770 le Conseil de sécurité s'est déclaré "*consterné par la persistance des conditions qui empêchent l'acheminement des fournitures humanitaires à leur lieu de destination*"²⁴⁹. Certes il ne précise pas la nature de ces conditions mais il est évident que la déliquescence des structures étatiques est propice au développement de milices et de factions incontrôlées pour lesquelles les vivres et les médicaments représentent un véritable objectif de guerre. La précarité et la dangerosité du contexte interne qui en résulte justifie que le Conseil autorise un usage élargi de la force pour garantir l'acheminement effectif des convois d'aide humanitaire.

Par ces deux résolutions, le Conseil de sécurité érige donc la bonne distribution de l'aide humanitaire en but unique de l'opération déclenchée sur la base du chapitre VII dans des contextes purement internes. Compte tenu de son importance cardinale pour la restauration de la paix, il est justifié, selon le Conseil, que pour l'accomplissement de cette tâche les forces soient investies d'un droit de recourir à la force qui dépasse la simple occurrence de la légitime défense. Ce n'est pas encore le point d'aboutissement du processus qui a vu le Conseil se saisir de plus en plus de situations de catastrophes humanitaires internes. La dernière étape devrait être l'érection des violations massives du DIH en détonateur de l'action coercitive du Conseil de sécurité, sans passer par le truchement de la menace à la paix.

Cette immixtion accrue du Conseil de sécurité dans la sphère du Jus in Bello constitue désormais un axiome de base autour duquel doit s'articuler la réflexion sur la légitimité et la légalité d'une telle

²⁴⁶ Voir Corten, O., Klein, P., *Op. Cit.*, note 34, par. 8.

²⁴⁷ Voir Corten, O., Klein, P., *Op. Cit.*, note 34, par. 10.

²⁴⁸ Voir en ce sens S/RES/473 (1980), par. 3, "*réaffirme que la politique d'apartheid est un crime contre la conscience et la dignité de l'humanité et est incompatible avec les droits de l'homme et sa dignité, la Charte des Nations Unies et la Déclaration universelle des droits de l'homme, et porte gravement atteinte à la paix et à la sécurité internationales*"

²⁴⁹ Voir S/RES/770, 1992, Préambule, par. 8.

intervention. Il nous appartient dès lors de poser quelques pistes d'analyse qui ne sauraient, cependant, épuiser la totalité du débat.

IV. APPRECIATION CRITIQUE DE L'IMMIXTION DU CONSEIL DE SECURITE DANS LA SPHERE DU DROIT INTERNATIONAL HUMANITAIRE

Si nécessaire et louable soit elle, l'intervention du Conseil de sécurité à des fins humanitaires reste sujette à caution. La source de problématiques juridiques qu'elle soulève semble intarissable et nous ne saurions les épuiser toutes dans le cadre de cette étude. Néanmoins, il importe d'en soulever quelques unes. Outre le problème du risque de confusion entre le *Jus in Bello* et le *Jus ad Bellum* que l'action du Conseil engendre inévitablement (A), se pose la question de savoir s'il est satisfaisant de confier à un organe, par essence politique, la gestion du droit humanitaire dont l'application doit être inconditionnelle et se réaliser en toutes circonstances (B). De même, il est utile de réfléchir à l'intensité de la relation qui doit exister entre un organe de *Jus contra bellum* et des organismes chargés de faire respecter le *Jus in bello* comme le CICR. Se situent-ils dans un rapport de complémentarité ou au contraire d'antagonisme ? Si la réponse est incertaine, il est néanmoins acquis qu'une réponse trop manichéenne doit être rejetée, tant il est nécessaire de trouver un juste équilibre permettant leur coopération (C).

A. Le risque de confusion entre le *Jus in Bello* et le *Jus ad Bellum*

On entre ici dans ce qui est probablement le problème le plus épineux des relations entre l'ONU et le DIH. Le Conseil de sécurité, en sa qualité d'organe principal du maintien de la paix et de la sécurité internationales, de cerbère du *Jus contra Bellum*, peut-il aussi se faire le garant du respect du droit des conflits armés ou *Jus in Bello* ? Le simple énoncé de cette question fait évidemment bondir tout juriste bercé au dogme de l'autonomie de ces deux branches du droit international. Elle mérite cependant d'être examinée compte tenu de la controverse qu'elle génère actuellement. Pour ce faire il convient de se placer sur un double plan : celui, tout d'abord de la légitimité d'une telle intervention du Conseil, celui, ensuite, de son caractère souhaitable ou non.

La légitimité du Conseil de sécurité à se préoccuper de questions humanitaires trouve son principal fondement dans la non-exclusivité de ses attributions en vertu de son acte constitutif. Ainsi, l'article 24 de la Charte des Nations Unies ne doit pas être lu comme limitant la compétence du Conseil aux seules questions relatives au maintien de la paix. Au demeurant, à la lumière de nos développements précédents, il apparaît clairement que les situations de crises humanitaires contiennent souvent, en leur sein même, une dimension potentiellement dangereuse pour la paix régionale ou internationale, tant les déplacements de populations qu'elles sont susceptibles de générer peuvent être déstabilisants pour les Etats voisins. De telles situations tomberaient alors d'elles mêmes dans le champ de compétence du Conseil de sécurité. Certes, *prima facie*, cela ne fonde pas la capacité juridique du Conseil à s'occuper de droit humanitaire. Mais puisque les

violations du droit international humanitaire constituent, en pareille occurrence, la substance même de la menace contre la paix, c'est leur résolution qui seule permettra la restauration d'un contexte apaisé. En conséquence le Conseil de sécurité, pour satisfaire les tâches qui lui sont confiées, doit prendre des mesures directement relatives au droit humanitaire. Une telle considération se trouve corroborée par le fait que le règlement de problèmes internationaux d'ordre humanitaire échoit expressément, à l'article 1 § 3 de la Charte, à la compétence de l'ONU et donc, a fortiori, à celle de son organe exécutif, le Conseil de sécurité.

En outre, il serait assez paradoxal de plaider pour une meilleure mise en œuvre du DIH tout en se privant des compétences, et de l'atout principal du Conseil, c'est-à-dire le caractère juridiquement contraignant de ses décisions²⁵⁰.

Si la légitimité du Conseil de sécurité à intervenir pour un meilleur respect du DIH semble acquise, davantage, il est vrai, au titre du bon sens et de la raison, que par référence à une norme juridique établie, demeure posée la question de l'intérêt de voir cet organe s'investir dans ce domaine. Cette immixtion est souhaitable si l'on en juge par les résultats plutôt positifs qui sont venus ponctuer les actions du Conseil de sécurité. Elle l'est, en revanche, beaucoup moins si l'on pense que cela place le Conseil de sécurité dans une position pour le moins ambiguë à l'égard des parties. Lorsqu'il stigmatise des violations du DIH, l'une des parties au conflit attend que le Conseil accompagne sa constatation, sinon d'une condamnation formelle, du moins d'une action autrement plus significative à ses yeux. Elle espère une reconnaissance de la justesse de ses revendications et la sanction corrélative de l'agresseur²⁵¹. La question qui se pose dès lors est celle de savoir si le Conseil doit limiter son action aux fins de cessation des hostilités ou s'il doit simplement demander aux belligérants d'adopter un comportement conforme aux exigences du droit de Genève et de La Haye. Sans aucun doute, il ne doit sacrifier aucune de ces deux missions sur l'autel de l'autre et doit tendre, tant que possible, à une satisfaction optimale de ces deux finalités.

Par conséquent, à la question de l'intensité de l'implication du Conseil de sécurité dans un domaine qui n'est pas originellement le sien, *le Jus in Bello*, une réponse trop manichéenne doit être écartée. Certes, il est nécessaire que soit maintenue une certaine frontière pour ne pas diluer l'autonomie des deux corpus juridiques, car le droit humanitaire interdit de prendre position sur la justice des causes invoquées. Néanmoins, face aux violations de plus en plus fréquentes du DIH, il est nécessaire que le Conseil de sécurité rappelle constamment aux acteurs, étatiques ou non, leurs obligations en la matière. Son action, plus que celle de tout autre organisme, sert la meilleure application du DIH. Même si le Conseil de sécurité, en lui-même, n'est pas tenu de remplir cette mission, les Etats qui en sont membres sont dans l'obligation de "*faire respecter*"²⁵² le droit humanitaire. C'est par cette voie indirecte, nous semble-t-il, que l'action du Conseil de sécurité en matière de DIH se justifie le mieux.

²⁵⁰ Voir Charte des Nations Unies, art. 25.

²⁵¹ Voir Torrelli, M., *La dimension humanitaire de la sécurité internationale, Le développement du rôle du Conseil de sécurité*, Colloque de La Haye, 21-23 juillet 1992, R.-J Dupuy (éd.), Dordrecht/Boston/London : Martinus Nijhoff publishers, 1993, p. 214.

²⁵² Voir l'article 1 commun aux 4 Conventions de Genève du 12 août 1949.

B. Le caractère politique des décisions du Conseil de sécurité : une vision de l'humanité à géométrie variable

En intégrant, par sa résolution 688²⁵³, les préoccupations humanitaires dans son champ d'activités, le Conseil de sécurité a inauguré une *“tendance à l'excroissance de l'humanitaire hors du droit des conflits armés”*²⁵⁴ qui porte en elle les germes de nombreux problèmes. Ainsi notre réflexion doit, à peine, sinon, de perdre en qualité, mettre en exergue l'écueil que constitue le caractère éminemment politique du Conseil de sécurité. La question qui se pose, dès lors, est celle de savoir si le « directoire des grandes puissances » que représente le Conseil, lorsqu'il est amené à agir dans le champ de l'humanitaire, peut suffisamment s'affranchir des déterminismes politiques, économiques, stratégiques qui orientent généralement ses choix pour revenir à plus d'authenticité, d'humanité afin de satisfaire aux exigences de neutralité et d'impartialité qui doivent présider aux actions humanitaires. En effet, tout son apport en la matière serait fragilisé *“si la politique du Conseil n'[était] pas conforme aux grands principes du droit humanitaire”*²⁵⁵.

Or en pratique il ne fait de doute pour personne que lorsque le Conseil choisit de s'intéresser à une situation humanitaire, il fait preuve d'opportunisme. Les ères d'intervention sont choisies par le Conseil en vertu de critères pour le moins subjectifs, qui oscillent entre intérêts politiques et perspectives financières. Comme le note Michael Bothe, le respect du DIH n'est souvent qu'un simple critère parmi d'autres, et rarement le plus important²⁵⁶.

Plus encore en matière de *jus in bello* qu'en matière de *jus contra bellum*, la légitimité de l'action de la communauté internationale dépend de sa capacité à s'extraire de ces considérations partisans. Tout en conservant un sens aigu des réalités et sans verser dans une utopie naïve, n'est il pas possible de dégager un cadre formel dans lequel devrait s'inscrire la réflexion du Conseil de sécurité ? Sans constituer la panacée absolue, cela permettrait au moins à l'action du Conseil de sécurité d'abandonner cette *“sélectivité pusillanime”*²⁵⁷ qui la caractérise si souvent en matière humanitaire.

Deux défauts essentiels de l'action du Conseil devraient à ce titre être corrigés. Le premier touche à la qualification des situations. Lorsqu'il stigmatise une situation de crise humanitaire comme constitutive d'une menace à la paix²⁵⁸ le Conseil identifie un faisceau d'indices concordants. Dès lors toute autre situation présentant des caractéristiques similaires doit être qualifiée de la même façon et susciter la même attention de la part du Conseil. Tel n'est évidemment pas le cas à l'heure actuelle comme en atteste la différence de traitement entre la crise yougoslave, *“cette guerre des riches”* qui a mobilisé toutes les volontés et toutes les actifs, et la catastrophe somalienne, cette *“crise des pauvres”*, qui n'a eu les faveurs de la communauté

²⁵³ Voir S/RES/688 (1991), Préambule, par. 3 et 4.

²⁵⁴ Voir Torrelli, M., *Op. Cit.*, note 43, p. 190.

²⁵⁵ Voir Boisson De Chazournes, L., *Op. Cit.*, note 10, p. 158.

²⁵⁶ Voir Bothe, M., *Op. Cit.*, note 19, p. 227.

²⁵⁷ Voir Boisson De Chazournes, L., *Op. Cit.*, note 10, p. 158.

²⁵⁸ Voir la Charte des Nations Unies, art. 39.

internationale que tant que celle-ci n'a rien eu de plus médiatique à gérer. Il s'agit là sans doute de l'exemple le plus topique de la tendance actuelle du Conseil de sécurité à entretenir une "vision de l'humanité à la carte"²⁵⁹, tendance entretenue par ce que M. Kouchner qualifie ironiquement de "loi du tapage".

Il ne s'agit là bien sur que d'une réflexion et nous sommes bien conscients que ces propositions sont vouées à rester vaines. Néanmoins, deux arguments semblent pouvoir étayer cette position. Le premier est que cet effort d'objectivisation des critères commandant l'opportunité de l'action du conseil de sécurité correspond exactement à l'esprit général de la Charte des Nations Unies. Son objectif premier, rappelons le, était de marginaliser le recours à la force en limitant l'exercice licite de celle-ci à un nombre restreint d'occurrences. Il est donc contradictoire, pour ne pas dire scandaleux, qu'un organe des Nations Unies détermine son action sur la base de motivations subjectives dont ces dernières ont précisément voulu exproprier les Etats. Idéalisme candide....

Le second argument, qui découle d'ailleurs du précédent, est qu'en choisissant de n'intervenir que dans certains contextes et pas dans d'autres, pourtant identiques, le Conseil faillit à la mission qu'il s'est lui-même arrogée. Ce faisant il laisse une brèche béante à des Etats pour entreprendre eux-mêmes de telles actions humanitaires. La menace qui pèse sur le principe de non recours à la force ne s'en trouve que renforcée, au péril de la sécurité collective.

Le second défaut majeur de l'action du Conseil de sécurité réside dans son manque de rigueur dans la condamnation des violations du droit humanitaire. Lorsqu'il est saisi d'un conflit, il devrait condamner toutes les violations du DIH et non seulement certaines d'entre elles²⁶⁰. En effet cette sélectivité conduit à établir, entre les violations du DIH, une hiérarchie dangereuse car susceptible, sinon de ruiner complètement, du moins d'affaiblir substantiellement la poursuite et la répression de celles qui ne sont pas stigmatisées par le Conseil dans ses résolutions. Il en va de la cohérence de l'action du Conseil dans le domaine humanitaire. Celle-ci est déterminante pour l'efficacité de cette action et indispensable pour la réconcilier avec les principes fondamentaux de neutralité et d'impartialité qui doivent le régir.

C. La nécessité de préserver la neutralité de l'action humanitaire : *une coopération trop étroite entre le Conseil de sécurité et les organismes humanitaires, notamment le CICR, ne risque-t-elle pas d'affaiblir le pouvoir d'action de ces derniers ?*

Sans avoir épuisé tous les sujets de controverse relatifs à l'immixtion du Conseil de sécurité dans la sphère du DIH, notre étude s'achèvera avec l'évocation d'un problème dont l'acuité ne cesse de se renforcer, celui de l'intensité de la collaboration entre le Conseil de sécurité et les organisations humanitaires, notamment le CICR. Entre ignorance réciproque et association trop étroite, une solution transactionnelle doit être trouvée afin que, tout en profitant du soutien de la communauté internationale, les organisations

²⁵⁹ Voir Torrelli, M., *Op. Cit.*, note 43, p. 192.

²⁶⁰ Voir Boisson De Chazournes, L., *Op. Cit.*, note 10, p. 158.

humanitaires continuent à être perçues comme “ *neutres et indépendantes par l’ensembles des parties au conflit* ”²⁶¹.

Soucieux de la bonne application du DIH, le Conseil de sécurité a fait du CICR son relais privilégié²⁶². Cependant, comme le note Madame Boisson de Chazournes, “ *les vellétés du Conseil peuvent parfois aller au-delà de ce que le [CICR] pourrait souhaiter ou, en tout cas, placer cette institution dans une situation d’inconfort par rapport à ses propres principes et lignes d’action* ”²⁶³. Certes l’organisation des Nations Unies a pu faciliter le passage de secours ou l’accès de certains lieux de détention. Cependant, les condamnations qu’il a formulées et les actions qu’il a entreprises ou permis d’entreprendre ne le rendent pas acceptable par toutes les parties. Si le CICR a toujours reconnu que pour que “ *[ses] objectifs soient atteints il faut que l’opinion publique et la communauté internationale [lui] apportent - comme aux autres institutions humanitaires efficaces et impartiales – leur soutien résolu* ”²⁶⁴, il n’est pourtant pas près à sacrifier l’indépendance de l’organisation. Il importe que les organisations humanitaires demeurent, en toutes circonstances, les moyens d’une solidarité authentique entre les hommes et ne deviennent pas “ *captive des enjeux politiques qui entourent les conflits* ”²⁶⁵.

La recherche d’une telle exigence entraîne pléthore de conséquences. Deux nous semblent particulièrement intéressantes et méritent d’être à présent explicitées. Tout d’abord, lorsque le Conseil de sécurité demande au CICR de réaliser une mission et de lui en faire rapport, ce dernier doit affronter un paradoxe dont la solution conditionnera son action effective sur le terrain : l’utilité de l’intervention du CICR est reconnue mais la nature du mandant et les termes même de la mission sont susceptibles de nuire au principe de confidentialité qui gouverne toutes les initiatives du CICR. En rendant compte de ses observations au Conseil de sécurité le CICR risque, en effet, de se voir taxer de partialité et, ce qui est pire, d’être perçu comme un organe subsidiaire, une sorte de façade instrumentalisée du Conseil de sécurité. Le pas vers un rejet du CICR par les parties à un conflit serait alors vite franchi. On aboutirait à la situation inverse de celle qui était recherchée par le Conseil lui-même. Au lieu de renforcer le caractère indépendant et la légitimité d’intervention du CICR, sa sollicitation par le Conseil de sécurité fragilise ses acquis et réduit sa capacité d’action.

La deuxième problématique que nous souhaitons soulever est celle de l’escorte d’un convoi humanitaire par les forces des Nations Unies. Là encore se profile le risque de “ *dé-neutraliser* ” des actions pourtant entreprises sous la bannière humanitaire et impartiale du CICR. Certes, comme le souligne le professeur Yves Sandoz, “ *lorsqu’il s’agit de protéger des convois contre le banditisme, avec l’accord de toutes les parties, l’escorte armée par des forces de l’[ONU] paraît moins inacceptable* ”²⁶⁶. Il n’en demeure pas moins vrai que non seulement ces escortes armées, dans d’autres circonstances, seront amenées à utiliser la force contre l’une des parties au conflit, mais qu’au surplus elles demeurent toujours des émanations de

²⁶¹ Voir Sandoz, Y., *Op. Cit.*, note 1, p. 72.

²⁶² Voir les développements en ce sens de Bourloyannis, C., *Op. Cit.*, note 6, p. 350.

²⁶³ Voir Boisson De Chazournes, L., *Op. Cit.*, note 10, p. 162.

²⁶⁴ Voir Sommaruga, C., tel que cité dans Torrelli, M., *Op. Cit.*, note 43, p. 194.

²⁶⁵ *Ibidem*, p. 217.

²⁶⁶ Voir Sandoz, Y., *Op. Cit.*, note 1, p. 73.

l'ONU et de son organe le plus politique, le Conseil de sécurité. Dans l'esprit de certains belligérants, les convois humanitaires assistés de ces forces auront tendance à être assimilés à des moyens de pénétration de leur territoire et de contestation de leur souveraineté. L'action du CICR s'en trouvera, une nouvelle fois, fragilisée. Faudrait-il, dès lors, créer des forces spéciales uniquement chargées d'assurer la sécurité d'actions humanitaires et qui se distingueraient des autres forces de l'ONU²⁶⁷ ? Sous des apparences séduisantes, il nous semble pourtant que cette proposition ne serait qu'un pis-aller. Elle ne règle pas le problème en profondeur puisque, à défaut de se placer sous l'égide de l'ONU, ces forces se rattacheront à une bannière nationale. De ce fait elles souffriront toujours d'une présomption d'impartialité aux yeux de l'un ou de l'autre des belligérants.

En résumé, il ressort qu'en intégrant trop largement l'action du CICR dans le maintien de la paix et de la sécurité internationales, les décisions du Conseil de Sécurité risquent d'aboutir au résultat contraire à celui escompté, à savoir une marginalisation de l'action du CICR et un affaiblissement chronique de sa capacité d'intervention. La solution la plus satisfaisante ne pourra résider que dans un savant compromis entre, d'une part, la nécessité d'une mobilisation de toutes les compétences au service de l'action humanitaire et, d'autre part, la nécessité de préserver les caractéristiques qui donnent à cette action son efficacité.

V. CONCLUSION

Aux termes de ces quelques développements, il apparaît que le rôle du Conseil de sécurité dans la mise en œuvre du DIH a considérablement évolué. L'organe exécutif des Nations unies a ainsi inscrit de plus en plus fréquemment la dimension humanitaire au cœur de ses préoccupations, en montrant de la façon la plus nette que la protection des populations civiles et l'acheminement effectif de l'aide humanitaire à ses destinataires fait partie intégrante de la conception polymorphe et protéiforme qu'il se fait du maintien de la paix. L'écran de la souveraineté étatique a été levé, les réticences à utiliser la force à des fins strictement humanitaires apprivoisées, si bien que le Conseil de sécurité, en s'appropriant le DIH, est devenu le vecteur d'application le plus efficace. Son utilité s'est d'ailleurs matérialisée par la mise en place de plusieurs structures concrètes, notamment dédiées à la sanction des violations de ce droit, comme les commissions d'enquêtes ou les tribunaux pénaux ad hoc. Ce faisant le Conseil de sécurité œuvre pour que le droit des conflits armés devienne un régime de responsabilité internationale autosuffisant car seule la sanction permet de faire d'un ensemble de normes un ordre juridique achevé de droit, autonome et fonctionnel.

Néanmoins, si louable soit elle, l'immixtion du Conseil de sécurité sur la scène du DIH ne va pas sans poser de nombreux problèmes que la pratique confirme chaque jour. Comment concilier la nature politique du Conseil de sécurité avec les principes de neutralité et d'impartialité qui président à toute action humanitaire ? Comment faire en sorte que le Conseil s'extirpe de ses travers partisans et adopte une attitude purement humaniste et désintéressée à l'égard des crises humanitaires dont il a à connaître ? De même quelle

²⁶⁷ Voir Sandoz, Y., *Op. Cit.*, note 1, p. 73.

doit être l'intensité de la relation entre le Conseil de sécurité et les organismes humanitaires et impartiaux chargés de faire respecter le *Jus in bello* comme le CICR. Se situent-ils dans un rapport de complémentarité ou au contraire d'antagonisme ? Si la réponse est incertaine, il est néanmoins acquis qu'une réponse trop manichéenne doit être rejetée, tant il est nécessaire de trouver un juste équilibre permettant une coopération compréhensive.

Ces quelques considérations ne sauraient évidemment tarir définitivement la source des problématiques juridiques soulevés par l'intervention du Conseil de sécurité dans un domaine qui n'est pas, originairement, le sien. Une chose est cependant établie au delà de tout doute : quelles que soient les évolutions envisagées, il importe qu'elles soient en toutes circonstances imprégnées de la volonté résolue de préserver l'indépendance de l'action humanitaire. De cette faculté à tenir les valeurs humanitaires éloignées des transactions politiques et de la capacité à ne pas assimiler trop étroitement les organismes humanitaires à l'ONU, dépend l'efficacité des missions d'aide sur le terrain. Une fois n'est pas coutume, une institutionnalisation trop formalisée de la relation entre les organismes de *Jus ad bellum* et ceux de *Jus in bello* pourrait s'avérer plus nuisible que profitable.

UNITED NATIONS PEACEKEEPING FORCES

UN PEACEKEEPING OPERATIONS AND INTERNATIONAL HUMANITARIAN LAW

Prof. Ove BRING
University of Stockholm

Dear Participants,

This year the UN has reached the ripe old age of 60; and its second Secretary-General, Mr Dag Hammarskjöld, was born 100 years ago. Both events have resulted in a number of commemorative seminars. Hammarskjöld, together with the Canadian Foreign Minister Lester Pearson, invented the concept of peacekeeping operations in 1956 and thereby initiated the so-called Chapter 6½ of the UN Charter. Since then the concept of peacekeeping has evolved through several generations. In the beginning a PKO was a single purpose exercise focusing on the achievement of Interstate Security. Today PKOs are multipurpose operations geared primarily towards Human Security. Modern peace operations are expected to take into consideration any needs triggered by international humanitarian law, human rights law, refugee law, fundamental standards of humanity and possibly disaster response law. The legal protection of individuals today is at the very core of peacekeeping.

Regarding protection, our topic this afternoon has two angles:

- 1.It concerns the protection of people in the peace operation area; ensuring that civilians, refugees, women, children and others are treated in accordance with humanitarian legal standards. Peacekeepers themselves have violated the norms in Somalia (torture of trespassers), Kosovo and the Democratic Republic of Congo (sexual exploitation and abuse of women).
- 2.It is also concerns the protection of personnel involved in peace operations; UN personnel, NGO personnel, civilian and military personnel. This protection has not always materialized, for example violations occurred in Bosnia during the time of UNPROFOR.

Personnel deployed on peace operations are entitled to the protection afforded to civilians under IHL as long as they do not engage as combatants in an armed conflict. Forces involved in the classical PKO are entitled to use force in self-defence, individual defence or mission defence, but that would not automatically make them combatants. On the other hand, if the situation is characterized by protracted armed violence involving Government units, there comes a point in time where UN military personnel will lose their protected status as civilians and be regarded as combatants. Doctrine has suggested that a high level of force should be tolerated in peace operations (POs), so that this shift from civilian to combatant status is subject to a threshold limitation, and consequently does not occur too often or too easily.

The Secretary-General's 1999 Bulletin on Observance by UN forces of IHL lists some core rules and principles. According to the Bulletin, these humanitarian rules and principles apply to UN forces in

combatant situations of armed conflict - that is on enforcement operations - but also on PKOs in self-defence situations.

One problem in this context is that the deployment of military personnel on POs can result in tension between IHL standards on the one hand, and UN Charter generated requirements on the other, between norms entailing a *horizontal* relationship of equal treatment between parties to an armed conflict, and norms establishing a *vertical* relationship of unequal treatment between actors in accordance with Security Council decisions. These issues are dealt with in a recent doctoral thesis sponsored by the Swedish National Defence College, with particular focus on the 1984 UN Safety Convention (Ola Engdahl, "*Protection of Personnel in Peace Operations*", 2005).

The Convention on the Safety of UN and Associated Personnel is up for revision and Dr. Engdahl has a number of suggestions as to how its usefulness could be improved, for example in increasing the protection of civilian personnel on peace operations.

The achievement of "*transitional justice*" is also part of our topic this afternoon. In the aftermath of armed conflict, legal security is often absent and appropriate mechanisms for the administration of justice have to be established from first principles. One of the purposes of peace building is to pave the way for legal standards and human rights - to establish "*the rule of law*" in the area of the operation.

Peacebuilding can also be linked to "*fact finding*". The International Humanitarian Fact-Finding Commission of Article 90 of Additional Protocol I has not been used so far. This is a pity, because the Swiss Department of Foreign Affairs has, in its depositary role, done a good job - with the Commission's President - in preparing the Commission for action in the field, including *bona officia* (good offices) missions. The option of using the Article 90 Commission was discussed in 2004 in connection with the tragic events in Darfur, but the UN chose instead to establish an *ad hoc* Commission under Professor Antonio Cassese to look into whether or not the ethnic violence in Darfur amounted to genocide. The Darfur conflict also highlights the potential role of regional organisations in peacemaking, peacekeeping and peacebuilding. The African Union has a key role to play in resolving the conflict in Sudan and Darfur, but it needs multifaceted support from the international community at large in order to be effective.

THE ICRC's PERSPECTIVE: APPLICABLE LAW AND OPERATIONAL INTERACTION

Mrs. Emanuela-Chiara GILLARD

Legal Adviser of the International Committee of the Red Cross, Geneva

Ladies and gentlemen,

It is a pleasure and an honour for me to address you today and to be part of this very eminent panel.

The focus of the present session are United Nations peacekeeping operations. Although the International Committee of the Red Cross ("*ICRC*") is not part of the UN family, the topic is of relevance to us, at a practical level, because it relates to activities carried out in countries involved in armed conflicts or emerging therefrom, where the ICRC is often active, and also at a policy level, as it relates to matters such as the law regulating multinational forces, which the ICRC has to address.

In my short presentation I would like to touch upon both aspects: first, the more legal dimension, in terms of the role of peacekeeping operations in ensuring respect for international humanitarian law, as well as the law that regulates their activities. Secondly, I would like to spend a few minutes presenting the ICRC's operational interaction with multinational forces.

Although the title of the present session is United Nations peacekeeping forces, many of my comments are also applicable to multinational forces mandated by other inter-governmental organisations, such as NATO or the African Union.

I. THE INTERNATIONAL COMMITTEE OF THE RED CROSS

It is worth recalling right at the outset that the ICRC does not engage in peacekeeping or in peace-building, and even less in peace-enforcement. The ICRC is an impartial, neutral and independent organisation whose exclusively humanitarian mandate, given to it by states, is to protect the lives and dignity of persons affected by armed conflict and to provide them with assistance.

It carries out its activities in accordance with universally recognised humanitarian principles: humanity, neutrality, impartiality and independence.

The ICRC is an operational agency. Currently, we have some 12,000 staff members and a permanent presence in over 60 countries experiencing armed conflict or other forms of violence and conduct operations in about 80. To obtain access to populations in need it is essential to maintain a dialogue with *all* warring parties. This can only be done if we actually act in accordance with the Fundamental Principles and are perceived as doing so. A perception of neutrality and independence is as important as its reality – and this is a point I will come to later in relation to integrated missions.

The ICRC's action is rooted in international humanitarian law. As guardian of that body of law, by engaging in dialogue with all relevant actors, the ICRC endeavours to ensure that it is respected by all parties involved in conflict, both states and organised armed groups.

II. THE ROLE OF PEACEKEEPING OPERATIONS IN THE PROTECTION OF CIVILIANS IN SITUATIONS OF ARMED CONFLICT

In recent years, the Security Council has increasingly directed its attention to the plight of civilians in situations of armed conflict, recognising that this is an important dimension of its responsibility to maintain international peace and security. One of the ways in which it has done so is by expressly incorporating measures aimed at enhancing the protection of civilians in the mandates of peacekeeping missions. This recognition of the importance of the human security dimension of peacekeeping work is extremely important and must be welcomed.

The challenge now is to ensure that forces participating in these missions have a clear and shared understanding of what is meant by "*protection of civilians*" and of the precise nature of their responsibilities. Similarly, in order to develop this valuable tool to its full potential and to turn policy into a protective reality on the ground, the exercise of such "protection of civilians" mandates must be monitored and the Security Council must receive regular reports on successes and obstacles encountered.

A second challenge is ensuring that personnel with the relevant expertise is deployed, in accordance with the specific activities for the protection of civilians to be undertaken under the mandate. For certain activities – "*such as ensuring the protection of civilians under imminent threat of physical danger*" - the appropriate personnel may be armed forces. For other activities, like assisting the local state with law enforcement, for example, it may be civilian police officers. The two have different training, backgrounds and experience. They are not interchangeable.

III. RESPECT FOR INTERNATIONAL HUMANITARIAN LAW

My next point is a matter at the heart of the ICRC activities: knowledge and respect of international law humanitarian law – by parties to a conflict where peacekeepers are deployed but also, in certain circumstances, by the peacekeeping forces themselves.

A. By parties of conflict in areas where peacekeepers operate – towards civilian population and peacekeepers

All parties to an armed conflict are bound by international humanitarian law. The principle that civilians must be spared from the effects of hostilities is articulated and developed in numerous clear and categorical prohibitions. Prohibitions that are all too frequently wilfully violated.

It is often in these situations of widespread attacks against the civilian population that peacekeeping forces are deployed to prevent further violations. As long as the peacekeeping forces are not drawn into the fighting, they too are protected and should not be targeted. In its dialogue with warring parties the ICRC regularly recalls the protections to which civilians and peacekeepers are entitled.

B. By peacekeeping forces themselves if drawn into hostilities

As recognised by the High-Level Panel of Experts, the distinction often drawn between Chapter VII peace-enforcement operations and Chapter VI peacekeeping operations is to some extent misleading. Admittedly, in the former there is an expectation from the outset that the robust use of force is integral to the mission, while in the latter there may be a reasonable expectation that force may not be needed at all. And often it is not.

But the reality is, to quote the High Level Panel of Experts, "*that even the most benign environment can turn sour*". In these circumstances, the multinational forces, if themselves drawn into violence of a duration and intensity to amount to armed conflict, are also required to respect international humanitarian law. As always, the nature of the situation and, consequently, the applicable law must be determined on the basis of the facts on the ground rather than the formal mandate given to the force by the Security Council.

If the violence in which the multinational force is involved amounts to an armed conflict it will be regulated by international humanitarian law. If the multinational forces are fighting a state, the rules regulating international armed conflict will apply, while if they are fighting an organised armed group it will be the rules regulating non-international conflicts.

I have been invited to say a few words about the the Bulletin on "*Observance by United Nations Forces of International Humanitarian Law*" – issued by the Secretary-General in 1999 ("*Bulletin*"). This instrument summarises the key principles and rules of international humanitarian law and declares these to be applicable to UN troops engaged in enforcement actions or in peacekeeping operations when the use of force is permitted in self-defence.

The ICRC was involved in the elaboration of the *Bulletin*, and believes it is a useful document, not least, at a very fundamental level, because it re-affirms the fact that UN forces *are* bound by international humanitarian law, even though the UN, as it is not a state, cannot itself ratify the relevant treaties.

As the "*Bulletin*" itself states, it is a summary and not an exhaustive list of the applicable rules of international humanitarian law binding on multinational forces. Moreover, national contingents remain bound by the treaty obligations assumed by their states of nationality and, of course, by customary international humanitarian law.

What are the short-comings of the "*Bulletin*"? And I say short-comings with trepidation as I am very aware of the complexity of the drafting exercise. First, it has been said, that its scope of application is not entirely clear. It would have been useful to have some indication of factors to be taken into account for

determining when United Nations forces are "*actively engaged in armed conflict as combatants*" for the purposes of Section 1.1 of the "*Bulletin*".

Secondly, always in section 1.1, the reference to "*peacekeeping operations when the use of force is permitted in self-defence*" has given rise to some confusion. International humanitarian law and, thus the *Bulletin*, are relevant when peacekeeping forces become involved in armed conflict, and in these circumstances the question of "*self defence*" – a notion of law enforcement, and, with a different meaning, *ius ad bellum* – is not relevant.

Thirdly, the *Bulletin* does not indicate which body of international humanitarian law regulates the operations of the forces: it is that of international or non-international armed conflict? While with regard to the rules regulating conduct of hostilities this probably does not make an important difference in practice, as many of the conventional rules regulating international armed conflict are generally accepted as also applying in non-international armed conflicts as customary rules, the matter is important when it comes to the status of persons deprived of their liberty.

Finally, the "*Bulletin*" focuses principally on rules regulating conduct of hostilities and, as its name indicates, exclusively on international humanitarian law. This means that it is relevant to an important but fairly narrow category of situations in which multinational forces are deployed.

What is the applicable law when the UN is effectively administering a territory, as was the case in East Timor or Kosovo? The law of occupation is not applicable *de jure*, but many of the rules found therein could provide useful guidance by analogy.

Another very specific area of operations is deprivation of liberty by multinational forces in situations falling short of armed conflict. What is the applicable law regulating these activities? Human rights law is probably a more appropriate frame of reference than international humanitarian law.

These and other related issues were discussed at an Expert Meeting on Multinational Peace Operations co-hosted by the ICRC and the Geneva University Centre for International Humanitarian Law in December 2003, where we benefited from the very direct practical experience of persons involved in the drafting of the *Bulletin* as well as in the administrations of East Timor and Kosovo²⁶⁸.

There was general agreement that a compilation of rules similar to the *Bulletin*, addressing administration of territory and deprivation of liberty by multinational forces would be extremely useful. I wish I could tell you that the ICRC has commenced work on it already. But I cannot. Maybe a project for the Institute's 36th year?

C. Training

The ICRC believes that it is essential for military personnel deployed in peacekeeping missions – and *a fortiori* in peace-enforcement missions – as well as by police and civilian personnel to be adequately

²⁶⁸ The report of the meeting is available at www.icrc.org/web/eng/siteeng0.nsf/html/5UPD5E.

trained in international humanitarian law. In this respect I wish to highlight to the extremely important contribution of the Institute.

Primary responsibility for ensuring the proper training – and discipline – of troops lies with troop contributing states. The UN should nonetheless require common minimum levels of training from all contingents.

Recognising the crucial importance of awareness of the law, the ICRC carries out dissemination activities both with national troops before their secondment and with UN and regional multinational forces both prior to and during their deployment.

Just by way of example, as we really do have a very developed network of contacts, pre-secondment sessions were held with Australian and Thai troops who went to East Timor, and forces from Benin prior to their secondment to ECOWAS. In terms of multinational forces, the ICRC carried out dissemination to SFOR, KFOR, UNMEE, UNMIL, MINUC, MINUCI as well as to SADC and ECOWAS troops. The aim of these sessions is to recall the basics of international humanitarian law and to present the ICRC, its activities and its approach to civil-military relations.

Training, although an essential first step, is not sufficient. Respect for humanitarian law by multinational forces must be monitored and violations suppressed.

The same holds true for sexual exploitation of the very civilians that forces have been mandated to protect. The proper behaviour of troops at all times – during operations and outside operations – is a matter of basic discipline for which troop-contributing states but also the UN have legal, moral and political responsibility.

IV. ICRC interaction with peacekeeping forces

The final part of my presentation focuses on the ICRC's interaction with multinational forces. A distinction must be drawn between operational interaction in the field and interaction at what I will refer to as "*headquarters*" level.

A. Interaction in the field

With regard to interaction in the field, as stated at the outset, the ICRC is an independent, impartial and neutral organisation with the exclusively humanitarian mission of protecting and assisting persons affected by armed conflict.

ICRC strives at all times to operate on the basis of the Fundamental Principles and, in particular, independence, impartiality and neutrality. In this respect a "*perception*" of action in accordance with these Principles is as important as reality. Allow me a few words on the interpretation of these principles and of their operational consequences for the ICRC.

Neutrality requires the ICRC not to take sides in hostilities or engage at any time in controversies of a political, religious or ideological nature. Neutrality is not an end in itself. Rather, it is a mode of operation that the ICRC uses to ensure access for concrete action.

There are times when other actors in the field are not neutral – including peacekeeping forces and, even more clearly, peace-enforcement forces. As we have seen, they may be party to a conflict. Even when they are not actually party to a conflict, the UN is a political actor and, consequently, not necessarily neutral or perceived as such.

Impartiality requires humanitarian action to benefit people without discrimination, and that the ICRC's response be prioritised solely on the basis of need.

Independence requires the ICRC's humanitarian action to be distinct - and to be perceived as such - from any political or military interests. The reason for working independently is simple: parties to an armed conflict are likely to reject humanitarian organisations that they suspect of having ulterior political motives. As we have all too tragically realised, rejection can take extreme forms.

For these reasons, the ICRC insists in emphasising the different identities, affiliations, mandates and operational approaches of organisations working in situations of armed conflict.

In practical terms, this means that while the ICRC will have significant contacts in the field with other actors and will coordinate the humanitarian response, it will not work with them.

(i) UN integrated missions

These considerations also lie at the root of the ICRC's reservations about integrated missions highlighted by Dr. Kellenberger yesterday. Peacekeeping forces are often part of a UN integrated response that combines political, military, reconstruction and humanitarian tasks under a single leadership.

Such an approach cannot be reconciled with the principles of neutrality and independence as understood by the ICRC. Accordingly, the ICRC cannot and will not subscribe or participate in them.

We recognise – indeed, we have been told very bluntly! – that integrated missions "*are here to stay*". We accept this reality, and our position has moved from calling upon the UN to adopt a neutral and independent approach to its humanitarian action to demanding that "*our*" approach be respected.

I reiterate: the ICRC fears that an integrated approach may jeopardise delivery of independent humanitarian aid. This is a concern based on principle but also based on experience in a number of contexts.

(ii) The ICRC and civil-military relations

For the same reasons, and time prevents me from discussing this topic, the ICRC takes an equally cautious approach to civil–military relations more generally, including with peacekeeping forces.

(iii) Interaction with peacekeeping forces

I do not want to give the impression that the ICRC believes that it does not need to interact with other humanitarian actors or with peacekeeping forces. This is far from being the case. In today's complex emergencies no single actor can meet all needs and it is essential that coordination take place to ensure that needs are not forgotten, efforts duplicated and that the most is made of each actor's expertise and strengths.

Turning to peacekeeping forces more specifically, I would like to give a couple of examples of interaction in addition to the training that I mentioned earlier.

In some instances, the ICRC can provide expert advice on legal matters. This was the case in Sierra Leone with UNAMSIL on the question of interned combatants from Liberia, and with UNMEE in regard to the drafting of the force commander's instructions on detention.

On other occasions, in view of the nature of the multinational forces' operations, the ICRC has interacted with such forces in the exercise of its traditional activities in situations of armed conflict. It regularly reminds multinational forces of their obligations under international humanitarian law, both preemptively when the force is established and, if necessary, reactively in response to resort to armed force or allegations of violations. The ICRC has also visited persons deprived of their liberty by multinational forces, such as UNOSOM, UNMEE and UNMIK, to name but a few.

In both situations the ICRC's dialogue with multinational forces has been positive and constructive.

B. Interaction at headquarters level

Finally, a few words on interaction at headquarters level and on questions of policy. This interaction is less fraught with potential risks and very well developed. The ICRC is in constant dialogue with the UN departments and agencies that deal with multinational forces and the protection of civilians in armed conflict.

For example, the ICRC participated in the drafting of the Secretary-General's Bulletin on "*Observance by United Nations Forces of International Humanitarian Law*". It regularly participates in the activities organised by OCHA as part of its work on the protection of civilians in armed conflicts. Finally, earlier this summer, the ICRC submitted extensive comments on the draft Guidelines on Disarmament, Demobilization and Rehabilitation that DPKO is developing.

I would like to end by reiterating the ICRC's firm commitment to dialogue with all actors, including peacekeeping forces, in order to help render humanitarian action more effective, complementary and safe.

UNITED NATIONS PEACEKEEPING OPERATIONS

M. Eric STEINMYLLER

Chef du Bureau de Droit des Conflits Armées, Chef des affaires légaux du Ministère de la Défense , France

10 000 militaires français sont actuellement engagés sur des théâtres extérieurs dans le cadres d'opérations de maintien de la paix de l'ONU. On les retrouve ainsi principalement en Côte d'Ivoire avec La Force Licorne au côtés de l'ONUCI, en ex-Yougoslavie, en Afghanistan et au Liban.

Depuis 15 ans en commençant par le conflit Irak/Koweït, la France est ainsi devenue l'un des principaux Etats contributeurs de troupe. Mais mon propos n'est pas de vous parler de la France mais de me servir de notre expérience qui est largement commune à tous les pays engagés pour maintenir la paix (au sens générique) afin d'illustrer les nouvelles dimensions juridiques que doivent intégrer ces forces dans leurs actions.

Je voudrais aujourd'hui m'attacher plus particulièrement au rôle des forces armées "*lorsque le conflit armé cesse*", souvent hélas que provisoirement.

Les militaires ne rentrent pas chez eux même si le souhait de bon nombre de gouvernements serait de faire du "first in first out", arriver vite donc pour éteindre l'incendie quand il vient de prendre grâce à des forces de réaction rapide (appelées dans le rapport Brahimi ?) et repartir vite pour ne pas s'enliser en laissant la place à des forces traditionnelles de maintien de l'ordre.

Avec la globalisation des crises, la volonté de restaurer un état de droit et non pas simplement de faire cesser des combats plus souvent internes à un Etat qu'entre deux Etats, les militaires sont amenés à faire d'autres choses que la guerre et à rencontrer d'autres droits que le droit international humanitaire. Leurs références traditionnelles peuvent être parfois troublées.

Ces droits multiples, droits de l'homme, droit national des pays contributeurs de troupes dans un environnement multinational (il y a X nations qui composent la KFOR) , droit du pays de déploiement qui reste souverain, comme se plaisent à le rappeler les résolutions du Conseil de sécurité, vont largement dépasser la simplicité de la cible légitime en temps de guerre. Je voudrais illustrer mon propose à travers d'abord

- l'usage de la force par les armées,
- le droit des personnes déplacées,
- la gestion des réfugiés
- et la coordination entre les civils et les militaires.

L'usage de la force armée en période de conflit armé - et pour faire simple- les armées ont le souci de prendre l'ascendant par la force sur un ennemi qui est une cible légitime. Le tout en respectant le droit des conflits armés et j'évoquerai au terme de mon intervention les efforts français pour la diffusion de ce droit.

Puis lorsque les armes se sont plus ou moins tues, que l'on entre dans une période de troubles et tensions internes, nous allons rencontrer des situations comme celles de mars 2004 au Kosovo, Des violences ont fait une trentaine de morts et de nombreux dégâts principalement chez les Kosovars d'origine serbe et contre les édifices orthodoxes. Alors que la situation était assez calme sur le terrain depuis un an, que la KFOR étudiait une diminution du nombre de militaires puisque logiquement des forces civiles de maintien de l'ordre devaient prendre le relais²⁶⁹, (ces événements ont rappelé l'incertitude de la stabilité de la paix, la nécessité de rester sur ses gardes.)

Lors de ces violences Amnesty international a écrit "*dans certains endroits, les forces de sécurité, y compris la KFOR, n'ont pas protégé les communautés minoritaires*"²⁷⁰. Sans partager entièrement les conclusions de l'ONG, on ne peut que constater et regretter que la mission confiée à la présence internationale de sécurité (comprendre l'OTAN) "*d'établir un environnement sûr*" fixé par la résolution 1244 n'a pas été immédiatement et entièrement accomplie. Les incertitudes sur l'étendue des possibilités de recours à la force sont une des causes parmi tant d'autres.

Pourtant nous sommes bien sous chapitre 7, avec un mandat clair car après les impasses des missions en Somalie ou en Bosnie-Herzégovine avec la FORPRONU, la plupart des Etats ne s'engagent plus qu'à cette condition de clarté et de disposer des moyens nécessaires à la mission.

Et c'est là où nous rencontrons l'enchevêtrement des droits en vigueur: Prenons "*l'exemple du droit français*" que l'on retrouvera chez bon nombre de pays.

Le "*droit pénal*" français conçu pour la protection du citoyen en temps de paix "*s'applique aux nationaux hors du territoire*" et est parfois mal adapté à "*ces situations entre guerre et paix*" que constituent les opérations extérieures.

Il n'autorise alors l'usage de la force que pour la "*légitime défense*" de soi-même ou d'autrui. Pour la légitime défense des biens, il n'autorise pas le recours à l'homicide volontaire.

Pourtant, sous chapitre 7, le mandat international permet le plus souvent d'employer la force au-delà de la légitime défense. C'est le cas de la résolution 1244.

(CB) Il est évident que "*la légitime défense ne suffit pas*" à justifier les actions collectives nécessaires pour mener à bien les missions imparties, lorsqu'il s'agit de "*défendre un dépôt de munitions, d'interdire le franchissement d'un point de contrôle*", de lever un barrage ou, a fortiori, de "*prendre de vive force un objectif*".

²⁶⁹ Voir La résolution 1244 S/RES/1244 du 10 juin 1999 (qui "*réinsère*" dans la légalité internationale l'intervention militaire au Kosovo même si elle ne l'approuve pas explicitement) confiée à la force internationale de sécurité la mission "*d'établir un environnement sûr (pour que les réfugiés et les personnes déplacées puissent rentrer chez eux)*", ... "*d'assurer le maintien de l'ordre et la sécurité publics jusqu'à ce que la présence internationale civile puisse s'en charger*".

²⁷⁰ Voir Amnesty international, rapport 2005, p. 312.

Les limitations inhérentes au concept de légitime défense ne sont pas pleinement compatibles avec la mission confiée, donnent naissance à des incertitudes préjudiciables qui s'ajoutent à la difficulté de coordonner l'action de multiples contingents nationaux aux règles nationales différentes.

Malgré la primauté du droit international sur le droit français, *“une résolution”* du conseil de sécurité qui est du droit dérivé d'un traité et non un traité elle-même, *“ne peut donc autoriser ce qu'interdit la loi française”*. Les *“règles d'engagement ne le peuvent pas plus”* qui sont de simples ordres du commandement.

Il est légitime de penser que *“le juge”* qui serait amené à prendre en considération une action de vive force au regard de la légitime défense prendrait en considération le *“contexte”* particulier d'une intervention extérieure dans le cadre d'une résolution. Il n'empêche qu'il y avait des *“doutes”* sur l'attitude éventuelle des juges, doutes préjudiciables à une action sereine d'usage de la force certes minimum mais nécessaire au delà de la légitime défense.

L'inadéquation des règles du temps de paix aux opérations extérieures contemporaines a donc conduit *“la France à légiférer”*²⁷¹.

Entré en vigueur le 1^{er} juillet 2005, *“le nouveau statut général des militaires”* modifie le cadre juridique de l'emploi de la force par les militaires français en opérations extérieures (Opex). Ils bénéficient désormais d'une *“exonération de leur responsabilité pénale”* en cas d'emploi de la force pour accomplir leur mission.

Elle *“ne soustrait cependant pas l'action militaire”* hors du territoire national à un éventuel contrôle judiciaire - c'est bien normal - et est soumise à des conditions d'application strictes.

Art. 17-2: *“N'est pas pénalement responsable le militaire qui, dans le respect du droit international et dans le cadre d'une opération militaire se déroulant à l'extérieur du territoire français, exerce des mesures de coercition ou fait usage de la force armée, ou en donne l'ordre, lorsque cela est nécessaire à l'accomplissement de sa mission”*.

Pour bénéficier de cette nouvelle cause d'irresponsabilité pénale, les conditions sont strictes. Le *“recours à la force doit”* être nécessaire, strictement proportionné à la gravité de la *“menace”* ou à l'entrave à l'accomplissement de la mission ou à l'objectif opérationnel à atteindre. Il doit être *“conforme au droit international”*, humanitaire, des droits de l'homme etc. Il doit se limiter à la *“mission”* qui a été fixée, c'est à dire le mandat donné par l'ONU dans le cadre des opérations de maintien de la paix

Il ne crée *“en rien une immunité pénale”* et le juge pourra apprécier le cas échéant si les conditions requises étaient réunies.

²⁷¹ Voir Bergeal, C., *Le Nouveau cadre juridique de l'emploi de la force en opérations extérieures*, Revue de la défense nationale, juillet 2005, pp. 91-99.

Cette modernisation du droit a également une “*vertu simplificatrice*” puisque le respect du droit français “*ne nécessite désormais plus l’émission de restrictions*” de nature exclusivement juridique aux “*règles d’engagement*” propres aux contingents français des forces multinationales.

Ils pourront donc appliquer intégralement les règles communes, facilitant la lecture de ces ROE, sauf bien sûr si des directives politiques ou opérationnelles en décidaient autrement.

:I. BOUAKE / Côte d’Ivoire novembre 2004.

La France est intervenue en 2002 Côte d’Ivoire d’abord pour secourir ses ressortissants puis dans le cadre des résolutions du CS pour éviter que le pays ne continue à tomber dans le “*chaos*” de la guerre civile. 4000 militaires y sont déployés ainsi que des troupes de l’ONUCI.

En novembre 2004, des avions de combat des forces du président Gbagbo²⁷², ont en contravention avec les résolutions du CS, repris les bombardements contre les positions rebelles dans le Nord et ont délibérément attaqué un camp français faisant 8 morts.

A la différence de ce qui s’est passé au Kosovo en mars 2004 où la perception de la menace était floue, entre maintien de l’ordre, troubles et tensions internes mais certainement pas de guerre, ici, l’agression armée était caractérisée et les forces françaises se sont trouvées dans une position de légitime défense et ont immédiatement réagi dans le cadre du mandat.

Une semaine de “*quasi-guerre*” comme titrait le journal *Le Monde* où la France est intervenue avec détermination mais aussi mesure, détruisant par exemple les forces aériennes mais en attendant que les avions soient au sol et leur pilote à terre, en faisant front pour protéger les résidents civils français mais aussi d’autres européens permettant une évacuation de 8000 d’entre eux en quelques jours.

II. PERSONNES DÉPLACÉES – RÉFUGIÉS

Le théâtre du Kosovo a été le lieu d’une nouvelle expérience pour les armées avec la gestion des Ashkalis, minorité non albanaise de la province et personnes déplacées au regard du droit international qui se sont réfugiées dans le camp français de Novo Selo au Nord de Pristina après les événements de mars 2004. Il illustre l’application du DIDH, du DIH et du droit local.

Les armées ont accueilli, nourri, protégé ces déplacés. Si la KFOR a pour mission d’assurer un environnement sûr selon la résolution 1244, ce mandat précise également que c’est à la MINUK qu’il revient de veiller au retour chez elles des personnes déplacées²⁷³.

²⁷² Voir FANCI, forces

²⁷³ Voir la Résolution 1244 du Conseil de sécurité des Nations Unies du 10 juin 1999: la Mission intérimaire des Nations Unies au Kosovo (MINUK) veille au retour chez elles en toute sécurité et sans entrave des personnes déplacées (paragraphe 11 k), en s’appuyant sur les organismes compétents pour l’amélioration de leur condition. Dans ce cadre, le rôle de la KFOR consiste à établir un environnement sûr pour permettre ce retour (paragraphe 9.c) et à appuyer le travail de la MINUK (paragraphe 9.f). C’est à ce titre que la KFOR peut accueillir temporairement dans ses enceintes des personnes déplacées, avant que celles-ci soient prises

Dans un premier temps, pour la sécurité, ces personnes sont donc accueillies et protégées. Mais vu la répartition des tâches entre la MINUK et l'a KFOR, elles ne sont pas censées rester dans le camp. Pourtant, cinq mois après leur accueil dans le camp, en août 2005, 47 Ashkalis sur les 257 qui s'y sont réfugiés sont toujours là. Est-ce le confort du camp, la réputation de la nourriture française ?

Cette présence pose des problèmes de sécurité. En effet, on ne peut les contraindre à rester dans le camp au risque d'en faire des personnes détenues illégalement et elles aspirent donc à rentrer et sortir autant qu'elles le souhaitent ce qui est potentiellement dangereux pour la sécurité d'un camp militaire. Il faut les laisser aller et venir, donc contrôler les identités, fouiller si nécessaire voire laisser les organisations internationales ou non gouvernementales à vocation humanitaire accéder à ces personnes déplacées qui suscitent un intérêt toujours plus grand

Le HCR et le CICR, avec lesquels la force multinationale échange régulièrement, sont toujours les biens venus mais on ne peut étendre cet accès à tout le monde.

Malgré l'ouverture d'un motel spécialement réaménagé à leur intention, les Ashkalis refusent de quitter Novo Selo et menacent de grève de la faim, refusent de laisser leur tentes inspectées etc.

Cette attitude pose un problème de DIH aussi car en cas de reprise des hostilités, l'armée serait en contradiction avec l'article 58 du premier protocole additionnel aux conventions de Genève qui stipule que les belligérants doivent éloigner les personnes civiles des objectifs militaires dans le cadre des précautions dans l'attaque.

"Amnesty International" s'est ému auprès du ministre de la défense de la volonté des autorités françaises de vouloir le départ des Ashkalis du camp contre leur gré. L'organisation invoquait au soutien de son argumentation les principes directeurs relatifs au déplacement de personnes à l'intérieur de leur propre pays, adopté par la Commission des droits de l'homme des NU²⁷⁴, principes que les forces armées ont naturellement appliqués pour une grande partie mais qui ne sont pas pour autant des règles juridiquement contraignantes.

Les Ashkalis finiront par partir d'eux-mêmes et cet épisode témoigne des questions nouvelles qu'ont à traiter les forces déployées dans les opérations de la paix. Il illustre certes le proverbe chinois qui veut que "*Celui qui sauve une vie en est responsable*".

En l'occurrence les critiques formulées débouchait également sur une problématique rencontrée de nombreuses fois, la détention ou la rétention de personnes en cas de troubles à l'ordre public.

En cas de conflit armé, la 3^e CG s'applique pour les Pow.

Mais hors conflit armé, si l'on veut prévenir des abus, éliminer les risques de mauvais traitements comme ceux qui ont défrayé la chronique, dans un autre contexte, à Abu Graib,

en charge par des organismes civils. En conséquence, l'hébergement durable de personnes déplacées ne relève pas du mandat de la KFOR.

²⁷⁴ Voir UN Guiding Principles on Internal Displacement, 11 février 1998

Il vaut mieux organiser cette situation que l'on voudrait ne pas confier aux armées mais qui dans la pratique peut survenir lorsque l'Etat d'accueil est défaillant, lorsque le relais de la police civile n'est pas encore effectif.

Il faut alors manier de multiples instruments juridiques, un droit local (évoquer la réglementation art 1 de Kouchner) le respect des instruments pertinents de droit international, des conventions sur les droits civils et politiques²⁷⁵, convention contre la torture²⁷⁶. [La question reste pendante de l'application de la CEDH et d'un contrôle des OMP par la Cour EDH d'une certaine manière. L'extension de la compétence *rationae loci* de la Convention au moyen d'une acception trop extensive par la Cour de la notion d'exercice de la juridiction stipulée à l'article 1^{er} de la Convention ne manquerait pas de poser des problèmes de compatibilité avec les engagements nationaux sous mandat de l'ONU face au risque de voir la responsabilité des Etats contributeurs engagés au delà de ce à quoi ils pensaient initialement (affaires Bankovic et Issa, Behrami en cours)]

Pour les armées, un processus de formalisation des procédures à employer est donc engagé, tant pour des opérations dans le cadre de l'OTAN que pour des opérations nationales sur la gestion des personnes détenues et non pas seulement des PoW. Dans ces nouvelles missions que connaissent les militaires je voudrais en troisième lieu évoquer la gestion des réfugiés, ceux de la convention de 1951 et aborder ainsi les relations entre les civils et les militaires

III. LES RÉFUGIÉS ET LA COOPÉRATION CIVILO-MILITAIRE

[Permettez-moi de revenir un moment dans le conflit armé et sur la situation inédite des réfugiés fuyant la guerre au Kosovo lors des frappes aériennes du printemps 1999 et qui feront bien sûr l'objet d'attentions spéciales dans la résolution 1244.] Lors des frappes aériennes du printemps 1999, 800 000 personnes affluent vers le nord de l'Albanie et l'ex-république yougoslave de macédoine. C'est un exode d'une ampleur et d'une rapidité jamais imaginées qui dépasse rapidement les capacités de gestion du HCR et d'autres agence ONU ou d'ONG.

Paradoxe face à cette catastrophe humanitaire qui menace, c'est un des belligérants, l'OTAN, qui va proposer son aide pour aller au secours de cette population. Cette aide est la bienvenue et s'avérera très efficace. mais elle répond évidemment peu aux critères d'indépendance, d'impartialité et de neutralité qui doivent caractériser l'aide humanitaire. Elle risque aussi théoriquement d'exposer les populations civiles dans les camps où se trouvent des forces armées ennemies des forces serbes²⁷⁷.

Les mouvements de réfugiés ne sont plus des effets secondaires, collatéraux des conflits armés mais sont souvent au centre même des objectifs et tactiques de la guerre lors des « purifications ethniques ». Ainsi, tout secours aux réfugiés peut n'être plus perçu comme un acte neutre.

²⁷⁵ Voir International Covenant on Civil and Political Rights, 1966

²⁷⁶ Voir Convention against Torture and other Cruel, Inhuman or degrading Treatment or Punishment, 1985

²⁷⁷ Voir article 58, CG P1 sus évoqué

L'aide est efficace et permet à l'OTAN de s'occuper tout de suite de dizaine de milliers de réfugiés car seules les armées modernes possèdent l'organisation et la capacité logistique susceptible d'offrir une aide rapide et massive²⁷⁸ comme elles l'ont encore récemment montré en proposant leur aide dans le cadre non plus d'une OMP mais du Tsunami²⁷⁹. Pour la première fois dans un conflit on a une intégration presque complète entre Etat hôte, humanitaires (parfois divisés, affaiblis, surchargés), organisations onusiennes, ...sous le contrôle de l'un des belligérants, l'OTAN.

Il ne faut pas se laisser trop séduire pour l'avenir par cette unité de commandement. Le risque en est une militarisation de l'aide humanitaire qui parfois à séduit les militaires eux-mêmes voyant là un motif de réclamer des crédits supplémentaires.

Cela me permet d'aborder la coopération civilo-militaire et la France a tiré beaucoup d'enseignements des conflits menés ces dernières années ce qui a permis d'affiner sa doctrine, publiée au printemps 2005.

L'objectif est justement d'éviter lors d'une opération de maintien la paix le mélange des métiers. L'humanitaire est une valeur des armées, ce n'est pas leur raison d'être. La meilleure contribution que l'armée peut faire à l'humanitaire c'est de restaurer l'ordre et la sécurité et permettre ainsi l'aide au développement d'actions humanitaires tout en traitant les causes du conflit.

L'armée fait en quelque sorte de l'accompagnement humanitaire. Car le succès d'une mission militaire passe aussi par des bonnes relations avec la population locale en gagnant les cœurs et les esprits : "*Donnez-moi un médecin, je vous rends trois compagnies....Un chantier vaut trois bataillons....*" disait le Maréchal Lyautey, Madagascar 1900. Il s'agit alors d'une compassion de proximité très naturelle pour sécuriser l'environnement ne pas se voir coller l'image d'une armée d'occupation.

On a même constaté une dérive affective car les militaires adhèrent toujours fortement à leur mission, engagés dans l'action humanitaire ils s'investissent au plan affectif, parfois à l'excès et perdent leur repères;

Il est facile et la bascule morale est aisée pour faire de l'humanitaire...l'inverse n'est pas vrai pour les humanitaires qui ne vont pas faire du militaire et pourtant il faut préserver l'ordre et la sécurité.

Humanitaires et militaires n'ont pas les mêmes buts, les mêmes moyens, les mêmes savoir-faire.

²⁷⁸ Voir Le pont aérien mis en place par l'OTAN permettra de prendre en charge très rapidement 65 000 personnes. La France sera parmi les premiers à s'investir dans cette tâche et fournira des camps de réfugiés clefs en main (camps de Stenkovac et Brazda). Elle a pris en charge 10 000 réfugiés, fournissant 1 000 000 de repas entre le 1^{er} et le 30 avril 1999, 1500 T de fret dont plus de 1200 d'aide humanitaire par avion. Le relais sera passé notamment aux ONG (Care...) dès le 15 avril.

²⁷⁹ Voir Charasse, M., Gouteyron, A., *L'Aide française aux victimes du Tsunami en Indonésie*, Les Rapports du Sénat, n° 202, 2004-2005. Voir aussi *l'Appel de Limoges sur les réfugiés écologiques*, adopté à Limoges (France) le 23 juin 2005 lors du colloque sur le sujet du même nom.

Quand L'intensité du conflit baisse, on fait un peu plus d'humanitaire mais ce qui devrait primer c'est La stratégie d'entrée en premier et de sortie rapide des crises , pour éteindre rapidement l'incendie à ses débuts et montrer la détermination de la communauté internationale et éviter l'enlisement en aidant à reconstruire un état de droit avec d'autres moyens si possible que ceux de la force militaire.

La gestion des crises est globale et ne peut se résoudre au seul emploi de la force. Elle fait appel à une stratégie qui met en jeu de nombreux acteurs civils à côté du dispositif militaire. Il importe donc de gérer parfaitement les interactions entre force militaire et environnement civil.

Cet idéal est contrarié par l'indifférence de plus en plus grande des belligérants face aux organisations humanitaires qui ont de nouveaux besoins de protection sécuritaire, au risque de perdre au vu de certains leur neutralité. [Un exemple pratique de relais: sur le terrain les militaires qui sont déployés identifient les besoins humanitaires et communiquent l'information aux OI ou ONG. C'est la pratique des "*Village rapid assessment par une équipe de 3 personnes qui comprend un médecin et un personnel du génie*"²⁸⁰. Nous assistons donc à un retour en arrière qui évite de mélanger les genres mais cherche dans le cadre de crises qui sont aujourd'hui globales de connecter le volet militaire aux autres volets nécessaires pour résoudre la crise ce qui impose une coordination étroite entre les acteurs²⁸¹]

IV. TRANSITION

A. Dissemination

Face à ces nouveaux défis, parmi d'autres, pour les armées dans le cadre des OMP, il est indispensable de bien former nos personnels et que des automatismes soient acquis pour réagir de manière adéquate dans l'action en prenant en considération le cadre juridique des opérations.

A cet égard je voudrais au terme de mon intervention décrire succinctement comment ces règles et au premier titre d'entre elles le DIH sont diffusées au sein des armées.

Cet enseignement va croissant dans les armées, tout d'abord en école militaire que ce soit en formation initiale ou au cours de la vie professionnelle, avec le concours de spécialistes du CICR, de la direction des affaires juridiques de la défense etc.

Avant chaque départ en opérations extérieures (OPEX) , soit tous les quatre mois pour les théâtres principaux du Kosovo, de la Côte d'Ivoire et de l'Afghanistan, est organisée pour tout le régiment qui doit

²⁸⁰ Voir aussi les systèmes d'équipe de coordination et d'évaluation de terrain (Field assessment and coordination team) mis en place par la FICR.

²⁸¹ Dans cet effort pour distinguer humanitaire / militaire, il faut noter la proposition du président française vers le secrétaire général de l'ONU de créer une force d'intervention humanitaire pour le secours d'urgence. Cette proposition est limitée aux cas de catastrophe naturelle ou technologique et exclut les hypothèses de CAI ou CANI. Le dispositif vise très clairement la phase d'extrême urgence dans laquelle la rapidité et la puissance logistique sont cruciales. Le Bureau de coordination des actions humanitaires de l'ONU (BCAH – OCHA) serait compétent pour conduire ces opérations de secours et travailler à la prévention des catastrophes dans le projet français.

partir une "*Mise en Condition opérationnelle*" avec un volet juridique adapté à tous les grades et responsabilités.

Sur le terrain, les militaires portent normalement sur eux la "*carte du soldat*", memento sur lequel sont résumées les principales obligations du DIH et les exercices ont lieu fréquemment intégrant les aspects du DIH.

Enfin des conseillers juridiques²⁸² sont placés auprès du commandement tant central que local.

²⁸² *Legal advisor (legad)*

**THE PROTECTION OF HUMAN BEINGS IN DISASTER SITUATIONS – THE TSUNAMI
TRAGEDY – INTERNATIONAL SOLIDARITY**

**PANEL ON “THE PROTECTION OF HUMAN BEINGS IN DISASTER SITUATIONS –THE
TSUNAMI TRAGEDY –INTERNATIONAL SOLIFDARITY”**

Mrs Yvette STEVENS

United Nations Assistant Emergency Relief Coordinator & Director, Office for the Coordination of
Humanitarian Affairs (OCHA), Geneva

Welcome to this panel, which will focus on “*The Protection of Human Beings in Disaster Situations – The Tsunami Tragedy – International Solidarity*”. I am pleased to be your Moderator for this session.

Let me first of all introduce the distinguished panelists who are here with me today. Most of them were directly involved in the response to the tsunami disaster, so I think that it will be particularly interesting to listen to their presentations.

Professor Walter Kälin is the Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons (IDPs). In his presentation, he will focus on IDPs and human rights in the context of disasters, addressing such issues as access, discrimination, documentation, property rights and participation.

Ms. Janet Lim is the Director of the Bureau for Asia and the Pacific at UNHCR, and will focus on the similarities and differences between disasters and conflict settings. She will also reflect upon the implications of the response to the tsunami disaster for those populations that had been affected by conflict prior to the tsunami, in Aceh and Sri Lanka.

Mr. Reto Meister is Delegate General for Asia and the Pacific at the International Committee of the Red Cross. He will focus on the political dimension of the post-tsunami period from a protection perspective, particularly in relation to Aceh and Sri Lanka.

Mr. Johan Schaar is Special Representative of the Secretary General of IFRC for the tsunami operations. He will focus on IFRC’s operational experience following the tsunami, including, in particular, issues such as temporary shelter and other transitional arrangements.

Mr. Mar’ie Muhammad is the Chairman of the Indonesian Red Cross Society, and will talk about advocacy on behalf of victims of disasters.

As most of the panelists will focus on the human rights implications of the tsunami disaster, in terms of protection of the affected populations, in these brief introductory remarks I would like to focus on the other issue that is within the purview of this panel, that is international solidarity, so as to offer some food for thought for the discussion.

While the tsunami was not the largest disaster ever in terms of scale or loss of life, round the clock media coverage by all major networks led to extraordinarily high levels of governmental and private engagement, prompting a proliferation of relief actions.

As soon as requests for help were received, 16 UN agencies, 18 IFRC response teams, more than 160 international NGOs, and countless private companies and civil society groups deployed to affected areas to provide emergency food, water and medical services to the estimated five million people in need of assistance. Some 35 countries provided military assets for the relief effort.

The assistance provided by low- and medium-income countries was particularly noteworthy. Although the Government of India, for instance, was preoccupied in addressing the needs of its own compatriots in the affected states and union territories, it also deployed medical teams, naval ships, aircraft, and several tonnes of relief supplies to Sri Lanka, the Maldives and Indonesia.

The disaster generated an extraordinary outpouring of solidarity, making greater resources available over a shorter period of time than for any other crisis ever, and generating new sources of funding from the private sector. Some 95 countries contributed to the United Nations Flash Appeal, making almost 600 million US dollars available within record three weeks after the disaster. As of the end of August, a total of 6.7 billion US dollars have been pledged for relief, recovery and reconstruction efforts, of which 1.2 billion US dollars specifically against the United Nations appeal.

At the same time, the high level of international interest in this disaster contributed to exacerbating some of the problems traditionally experienced during large-scale disasters that receive high levels of media attention.

The large number of often diverse humanitarian actors proved to be at once an opportunity and a challenge. On the one hand, these actors were able to provide immediate life-saving assistance to a larger number of people in a shorter span of time. On the other hand, the need to provide strong coordination and

leadership to such a numerous and diverse community put immense pressure on the affected governments and local authorities at a time when they had the least resources, and often little experience in doing so.

Numerous “*well-wishers*” arrived in the affected areas sometimes without resources, and many without appropriate experience in working in disaster situations. Many of these less experienced actors did not follow established standards and guidelines on the provision of humanitarian assistance, raising serious accountability concerns. Some actors engaged in culturally inappropriate behavior that were detrimental to the dignity of the victims. Many of these non-traditional actors were not necessarily aware of, or receptive to the need to coordinate with other partners. In some cases, the very high budgets at the disposal of some NGOs acted as a disincentive to coordinated action. Even large international organisations with a long history of involvement in humanitarian operations, at times took initiatives without prior consultation with other partners, and in some cases bypassed the government.

In many instances, quickly establishing appropriate coordination structures proved difficult. Local authorities, who were in charge of directing the relief efforts, were often weakened by severe human and material losses, and at times had to cope with unclear reporting lines and interference from other government bodies.

Insufficient coordination led to gaps and duplications of effort, as well as to inconsistencies in standards of assistance. Some areas were flooded with relief items and with actors who did not have the capacity to assist. In other areas the assistance provided did not match needs. The resulting “*humanitarian traffic jam*” led at times to miscommunication, *ad hoc* or non-systemic planning, and delays in clearance of relief items and operational equipment.

I would also like to underscore the negative impact of the large quantities of unsolicited, inappropriate contributions donated by private citizens, non-governmental organisations and even foreign governments. Managing these contributions placed major, unnecessary strains on the already burdened national authorities.

Despite these problems, which as I said are common to all large-scale disasters that receive high levels of media attention, overall the international response to the disaster was timely and effective. Established emergency response networks and tools were quickly deployed, and assistance teams reached all affected areas within the first six weeks. No major outbreaks of disease or epidemics took place, close to two

million people received emergency medical assistance, and an equal number received food aid. All in all, the level of international assistance provided to affected countries was truly unprecedented, rendering the tsunami response operation a high point in international cooperation.

The timely relief response raised expectations for a relatively speedy transition to recovery and reconstruction. It is essential to recognize, however, that the pace of such transition will vary from country to country, and that a differential approach will be required. Managing a smooth transition from relief to recovery is a critical concern at this point in time.

There are three major challenges in this respect, I believe. The first concerns the provision of shelter. The number of transitional shelters that need to be built is simply staggering. As concerns permanent housing, major land tenure and land rights issues are at stake, which will take a long time to settle. Suffice to say that in Aceh, only 5% of the land was registered as “*owned*” before the tsunami. The second challenge relates to access. Recovery operations have been hampered by difficulties in accessing affected areas. In Indonesia and Sri Lanka, access is constrained mainly by damage to roads, and by the distances of some of the more remote communities and islands. In the Maldives, access to and communication with widely dispersed outer islands has been a major problem. The distances that recovery and reconstruction materials have to pass are immense, and the transportation of construction material is time consuming and costly. Lastly, maintaining the momentum for the recovery and reconstruction phase is key to its success. The efforts of the UN Special Envoy for Tsunami Recovery, former US President Bill Clinton, are crucial in this respect.

In conclusion, the response to the tsunami disaster demonstrated the strength of the humanitarian system when resources are plentiful and political commitment is high. Unfortunately, international solidarity is highly selective. While large-scale disasters such as the tsunami attracted great international attention, it is worth recalling that most of the disasters taking place in the world are smaller in scale, and as such do not make international headlines. In these less visible disasters, the brunt of the response and recovery effort is entirely borne by the affected communities and countries.

These low-profile disasters deserve more attention, not only because they cause huge human suffering, but also because they impose heavy losses and set back development in low-income and the least developed countries.

Regrettably, the international community continues to favour high-profile emergencies. This trend is clearly reflected in funding patterns. For instance, while donors provided a record 86% of the 1.3 billion dollars requested in the United Nations appeal for the Indian Ocean tsunami, the United Nations appeal to help drought victims in Djibouti received only 34% of the 7.5 million dollars requested.

Ladies and Gentlemen: the Tsunami disaster starkly demonstrated that extraordinary levels of funding are achievable, provided there is political commitment and will. The same level of political commitment and will that was displayed after the tsunami should also be applied to disasters that are far from the media or political spotlight.

The same level of political commitment and will should also be applied to preparedness activities, so as to ensure that natural hazards do not result in disasters.

THE PROTECTION OF PERSONS DISPLACED BY NATURAL DISASTER

Prof. Walter KÄLIN

Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons

In the understandable rush to provide assistance to the survivors of the tsunami insufficient attention has been devoted to protecting the human rights of those forcibly displaced by the disaster. Protection concerns include access to assistance, discrimination in aid provision, enforced relocation, sexual and gender-based violence, recruitment of children into fighting forces, loss of documentation, safe and voluntary return or resettlement and issues of property restitution. The more the tsunami-affected countries move from relief to reconstruction, the greater the need to address human rights problems.

Experience from other natural disasters teaches us that there is a serious risk of human rights violations when the displaced cannot return to their homes or find new ones after some weeks or months. In the context of natural disasters, discrimination and violations of economic, social and cultural rights can become more entrenched the longer displacement lasts. Often, these violations are not consciously planned and instigated but result from inappropriate policies. They could, therefore, be easily avoided if the relevant human rights guarantees were taken into account from the outset.

The Guiding Principles on Internal Displacement provide the normative framework for addressing human rights challenges in situations of disaster-induced displacement. Recognising that persons forced to leave their homes share many common types of vulnerability regardless of the underlying reasons for their displacement, the Principles use a broad definition of ‘internally displaced persons’ as persons ‘forced or obliged to flee or leave their homes or places of habitual residence’ for reasons which include, besides conflict and civil strife, “*natural disaster*”

I. TYPICAL POST-NATURAL DISASTER HUMAN RIGHTS CHALLENGES

Access to assistance: IDPs have the right to request and to receive protection and assistance from national authorities. States have in general been willing to respond quickly in providing humanitarian assistance to tsunami-affected populations, and those states needing assistance from abroad did so in collaboration with the international community. However, governments must not block access to those in need when they themselves are not in a position to provide adequate assistance. Restrictions on the delivery of aid, such as excessive delays to obtain the necessary permits to reach affected populations, should be avoided.

Non-discrimination: After natural disasters, discrimination may arise in the distribution of humanitarian and reintegration assistance and in decisions regarding relocation and resettlement. As affirmed in the Guiding Principles, assistance must be provided in accordance with the long-established principles of impartiality and neutrality, without discrimination on the basis of race, ethnicity, religion or caste or privileging those uprooted by a natural disaster over those displaced by conflict. Inequities in aid distribution not only violate humanitarian principles but also risk creating tensions which can threaten the security of IDPs and complicate their integration as well as frustrate moves towards national reconciliation.

Protection of women and children: The Guiding Principles call for special attention to the needs of women and children. They experience increased vulnerability to sexual and gender-based violence, especially in camps, where they risk higher levels of domestic violence. When food is not delivered directly to women and when they are excluded from camp management and from the design of relief and reintegration plans, women's vulnerability to sexual exploitation and abuse increases dramatically. Women also have special needs as regards access to health services and in the area of reproductive health. Children who have lost their homes and families are particularly at risk of military recruitment.

Trafficking: This is another serious risk that is heightened when people are displaced, families separated, children orphaned and livelihoods destroyed.

Access to education: Prompt return to school after a natural disaster is important to minimise disruption to the education to which displaced children are entitled and also is critical for their psychosocial well-being. School attendance can reduce children's exposure to risks including trafficking and military recruitment. Access to education for non-displaced as well as IDP children will also be constrained where IDPs are sheltered in school buildings. Resettling IDPs to more appropriate temporary accommodations will open opportunities for educational access not only for IDPs but also for children from the broader community. [I added "opportunities" because simply moving IDPs to more appropriate accommodation will not necessarily, and often does not, "provide" them with educational access]

Loss of documentation: Lack of documents can lead to denial of access to health, education and other essential public services as well as to mechanisms to seek property restitution or compensation. Obtaining replacement documentation can be difficult and time-consuming, but is something to which IDPs are entitled.

Participation of IDPs: IDPs can find themselves excluded from decision making, for instance about the location and layout of camps and settlements, the manner in which aid is distributed, the type of food and other items supplied and other matters central to their daily lives. This can heighten the sense of helplessness inflicted by a natural disaster, undermine the effectiveness of humanitarian assistance, and even put IDPs' physical security at risk, in particular that of women.

Voluntary return and resettlement: After the emergency stage of a disaster is over, displaced persons will usually require assistance to rebuild their lives. National authorities have the primary duty and responsibility to facilitate this, by establishing the conditions, as well as providing the means, for IDPs to return voluntarily, in safety and dignity, to their places of origin or to resettle in another part of the country

and to facilitate their reintegration. In addition to rebuilding homes and other infrastructure, this may include assistance to enable the displaced to re-establish previous livelihoods (e.g. rehabilitating damaged agricultural land, business assets and fishing boats) or providing the displaced with training and assistance for developing new sources of income.

After a disaster, it may be that Governments wish to designate certain areas as “*buffer zones*” or “*exclusion zones*” in which reconstruction is prohibited. Such decisions have implications for IDPs’ freedom of movement and, in some instances, for property rights and their ability to make a living. Where the authorities determine that exclusion zones legitimately should be enforced, such decisions must be taken in close consultation with the displaced, who should receive compensation for property and land lost as a result as well as assistance in relocating and re-establishing their livelihoods and residence elsewhere. It is essential that such decisions do not discriminate against certain ethnic, religious or other groups or among persons displaced for different causes, such as in cases where natural disaster strikes areas with existing displaced populations as a result of armed conflict or civil strife.

On the other hand, IDPs may choose not to return to their original homes, particularly if their displacement is protracted and they have begun rebuilding their lives elsewhere. Authorities are sometimes anxious to promote return as a symbol of normalisation after the chaos brought on by a disaster. However, they should respect IDPs’ right to choose whether to return to their place of origin or to resettle elsewhere, and in either case should assist them to reintegrate.

Property issues: Property issues may pose especially complex problems particularly where a natural disaster has wiped out landmarks used for demarcation and where residents may not have had formal evidence of land ownership in the first place or records have been destroyed. When regulations on registration and inheritance discriminate against women they find it hard to regain property, especially when their husbands have been killed. Experience has shown that the designation or establishment of a dedicated administrative body to handle property claims with a mandate for mediation, adjudication (subject to appeal to courts) and flexible types of remedies is the most effective way of handling such large-scale property issues. Addressing the property issues resulting from displacement crises can also be an opportunity to address any long-standing inequities or inefficiencies in registration and cadastral schemes generally as well as to modify laws and policies to ensure that customary rights and non-traditional forms of ownership evidence are recognised.

II. CONCLUSION

When governments, international agencies and NGOs develop and implement programmes of reconstruction and reintegration for IDPs they must seek equitable solutions in accordance with applicable human rights requirements. It is no less important in the context of natural disasters than it is in cases of displacement by conflict to examine and address situations of displacement through a “*protection lens*”.

During my working visit to a number of tsunami-affected states there was recognition of the need for a human rights based approach in developing and implementing a response to natural disasters.

It is important that:

- recovery and reconstruction efforts in the tsunami-affected region and in other disaster-affected parts of the world be informed by a human rights based approach;
- when governments formulate national reconstruction and reintegration programmes the Guiding Principles should be taken into account as they provide guidance not only in situations of armed conflict but are also equally applicable during and after natural disasters;
- donors become more aware of their responsibility to provide assistance in ways that do not discriminate against people displaced due to prior conflicts or of different ethnic, religious or social groups, or on grounds of gender;
- the displaced, particularly women, should be included in any decisions for the planning and management of relocation, distribution of humanitarian assistance and finding durable solutions to displacement;
- national Human Rights Commissions be encouraged and supported to monitor the situation of IDPs and develop a common methodology for doing so;
- the UN High Commissioner for Human Rights and the Office for the Coordination of Humanitarian Affairs (OCHA) should jointly develop guidelines on human rights for situations of natural disasters in order to provide practical operational guidance to IASC (Inter-Agency Standing Committee) members on the ground.

(FMR Tsunami /2005, p. 10)

THE PROTECTION OF HUMAN BEINGS IN DISASTER SITUATIONS - THE TSUNAMI TRAGEDY – INTERNATIONAL SOLIDARITY

Ms Janet LIM

Director of the Bureau of Asia and the Pacific of the United Nations High Commissioner for Refugees

Given the topic of this Panel, I think it would be appropriate for me to speak about UNHCR's experience in the Tsunami disaster from a protection perspective. This is in fact not self-evident. Although UNHCR is a humanitarian agency, we do not normally have a mandate to assist in natural disasters. Furthermore, we do not normally associate natural disaster situations with the kind of protection work that UNHCR performs. Indeed one often makes a clear distinction between man-made disasters, such as war, conflict and outbreak of violence, persecution, etc, and natural disasters.

Yet our experience in the Tsunami crisis has also shown that there are areas where the needs in a natural disaster situation may overlap with those in a man-made disaster, or the response to a natural disaster could have an impact on an existing man-made conflict situation. There are three such areas which I would like to explore further here:

- the first is the type of material assistance, such as shelter, food, etc. that is needed in natural and man-made disasters,
- the second is the type of protection needs which may arise in natural disaster situations which may not be immediately apparent but could emerge and which may not be different from some of the protection needs encountered in man-made crises,
- finally, I would also like to focus on the possible impact that a natural disaster crisis could have on an existing conflict situation such as we have seen also in the case of Sri Lanka and Aceh during the Tsunami.

I would like to start by sharing with you the context in which UNHCR has participated in the Tsunami tragedy. Indeed UNHCR's response to the Tsunami crisis was an exceptional measure for the Organisation, since it was outside our normal mandate. It was first and foremost a response in solidarity with the rest of the UN system. Given the scale of the destruction and the urgency of need, there was a moral imperative to respond since we had the capacity and presence on the ground. Finally it was not co-incidental that we chose to focus our response in the two countries where there was an existing conflict situation. In Sri Lanka UNHCR has long been involved with internally displaced from the civil war, many of whom were also victims of the Tsunami. Nevertheless, getting involved in the Tsunami was not an easy decision for the Organisation to make, not least because we did not want to divert what were already scarce resources to help refugees all over the world, to assisting in the Tsunami. Hence our insistence that UNHCR could only

respond to the extent that additional resources were received, while appealing at the same time that this was not done at the expense of assistance meant for refugees.

UNHCR's participation in the UN country team response to the Tsunami in Sri Lanka and Aceh were in non-food relief items, shelter and some specific protection related activities. Our experience and capacity for assisting in mass influx situations stood us in good stead during the Tsunami response. For instance, in Sri Lanka, as part of our regular programme to assist IDPs from the conflict in the North and Northeast, we had sufficient stocks of non-food relief items in the country for some 200,000 persons. In addition we had already a network of field offices throughout the country. This made it possible for us to immediately distribute these relief items to the victims soon after the disaster struck. Temporary shelter in the form of tents was also provided. In an emergency the most critical period for saving lives is in the first 48 hours so the speed with which essential relief items are provided is key, if we are to minimise mortality rates in the aftermath of a disaster. In fact the emergency needs of the victims of the Tsunami were no different from any other crisis of mass displacement, regardless of the causes. Neither is there a difference in the challenges in organising the large scale response. The overall response from the international community was overwhelming and one of the biggest challenges was the co-ordination of the very large numbers of actors who came to assist, resulting in log-jams in bureaucracy, logistics and infrastructure. As we have seen in many other large scale emergencies, mobilising aid may not be difficult, as was the case in the Tsunami, but getting the aid down to the individual level where the real impact can be felt, is often very problematic. The point I want to make here, however, is that the kind of immediate relief that is needed in a natural disaster as the Tsunami, is no different from the response that is needed in any large scale emergency resulting from man-made causes. At UNHCR we have certainly found that we could easily transfer our expertise and capacity tailored for man-made emergencies to the Tsunami or any other large scale emergencies for that matter.

While our initial intention was to provide only material assistance, it quickly became clear that our experience in addressing the protection needs of vulnerable groups and individuals in crisis situations was also very relevant. For instance, when the authorities were organising temporary housing for the victims, no consideration was initially given to the special needs of women and children and to organising space to provide for communal needs. Through sharing our experiences with addressing the privacy needs of women, location of facilities to minimise risks for individuals in a crowded situation, we were able to influence the authorities in their lay-out of the temporary housing which had to be established very quickly. We were also able to provide advice on measures to prevent the outbreak of Sexual and Gender Based Violence in this highly stressful situation. Such protection needs are also common in other crisis situation and were especially important to address for a population already highly traumatised. During the Tsunami, many people lost important documents relating to their identity and ownership of land and other properties. It caused the people a lot of concern and actions needed to be taken to ensure that a system was established for recuperating these documents which would facilitate the recovery process. UNHCR was able to provide

support in these areas including advice on the registration and documentation of the victims, through *inter alia*, the dispatch of mobile legal teams. There was also a need for advocacy with the authorities on the concerns of the displaced population, such as issues relating to relocation and the application of laws and land right issues. In advocating for the rights of the victims, it was very useful to have as a reference the Deng guiding principles on internal displacement which were developed not only for those internally displaced by conflict but also those displaced by natural disaster. As in any protection activities, immediate presence of the humanitarian workers in proximity to the victims was key in order to be able to influence and intervene at the local levels as measures were being taken which could impact on the long term recovery of the victims.

Finally I would like to touch on the impact of the Tsunami on existing conflict situations in Sri Lanka and Aceh. At the political level, there was certainly hope that the scale of the disaster and the imperative for everyone to work together would provide an opportunity for peace. In Sri Lanka, this was initially the case but unfortunately the management of aid subsequently degenerated into bones of contention between the two sides, and has been a setback to the peace process since then. At the time of Tsunami, there were already some 350,000 internally displaced, from the conflict, mainly located in the North and Northeast. Some 450,000 were estimated to be displaced by the Tsunami, with substantial numbers mainly in the South. Given the ethnic divide in these two parts of the country, we were very cognizant of the sensitivities which could arise if there was any perception of impartiality in the distribution of aid. We were particularly concerned that with the overwhelming volume of aid for the Tsunami victims, there would emerge an inequity in the assistance being provided to the conflict displaced victims. Hence side by side with our assistance to the Tsunami victims we had also to maintain our attention to the conflict displaced IDPs, even more substantively than ever, and advocating also with other humanitarian actors not to divert their capacity to Tsunami victims as was the tendency in the early days. In fact we did ask for some funds to be reallocated to these IDPs.

In Aceh after the initial response, UNHCR's role as a refugee agency was seen by the Indonesian Government as being too sensitive given the on-going conflict in Aceh. Of particular concern to the central government was UNHCR's involvement with Acehese refugees in Malaysia. After some three months of being part of the UN response in Aceh, we felt obliged to leave, even though there were substantial amounts of funds left unspent. Much was made of the fact that UNHCR does not have a mandate for natural disasters. Subsequently however, with support from many quarters, not least from the local authorities in Aceh, agreement was reached with the central government on our return to Aceh based on clear parameters for a minimum presence and the confinement to technical work relating to shelter. Since the Tsunami, there has been progress made on the peace process at the political level. We hope that when the time is ripe UNHCR will be permitted to carry out its mandated responsibilities to assist in any voluntary return of refugees to Aceh.

In conclusion I would like to emphasize that never before the Tsunami, has UNHCR been involved to such an extent in a natural disaster. Within the UN system, there is an increasing pressure for all UN

agencies, regardless of their mandates, to work more coherently and more collaboratively together. It seems to make sense that when there is a crisis of unmanageable magnitude, there should be a possibility to draw on all the capacities that are available within the UN system. We do not want to dilute the importance of our mandate, but there is a need for pragmatism as well. As I have tried also to show, the kind of needs and the capacities and expertise we need for managing both man-made and natural disasters are not necessarily so different – the causes may be different but there are consequences which are very similar.

THE PROTECTION OF HUMAN BEINGS IN DISASTER SITUATIONS– THE TSUNAMI TRAGEDY– INTERNATIONAL SOLIDARITY

Mr. Johan SCHAAR

Special Representative of the Secretary-General for the Tsunami Operations, IFRC

Much is unique and unprecedented with the tsunami disaster – the range of countries and regions affected, its cinematographic visibility, the public attention and the volumes of funding available, most of it from the general public in many countries. The tremendous international solidarity, however, brings benefits as well as challenges. I would like to briefly address some aspects encountered by humanitarian organisations active in the emergency as well as the recovery and reconstruction phases of the response. I will then touch upon the Federation’s position and actions with regard to how international emergency assistance can become better organised and more expeditiously delivered through the establishment of International Disaster Response Laws, Rules and Principles.

“It was nature at its worst but humanity at its best” is how Jan Egeland has described the tsunami disaster and the ensuing response. For once, we have sufficient funds to address emergency and recovery needs after a disaster and the necessary disaster risk reduction activities beyond that. As we all know, the problem is not too much money but that we regularly have too little funding for many other situations, where populations are in dire and desperate need. For those of us representing humanitarian organisations, basing action on the principles of impartiality and neutrality, the problem becomes particularly painful. Working indiscriminately, *“solely on the basis of need”*, will not be possible if our donors, however generous, whether governments or the public, point us in the direction of only certain emergencies and disasters. Working on the response to the tsunami, we face a dilemma which we try to manage by including a call for solidarity with all those in need as one of our messages.

Recent studies on recovery from the ProVention consortium and the World Bank tell us that recovery programmes are often supply rather than demand driven. This results in high pressure for early and visible results, sometimes favouring shortcuts at the expense of proper planning, appropriate designs and full consultation with the affected population. Rather than reducing vulnerability and exposure, risks may be rebuilt. Obviously, with all the attention and funds raised in response to the tsunami, this is a danger that all of us involved have to face and manage. While being fully accountable to our donors for the resources entrusted to us, our first responsibility is towards the survivors of the tsunami and their communities. Just as there is no excuse for being slow in this task, there is no justification for compromising on the basic principles for achieving sustainable recovery.

Many actors in the tsunami recovery effort are humanitarian organisations. This means having to manoeuvre in a heavily politicized context, facing a range of sensitive issues, such as the ultimate fate of those displaced, the equitable distribution of resources and the use and allocation of land for housing and

infrastructure. In addition, and as we have often seen, a natural disaster reveals political, social and economic divides in a society. Is this a role that humanitarian organisations should accept? Does it not risk jeopardizing the confidence in us as neutral and impartial actors? When we look at the experience of the International Federation and its member Societies, we find that we have been involved in recovery and reconstruction efforts after almost all major natural disasters during the past decades. We conclude that this is and will continue to be what we do, and we should see it as an integral part of the disaster management cycle, stemming from our presence in the midst of the affected communities. We even realize that our way of involving and empowering the local population in the early stages of disaster relief will have a major impact on their ability to recover. What we need to do as a humanitarian organisation is to accept our situation and clearly define our role and our mandate in relation to national governments, the development banks, international organisations and NGOs, ensuring that we act in the best interest of the most vulnerable and that we use the post-disaster opportunity to truly strengthen community resilience and reduce the risk of disaster.

But let us go back to the emergency phase and put the early response in the context of international efforts to facilitate, coordinate and regulate humanitarian assistance. As a federation of national societies, we believe strongly in the primacy of domestic actors. The principle of subsidiarity is very much a cornerstone in how we view roles and responsibilities in disaster response. This includes not only national governments, who have the acknowledged primary role in international law, and national Red Cross and Red Crescent societies, who function as auxiliaries of their governments, but also local communities, including Red Cross and Red Crescent volunteers, whose ability to respond is invariably the decisive factor in saving lives. International solidarity, particularly in the form of outside humanitarian assistance, is nonetheless still needed in many disaster situations when local actors become overwhelmed, not least the devastating 2004 tsunami.

In his opening speech to this conference, our President Don Juan Manuel Suarez del Toro Rivera pointed out that within the Red Cross/Red Crescent Movement, the most basic questions of principles, rights and duties in situations of natural or technological disaster have long been settled. As affirmed by the International Conference of the Red Cross/Red Crescent (Principles and Rules for Red Cross and Red Crescent Disaster Relief, XXIst International Conference, as revised), we believe that every human being has a right to receive humanitarian assistance in strict accordance with his or her needs and that we, as individual societies and as the Red Cross Red Crescent Movement, have an obligation to try to provide such assistance, in an impartial, neutral, efficient and effective manner. This is the humanitarian imperative. The question before us, however, is how international humanitarian assistance, when it is needed, should be facilitated, coordinated and regulated. For example, should humanitarian actors benefit from liberal entry visa, landing, overflight, mooring, and transit privileges to ensure that aid arrives in the critical first hours and days after a disaster? Should international humanitarian assistance receive special dispensation from customs tolls, charges and taxes so that aid goes directly to its intended source? What guarantees exist as to the quality, transparency and appropriateness of international aid? What assurances are there that international efforts

will complement rather than undermine or replace the capacity of local communities, domestic humanitarian actors and national governments? From a purely practical point of view, these are not easy questions. Although there is a need for quick access for international aid to be effective, such access can and has been abused. In our experience of the tsunami, there are examples both of unnecessary legal barriers to access as well as of unhelpful practices by some aid providers.

Some answers to these questions can be found in existing but dispersed areas of international law including:

- The international law of customs, aviation, health, atomic energy, communications, environment and law of the sea.
- Inter-governmental bodies, including the International Conference of the Red Cross and the United Nations General Assembly and Economic and Social Council, have adopted numerous resolutions, decisions and recommendations relevant to IDRL issues.
- A nascent accountability movement is growing among international humanitarian actors, as exemplified in the development of documents such as the Red Cross/Red Crescent NGO Code of Conduct and the SPHERE standards.
- A substantial network of bilateral mutual assistance treaties between states has grown up over the last century and there are also a limited number of multi-lateral treaties specially focused on these issues, the most recent of which is the Agreement on Disaster Management and Emergency Response adopted by ASEAN in July this year.

However, this existing international normative framework has, until recently, remained unnamed and unexplored and it is therefore not surprising that many of those most closely concerned are unaware of its full extent. Moreover, the existing framework remains thin with substantial gaps, both in the level of ratifications of key instruments and the scope of the instruments.

Since 2001, the International Federation has been attempting to address this problem through its *“International Disaster Response Laws, Rules and Principles”* or *“IDRL”* Project. The project has compiled over 400 international instruments relevant to this area, commissioned over a dozen country case studies, consulted with experts, practitioners and national governments, and sought to raise awareness of both the existing *“IDRL”* and existing gaps. Still, much remains to be done, and the Federation hopes that conferences like this one will stimulate more thinking on this new but tremendously important topic. In particular, the Federation is currently organizing a network of interested individuals, agencies and governments to discuss and debate solutions to the problems remaining in the area of IDRL and hopes that many of you will be interested to join in.

To conclude, the international solidarity shown to the survivors of the tsunami has translated into tremendous confidence in us to help restore their livelihoods. This, however, must be a collaborative effort, ultimately ensuring that it is they who are the agents, given the resources and the support to take action, now and in preparedness for any future calamity that they may face.

SOME REFLECTIONS IN INTERNATIONAL DISASTER RELIEF LAW

Mr. Bosko JAKOVLJEVIC

Member of the International Institute of Humanitarian Law

International disaster relief operations, providing humanitarian assistance in peace-time disasters, are very important and a constant activity all over the world. These disasters, in fact, cause huge numbers of victims and often large-scale destruction, engaging a significant number of personnel as well as material and financial resources. The political importance of these operations is constantly increasing. Various aspects are being examined with the purpose of improving their efficiency. However, until recently, their legal aspect has been neglected.

In 2000, an article published in “*World Disasters Report 2000*”²⁸³, edited by the International Federation of Red Cross and Red Crescent Societies (International Federation), served as a sort of warning to all those concerned on the need to focus the attention of the international humanitarian community on this forgotten aspect and the need to take action. The International Federation examined the problem in 2001 in the framework of its various bodies, and its work culminated in the decision taken by the Council of Delegates in 2001, whereby, in its Resolution N° 5, the Council welcomed the initiative of the International Federation to advocate for the identification, development, improvement, application and promotion of International Disaster Response Law (IDRL). It encouraged the International Federation to continue its work and so the “*IDRL Project*” was established. In December 2003 the supreme deliberative body of the International Red Cross and Red Crescent Movement (the Movement) and the highest world humanitarian forum, the 28th International Conference of the Red Cross and Red Crescent, thoroughly examined the results of the first years of action to promote IDRL. All the components of the Movement, together with governments and international organisations, participated at this meeting where they approved and supported the initiative presenting their recommendations for future activities in a document entitled “*Agenda for Humanitarian Action*”²⁸⁴. This document laid down the directives for action over a period of four years and was intended for all those concerned about this topic.

The reasons supporting the initiative to work on identifying, developing and applying IDRL (now it is called: International Disaster Response Laws, Rules and Principles), should be examined. Nowadays, many important fields of human actions are regulated by law to ensure order and to implement the principles governing these actions by harmonising the views and interests of numerous actors. International Disaster Response is an exception as it has not been codified. However, the huge number of victims killed as a result of or suffering from the effects of disasters, such as the tsunami tragedy of December 2004 which caused

²⁸³ See Hoffman, M., *Towards an International Disaster Response Law*, Chapter 8, World Disaster Report 2000

²⁸⁴ See Resolution 1 B 4 urges all members of the Conference to implement the Agenda for Humanitarian Action. IDRL is mentioned in this Agenda as the Final Goal 3. 2., actions proposed are listed in points 3.2.1. – 3.2.6.

such widespread damage to property essential to the survival of the populations affected, confirms the growing volume and value of relief provided, the continual increase of technical and economic possibilities to assist victims, the development of the concept that victims are entitled to assistance when in distress, and their need for additional and external protection and aid, all this calls for the introduction of more order in this field. Who would benefit if disaster response actions had an improved and stronger legal basis?

- a. The victims feel that they are entitled to humanitarian assistance if they are in distress and exposed to sufferings, because the world has the necessary resources, and the concept of universal solidarity exists. They would certainly benefit if the humanitarian principles of modern society were respected.
- b. Different types of donors, including recipient states and their local bodies, would benefit from more precise rules regulating responsibility and accountability of all the actors involved in relief operations. These rules would determine objectively the needs and categories to be assisted, ensuring not only relief to rightful beneficiaries but also better protection of personnel participating in relief operations, thus assuring control and transparency throughout the whole operation. These rules are expected to produce greater solidarity: in the aftermath of a disaster and in post-disaster rehabilitation, the public supporting them would be easily convinced of the validity of the cause.
- c. Relevant international organisations would affirm their role and action: by defending, through applicable law, agreed principles and rules governing relief operations; by developing international co-operation in the humanitarian field; and possibly by removing obstacles and difficulties encountered during the operations. They could consequently render their action more efficient, quick, effective and just.
- d. The recipient state would feel that its efforts to reduce the effects of a disaster were strengthened, facilitated and rendered more effective, both in the phase of reducing the consequences of disaster and in the later phase of recovery. An improved legal basis covering relief operations would represent a better contribution to international co-operation, to the protection of certain basic human rights, and to peace. This type of humanitarian action could be regarded as a support to a true security policy.

Who could oppose better legal regulations regarding relief operations? Would the donors feel that their freedom of action was greatly reduced? But the international community has evolved the principles of relief operations basing them particularly on humanity, neutrality and impartiality, and these principles must be respected. This leaves sufficient freedom of action to potential donors. Therefore, better regulation of relief operations would contribute to the development and improvement of disaster relief.

The abuses committed by the recipient states, its local bodies, or by the beneficiaries, and the changing of the agreed objective or destination is contrary to the general principles of relief actions, and should be avoided or prevented by applying IDRL. The sovereignty of states is undergoing changes in conformity with the new developments in the world.

Up until now the opinion has been that international disaster response operations have not been regulated by adequate enough rules. This view is misleading. Certain laws exist but they are not known even by those who direct relief operations, and therefore, not applied fully. Moreover, those laws have not been collected into one or more general acts containing basic aspects requiring legal regulation. In addition, the existing law is far from complete, there are many lacunae or even contradictions. The present state of that law does not provide a full picture of the whole as it covers many different branches and sources. All this contributes to the impression that the law relating to relief operations does not exist. Therefore, defining it is the first task to be undertaken.

I do not consider the situation of this law as being so “*disastrous*” in regard to its existence, but it does require more development, improvement, clarification and harmonisation. The sources of this law can be found in numerous norms, but they are of different legal nature, and in different phases of development. International conventions exist only for certain questions, such as, custom co-operation, various means of transport, telecommunications. For each of these branches the question may be raised as to whether the existing norms are sufficient to facilitate disaster relief operations. If they are not, they should be amended.

There is a lot of “*soft law*”, such as resolutions of the UNGA, ECOSOC, the Movement, acts of UN specialised agencies, which may be sufficient to promote international co-operation in relief operations. In addition, there are numerous internal acts of states, which should be gradually incorporated within the general framework of IDRL.

Finally, states and international (and often regional) agencies, have extensive experience which may be easily codified in the form of specific rules, and if necessary, strong recommendations. The list of some of these rules can be found in the doctrine and in the document of the Balkans National Societies.

Particular mention should be made to the right to humanitarian assistance, which could accelerate the process of consolidation and development of IDRL. This right is rarely explicitly stated merely implied. For the victims, this right enables them to enjoy some basic human rights, such as, the right to life, to health, to social services, to family unity, to the protection of their physical integrity and dignity. It would be important to promote the development of this right and its recognition. The doctrine supports such a development and has suggested detailed rules²⁸⁵.

In the IDRL Project and acts of the 28th Red Cross and Red Crescent Conference the term “*response*” is used. I maintain the term “*relief*” as it is more precise and better defines the scope of its field of action. The term “*response*” is too wide as it also embraces other spheres of action which are already regulated by specific rules, such as prevention, rehabilitation, development. The term “*relief*” is used in UN: UNDRO; the highest UN functionary responsible for this field of action has the title of “*Emergency Relief Co-ordinator*”. The Movement has specialised in humanitarian assistance to disaster victims, and this activity is regulated by the “*Principles and Rules for Red Cross and Red Crescent Disaster Relief*” (1995)

²⁸⁵ See in particular the “*Guiding Principles on the Right to Humanitarian Assistance*”, containing 14 principles. International Institute of Humanitarian Law, Sanremo, 1993.

The International Federation, being a universal organisation, is working to identify global standards and rules. International solidarity in major disasters today is global. It is a difficult task, requiring much time; the Federation must continue in this direction. But at the same time a regional approach has also been recommended. Neighbouring countries know each other well, they have joint practice and similar experiences, therefore, regional or sub-regional rules are much easier to identify. Both methods should be combined, global rules should be based on essential rules from different regions.

In the Balkans sub-region, National Red Cross and Red Crescent Societies, whose countries are often exposed to disasters, have decided to examine how to implement IDRL in their area. At the meeting held in Belgrade from 24-26 September 2004, following an introduction to the subject by the International Federation, the document “*Recommended Rules and Practices*”, proposed by the host Society, Serbia and Montenegro Red Cross Society, was discussed. The document was adopted subject to numerous amendments. It was finalised on 1 February 2005, and on 1 April 2005 it was sent to all National Societies of the Balkans, with the suggestion to approach their governments and propose that they examined the 77 points presented and checked to see if they had been implemented. The document is based on the general principle whereby every government has a primary responsibility to take care of the victims of disasters and other emergencies occurring on their territory²⁸⁶, the first step would be to consolidate the law at the level of the receiving state and harmonise it with IDRL standards. This step was also recommended by the 28th Conference, in point 3.2.4. of the Agenda for Humanitarian Action and should be followed by other steps, including those involving the role of international organisations.

The document “*Recommended Rules and Practices*” of the National Societies of the Balkans does not cover all aspects and details on international relief operations, but only the main questions. It is a compilation based on various legal sources²⁸⁷ of different legal nature. Therefore, the document can contain mere recommendations, especially because it also embraces rules derived from long and fruitful practice and specific experiences of Balkan countries in numerous relief operations considered to be a good and recommended practice. The document is evidently valid as a recommendation for action in the sub-region only. Whether some of these rules are the same or similar to those for other regions, it is up to these regions to say. The titles of the chapters of the Balkans document indicates their contents. They are I: Receiving states: introductory text; preparatory measures; decision-making process; delivery of relief; monitoring, control and claims; reporting and evaluation. II: Similar rules are proposed for assisting states.

One of the open questions is international co-ordination, which is such an important factor in the harmonising of actions and interests of numerous actors, aimed at substantially facilitating international relief operations, and at removing obstacles that may arise. According to the crucial UNGA Resolution

²⁸⁶ See important UNGA Resolution 46/182, Annex, point 4 of the Guiding Principles. The Resolution is entitled “*Strengthening of the co-ordination of humanitarian emergency assistance of the United Nations*”, 19 December 1991.

²⁸⁷ About the main legal sources see the document: *Implementation of International Disaster Response Laws, Rules and Principles in the Balkans: Recommended Rules and Practices*, 1st February 2005, point 6 of the Introduction. The document can be obtained from the Serbia and Montenegro Red Cross Society, Simina 19, Belgrade.

46/182 of December 1991, point 12 of the Annex reads: “UN has a central and unique role to play in providing leadership and co-ordinating the efforts of the international community to support the affected countries.” To implement this role the special post of Emergency Relief Co-ordinator, was created. This person is an Under-Secretary-General and head of the Office for the Co-ordination of Humanitarian Affairs /OCHA/. The role of this functionary is not an easy one, as he is responsible for the entire co-ordination of international disaster relief, not on the basis of an international convention, but on an UNGA Resolution. He deserves full support and this task should be further analysed in order to see how the role entrusted to him/her, as the main international co-ordinator, can be fulfilled. Among the problems to be examined is the tendency of certain actors, such as some strong and developed international organisations, to act directly and independently. The interests of victims to receive adequate relief in time should be the criteria for defining the role of Emergency Relief Co-ordinator and for coping with political and other problems that may arise.

When speaking about the role of the UN, mention should be made of one important problem. The UN now very often resorts to severe economic sanctions, but these may run counter to the basic principles of disaster relief operations, particularly those of humanity, rapidity, efficiency, and effectiveness. In fact, in some cases they may become a negative factor in relief operations, greatly limiting the contents of relief, and consequently causing great delays in delivery and imposing strong political control. It should not be forgotten that even the UN and its bodies are not above the principle requiring respect for humanitarian consideration, when the most vulnerable parts of the populations, and not the political leaders, are exposed to sufferings. The UN Security Council has recently understood this problem and has undertaken certain appropriate measures to address the matter²⁸⁸. It is still to be seen whether the application of these measures has contributed to a significant reduction of suffering.

The IDRL Project was designed to examine the under developed law applicable to peace time disasters only, as the basic rules of international humanitarian law applicable to armed conflict are contained in a well-developed and well-known special branch of international law with its own set of rules. Therefore, the IDRL initiative should not touch this well-established branch. While international humanitarian law always has priority in the case of armed conflict, certain rules of IDRL may also be applicable under the following conditions: a) that the parties concerned and the ICRC agree to this, the ICRC being a humanitarian body and mandated by the international community to protect and assist war victims; b) that these rules are not regulated by international humanitarian law; c) that the application of such rules would improve humanitarian assistance to these victims.

Could IDRL develop into a specific branch of law? It is not yet possible to answer this question. At the moment, IDRL is certainly not a specific branch of law. On the contrary, its rules cover many branches of international law and internal law. For the purposes of presenting and teaching IDRL all the rules should remain within their own branch, collected into one or a few general acts²⁸⁹, in this way, it would be easier to

²⁸⁸ See OCHA in 2003, “*Developing Humanitarian Standards*”, p.21.

²⁸⁹ See Toman, J.,: “*Towards a Disaster Relief Law*” in the publication: “*Assisting the Victims of Armed Conflict and Other Disasters*”, edited by Kalshoven, F., Martinus Nijhoff Publishers, 1989, pp. 181-199. About the question of a branch of law see page p.194.

detect the lacunae or contradictions and work for their removal and the coherence of the whole system of applicable law. This might be beneficial in efforts to strengthen the legal framework on which relief operations are based.

Beginning from the principle that every state has the responsibility to take care of its population exposed to suffering caused by disasters and other emergencies, it is good to recall that many states have created or authorised a special service to fulfil this duty, which is usually called civil defence or civil protection. This body, which has a legal base in international humanitarian law (Protocol I to the Geneva Conventions, adopted in 1977, Articles 61-67), is active in war, but also in peacetime. Civil defence could perform many of the tasks specified in any chart of IDRL rules, and should be encouraged to offer suggestions to develop and strengthen its sphere, both at national and international levels because, as a public service, it contributes to reducing the suffering of persons affected by disasters. It is also an expression of the concern of every state and international organisation for the fate of the victims of disasters or other emergencies. So far, international co-operation at the universal level and joint efforts to see how to improve the effectiveness of the role of civil defence, have not been sufficiently developed and, in my view, its potential has not been fully reached. There have been many armed conflicts since 1977, but in many of these civil defence has not played the role assigned to it by international law.

The legal doctrine is not adequately concerned with strengthening the legal basis of important humanitarian activities – international relief operations in favour of the victims of disasters. Only recently the International Federation has produced the first collection of articles on this subject. The doctrine should be more active in analysing the problems of IDRL, its identification, its development, its application and should make efforts to indicate new trends and solutions to the various problems that hinder its action. Various institutions, such as the International Institute of Humanitarian Law, should encourage studies of this field.¹ These studies should include lessons to be drawn from large scale disasters like the December 2004 tsunami, to see how the rules of IDRL were implemented²⁹⁰.

²⁹⁰ The doctrine is rather limited but certain works could be mentioned. Patrnoic, J., *Disaster Relief and International Law – Protection of Human Beings in Natural Disaster Situations*, study project, League of Red Cross Societies, 1981. In addition to the articles mentioned in notes 1 and 7, see the publication edited by Kalshoven, F., mentioned in note 7. Peter Macalister-Smith: *“International Humanitarian Assistance – Disaster Relief Actions in International Humanitarian Organisation”*, Martinus Nijhoff publishers, 1985. Particularly consult the collection of articles *“IDRL”*, edited by Bannon, V., published by the International Federation of Red Cross and Red Crescent Societies, Geneva 2003, and in this publication mention should be made to the article *“International Disaster Response Law Treaties: Trends, Patterns and Lacunae”* by Prof. Horst Fischer. For my views see: *“The Right to Humanitarian Assistance – Legal Aspects”*, International Review of the Red Cross, Geneva, September-October 1987. *“Reflections on the International Disaster Response Law Project and Experiences in Serbia and Montenegro”*, in the publication of the International Federation, 2003, Geneva, pp. 96-105. *“International Disaster Relief Law”*, Israel Yearbook on Human Rights, 2004. My reports at the International Law Association Conferences of 1982 and 1984, under the title *“Assistance internationale aux victimes de guerre”*, Montreal and Paris, *“New International Status of Civil Defence”*, Martinus Nijhoff, 1982, The Hague. The report, submitted in 2003 to the International Federation on the implementation of IDRL in Former Yugoslavia 1991-2001, during the great humanitarian crisis, together with numerous international agreements concluded with that country regarding disaster relief.

Various legal forms could be used to promote the development of IDRL once an agreement has been reached on the need to strengthen the legal basis of international disaster relief operations. I consider that this agreement was expressed in the Recommendation of the 26th International Conference of the Red Cross and Red Crescent in 2003, through the consensus of all the participants interested in this subject. In this respect, the following forms could be mentioned: a declaration of basic or core principles; a declaration of operative principles and rules; model bilateral or regional agreement; a declaration by one of the UN bodies on the need for the consolidation of the rules called “*IDRL*”; guidelines or a handbook for those engaged in these operations; set of recommendations by a high international body, such as the UN General Assembly or ECOSOC, or the International Red Cross and Red Crescent Conference; set of principles and rules on the powers and role of the international co-ordinator; regional and recommendable rules and good practices; amendments to the international conventions regulating specific aspects of relief operations. As far as the adoption of a universal international convention, or, as the first step, a framework convention, which would contain specific and concrete obligations, this should be considered in the later phase, when the IDRL initiative attains a certain degree of general recognition on the main principles and rules. The UN already prepared a draft convention on this subject in 1984, but there was not sufficient interest in it. A body promoter of this law which is still in the phase of being developed is needed. Such a promoter was lacking in 1984. Today, the International Federation has assumed this role; this should be understandable because the Federation has specialised in disaster relief ever since 1919. However, it would also be necessary to obtain stronger support from the UN, which is not the case at the moment. Once started, the IDRL initiative of the International Federation must proceed, because globally humanitarian problems are becoming more complex, acute and urgent. One of the ways to achieve this is to promote the right of victims to humanitarian assistance, which is implied but not yet expressly formulated. This is in conformity with the general trend of the growing importance of human rights. Basic human rights in emergencies should be promoted more vigorously. This could be done also within the concept of a new international humanitarian order, which is permanently on the agenda of UN bodies, so that the protection of human beings in disaster and other emergencies would be substantially increased and improved. In these efforts, the final goal of a general development of communities at all levels, should be kept in mind. Disasters and other emergencies would be substantially strengthened.
