The Development of International Refugee Protection through the Practice of the UN Security Council

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This paper examines the ambivalent influence of the UN Security Council’s practice on the development of international refugee protection since the early 1990s. While the international refugee protection regime did not originally foresee a role for the Security Council, the increasingly complex security challenges in the post-Cold War era have led to its de facto inclusion in the institutional framework of protection. After having used its wide discretionary powers under the UN Charter to link refugee flows with its primary responsibility for the maintenance of international peace and security, the Security Council thus began to strengthen different aspects of international refugee protection.

**Mariano Garcia Rubio Prize 2009** for the best Master’s Thesis in International Law.


*The views reflected in this paper are personal and do not necessarily reflect those of the Graduate Institute of International and Development Studies.*

CHRISTIANE AHLBORN

Christiane Ahlborn is currently working as a Ph.D. researcher at the Amsterdam Center for International Law, University of Amsterdam. She holds a Master’s Degree in International Studies with a specialization in International Law from the Graduate Institute of International and Development Studies (2009) and a Bachelor’s Degree in International Relations with a specialization in Law from the University of Dresden (2006).
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Summary

This paper examines the ambivalent influence of the UN Security Council’s practice on the development of international refugee protection since the early 1990s. While the international refugee protection regime did not originally foresee a role for the Security Council, the increasingly complex security challenges in the post-Cold War era have led to its de facto inclusion in the institutional framework of protection. After having used its wide discretionary powers under the UN Charter to link refugee flows with its primary responsibility for the maintenance of international peace and security, the Security Council thus began to strengthen different aspects of international refugee protection. Within a general trend in favour of human security in its activities, it has addressed the responsibility for root causes of forced displacement, supported the assistance to and protection of refugees and internally displaced persons in conflict situations, and promoted durable solutions. On the downside, the Security Council’s interaction with the United Nations High Commissioner for Refugees (UNHCR) and its encroachment on the General Assembly’s traditional field of competence have also given rise to criticism. Both the Security Council’s peace operations and its economic sanctions regimes have contributed to the erosion of established refugee protection standards. However, the Security Council’s increasing focus on human security alongside State security has mitigated some of the negative repercussions of its inherently political actions on international refugee protection. This paper concludes that, on balance, the Security Council has made a considerable contribution to the strengthening of international refugee protection by enforcing, developing and even making norms that place the individual at the center of the international security agenda.
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Abbreviations

1. AFDI – Annuaire Français de Droit International
2. AJIL – American Journal of International Law
3. AMISOM – Mission of the African Union to Somalia
4. BYIL – British Yearbook of International Law
5. CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women
6. CRC – Convention on the Rights of the Child
7. CRPC – Commission for the Restitution of Property Claims
8. CYIL – Canadian Yearbook of International Law
9. DDRRR – Disarmament, Demobilization, Repatriation, Reintegration and Rehabilitation
10. DRC – Democratic Republic of Congo
11. ECOSOC – Economic and Social Council
12. ExCom – Executive Committee
13. FRY – Federal Republic of Yugoslavia
14. HPCC – Housing and Property Claims Commission
15. HPD – Housing and Property Directorate
16. ICC – International Criminal Court
17. ICCPR – International Covenant on Civil and Political Rights
18. ICESCR – International Covenant on Economic, Social and Cultural Rights
19. ICISS – International Commission on Intervention and State Sovereignty
20. ICJ – International Court of Justice
21. ICRC – International Committee of the Red Cross
22. ICTR – International Criminal Tribunal for Rwanda
23. ICTY – International Criminal Tribunal for the Former Yugoslavia
24. IDP – Internally Displaced Person
25. ILC – International Law Commission
26. LJIL – Leiden Journal of International Law
MINUCRAT – United Nations Mission in the Central African Republic and Chad
MONUC – United Nations Mission in the Democratic Republic of Congo
NYIL – Netherlands Yearbook of International Law
OAS – Organization of American States
OAU – Organization of African Unity (now: African Union)
RUF – Revolutionary United Front
UDHR – Universal Declaration of Human Rights
UN – United Nations
UNAM – United Nations Assistance Mission in Iraq
UNAMSIIL – United Nations Mission in Sierra Leone
UNEF – United Nations Emergency Force in the Middle East
UNHCR – United Nations High Commissioner for Refugees
UNICEF – United Nations Children’s Fund
UNMIK – United Nations Mission in Kosovo
UNMIN – United Nations Political Mission in Nepal
UNMIS – United Nations Mission in Sudan
UNOSOM – United Nations Mission in Somalia
UNPROFOR – United Nations Protection Force
UNTAC – United Nations Transitional Authority in Cambodia
UNTAET – United Nations Transitional Administration in East Timor
UNTS – United Nations Treaty Series
VCLT – Vienna Convention on the Law of Treaties
WHO – World Health Organization
Introduction

“We in UNHCR look to the Security Council as the center stage of a system of global governance that preserves the security of persons as well as of states – as these two principles are increasingly indivisible. We insist on our humanitarian impartiality. But we also need [its] guidance and support in order to safeguard the integrity and effectiveness of humanitarian action.”

Since the end of the Cold War the regime governing the international protection of refugees has faced increasing and complex challenges going well beyond the institutional capacities of the United Nations High Commissioner for Refugees (UNHCR) and the legal guarantees of the 1951 Convention Relating to the Status of Refugees at the core of this protection regime. The shift in geographic focus from East-West to North-South has been accompanied by massive refugee flows and a steadily mounting number of internally displaced persons (IDPs), exacerbating previously existing legal and operational dilemmas. Moreover, refugee movements have become increasingly politicized and militarized with a dangerous mix of armed elements and vulnerable populations such as women and children. As a result humanitarian access to displaced persons has met serious impediments. Attacks on refugee and IDP camps as well as humanitarian personnel are nowadays the norm rather than the exception. Indeed, displacement is often no longer considered a by-product of armed conflict but rather its objective. Insistence on the right to return of the defeated group, individually or collectively, may accordingly reverse the very goal of the resort to force. It is in this context that the Security Council first linked the problem of mass exodus with determinations of a threat to international peace and security under Article 39 of the UN Charter in the early 1990s. It thereby set the stage for addressing different aspects of international refugee protection, often in close cooperation with UNHCR and in addition to other relevant UN organs and agencies. Although the Council had previously pronounced itself on international refugee protection as in the right to return of displaced persons in Cyprus, such references remained isolated incidents in comparison to the Council’s post-Cold War activism.
The linkage between international peace and security and refugee flows is a welcomed occurrence for the development of the regime of international refugee protection, which is an area of law that has not experienced substantive codifications at the universal level since the 1951 Convention. In resolutions relating to the Kurdish region of Iraq, Haiti, Rwanda, Kosovo, and Sudan, the Security Council has characterized grave violations of human rights and international humanitarian law, resulting in mass exodus or refugee flows, to constitute threats to international peace and security, even in the context of intra-State conflicts. Following such determinations, the Security Council has taken enforcement actions to end these violations of international law, including sanctions and authorizations for the use of force by States and regional organizations, mandates for robust peace operations to protect humanitarian activities in countries of origin and complex peace-building missions with far-reaching administrative powers. Moreover, the Council has continuously promoted the right to return of refugees in order to restore international peace and security as a precondition for the repatriation of refugees and internally displaced persons, as illustrated by the cases of Cambodia, Bosnia-Herzegovina and Sudan.

At the same time, the Security Council’s actions in the General Assembly’s traditional domain of international refugee protection, and its interaction with UNHCR, have encountered serious criticism. Beginning with the creation of so-called safe havens in Iraq, Bosnia and Rwanda, the Security Council has been accused of prioritizing State security over the security of IDPs and refugees by preventing persons at risk from seeking asylum elsewhere. Moreover, comprehensive sanctions regimes, intended to induce compliance with international law, have had a harmful humanitarian impact on the situation of refugees and displaced persons at different stages of their displacement process. The Security Council has also been strongly criticized for making unwarranted links between refugee status and terrorism in its counter-terrorism resolutions, in particular in resolution 1373, which may have contributed to the erosion of established refugee protection standards.

The UN Security Council has thus exerted a notable but ambivalent influence on international refugee law and policy; however, this influence has never been treated comprehensively by scholarly writings on the Security Council and international refugee protection. The relationship between the Security Council and general international law has mostly been analyzed from the perspective of the potential of the Security Council to abide by international law. Increasing recognition of the Council’s law enforcement powers has been supplemented by discussions on its potential role as a law-maker. With the exception of resolution 1373, Security Council resolutions with explicit or implicit references to refugees or displaced persons have been primarily considered in respect of collective action under Chapter VII of the UN Charter in cases of serious violations of international human rights and humanitarian law. This is not to say that other fields of international law are irrelevant for international refugee protection. In contrast to refugee law, human rights law has undergone a radical evolution after the Second World War and has also contributed substantively to the development of the contemporary refugee protection regime, including situations of internal and mass displacement. The same observation can be made with regard to international humanitarian law as the principal source of law applicable during armed conflict, which is not only frequently the reason for massive displacement but it is also related to the Security Council’s primary area of responsibility: peace and security.
fields of law have gained in importance in the Security Council’s resolutions, it is international refugee law that has received very little scholarly attention.

In light of this lack of scholarly consideration, this paper seeks to shed light on the ambivalent influence of the Security Council’s practice on the development of international refugee protection. For this purpose, international refugee protection is defined as the totality of activities from “securing admission, asylum, and respect for basic human rights, including the principle of non-refoulement, [to] the attainment of a durable solution, ideally through the restoration of protection by the refugee’s own country”. Accordingly, the term “refugee” is considered in its broad and inclusive meaning with emphasis on the element of coercion and the continuum of the displacement process. It includes other categories relevant to the Council’s practice such as persons at risk of displacement, internally displaced persons and returnees, but excludes voluntary forms of migration. Part one of this paper will discuss the normative competence of the Security Council over international refugee protection by considering the premises and institutional consequences of the Council’s gradual inclusion into the existing international protection regime. On this basis, part two will analyze to what extent the Security Council has strengthened the system of international refugee protection during the different stages of displacement from the elimination of root causes to the search for durable solutions to the refugee problem. Part three will then contrast the findings of this analysis with the possible erosion of refugee protection standards through the Security Council’s peace operations and sanctions regimes. Despite certain negative repercussions due to the inherently political nature of its actions, it will be argued that the Security Council has made a considerable contribution to the strengthening of international refugee protection by enforcing, developing and even creating norms that place the individual at the center of the international security agenda.

NOTES

2. 1951 Geneva Convention Relating to the Status of Refugees, 189 UNTS 150 (22 Apr. 1954) [hereinafter: 1951 1967 Convention], as modified by the Protocol Relating to the Status of Refugees, 606 UNTS 267 (4 Oct. 1967) [hereinafter: 1967 Protocol]. For reasons of simplification, this paper may only refer to the 1951 Convention. This reference is meant to include the 1967 Protocol. The 1967 Protocol incorporates the 1951 Convention and removes the temporal and geographic limitations of the Convention. Most states (120) are parties to both instruments. Madagascar, Monaco, Saint Vincent and the Grenadines as well as the Solomon Islands only ratified the 1951 Convention. Cape Verde, Swaziland, the United States and Venezuela are only parties to the 1967 Protocol.
4. Kourala observes that “[w]ith the end of the of the Cold War, international protection concerns increasingly converge with action contemplated or taken by the Council under Chapter


12. International humanitarian law and its codification were originally not included in the purposes of the United Nations in order not to undermine the so-called *ius contra bellum*. This legal doctrine prevailed after the Second World War and was based on the assumption that the establishment of the UN had led to the abolishment of war. See generally R. Kolb, ‘Aspects historiques de la relation entre le droit international humanitaire et les droits de l’homme’, (1999) 37 CYIL 57.

14. *Ibid.*, at 8, paras. 24 and 25. The 1994 Note on International Protection further emphasized that “coerced displacement, whether within or across national borders, should be seen as the consequence and symptom of a broader problem involving the absence or failure of national protection, a problem which should be addressed globally rather than piecemeal.” (*Ibid.*, at 29, para. 64).
1. Normative Competencies within the UN System: The Evolution of the Institutional Framework

The development of the international legal protection of refugees has taken place within a dynamic institutional framework predating even the establishment of the United Nations. In the interwar period different institutional and inter-state arrangements were created under the auspices of the League of Nations to ensure, inter alia, the acquisition of legal status in countries of asylum. When States decided to codify the institution of asylum in the 1951 Convention Relating to the Status of Refugees, this legal approach to the Second World War refugee crisis was unsurprisingly embedded within the institutional framework of the United Nations, notably through the establishment of UNHCR by the General Assembly. In consequence, the contemporary international protection regime has evolved around these two main pillars, the 1951 Convention and its complement UNHCR, illustrating the close interaction between the institutional and normative building blocks of the system.

In order to analyze the development of international refugee protection through the practice of the Security Council, it is necessary to understand the processes by which the Security Council has become incorporated into this system of existing normative competencies. The following discussion of the inclusion of the Security Council in the institutional refugee protection framework will begin by briefly outlining the role and practice of the General Assembly and other relevant UN organs in international refugee protection. However, while the practice of the General Assembly may give an indication of how the protection regime has been shaped by the actions of a political organ over the past decades, the Security Council’s sources of authority and its role in the international legal order clearly have to be distinguished from those of other organs in the UN system. After examining the normative authority of the Security Council over international refugee protection, it will therefore also be necessary to consider potential conflicts resulting from the de facto expansion of the institutional protection framework.
1.1 Traditional Competencies

1.1.1 Institutional Beginnings: UNHCR and the 1951 Convention

When the General Assembly formally adopted the Statute of the United Nations High Commissioner for Refugees as an annex to resolution 428 (V) at its 1950 session, calling on States to cooperate with UNHCR, it firmly anchored the legal protection of refugees within its area of competence. After bringing refugees covered by previous institutional arrangements or treaties into its scope of application, the UNHCR Statute includes refugees resulting from events occurring before 1 January 1951 and finally provides the following general definition of a refugee:

“[a]ny other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had a well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.”

At first sight, this definition is very broad in character. It nevertheless restricts the possibility to receive refugee status by stipulating the condition of a well-founded fear of persecution on the basis of an exhaustive number of stated reasons. Once refugee status has been granted, the functions of UNHCR include “providing international protection” and “seeking permanent solutions” to the problem of refugees by way of voluntary repatriation or assimilation in new national communities.

In exercising these functions, UNHCR’s relationship with the General Assembly is generally defined by Article 22 of the UN Charter which served as the legal basis for the Assembly to establish UNHCR as its subsidiary organ. More specifically, the UNHCR Statute provides that UNCHR acts “under the authority of the General Assembly”. Although the Economic and Social Council (ECOSOC) also has the authority to give policy directives, it is only the General Assembly that may determine that UNHCR “shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine”. The High Commissioner is further required to report annually to the General Assembly, through ECOSOC, and this report is to be discussed as a separate agenda item. The Secretary-General’s role was deliberately limited to shelter the High Commissioner from the highly politicized work of the UN Secretariat, and to ensure that UNHCR enjoys the necessary independence, authority and impartiality to carry out its humanitarian work as stipulated by its Statute. Although the High Commissioner is nominated by the Secretary-General, he or she is elected into office by the General Assembly. Moreover, the Statute provides that the High Commissioner and the Secretary-General “shall make appropriate arrangements for liaison and consultation on matters of mutual interest”. Finally, the Statute stipulates that the High Commissioner, especially in the case of difficulties, request the opinion of the advisory committee on refugees. Such a committee was first created in 1951 and finally replaced in 1958 by the so-called Executive Committee of the High Commissioner’s Program (ExCom), set up by ECOSOC and still operating today.

After the establishment of UNHCR, the General Assembly called on the agency to participate in the elaboration of the 1951 Convention, initiated by ECOSOC pursuant to Article 62 of the UN Charter in 1949 and finalized by a Conference of Plenipotentiaries
convened by General Assembly resolution 429 (V). The 1951 Convention sets out a catalogue of obligations for countries of asylum with the principle of non-refoulement at its center. It was adopted only half a year after the UNHCR Statute, which it complements and extends by elaborating on the normative dimension of the above-described institutional framework. On the one hand, Article 1 of the 1951 Convention adopts a definition of a refugee with wording that is very similar to the UNHCR Statute, and it also includes an additional ground for persecution, namely membership of a particular social group. On the other hand, the refugee definition contained in the Convention is more restrictive than the definition in the UNHCR Statute as the Convention is only applicable to refugees of events occurring in Europe before 1 January 1951, a limitation that was only removed in 1967 by the Protocol Relating to the Status of Refugees. It is therefore significant that the 1951 Convention establishes a strong link with the UNHCR Statute by explicitly acknowledging UNHCR's task of supervising international conventions providing for the protection of refugees and calling on contracting States to “undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and [...] in particular facilitate its duty of supervising the application of the provisions of this Convention.” Interestingly, the International Court of Justice is also mentioned in Article 38 of the 1951 Convention in the event of disputes arising over the application or interpretation of the Convention. The international protection of refugees is thus guaranteed by a complex complementary framework made up of a treaty and an international agency. However, while all major UN organs have been assigned a role in this context, it is noticeable that neither the 1951 Convention nor the UNHCR Statute mentions the Security Council.

1.1.2 Normative Development through the Practice of the General Assembly

Since the adoption of the 1951 Convention, States have been reluctant to accept new treaty obligations pertaining to international refugee law. Despite notable codifications at the regional level such as the 1969 OAU Convention on the Specific Aspects of the Refugee Problem in Africa and the non-binding 1984 Cartagena Declaration on Refugees, no universal treaty has been drafted to cover more recent developments such as large-scale refugee crises or internal displacement, often taking place in the context of armed conflict which is not per se covered by the existing refugee definition. Although the UNHCR Statute mandates the agency to relate, as a rule, to groups and categories, the refugee definition in the Statute as well as the definition in the 1951 Convention are basically individualistic and seem to require a case-by-case examination of subjective and objective elements after asylum-seekers have crossed an internationally recognized border. Nonetheless, the competent UN organs, mainly led by humanitarian and political considerations, have continuously adapted the UNHCR Statute and the 1951 Convention to new protections needs. ECOSOC and the UNHCR Executive Committee have played a considerable role in this evolution. However, it is primarily the General Assembly which has given “normative value” to emerging protection standards, in particular by contributing to the formation of customary international law.

As paragraph 9 of the UNHCR Statute expressly gives authority to the General Assembly to include “additional activities” in UNHCR’s mandate, the General Assembly has made
use of its normative powers to develop international refugee protection through its resolutions and in constant interaction with the practice of its subsidiary organ on the ground, UNHCR. With a view to expanding the mandate of UNHCR, the General Assembly has amended the legal basis of the agency and has authorized its on-going activities. As the development of UNHCR’s mandate illustrates, most States have clearly wanted the United Nations to assume responsibilities with regard to a broad category of persons obliged to flee their countries for a variety of reasons. In 1980, for instance, the UNHCR Executive Committee “emphasized [...] the leading responsibility of [UNHCR] in emergency situations which involve refugees in the sense of the Statute or of General Assembly resolution 1388 (XIV) and its subsequent resolutions”.

Those “subsequent resolutions” first outlined UNHCR’s good offices in securing contributions for assistance to refugees, which were not within the competence of the UN by definition of the UNHCR Statute. On this basis, UNHCR’s mandate was further developed to include assistance and protection activities, and eventually recognition of a general responsibility to seek solutions to the problems of refugees and displaced persons of concern to UNHCR, regardless of where such problems arise. The General Assembly has endorsed UNHCR’s activities for humanitarian reasons, but also to use the means of international law in order to fill the “legal vacuum” created through the lack of national protection. As a result, the United Nations has now assumed responsibility for both the refugee fleeing from persecution and the refugee fleeing from the violence of a “man-made disaster”, despite the fact that the present system of duty and cooperation fails to demand durable solutions from sovereign States, for instance, in the form of new treaty obligations beyond the 1951 Convention.

Although the General Assembly could evidently not modify the 1951 Convention in the same way as the UNHCR Statute, it has developed – in cooperation with the UNHCR Executive Committee – the normative content of the Convention by means of a progressive interpretation of its provisions in the light of new protection challenges. Its resolutions have consistently underlined “the importance of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees as the cornerstone of the international system for the protection of refugees”, and promoted its implementation at the national level. In addition to urging States to ratify the 1951 Convention, the General Assembly has equally recognized the supplementary nature of regional agreements and called for their ratification. Whereas both the Cartagena Declaration and the OAU Convention provide for cooperation with UNHCR, the refugee agency has in turn made use of these regional instruments. In so doing, it has applied the term “refugee” in the broader sense of these regional definitions to denote persons in need of international protection due to a serious threat to their life, liberty or security of person in their country of origin such as persecution or armed conflict, or serious public disorder. To adopt the words of the ICJ in its Advisory Opinion on the Genocide Convention, the General Assembly has thus demonstrated that the 1951 Convention continues to be “a permanent interest of direct concern to the United Nations which has not disappeared with the entry into force of the Convention” and that its provisions “associate the General Assembly with the life of the Convention”, in particular through its subsidiary organ UNHCR.
as well as a normative quality on its decisions, including the attribution of legal significance to its practice with regard to interpretation and legal development. Consequently, the development of international refugee protection through the practice of the General Assembly shows how the actions of a political organ become part of a legal framework through the existence of legal mechanisms, that is through their operation, their formal and substantive content, and the broader legal environment.

1.2 Expanded Competencies

When the Security Council began its activities with regard to international refugee protection in the early 1990s, it had to integrate itself in an elaborate system of actors at the national, regional and international levels. Moreover, the Security Council was certainly not the sole new actor in this expanding institutional framework. One has only to think of the important role of the Special Representative of the Secretary-General on the Human Rights of Internally Displaced Persons who was appointed at the request of the UN Human Rights Commission in 1992. However, due to its standing in the international system and its normative powers under the UN Charter, the Security Council may be one of the most important additions to the international protection regime. The General Assembly can only extend the responsibilities of its subsidiary organ UNHCR and interpret the 1951 Convention; it cannot directly impose obligations on States – a power that is reserved to the Security Council whose actions thus have a markedly different impact on international law. Yet, neither the UNHCR Statute nor the 1951 Convention assigns any role to the Security Council. A description of the extent of institutional expansion through the *de facto* inclusion of the Security Council would therefore be incomplete without a subsequent examination of the Council’s normative authority over international refugee protection.

1.2.1 Institutional Expansion: The *De Facto* Inclusion of the Security Council

The possibility that the Security Council make use of its competencies to promote the development of international refugee protection was first officially acknowledged by the Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees in 1986. The Group was established in 1981 by General Assembly resolution 36/148 in which the Assembly expressed its grave concern over the continuing massive flows of refugees in many parts of the world and the human suffering affecting millions of refugee men, women and children. The General Assembly also stressed “that massive flows of refugees may not only affect the domestic order and stability of receiving States but also jeopardize the political and social stability and the economic development of entire regions and thus endanger international peace and security”. The Security Council had previously referred to different aspects of international refugee protection, for instance, by emphasizing the right to return of Cypriot refugees. However, when the General Assembly endorsed the Report of the Expert Group, it urged “the main organs of the United Nations to make fuller use of their respective competencies under the Charter of the United Nations for the prevention of new massive flows of refugees, as envisaged in paragraph 68 of the report”.

This call was answered by the Security Council for the first time in 1991, with a recognition in resolution 688 concerning Iraq that the repression of the civilian, in particular Kurdish, population by its own government was not primarily within the domestic jurisdiction of Iraq. In order to legitimize this finding, the Council stated that a massive flow of refugees caused by the actions of the Iraqi government contributed to the threat to the peace and security in the region under Article 39 of the UN Charter. This determination – reminiscent of the language of the above-mentioned General Assembly resolution – was only the beginning of a whole series of similar Security Council resolutions, often followed by measures adopted under Chapter VII of the UN Charter. By linking refugee flows to threats to peace and security, the Security Council thus gradually became part of the institutional protection framework.

This de facto inclusion was probably most clearly indicated by the increasing interaction between the Security Council and UNHCR. From 1993 onwards the then High Commissioner Sadako Ogata addressed the Council on different country situations, in particular the looming displacement crisis in the former Federal Republic of Yugoslavia. Ogata justified this emerging practice with the following explanation: “Our recent experiences in protecting and assisting refugees have proven the essential links between peacemaking, peacekeeping and humanitarian action. A link which has brought my Office into closer contact with the Security Council.” Following Ogata’s example, the subsequent High Commissioners for Refugees have equally raised situation-related and substantive aspects with the Council on various formal and informal occasions. Moreover, these issues have often come to be reflected in the Security Council’s resolutions, either with the direct support of the UNHCR Office in New York or indirectly through the UN Secretariat. However, before analyzing the content and scope of the Council’s extensive pronouncements on international refugee protection, one first has to inquire into the legal basis for the Security Council’s acts with regard to this field of the law, which the 1951 Convention as well as the UNHCR Statute clearly situate within the mandate of the General Assembly.

1.2.2 Normative Authority of the Security Council

Considering that no legal instrument makes explicit reference to the Security Council’s authority with regard to international refugee protection, this inquiry can only be undertaken by examining the UN Charter. As Judge El-Erian emphasized, “[w]hatever the legal nature of the powers attributed to an international institution, they are specific in the sense that they may be exercised only with respect to certain subject-matters prescribed by the constituent instrument.” The Charter circumscribes the Council’s principal function and powers in Article 24 which gives the Council the primary responsibility for the “maintenance of international peace and security”. The specific powers of the Security Council are further laid down in Chapters VI (Pacific Settlement of Disputes), VII (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression), VIII (Regional Arrangements) and XII (International Trusteeship System). The Council’s powers are only expressly limited by Article 24 (2), obliging it to act in accordance with the purposes and principles of the United Nations. Accordingly, the UN Charter sets out a very broad scope of action for the Security Council. To the extent that aspects of international refugee protection are related to the maintenance of peace and security, they fall within the scope of Security Council’s competence.
Since the UN Charter does not define the term “international peace and security”, the Security Council has wide discretion in establishing its competence as illustrated by its determinations of a threat to the peace, a breach of the peace or an act of aggression in a particular situation pursuant to Article 39 of the UN Charter. Among the three elements that may trigger Security Council resolutions with enforcement character under Chapter VII, it is specifically the concept of a threat to the peace that has been continuously enlarged in the Security Council’s practice. As early as 1992, the Council emphasized that “the non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security”. While it may not be unusual for refugee flows to fall into this categorization, the Council has even considered HIV/AIDS as a threat to international peace and security. Following a determination pursuant Article 39 of the UN Charter, the Security Council’s wide discretionary powers under the UN Charter also extend to the choice of measures pursuant to Articles 40, 41 and 42. The UN Charter does not explicitly prescribe any particular order in which these measures have to be taken, ranging from inaction through recommendations, calls for provisional measures, mandatory non-forcible measures, to military force. Given the necessities of the maintenance of international peace and security, the reference to a specific normative authority of the Council for taking these measures is often muted, in the sense that its decisions must be taken with some urgency. In this discretionary framework of the UN Charter, it is therefore difficult to establish the specific normative authority of the Security Council’s actions and their effects on international refugee protection.

Traditionally, the coercive nature of the Security Council’s enforcement powers is considered as the primary source of the Council’s normative authority and the premise for the effects of its actions on general international law. The binding force of Security Council decisions is based on Article 25 of the UN Charter, by virtue of which the Council may impose obligations on UN Member States. The Security Council’s coercive powers are further reinforced by Article 103 of the UN Charter stipulating that in case of conflict such obligations shall prevail over any other international agreements. In the context of its enforcement actions, the Security Council’s resolutions frequently contain statements about the pertinent legal rules in connection with its political considerations of a particular case or matter. However, given the situation-specific approach of Article 39 of the UN Charter, the normative effects of these statements depend on a variety of factors such as a reference to Chapter VII of the UN Charter, the scope ratione personae and ratione materiae of the respective resolution, and the particularities of a given situation. From a conventional point of view, the Security Council is thus “not, properly speaking, an organ that creates law”, but merely a political organ that interprets and applies existing law in relation to UN Member States.

Progressive voices have more recently claimed that the Security Council may influence the formation of international norms beyond law enforcement in specific cases, drawing its normative authority from its unique status in the international system. As Rosalyn Higgins noted already in 1963, although “the Security Council is likely to state that it is basing itself on the law as it conceives it to be, the line between applying and legislating it becomes thin: certainly a question of developing law becomes involved.” In fact, it seems to be increasingly accepted that the Security Council may contribute to the development of nascent customary international law. Although the Security Council’s actions cannot be said to represent the generality of the requisite State practice in the same way as the
General Assembly’s actions can, the consistent and uniform reiteration of obligations by the Security Council may result in widespread State practice. In this vein, the International Committee of the Red Cross (ICRC), in its recent study on customary international humanitarian law, extensively referred to the practice of the Security Council in situations of armed conflict. If this practice subsequently finds general acceptance in the opinio iuris of UN Member States, it may contribute to the crystallization or consolidation of customary international law. This interplay between the Security Council’s practice and its acceptance by States was, for instance, addressed by the International Criminal Tribunal for the Former Yugoslavia (ICTY). In the Tadić case, the Appeals Chamber discussed States’ interpretation of the Security Council’s statements about the mixed nature of the conflict and the applicable international humanitarian law to determine the scope of application of the ICTY Statute. However, in order to be relevant for the formation of customary international law, it is evident that the general acceptance of States must be based on the existence of an (emerging) rule of general international law and not only on compliance with Article 25 of the UN Charter.

The development of customary international law through the practice of the Security Council obviously poses many procedural questions concerning the Council’s composition, its nature as a political organ and the coherence of its ad hoc actions. Yet a closer look at the practice of States reveals that many of these questions are equally relevant to customary law-making through the traditional subjects of international law. A more problematic phenomenon is rather presented by the Council’s recent quasi-legislative activities, especially in the field of counterterrorism. Whereas the Security Council’s influence on customary international law stems from references to existing or emerging rules of law, its quasi-legislative resolutions stipulate abstract norms of general application that go beyond existing rules of international law in apparent disregard of the consensual nature of treaty obligations. Although this development was somewhat foreshadowed by Higgins’ earlier observations, its possible consequences for the international legal system are not yet foreseeable.

For the purpose of this study on the development of the international legal protection of refugees through a political UN organ, it can be concluded that resolutions of the Security Council may enforce existing rules of international law, develop customary international law and possibly even lay down new rules of general application. The Council’s discretionary determinations under Article 39 of the Charter and its resulting actions can thus be brought within a legal construction that illustrates how the law operates in integrating political decisions into legal processes with far-reaching legal consequences, which transcend the illusive dichotomy between law and politics. Accordingly, the Security Council does not have the same general competence over international refugee protection as the General Assembly, based on the UNHCR Statute and also the 1951 Convention. It is the UN Charter itself that gives normative authority to the Security Council, and that transforms the Security Council’s decisions into normatively significant elements for the development of this field of law and the international legal system in general.

1.3 Conflicting Competencies

The UN Charter was meant to be based on a separation of functions between the General Assembly and Security Council, the former having competence over humanitarian,
economic and social matters and the latter being responsible for political matters. While a certain overlap of powers and functions cannot possibly be avoided, the expansion of the notion of threat to international peace and security to include areas such as international refugee protection has unhinged the institutional balance of the UN system. As a consequence, the development of legal rules applicable to the protection of refugees by both principal organs on the basis of different legal premises may lead to institutional conflicts as well as questions of authority and control over subsidiary organs, notably UNHCR.

1.3.1 Institutional Conflicts: General Assembly and Security Council

22 Under the law of the United Nations, it is theoretically not possible for the UN principal organs to impinge on each other’s Charter-mandated delimitation of powers. By establishing the Security Council’s principal function in the UN system, Article 24 of the UN Charter implicitly also regulates the relationship between the Security Council and the General Assembly by attributing to the Council the ‘primary’ responsibility for the maintenance of peace and security. Although it has been clearly acknowledged that the General Assembly has a secondary responsibility, Article 11(2) in connection with Article 12 (1) of the UN Charter provide that the General Assembly may only discuss questions relating to the maintenance of international peace and security in relation to any dispute or situation if the Security Council is not exercising the functions assigned to it under the Charter in relation the same dispute or situation. However, the logic behind this separation of powers is seriously flawed in one respect: the UN Charter does not delineate the competencies of the General Assembly against any similar intrusion on the part of the Security Council, a scenario apparently not envisaged by the drafters of the UN Charter. Article 24 (3) of the UN Charter merely requires the Security Council to submit annual reports and special reports to the General Assembly.

23 Although the pertinent jurisprudence of the ICJ mainly concerns questions that the General Assembly has raised concerning international peace and security, it can still provide useful guidance in interpreting the relationship between the two principal organs in view of the Security Council’s activities with regard to international refugee protection. In its Advisory Opinion on the Wall, the ICJ noted that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security. The Court considered this practice consistent with Article 12(1) of the UN Charter, reasoning that the two organs concentrate on different issues: While the Security Council has tended to focus on the aspects of matters related to international peace and security, the General Assembly has taken “a broader view, considering also their humanitarian, social and economic aspects”. With regard to the international legal protection of refugees, it could thus be concluded that both organs address the same matter but from different perspectives. The General Assembly develops the whole spectrum of international refugee protection, with particular emphasis on the UNHCR Statute and the 1951 Convention. In contrast, the Security Council concentrates on those aspects of international protection that are specifically related to peace and security, for instance, the prevention of refugees flows by addressing the root causes of displacement such as serious human rights violations.
While this conclusion does still not exclude institutional overlaps between the activities of the two organs, the ICJ has pointed out the decisive difference in the relationship between the Security Council and the General Assembly in the Expenses case: unlike the General Assembly, the Council has coercive powers under Chapter VII. Despite Koskenniemi’s warnings against the risks involved in the use of these coercive powers to enforce – not even to speak of developing or making – international law, the ‘security police’ have become well settled in the ‘temple of justice’ that now has to accommodate the institutional consequences of this development. Instead of emphasizing the potential for conflict between the General Assembly and the Security Council, the best way to reconcile traditional and new competencies may hence be to recognize the inseparability of contemporary security issues from humanitarian, social and economic concerns. It is this inseparability that makes a dialectic view on the relationship between the General Assembly and the Security Council unrealistic. This relationship should be framed in terms of complementarity – rather than subsidiarity – which would allow both principal organs to make use of their respective responsibilities in order to mutually reinforce their efforts in developing areas of law such as international refugee protection.

1.3.2 UNHCR and the Security Council: What Kind of Authority?

Such efforts on the part of the General Assembly and, more recently, the Security Council evidently include UNHCR. However, while UNHCR is a subsidiary organ of the General Assembly, it is unclear on which legal basis the Council interacts with the UN refugee agency. Palley, for instance, notes that “UNHCR is a body duty-bound to act as enjoined by the UN General Assembly and in cooperation, in certain cases, with other UN organs having jurisdiction (e.g. the Security Council in security matters and the Secretary-General in preventive diplomacy)

Despite the Security Council’s authority over UNHCR in matters relating to its primary responsibility, the maintenance of international peace and security, thereby influencing international refugee protection in a way similar to the General Assembly?

Like General Assembly resolutions, Security Council resolutions have internal effects within the UN legal order. As such they may be binding on other UN organs, including subsidiary organs such as UNHCR, provided the Charter has granted the Council the authority to take such decisions. Moreover, the Charter neither stipulates which entities the Council may use in its efforts to ensure the maintenance or restoration of international peace and security, nor does it explicitly prohibit its use of subsidiary organs established by other principal UN organs for such a purpose. At first glance, this a contrario argument might find support in the assumption that for purposes of external attribution, subsidiary organs are considered subsidiary organs of the UN as a whole and not only subsidiary organs of the principal organ which lawfully established them under the respective article of the UN Charter. However, the internal UN order clearly places the mandate of a subsidiary organ under the authority and control of the respective principal organ that has established the subsidiary organ either under the general competence of Article 7 (2) or under Articles 22 and 29 relating to specific functions of the General Assembly and Security Council, respectively. The fact that UNHCR was not created pursuant to the general authority of Article 7 (2) of the UN Charter, but was established in accordance with the very specific authority of Article 22, allowing the
General Assembly to “establish such subsidiary organs as it deems necessary for the performance of its functions”, puts additional emphasis on the close institutional link between the General Assembly and UNHCR.\(^8^9\) In contrast to the Peace-Building Commission, which was recently established by both the General Assembly and the Security Council, UNCHR is thus under the exclusive authority and control of the General Assembly.\(^9^0\)

Nonetheless, the finding that the Security Council does not have any direct authority or control over UNHCR’s mandate does not imply that it cannot influence UNHCR’s activities in any way. As the General Assembly has recognized, other “competent principal organs of the United Nations”, including the Security Council, may request UNHCR’s intervention in situations of in-country protection for internally displaced persons.\(^9^1\) Moreover, the Council has the freedom to adopt rules of procedure, including the capacity to extend invitations to non-Council members or other UN entities, which would explain the regular meeting between the Council and UNHCR.\(^9^2\) Rule 39 of the Provisional Rules of Procedure states that the Security Council “may invite members of the Secretariat or other persons, whom it considers competent for the purpose, to supply it with information or to give other assistance in examining matters within its competence.”\(^9^3\) Consequently, it is submitted that the Security Council’s interaction with UNHCR is a result of an exercise of the Council’s discretion to consult with relevant UN organs. UNHCR itself does not have the right to address the Council \textit{proprio motu}. Paragraph 11 of the UNHCR Statute stipulates that “[t]he High Commissioner shall be entitled to present his views before the General Assembly, the Economic and Social Council and their subsidiary bodies”, and not the Security Council.\(^9^4\) The Security Council’s own initiatives to collaborate and consult with UNHCR, beginning in the post-Cold War era, have therefore demonstrated that international refugee protection is not only “a permanent interest of direct concern” to the General Assembly, but to both UN organs in their specific and interrelated fields of competence.

\begin{notes}
\item 16. UN Doc. A/RES/428 (V) (14 Dec. 1950). Adopted by thirty-six votes to five, with eleven abstentions.
\item 17. UNHCR succeeded to the International Refugee Organization (IRO) as the principal UN organ responsible for refugees. See generally L. W. Holborn, \textit{The International Refugee Organization: A Specialized Agency of the United Nations} (1956).
\item 18. UNHCR Statute, para. 6 A. (ii).
\item 19. See Goodwin-Gill and McAdam, supra note 15, at 21.
\item 20. UNHCR Statute, para. 1. Of these two functions, the provision of international protection is of primary importance because protection – for example, in the form of intervention to secure admission and non-refoulement of refugees – is a precondition for finding lasting solutions. The
\end{notes}
General Assembly has reaffirmed international protection as a principal function since at least 1974: UN Doc. A/RES/3271 (XXXIX) (10 Dec. 1974). Recent resolutions also emphasize that “the protection of refugees is primarily the responsibility of States, whose full and effective cooperation, action and political resolve are required to enable the Office to fulfill its functions”: UN Doc. A/RES/60/129 (16 Dec. 2005), para. 7.

21. UNHCR Statute, para. 3.
22. UNHCR Statute, para. 9.
23. UNHCR Statute, para. 9.
24. UNHCR Statute, para. 11.
25. See Goodwin-Gill and McAdam, supra note 15, at 429 (FN 44). The Statute expressly provides that “the work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule to groups and categories of refugees” UNHCR Statute, para. 2.
26. UNHCR Statute, para. 13. In contrast, the UN High Commissioner for Human Rights (UNHCHR) has a closer link to the UN Secretariat. The UNHCHR has the rank of an Under-Secretary-General and the Office is considered part of the UN Secretariat. UN Doc. A/RES/48/141 (7 Jan. 1994).
27. UNHCR Statute, para. 17.
28. Originally comprising twenty-four States, the Executive Committee has been enlarged to its present membership of seventy-eight (2009). See generally Goodwin-Gill and McAdam, supra note 15, at 429.
30. UN Doc. A/RES/429 (V) (14 Dec. 1950), paras. 1 and 5. Article 13 (1) of the UN Charter provides that the General Assembly shall encourage the progressive development of international law and its codification. Accordingly, the General Assembly - often through the intermediary of ECOSOC - has participated in the elaboration of various international agreements relevant to international refugee protection, including the 1951 Convention and its 1967 Protocol.
31. Preamble and Article 35 (1) of the 1951 Convention.
34. See Goodwin-Gill and McAdam, supra note 15, at 23.
36. General Assembly resolutions can be declaratory of customary norms or evidence of emerging custom by stating the necessary opinio iuris of governments in the widest forum for the expression of such opinions, dependent on their content and conditions of adoption: See Military and Paramilitary Activities in and against Nicaragua case (Nicaragua v. United States of America), Judgment of 27 Jun. 1986, [1986] ICJ Rep. 14, at 98-104, paras. 187-195 [hereinafter: Nicaragua case]. Framed as general principles, General Assembly resolutions can also contribute to the progressive development of international law and consolidate customary norms. Moreover, resolutions that are declarations have direct legal effect as authoritative interpretations of the Charter. See R. Falk, ‘On the Quasi-Legislative Competence of the General Assembly’, (1966) 60
As Goodwin-Gill and McAdam point out, UNHCR is not merely a forum in which states may express their views; as a subject of international law, it can also be considered an actor in the relevant field whose actions count in the process of the formation of law. On the legal personality of UNHCR see Goodwin-Gill and McAdam, supra note 15, at 430 (stating that “Clearly, by derivation and intention, UNHCR does enjoy international personality. As a subsidiary organ of the General Assembly, its ‘personality’ (its capacity to possess international rights and duties) can be traced to the United Nations at large.”) and Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 Apr. 1949, [1949] ICJ Rep. 174, at 178-179. See generally Alvare, supra note 9, in particular at 184. See also C. Lewis, ‘UNHCR’s Contribution to the Development of International Refugee Law: Its Foundation and Evolution’, (2005) 17 International Journal of Refugee Law 67.


40. See Goodwin-Gill and McAdam, supra note 15, at 427. This vacuum may be due to the legal consequences of statelessness, or it may be a matter of fact, where an individual is unable or unwilling to avail himself or herself of the protection of the government of his/her country, either because of a well-founded fear of persecution, or because of some man-made disaster, such as violence resulting from a variety of sources.

41. See Goodwin-Gill and McAdam, supra note 15, at 428.

42. See, for instance, UN Doc. A/RES/49/169 (24 Feb. 1995), preamble and para. 2, in connection with the annual report of the UNHCR in which the Executive Committee used the same formulation. UN Doc. A/49/12/Add.1 (20 Oct. 1994), at 9, para. 18 (c). See, also UNHCR, Note on International Protection, UN Doc. A/AC.96/830 (7 Sept. 1994), para. 19, emphasizing that “[t]he provisions of the Convention remain the standard against which any measures for the protection and treatment of refugees are judged.”


44. Article 8 of the OAU Convention; Cartagena Declaration, preamble (e), (f), (g).

45. UNHCR, Note on International Protection, UN Doc. A/AC.96/830 (7 Sept. 1994), at 16, para. 32. The 1969 Convention contains a two-part refugee definition, including the 1951 Convention/UNHCR Statute definition as the first part and adding: “The term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in
another place outside his country of origin or nationality.” (Article 1 of the OAU Convention). The 1984 Cartagena Declaration states that “the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.” (Cartagena Declaration, para. 3)


48. See ibid.

49. UN Doc. E/CN.4/1992/73 (5 Mar. 1992), endorsed by UN Doc. A/RES/48/135 (18 Feb. 1994). The role of the Special Representative of the General Secretary and the Guiding Principles on Internal Displacement will be discussed below (see Section 2.2, subheading ‘Internally Displaced Persons’, infra). It is noteworthy that while the international protection regime included new actors such as the Security Council and the Secretary-General’s representative for IDPs, other actors such as ECOSOC became less important. UN Doc. A/RES/58/153 (22 Dec. 2003), which also removed the provisional character from the UNHCR’s mandate, replaced the written reporting system through ECOSOC through direct reporting to the General Assembly.


51. ibid.


58. UNHCR, Note on International Protection 2004, UN Doc. A/AC.96/989 (7 Jul. 2004), at 12, para. 43, stating that “[t]hrough it [sic] office in New York, UNHCR has in close cooperation with the Office for the Coordination of Humanitarian Affairs (OCHA) and DPKO contributed to reports on the topic [of the protection of civilians in armed conflict] and has sought to advise on the drafting of relevant parts of Security Council resolutions insofar as these are related to persons and issues of concern to the Office.” Even though the access of UNHCR to the Security Council is limited (see Section 1.3.2), the UN Secretariat is one of the primary interlocutors of the UNHCR Office in New York. This fact is significant as Security Council resolutions are often based on reports by the Secretary-General, which they may even partly incorporate, so that the Secretariat’s influence on the substance of the resolution will be considerable. See M. Wood, ‘The Interpretation of Security Council Resolutions’, (1998) 2 Max Planck Yearbook of United Nations Law 73, at 80.


64. See Higgins, supra note 36, at 5.

65. As the ICJ pointed out in its 1971 Namibia Advisory Opinion, the binding effect of Security Council resolutions has “to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.” Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory Opinion of 20 Jun. 1971, [1971] ICJ Rep. 16, at 53, para. 114. In general, the binding quality of Security Council decisions is indicated by reference to Chapter VII. For a discussion of possible rules of interpretation of Security Council resolutions, in particular Articles 31-33 of the Vienna Convention on the Law of Treaties (1155 UNTS 331, 27 Jan. 1980), see Wood, supra note 58. See also Öberg, supra note 36.


67. As Paul Szasz notes: “It is generally accepted that IGOs [intergovernmental organizations] in general, and those of the UN system in particular, do not have any inherent legislative authority; that is they cannot create international norm that are directly binding on states generally or even just on their members – though they can take certain decisions binding on their members vis-à-vis the organization (e.g. the assessment of contributions).” P. Szasz, ‘General Law-Making Processes’, in C.C. Joyner (ed.), The United Nations and International Law (1997), 27 at 58.

68. Alvarez observes that “the Council’s normative authority is premised on both its coercive powers as well as on its legitimacy, at least relative to more self-interested actors (such as the states using force or reacting to it). It is based on the Council is licensed to confer the legitimacy of the international community. […] Despite the persistent complaints about the Council’s unrepresentative nature, about the propriety and continued viability of the veto and the double standards it permits, about the Council’s lack of transparency relative to other UN organs, and about its lack of effective consultations with ‘more representative’ organs like the GA, the Council continues to be seen as the principal, if not the only, legitimator of uses of force precisely because it is the only organ, other than self-judging states, specifically authorized to use force itself and to license others to do so.” Alvarez, supra note 9, at 189. On law-making through the practice of political organs see also I. Brownlie, Principles of Public International Law (2008), 692; A. Boyle and C. Chinkin, The Making of International Law (2007), 108.


70. As early as 1952, the General Assembly had also passed UN Doc. A/RES/686 (VII) (5 Dec. 1952), para. 1 (b), on “Ways and means for making the evidence for customary international law more readily available” which requested the UN Secretary-General to establish the “Repertoire of the Practice of the Security Council”, available at http://www.un.org/Depts/dpa/repertoire/.


74. See Higgins, supra note 36, at 5.

75. On the Security Council quasi-legislative activities see supra note 9.

76. See Gowlland-Debbas, supra note 47, at 287.


82. *Ibid.*, para. 27.


84. With regard to the legality of the establishment of UN Emergency Force in the Middle East (UNEF I) by the General Assembly, the ICJ found that “it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII. It is only the Security Council which can require enforcement by coercive action against an aggressor.” Certain Expenses case, supra note 79, at 163.

85. See Koskenniemi, supra note 77, at 348. With reference to the Security Council and the General Assembly, Koskenniemi observed that “the police are ransacking the temple, searching for criminals and those it calls terrorists.”


88. The Repertory of Practice of United Nations Organs lists the following three characteristics of a UN subsidiary organ: (1) A subsidiary organ is created by, or under the authority of, a principal organ of the United Nations; (2) The membership, structure and terms of reference of a subsidiary organ are determined, and may be modified by, or under the authority of a principal organ; (2) A subsidiary organ may be terminated by, or under the authority of a principal organ. See UN, *Repertory of Practice of United Nations Organs* (Vol. 1) (1955), 228. See generally D. Sarooshi, *The Legal Framework Governing United Nations Subsidiary Organs*, (1996) 67 BYIL 413.

89. Under the specific authority of Articles 22 and 29, the relevant principal organ can only establish subsidiary organs to perform “its [the principal organ’s] functions” whereas the general

92. See Articles 30, 31 and 32 of the UN Charter.
94. UNHCR Statute, para. 11.

After having linked massive flows of refugees with peace and security in the case of Iraq in the early 1990s, the Security Council has increasingly used situations related to international refugee protection to declare a threat to international peace and security, triggering measures under Chapter VII of the UN Charter. The practice that has subsequently developed addresses the root causes of mass displacement, as originally requested by the Expert Group on International Cooperation to avert Refugee Flows. Moreover, the Security Council has begun to make statements on substantive aspects of international refugee protection, often following previous initiatives by the General Assembly, ECOSOC or the UNCHR Executive Committee. While the following analysis of the normative effects of these statements on the development of international refugee protection will focus on decisions with binding force for UN member States, mostly indicated by a reference to Chapter VII, it will also consider resolutions that are potentially only recommendatory, declaratory or addressed to subsidiary organs such as peacekeeping forces and other principal organs such as the Secretary-General. Moreover, presidential statements will be taken into account where they can be regarded as normatively significant decisions of the Security Council, for instance, by reiterating or elaborating on the terms of a resolution.

On the basis of this body of Security Council decisions it will be argued that the substantive references of the Security Council to international refugee protection have become more refined in legal language over time. Today they show a relatively consistent pattern of decisions centered around the agenda topic of the “Protection of Civilians in Armed Conflict” which places the individual – and not the State – at the core of modern understandings of international security. In view of its primary responsibility for the maintenance of international peace and security, the Council has thereby established a normative framework of general application and without any temporal limitations through a series of unanimously adopted resolutions. International refugee law figures in all of these resolutions, and the Security Council equally refers to international humanitarian law and human rights to ensure the protection of civilians. As these
civilians are mainly refugees and internally displaced persons, the framework created by the Council also illustrates how international refugee law may be effectively complemented by international humanitarian law and human rights in order to fill the gaps in the existing protection regime. It is therefore suggested that the codification of much of the Security Council’s previous law enforcement practice into this general normative framework confirms its above-described threefold normative influence on international law: by applying the refugee-related aspects of this framework in specific country situations, the Security Council has not only enforced, but also developed the customary law aspects of international refugee protection, a practice which has sometimes crossed the thin line to law-making in the area of human security. In its various political activities relating to the protection of civilians, the Council has thus normatively strengthened different aspects of international refugee protection throughout the stages of the displacement process.

2.1 Strengthening the Responsibility for the Root Causes of Displacement

International refugee law, and in particular the 1951 Convention as its centerpiece, has a strong bias towards countries of asylum. The 1951 Convention sets forth an extensive catalogue of legal rules and obligations which is exclusively applicable to State parties having received refugees or demands for admission of asylum-seekers. Yet, as implied by the notion of persecution at the core of the refugee definition, the creation of refugees has its causes in human conduct outside the country of asylum whose rectification is necessary for voluntary and safe return. In resolution 36/148, for instance, the General Assembly, strongly condemned “policies and practices of oppressive and racist regimes, as well as aggression, colonialism, apartheid, alien domination, foreign intervention and occupation, which are among the root causes of new massive flows of refugees”. It was through different subsequent initiatives examining the link between human rights violations and mass exodus, undertaken by the General Assembly and the UN Human Rights Commission, that the focus of the refugee protection regime gradually shifted to include the country of origin as a crucial element in the triangle whose other elements are the refugee and the country of asylum.

When the UNHCR Executive Committee called for a more articulate concept of State responsibility in the early 1990s, however, it was faced with a particular problem: the responsibility of the country of origin for the creation of refugee flows is not triggered by the crossing of an international border by potential asylum-seekers, but by violations of human rights and international humanitarian law within the delicate sphere of State sovereignty. After identifying the human rights dimensions of refugee flows as a source for national and international stability, ExCom therefore emphasized not only the obligations of the country of origin to “safeguard and protect human life and dignity and to guarantee citizens’ rights” but also the obligations of other States which are “inherent in membership of the international community”. The international community has discharged this responsibility to a certain extent by supporting the work of UNHCR. From originally mainly operating in countries of asylum, UNHCR has thus gradually developed capacities for so-called preventive protection, a term used at the beginning of the 1990s to describe the agency’s new activities to prevent
refugee flows. Nonetheless, although these preventive activities have led the agency to pay more attention to the causes triggering persecution, it is neither within UNHCR’s mandate nor within its capacity to handle certain root causes of displacement such as large-scale human rights violations or armed conflict. Consequently, several commentators have proposed that the international community make use of the powers of the Security Council to invoke the responsibility of the country of origin for conditions that led to displacement. Where such root causes amount to genocide, crimes against humanity or war crimes, it has even been claimed that the international community has a residual responsibility or duty to protect populations from such grave violations of human rights and international humanitarian law, which is to be discharged through the Security Council’s Chapter VII powers.

2.1.1 Responsibility of the Country of Origin for Violations of Human Rights and International Humanitarian Law

After invoking Chapter VII enforcement powers in only two cases before 1990, South Africa and Rhodesia, the Security Council has over the past two decades characterized various situations of grave human rights violations, which are almost invariably accompanied by displacement such as in Iraq in 1991, as threats to international peace and security. In fact, in such situations the reference to trans-border refugee flows has served as prima facie evidence of grave breaches of human rights and humanitarian standards, but also provided the necessary policy impetus and legal justifications to take collective action under Chapter VII. When the de facto regime in Haiti refused to reinstate former President Aristide, for example, China and other Security Council members depicted the crisis as “essentially a matter which falls within the internal affairs of the country, and therefore should be dealt with by the Haitian people themselves”. On 16 June 1993 the Council still voted unanimously in favor of resolution 841, imposing an arms and fuel embargo under Chapter VII. In adopting resolution 841, the Security Council was motivated by two primary concerns: the current “incidence of humanitarian crises, including the mass displacements of population” and the potential increase in Haitian refugees as a threat to regional peace and security. It stated “that the persistence of this situation contributes to a climate of fear of persecution and economic dislocation which could increase the number of Haitians seeking refuge in neighbouring Member States”. After further intransigence on the part of Haitian authorities and a renewed surge in violence resulting in the “desperate flight of Haitian refugees”, the Council even authorized a multinational intervention force under Chapter VII of the UN Charter in resolution 940 to enforce the responsibility of the de facto regime in Haiti for the causes of massive exodus from the country. By emphasizing the international dimension of mass exodus and particularly its consequences for the region, the Security Council has thus successfully circumvented the traditional legal constraints of the non-intervention principle in Article 2 (7) of the UN Charter which “shall not prejudice the application of enforcement measures under Chapter VII”.

In taking these enforcement measures to protect persons at risk of displacement, the Security Council has also not been confined by the State-centric view of the refugee definitions contained in the UNHCR Statute and the 1951 Convention which have generally been interpreted to refer to persecution by the “State” of nationality. In the case of Somalia, Security Council resolution 814 (1993) took note of the large numbers of
refugees displaced by the conflict and of “difficulties caused [to neighboring countries] due to the presence of refugees in their territories”.  

However, unlike Iraq in 1991 and Haiti in 1993, the Security Council did not invoke trans-border refugee flows to justify international action but emphasized in resolution 751 that it was the “magnitude of the human suffering” in Somalia that constituted a threat to international peace and security.  

More importantly, intervention took place without the ‘consent’ of the target State, on grounds that there was no effective government in Somalia to give or to withhold such consent.  

In Sierra Leone, the Security Council even explicitly held non-State actors, notably the Revolutionary United Front (RUF), and the military junta accountable for the threat to international peace and security which was declared on the basis of continued violence and loss of life following the military coup of 25 May 1997, the deteriorating humanitarian conditions in the country, and the consequences for neighboring countries. Besides imposing an embargo on petroleum and petroleum products, the Council also established an arms embargo on non-State actors as well as a travel ban that was explicitly extended to the RUF in resolution 1171.  

By declaring threats to international peace and security on the basis of serious human rights violations committed by non-State actors, the Council has certainly contributed to the recognition of non-State sources of persecution, and thus their responsibility for the creation of refugee situations.

The establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) by the Security Council has further demonstrated that not only countries of origin but also individuals can be held responsible for the root causes of displacement such as genocide, crimes against humanity and war crimes.  

While serious violations of international humanitarian law and human rights law are prevalent in these core crimes, the Statutes of both tribunals also contain different points of intersection with international refugee law, such as persecution and deportation as constituting crimes against humanity.  

As the ICTR and ICTY confirmed, the grave breaches of international humanitarian law addressed by the Council in the former Yugoslavia and Rwanda amounted to “persecution on racial, political or religious grounds” which was among the root causes of displacement in these two conflicts.  

In the former Yugoslavia, the Security Council also condemned policies of forced displacement in the form of deportation and encampment. As these policies were deliberately targeted against one ethnic group, the Council characterized these actions as unlawful “ethnic cleansing”; which when combined with the specific intent to destroy this group, in whole or in part, may possibly even constitute genocide.  

Whereas UNHCR’s efforts to alleviate the suffering of the displaced in the ethnic fighting were seriously hampered by its strictly humanitarian view, Security Council resolution 752 demanded an immediate cessation of hostilities and “call[ed] upon all parties to ensure that forcible expulsions of persons from the areas where they live and any attempts to change the ethnic composition of the population, anywhere in the former Socialist Federal Republic of Yugoslavia cease immediately.”  

Although Yugoslavia was still a State in the process of disintegration in 1991/1992, the mass killings of Bosnians through ethnic cleansing, and the displacement of millions of people, led the Council to declare a threat to international peace and security to which it reacted by imposing comprehensive economic sanctions and authorizing peace operations.  

It can be concluded that following resolution 688 regarding the Kurdish population in Iraq, the Security Council has used its enforcement powers to invoke the responsibility of
countries of origin for various root causes of displacement. After finding a breach of an international obligation of human rights or humanitarian law, the Council has attributed this breach to State, and sometimes also non-State actors. This process has formed the basis for the application of legal sanctions by the Council, even though the Council’s qualifications have been evidently political in nature. The Council has thus contributed to the articulation of the concept of responsibility for the conditions at the origin of displacement. By institutionalizing the responsibility of individual perpetrators in the form of the ICTY and the ICTR, and by continuously reiterating the need to end impunity through national and international efforts, the Security Council has also made clear that international refugee protection is a matter of concern to the international community as a whole.

2.1.2 Responsibility of the International Community: A Duty to Protect?

Does the international community have a responsibility to protect populations from serious violations of international humanitarian law, if necessary by use of force? While this question is certainly not new to international lawyers, the Security Council’s post-Cold War activism to intervene in internal affairs, often without the consent of the particular State concerned, has resulted in a vivid debate on collective UN action for humanitarian purposes, which more recently culminated in discussions of a “responsibility to protect”. Originally proposed by the International Commission on Intervention and State Sovereignty (ICISS), this emerging norm attributes the primary responsibility to protect a population from genocide, crimes against humanity and war crimes to the respective government in the same way as the above-discussed concept of the country of origin. However, the responsibility to protect also includes a subsidiary responsibility or duty to protect on the part of the international community if the country of origin has failed to fulfill its obligations under international law. When UN member States officially endorsed this two-step approach in the 2005 Summit Outcome, they agreed to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII.

In its practice to date, the Security Council has rarely referred to the responsibility to protect in its country-specific resolutions, with the notable exception of the Darfur region of Sudan. Before declaring a threat to international peace and security with particular emphasis on the more than 200,000 refugees who fled to neighboring Chad, Security Council resolution 1556 emphasized that the government of Sudan bore the primary responsibility to respect human rights while maintaining law and order and protecting its population within its territory against violations of human rights and international humanitarian law by all parties to the crisis, in particular by the Janjaweed, including indiscriminate attacks on civilians, rapes, forced displacements, and acts of violence especially those with an ethnic dimension. In resolution 1706 on the expansion of the United Nations Mission in Sudan (UNMIS), the Council specifically referred to paragraphs 138 and 139 of the Summit Outcome Document outlining its role in the implementation of the responsibility to protect. While these isolated references only speak of a nascent Security Council practice, they have to be seen in the context of its framework resolutions on the protection of civilians in armed conflict which underline the primary responsibility of States for their own populations, the 2005 Summit Outcome
Document, and the Council’s readiness to adopt appropriate steps to address systematic, flagrant and widespread violations of international humanitarian and human rights as threat to international peace and security. Although these framework resolutions were not adopted on the basis of Chapter VII, it could be argued that the Security Council’s emphasis on the potential application of Chapter VII measures shows its intention to give them binding and normatively far-reaching effect.

Nonetheless, a crystallization of the responsibility to protect as a norm in customary international law through the Security Council’s actions may be doomed to fail due to the selectiveness and ad hoc character of the Council’s actions when addressing serious human rights violations. In his 2009 report on “Implementing the responsibility to protect”, the Secretary-General underlined that the substantial gaps in capacity, imagination, and will to implement the norm have been “[n]owhere […] more pronounced or more damaging than in the realm of forceful and timely response to the most flagrant crimes and violations relating to the responsibility to protect.” Of course, any such criticism has to take into account the Council’s primary function in the international system as political and not a law enforcement organ. As Hans Kelsen once concluded, “the purpose of the enforcement action under Article 39 is not to maintain or restore the law, but to maintain or restore peace which is not necessarily identical with the law”. The determination under Article 39 of the Charter entails a factual and political judgment and not a legal one which is “in conformity with the general tendency which prevailed in drafting the Charter; the predominance of the political over the legal approach”. The collective responses to violations of international law by the Security Council as a political organ can therefore not be expected to be automatic or impartial as they depend to a large extent on the existing political consensus within that body and on various arrangements of power and State interests.

Although the Council is not compelled under the UN Charter to react to violations of international law, it is still undeniable that its practice, which has developed from mere political contingency decisions to general statements on the applicable law, creates normative expectations on the part of States but also individuals that have to bear the legal consequences of the Council’s actions. As human rights have become a cornerstone of the international legal order, it remains to be seen whether the responsibility to protect will consolidate as a principle or norm of general application that would make the Council’s actions more consistent and predictable. At this stage, it can only be observed that grave violations of human rights and international humanitarian law, which were once considered subordinate or outside the UN Charter’s main goal, peace and security, have gained in importance and now form an integral part of the Security Council’s function, but not duty, to maintain and enforce peace.

2.2 Strengthening the Provision of Protection and Assistance during Displacement

When efforts to address the root causes of refugee flows by the Security Council or other relevant actors have been unsuccessful and displacement has occurred, the respective responsibilities of States and of the international community seem to be clearly described in the applicable legal instruments. While the 1951 Convention sets out a concrete catalogue of obligations of countries of asylum or host countries, reaching from simple administrative measures to non-refoulement, the UNHCR Statute ensures international
cooperation in solving the refugee problem. However, since the end of the Cold War, the causes and context of persecution have changed with greater numbers of refugees fleeing from protracted civil war, communal violence, and civil disorder or more generally man-made disasters. In these complex conflict settings, countries of asylum are now often countries of origin at the same time, in particular on the African continent. Moreover, the rapidly rising number of IDPs has emerged as a new challenge for the international community, blurring the legal standards and institutional competencies established on the basis of the traditional refugee definition.

It is against this background that the President of the Security Council requested the Secretary-General to prepare a report on the “Protection for Humanitarian Assistance to Refugees and Others in Conflict Situations” which emphasized that the Security Council needs to take into account all aspects of a conflict in order to “develop a comprehensive approach to conflict resolution with the General Assembly, the Economic and Social Council, other relevant bodies of the United Nations […] as well as Member States”. By integrating the findings of this report into its subsequent resolutions, in particular on the protection of civilians, the Council has addressed more and more aspects pertaining to the protection of and assistance to refugees as well as IDPs when responding to armed conflict situations. The Security Council has thus begun to play an increasingly important role in strengthening the regime of international refugee protection, not only before or after, but also during displacement.

2.2.1 Protection of Civilians

The expansion of the Security Council’s conflict resolution activities to include the protection of persons during displacement is most evident in resolution 1208, which was adopted as a result of the Secretary-General’s report on protection for humanitarian assistance to refugees. After reaffirming the importance of the principles relating to the status of refugees and the common standards of treatment contained in the 1951 Convention, as well as the 1969 OAU Convention, this landmark resolution affirmed the primary responsibility of host States to ensure the civilian and humanitarian character of refugee camps and settlements in accordance with international refugee law, human rights and humanitarian law. Moreover, the Security Council urged UNHCR, other relevant organizations and Member States to support host countries in these efforts in light of international burden-sharing. Although resolution 1208 is not binding on UN Member States, it laid the groundwork for resolution 1296 on the protection of civilians in armed conflict. This latter resolution addressed the situation where refugees and IDPs are under the threat of harassment, or where their camps are at risk of infiltration by armed elements as potential threats to international peace and security. The Council thus acknowledged that not only causes giving rise to refugee movements, but also instability resulting from such movements or the presence of refugees in a host country, in itself, may constitute threats to international peace and security, and that refugees are in special need of protection in such situations.

This general statement was first put into practice by the Security Council with regard to the population displacement in the border region of Chad, Sudan and the Central African Republic. After having explicitly referred to the 1951 Convention on the Status of Refugees and its 1967 Protocol in the preambular paragraphs of resolution 1778 (2007), the Council determined “that the situation in the region of the border between the Sudan,
Chad and the Central African Republic constitutes a threat to international peace and security”, and

“[a]pproves the establishment in Chad and the Central African Republic, in accordance with paragraphs 2 to 6 below and in consultation with the authorities of Chad and the Central African Republic, of a multidimensional presence intended to help to create the security conditions conducive to a voluntary, secure and sustainable return of refugees and displaced persons, inter alia, by contributing to the protection of refugees, displaced persons and civilians in danger, by facilitating the provision of humanitarian assistance in eastern Chad and the north-eastern Central African Republic and by creating favorable conditions for the reconstruction and economic and social development of those areas.”

In the operative paragraphs of the resolution that followed, the Security Council established the United Nations Mission in the Central African Republic and Chad (MINUCRAT) to support the respective governments in creating those conditions conducive to voluntary return. The Security Council’s commitment toward the protection of civilians is hence not only shown in the form of numerous reiterations of resolutions on the protection and/or its content, mostly in topic-specific resolutions or presidential statements, but also in country-specific resolutions and in particular, peacekeeping mandates.

For the purposes of this paper on the development of international refugee protection, it is also noteworthy that the Council’s practice has shown its commitment to promote respect for international refugee law and the 1951 Convention in the specific context of the maintenance of peace and security, thus distinguishing its actions from the more general mandate of the General Assembly.

More importantly, the Security Council has emphasized the significance of the 1951 Convention in situations of mass influx and complex displacement situations which implies at least an indirect reference to the principle of non-refoulement as the cornerstone of the 1951 Convention. Although this principle has meanwhile gained the status of customary international law, its realization is often still hampered by ‘politico-legal arguments’. As criticized by the two General Assembly resolutions referred to in the preamble of Security Council resolution 1208, this is particularly the case in large-scale population movements. The Security Council’s reference to States’ obligations under the 1951 Convention may therefore give additional impetus to secure admission and to provide protection, including durable solutions, in the case of mass influx, especially when such statements are accompanied by enforcement action adopted pursuant to Article 41 or 42 of the UN Charter.

Refugee Women and Children

Whilst the Security Council’s decisions on the protection of civilians have provided the general normative framework within which to address situations of forced displacement, its increased focus on human security has also led the Council to pay specific attention to the situation of vulnerable groups within refugee movements, such as women and children. Accordingly, refugee women and children figure prominently in a number of thematic resolutions, notably on the topics of “Children and Armed Conflict”, “Women and Peace and Security” and “Sexual Violence”, in which the Council has supplemented its framework on the protection of civilians. The Security Council’s observation that children and women represent the vast majority of displaced persons thereby reflects earlier efforts of UNHCR and the General Assembly dating back to the late 1980s on the special protection needs of refugee women and children.
In the case of refugee women and girls, special protection needs stem from the risk of further violations of their human rights during flight from persecution, as female refugees are frequently targeted as victims of rape and abduction, or may have to pay for their passage to safety with sexual favors.  

This problem is addressed in resolution 1820 on sexual violence in which the Council requested “the Secretary-General and relevant United Nations agencies [...] to develop effective mechanisms for providing protection from violence, including, in particular, sexual violence, to women and girls in and around United Nations-managed refugee and internally displaced persons camps, as well as in all disarmament, demobilization and reintegration processes”. In the context of its agenda topic of “Women and Peace and Security” the Council further called upon all parties to armed conflicts to respect fully international law applicable to the rights and protection of women and girls, including the Refugee Convention of 1951 but also the relevant provisions of the Statute of the International Criminal Court (ICC), and human rights treaties, which are now widely recognized as applying in armed conflicts.

Refugee children are particularly vulnerable because they may be easily separated from their parents, and in the context of armed conflict they may be recruited for military purposes, which constitutes a serious violation of human rights and international humanitarian law. In this respect, Security Council resolution 1778 on MINURCAT underlines the need to preserve the civilian nature of refugee camps and IDP sites and to prevent any recruitment of individuals, including children, which may be carried out in or around the camps by armed groups. In its resolutions on children and armed conflict, the Security Council further recalled that child conscription under fifteen is a war crime under the ICC Statute, and reaffirmed its support for inter alia the Special Representative of the Secretary-General on Children and Armed Conflict, and UNHCR in protecting children in such situations.

Although these thematic resolutions largely refer to existing rules of international law, some of the norms affirmed therein also go beyond established treaty or customary law, especially when obliging non-State actors or non-parties to treaties to respect international agreements. By emphasizing that violations of these norms may constitute threats or serious impediments to the restoration of international peace and security, and affirming its intention to take appropriate targeted measures, the Security Council has once again implied the binding character of these decisions in a general manner, hence giving them quasi-legislative status. Moreover, the Security Council does not only rely on its traditional enforcement measures, economic sanctions and peace operations, in order to ensure compliance with these decisions. Resolution 1612 also established a monitoring and reporting mechanism on children and armed conflict, illustrating most particularly how the Council has substituted the often lengthy and difficult treaty negotiation process by imposing these new obligations on States.

This obvious departure from the consensual nature of treaty obligations may be a further indication that the international legal protection of refugees – here in the form of children and women in armed conflict – is a collective interest of the international community which does not always abide by the traditional rules of reciprocal inter-State law-making. It is certainly significant that the UNHCR Executive Committee has begun to quote the Security Council’s decisions as normative authority in its conclusions on refugee children and women at risk. These references show the extensive normative impact that the Security Council’s action may have on specific aspects of international refugee protection.
Internally Displaced Persons

The Security Council’s quasi-legislative activities to enhance the protection of civilians in armed conflict are also specifically relevant to the growing number of internally displaced persons which today by far exceeds the number of refugees. Since the early 1990s the Security Council’s references to aspects of international refugee protection have usually included IDPs, for instance, in Iraq, Rwanda, Bosnia and Herzegovina, and more recently the Central African Republic and Chad. Since neither UNHCR nor any other UN agency has received the legal authority to ‘protect’ persons within their own country, the Security Council has often fostered UNHCR’s ad hoc engagement with IDPs, in conformity with UNHCR’s internal IDP guidelines, and framed the agency’s operations by appropriate peacekeeping mandates. At the height of the crisis in Kosovo, for instance, the Security Council invited “UNHCR and other international humanitarian relief organizations to extend relief assistance to the internally displaced persons in Kosovo, the Republic of Montenegro and other parts of the Federal Republic of Yugoslavia, as well as to other civilians being affected by the ongoing crisis”. Fitzpatrick thus claims that – next to the UN Human Rights Commission – the Security Council has become one of the main fora for discussing IDPs and their protection.

It is consequently not surprising that the Security Council played a notable role in promoting the normative content of the so-called Guiding Principles on Internal Displacement, which were adopted in 1998. In the absence of any treaty or rule of customary international law explicitly covering “internally displaced persons”, these Guiding Principles were elaborated by the Special Representative of the Secretary-General on the Human Rights of Internally Displaced Persons based on applicable international standards of human rights law, international humanitarian law and, by analogy, refugee law. However, from the outset States were quite reluctant to endorse the Guiding Principles due to the sovereignty and interventionist concerns related to internal displacement. In light of this general hesitation, it is telling that the Secretary-General recommended in his 1999 report on the protection of civilians in armed conflict, leading to landmark resolutions 1265 and 1296, that the Security Council “[i]n cases of massive internal displacement, encourage States to follow the legal guidance provided in the Guiding Principles on Internal Displacement.” Only shortly after this report was handed down, the Security Council observed in resolution 1286 that “the United Nations agencies, regional and nongovernmental organisations, in cooperation with host governments, are making use of the Guiding Principles on Internal Displacement [...], inter alia, in Africa”. In contrast, the General Assembly initially only noted the relevance of the Guiding Principles in 1999, before gradually beginning to recognize them as “an important international framework for the protection of internally displaced persons”.

Although the Security Council has not often explicitly referred to the Guiding Principles on Internal Displacement in recent years, it has integrated specific aspects of the Guiding Principles in its own normative framework applicable to persons displaced by armed conflict, the primary competence of the Council, rather than internal displacement by other factors. The following non-exhaustive list of normative standards relevant to this study is mentioned in both the Guiding Principles and the Security Council’s resolutions on the protection of civilians: the obligation to prevent conditions that might lead to displacement, the primary responsibility of States to provide assistance and protection to their own citizens, the prohibition of forcible displacement of civilians in armed
conflict,\textsuperscript{199} the special protection needs of children and women,\textsuperscript{200} respect for fundamental human rights and humanitarian standards during displacement,\textsuperscript{201} the prohibition of attacks on civilians and the civilian character of IDP camps,\textsuperscript{202} and the obligation to grant humanitarian access.\textsuperscript{203} As described above, the Security Council has used its normative authority under the UN Charter to progressively develop this framework of obligations based on human rights law, international humanitarian law and refugee law and imposed them on States and non-State actors alike. Although the elaboration of an international convention on internal displacement remains highly unlikely, the practice of the Security Council has undoubtedly contributed to the consolidation, potentially even to the making, of protection standards for IDPs under customary international law.

2.2.2 Humanitarian Assistance

Although protection and assistance are not inextricably linked with one another, the provision of humanitarian assistance or relief in conflict situations is often a \textit{conditio sine qua non} for international legal protection which hence becomes a rather incidental or secondary concern to UNHCR.\textsuperscript{204} As a result, humanitarian assistance has gradually developed to be a crucial element in the effective protection of refugees and internally displaced persons, although it is not mentioned in the 1951 Convention.\textsuperscript{205} This development was set in motion even before the emergence of new kinds of conflicts in the post-Cold War period as UNHCR was faced with situations of countries divided \textit{de facto}, if not \textit{de jure}, including countries split by civil war such as Sudan, Vietnam and, to a lesser extent, Laos before 1975.\textsuperscript{206} While UNHCR was therefore certainly used to operating in conflict-torn countries of origin, the 1990s posed new challenges such as increasing instances of denial of humanitarian access or attacks against humanitarian personnel to an organization that had so far been able to rely on the consent of the host state as well as its non-political and humanitarian character.\textsuperscript{207}

In this complex security environment, the Security Council began to strengthen different areas of humanitarian assistance by using sanctions as well as peace operations. These actions undertaken by the Council are especially important as the law on humanitarian assistance itself is normatively still unclear in some areas and not even based on a generally agreed definition. Although the first proposals to draft a “Convention to expedite the delivery of international humanitarian relief” were made in 1984,\textsuperscript{208} the continued uncertainty is best illustrated by the newest topic on the agenda of the International Law Commission (ILC), the “Protection of Persons in the Event of Disasters”.\textsuperscript{209} A notable contribution to this field of law has been made by non-governmental institutions such as the \textit{Institut de Droit International} whose 2003 resolution defines humanitarian assistance as “all acts, activities and the human and material resources for the provision of goods and services of an exclusively humanitarian character, indispensable for the survival and the fulfillment of the essential needs of the victims of disasters.”\textsuperscript{210} The provision of such humanitarian goods and services is, of course, the primary responsibility of the authorities in effective control of the territory hosting the affected population which itself has a corollary right to receive such relief.\textsuperscript{211} However, in view of the principle of international cooperation to solve humanitarian problems, as enshrined in the UN Charter,\textsuperscript{212} humanitarian assistance is also a subsidiary concern of the international community, especially in cases in which the responsible national
authorities are unwilling or unable to provide assistance. The specific role of the Security Council in this context has been to use its Chapter VII powers to remove the obstacles in the effective provision of humanitarian assistance to refugees and IDPs, thereby contributing to the development of legal norms on humanitarian access and the safety of humanitarian personnel.

**Humanitarian Access: Obligation and/or Right?**

30 As stated by the UN Secretary-General, the unhampered access to those affected is “one of the key issues of humanitarian assistance”.\(^{213}\) Although security concerns may naturally restrict access to areas of armed conflict and other kinds of disasters, States and non-State actors often refuse to grant humanitarian access for a variety of reasons ranging from a denial of the humanitarian problem,\(^{214}\) to the deliberate displacement and starvation of the civilian population.\(^{215}\) In order to deny humanitarian access, parties to an armed conflict often misuse their authority to supervise or channel humanitarian assistance within their respective territory under the veil of sovereignty and the principle of non-intervention.

31 Nevertheless, according to international humanitarian law, the parties to a conflict are under an obligation to allow and facilitate rapid and unimpeded passage of humanitarian aid which is offered by humanitarian organizations, even if such assistance is destined for the civilian population of the adverse party.\(^{216}\) The ICRC Commentaries on the Additional Protocols to the 1949 Geneva Conventions therefore state that the requirement of consent of the authorities concerned does not mean that the decision on a relief operation is left to the discretion of the parties: “[i]f the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place [...]. [A] refusal would be equivalent to a violation of the rule prohibiting the use of starvation as a method of combat”, as stipulated in Article 14 of Additional Protocol II.\(^{217}\) Yet, does this interpretation of the applicable rules of international humanitarian law also establish a right to humanitarian access on the part of international governmental and non-governmental organizations?\(^{218}\)

32 In the past, the Security Council has frequently obliged UN Member States and other relevant actors to grant immediate, full and unimpeded humanitarian access by authorizing different measures under Chapter VII of the UN Charter, with or without the consent of the authorities in charge. In such situations the Council has often declared that the humanitarian situation itself or the “obstacles being created to the distribution of humanitarian assistance”,\(^{219}\) constitute or contribute to a threat to international peace and security.\(^{220}\) In this regard, the precedent in the Security Council’s practice was set by resolution 688 in which the Council “[i]nsists that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq”.\(^{221}\) As a result, UNHCR undertook one of its first major humanitarian operations in a conflict zone and not in Turkey where it might have assumed a more traditional role well away from the conflict area in Iraq. Following Iraq, all decisions in which the Security Council has addressed complex humanitarian emergencies – such as Somalia,\(^{222}\) Rwanda, Sierra Leone,\(^{224}\) Kosovo,\(^{225}\) the Democratic Republic of Congo (DRC)\(^{226}\) and Sudan, Chad and the Central African Republic\(^{227}\) – have included provisions to ensure humanitarian access. In the case of the former Yugoslavia, the provision of humanitarian relief was even a primary objective for the imposition of mandatory measures in the first place and
a continuous concern throughout the conflict. When the Security Council eventually decided to impose comprehensive mandatory sanctions against the Federal Republic of Yugoslavia for failure to comply with resolution 752, one of the reasons for this decision was to stop the blockage of unhindered and effective delivery of humanitarian aid to refugees and IDPs, including safe and secure access to airports in Bosnia and Herzegovina. As the ICTY Trial Chamber subsequently found in the Krstić case, the blocking of these aid convoys was part of the ‘creation of a humanitarian crisis’ which, combined with crimes of terror and forcible transfers, incurred individual responsibility for inhumane acts and persecution as crimes against humanity.

In view of the Security Council’s practice with regard to access to humanitarian assistance, the Institut de Droit International, amongst others, concluded that the Security Council may take the necessary measures under Chapter VII of the UN Charter “[i]f the refusal to accept a bona fide offer of humanitarian assistance or to allow access to the victims leads to a threat to international peace and security”. It is even more important, however, that the Security Council itself has codified this practice in its resolutions on the protection of civilians. In resolution 1296 it confirmed that the deliberate denial of humanitarian access is a violation of international law which may constitute a threat to international peace and security. Under explicit reference to the Geneva Conventions and the Hague Regulations, resolution 1674 further urges “all those concerned to allow full unimpeded access by humanitarian personnel to civilians in need of assistance insituations of armed conflict”, thereby extending this obligation to non-State actors. Accordingly, the 2005 ICRC Study on Customary International Humanitarian Law makes extensive references to the practice of the Security Council when establishing that the obligation to grant humanitarian access has attained a customary character with respect to international and internal armed conflicts. By viewing both this obligation and the corresponding subjective right as a part of the legal norm of unimpeded humanitarian access, it can certainly be suggested that the Security Council has also contributed to the development of a right to access of humanitarian actors. Needless to say that in cases where the consent of the responsible authorities is lacking, any implementation of this right will inevitably depend on the support of the Security Council and its political intricacies.

Safety of Humanitarian Personnel

In addition to access for humanitarian assistance, the safety of humanitarian personnel has become an increasingly important focus of the Security Council’s actions. Relief workers are often exposed to personal dangers such as kidnapping, threats, aerial bombings, and fighting between different factions when providing protection or bringing assistance to threatened populations in conflict-stricken areas. Intentional attacks against personnel, installations, goods and services involved in humanitarian assistance may constitute serious breaches of international law, especially international humanitarian law. Article 8 (2) lit. b of the ICC Statute even identifies attacks deliberately directed against personnel involved in humanitarian assistance as war crimes. In this respect, the Secretary-General in his first report on the protection of civilians in armed conflict emphasized the relevancy of both aspects, humanitarian access and safety, for the effective provision of humanitarian assistance and recommended to the Security Council to
“[u]nderscore in its resolutions, at the onset of a conflict, the imperative for civilian populations to have unimpeded access to humanitarian assistance and for concerned parties, including non-state actors, to cooperate fully with the United Nations humanitarian coordinator in providing such access, as well as to guarantee the security of humanitarian organizations, in accordance with the principles of humanity, neutrality and impartiality, and insist that failure to comply will result in the imposition of targeted sanctions.”

Security Council resolutions concerning access to humanitarian relief usually also include demands for the safety of humanitarian personnel and other personnel in the delivery of such assistance. In certain cases, the Security Council has even adopted resolutions that exclusively address particularly serious attacks against relief workers. In resolution 1319 (2000), for instance, the Council dealt with the murder of three UNHCR staff members in East Timor. After establishing that the murders committed were grave violations of international humanitarian and human rights law, the Security Council also referred to UNHCR’s future involvement in the conflict by “stressing that UNHCR workers cannot return to West Timor until there is a credible security guarantee, including real progress towards disarming and disbanding the militias”. Although the Security Council did not give direct instructions to UNHCR, the Council’s findings were clearly made with the authority of its primary responsibility over issues of international peace and security.

As a result of the Security Council’s extensive practice in the early 1990s, especially in the former Yugoslavia, it was proposed to strengthen the norms on the safety of humanitarian personnel by having the Council declare that attacks against UN personnel constitute international crimes, and that States should prosecute or extradite those who commit them. However, this approach was subsequently set aside in favor of action by the General Assembly to adopt a Convention on the Safety of United Nations and Associated Personnel. The Convention, which entered into force in 1999, requires or allows every State party to establish its jurisdiction over an attack on UN or associated personnel engaged in a UN operation under certain conditions. The Convention also refers to the Security Council and its field of competence by limiting the scope of application to cases where first, the operation serves the purpose of maintaining or restoring international peace and security, or second, the Security Council or the General Assembly has declared that there exists an exceptional risk to the safety of the personnel participating in the operation. In contrast to the 1951 Convention, the Security Council was therefore assigned a clear role in the legal and institutional framework set out in the Convention on the Safety of UN Personnel, to whose elaboration it provided decisive stimulus.

In addition to its role in the Convention on the Safety of UN Personnel, incidents such as the killing of humanitarian personnel in East Timor and the attack against the headquarters of the United Nations Assistance Mission in Iraq (UNAMI) in 2003 eventually led the Security Council to adopt its own thematic resolution 1502 on the safety of humanitarian personnel in conflict zones. In this resolution, it reaffirmed the obligation of all parties involved in an armed conflict to comply fully with the rules and principles of international law applicable to them relating to the protection of humanitarian personnel and United Nations and its associated personnel, in particular international humanitarian law, human rights law and refugee law. The Council also expressed its determination to take several steps to ensure respect for the Convention on the Safety of UN Personnel, for example, by requesting the Secretary-General to incorporate certain provisions of the Convention into existing status-of-forces, status-of-
missions and host country agreements. The Security Council itself regularly reiterates resolution 1502 in its peacekeeping mandates. By ensuring mutual references between resolution 1502 and its decisions on the protection of civilians, the Council has additionally established a coherent approach on humanitarian action, reinforcing the normative impact of its actions on the law on humanitarian assistance in contemporary conflict situations. The Security Council has thus been a crucial actor in what Goodwin-Gill and McAdam describe as “the emergence of the principle of humanitarian access, on the one hand, and a rule protecting the safety of humanitarian relief workers, on the other”.

2.3 Strengthening the Search for Durable Solutions after Displacement

The ultimate goal of international protection is to find a satisfactory and durable solution for the situation following forced displacement. This goal can only be achieved when the need for international protection ceases to exist and national protection – be it by the country of origin or by another country – is sustainable and fully effective. The international protection regime recognizes three durable solutions: voluntary repatriation, local integration, and resettlement in a third country. While the so-called cessation clauses in the 1951 Convention acknowledge the necessity for refugee status to end, the Convention only implicitly mentions solutions, notably local integration, by outlining the basic treatment of refugees and providing for facilitated naturalization. In contrast to the 1951 Convention, the UNHCR Statute explicitly stipulates that UNHCR shall assume the function of seeking permanent solutions, by assisting governments and private organizations “to facilitate repatriation and assimilation within new communities” and by engaging in “such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal”. Although the UNHCR Statute does not establish any particular hierarchy among these three solutions, voluntary repatriation has developed to be the preferred solution in UNHCR’s operations since the beginning of the 1980s when the General Assembly began to request UNHCR to carry out functions in relation to large-scale repatriation operations. By further expanding UNHCR’s mandate to assist countries of origin in the integration of returning refugees, the General Assembly has thus created a another interface between international refugee protection and the primary responsibility of the Security Council: the restoration of international peace and security.

While recognizing the importance of the voluntary and safe return of refugees as a precondition for the restoration of peace and security, the Security Council has consequently begun to support UNHCR and countries of origin in promoting the conditions conducive to return. As Volker Türk rightly notes “[c]reating the conditions for return […] remains fundamentally a political process which needs to be addressed at that level and should not be confused with humanitarian action.” Accordingly, the elimination of the root causes of displacement through the Security Council’s political actions extends to the post-conflict phase in which the Council pursues the objective of creating a sustainable peace. Only if relapse into conflict is prevented, will the local population return and engage in the political, social and economic reconstruction of its country. In the context of its efforts to support this post-conflict construction the
Security Council has therefore given a central place to the successful reintegration of refugees and those internally displaced. Most of the large-scale refugee repatriations in the 1990s took place in the context of comprehensive peace plans, promoted by the Security Council and implemented through its peacekeeping or peace-building missions. 260 By reiterating the importance of the right to return as the “legal precondition to realize voluntary repatriation”, 261 the Security Council has thereby not only promoted durable solutions to displacement itself, but also solutions to property issues which are often equally important for the creation of a sustainable peace.

2.3.1 Solutions to Displacement: Mass Exodus and the Right to Return

The existence of the right to return and the corresponding duty to admit are beyond dispute. 262 Explicitly stipulated in Article 13 (2) of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), 263 the right to return is also implied in the prohibition of arbitrary arrest, detention and exile as well as in the prohibition of expulsion of nationals. 264 Although the right to return does accordingly not originate in international refugee law per se, it illustrates how international refugee protection has appropriated this human right to fill the institutional policy of voluntary repatriation with normative content. 265 Nonetheless, the right to return is often denied or qualified in the broader context of persecution, human rights violations and situations in which political considerations prevail over legal entitlements. 266 More importantly, while the right to return is largely uncontested in its individual dimension, the question whether this right also applies to cases of mass displacement is still controversial. 267 As a consequence, it is normatively significant that the Security Council has consistently reiterated the right to return in situations of mass exodus when the maintenance of international peace and security has been at stake, thereby justifying UNHCR’s voluntary repatriation operations.

The Security Council emphasized the right to return for the first time with regard to Cyprus in 1974, following a related General Assembly resolution, by calling for urgent measures to permit refugees who wished to, to return to their homes. 268 Whereas these calls have been reiterated in vain for more than three decades, the Council began to increasingly and more successfully refer to the right to return in the 1990s. In the Gulf War cease-fire resolution 687 of 3 April 1991, for instance, the Security Council requested Iraq to co-operate with the ICRC for the return or repatriation of all Kuwaiti and third country nationals, by providing lists of such persons as well as facilitating access to those persons and the search of unaccounted persons. 269 In resolution 820 on the situation in Bosnia-Herzegovina, the Council then expressly stressed that “all displaced persons have the right to return in peace to their former homes and should be assisted to do so”, 270 and replicated such statements in many other situations such as Tajikistan, Rwanda, Georgia/Abkhazia, Kosovo or East Timor. 271 While the right to return has hence become an integral part of its post-conflict resolutions, it is remarkable that the Security Council has also acknowledged “the need for parallel programmes to resettle individuals who choose not to return”. 272

Following such statements the Security Council has further strengthened the right to return in situations of mass exodus through its participation in the design and conclusion of comprehensive peace agreements. The 1989/1990 Paris Conference on Cambodia, for
instance, was dominated by the permanent five Security Council members who initiated a series of high-level meetings successively in New York and then in Paris to discuss the situation in Cambodia and elaborate a general peace treaty. On the basis of the "Framework for a Comprehensive Political Settlement of the Cambodia Conflict", endorsed by the Security Council in resolution 668 (1990), the Permanent Five agreed on a text containing a general agreement with detailed annexes, inter alia, covering the proposed mandate for the United Nations Transitional Authority in Cambodia (UNTAC) and the repatriation of Cambodian refugees and displaced persons. In Annex 4 of the Agreements on a Comprehensive Political Settlement of the Cambodian Conflict, the parties agreed that:

"every assistance will need to be given to Cambodian refugees and displaced persons as well as to countries of temporary refuge and the country of origin in order to facilitate the voluntary return of all Cambodian refugees and displaced persons in a peaceful and orderly manner. It must also be ensured that there would be no residual problems for the countries of temporary refugees. The country of origin with responsibility towards its own people will accept their return as conditions become conducive."

In many ways, the Cambodia Peace Agreements set the stage for the active involvement of the Security Council in subsequent peace processes. The Security Council was subsequently also an important actor in the conclusion of other peace agreements such as the Dayton Peace Accords between the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (FRY), and the Rambouillet Accords on the peace in Kosovo. In general, these peace agreements included quite elaborate annexes on the return of refugees and internally displaced persons, often followed by Security Council resolutions that reaffirm the right to return.

After the elaboration of these peace accords, the Security Council’s peace operations exerted an even more substantive influence on the normative content of the right to return by implementing the displacement-related provisions of the agreements. Annex 4 of the Cambodia Peace Agreements, for example, gives UNHCR the principal role in facilitating the repatriation of Cambodian refugees and displaced persons but also emphasizes the supervisory function of UNTAC. The same observation can be made with regard to other peace agreements. The UN and African Union Mission in Sierra Leone (UNAMSIL), for instance, was mandated to support the voluntary return of refugees and displaced persons to Sierra Leone in fulfillment of the commitments of stakeholders to the Abuja Ceasefire Agreement of 10 November 2000.

While these peace operations have facilitated the disarmament, demobilization, repatriation, reintegration and rehabilitation (DDRR) of former combatants under international humanitarian law, they have also made refugee return safer by participating directly in UNHCR’s repatriation operations, accompanying convoys of returnees, guarding reception centers and monitoring the welfare of returning refugees. Under normative considerations, it is noteworthy that this increasingly close cooperation between UNHCR and UN peace operations has also seen a refinement in the Security Council’s language. Its references to return in its peacekeeping mandates now include normative qualifications such as “voluntary”, “safe”, “dignified” and “sustainable”. In resolution 1784 on the extension of the UN Mission in Sudan, for instance, the Security Council

welcomes the continuing organized returns of internally displaced persons from Khartoum to Southern Kordofan and Southern Sudan and of refugees from
countries of asylum to Southern Sudan, and encourages the promotion of efforts, including the provision of necessary resources to the Office of the United Nations High Commissioner for Refugees and implementing partners, to ensure that such returns are voluntary and sustainable, and further requests the Mission, within its capabilities and areas of deployment, to coordinate with partners to facilitate sustainable returns, including by helping to establish the necessary security conditions.\footnote{284}

Another pertinent example is resolution 1770 (2007) on the UN Mission in Iraq in which the Council equally reaffirmed that all parties should take all feasible steps to ensure the protection of affected civilians and should create conditions conducive to the “voluntary, safe, dignified and sustainable return of refugees and internally displaced persons,”\footnote{285} and decided that the Special Representative of the Secretary-General for Iraq shall advise, support and assist the government of Iraq towards that end.\footnote{286} Similar clauses are included in all other relevant Security Council resolutions that cover the right to return and its implementation through UN peace operations.\footnote{287}

Although these resolutions on the return of refugees do not in general make references to voluntary repatriation, the Security Council has clearly begun to employ the language of UNHCR, notably its 1996 Handbook on Voluntary Repatriation, and relevant General Assembly resolutions which refer to “return in safety and with dignity” when describing voluntary repatriation as a durable solution.\footnote{288} In its most recent resolution on the protection of civilians in armed conflict, the Council confirms its practice of ensuring that the mandates of United Nations peacekeeping, political and peace-building missions include provisions on “the creation of conditions conducive to the voluntary, safe, dignified and sustainable return of refugees and internally displaced persons”.\footnote{289} After having contributed to the consolidation of the right to return in cases of mass displacement, the practice of the Security Council has thus continued to develop the normative content of this right by specifying the high degree of convergence between human rights law and refugee law in the vague legal concept of voluntary repatriation.

\subsection*{2.3.2 Solutions to Property Issues: Rights to Restitution and/or Compensation?}

In situations of mass displacements, caused by armed conflict, the right to return has often been linked with the right to restitution and compensation.\footnote{290} As early as 1948, the General Assembly in resolution 194 (III), which established the UN Conciliation Commission for Palestine, in para. 11:

\begin{quote}
“\textit{[r]esolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law and equity, should be made good by the Governments or authorities;}”\footnote{291}
\end{quote}

In 1986, the General Assembly’s initiative on cooperation to avert new flows of refugees reaffirmed both “the right of refugees to return to their homes in their homelands”, which implies restitution, and also the right of those who do not wish to return to receive adequate compensation.\footnote{292} Yet, while the right to return has a stable foundation in international law, the rights to restitution and compensation have been considered as normatively underdeveloped,\footnote{293} not least because their normative content lacks substantive clarity. It is, for instance, not yet possible to determine a clear rule on whether the right to compensation only implies compensation in lieu of return or
whether compensation can be combined with return and restitution by being paid for loss and damage to property as indicated in resolution 194 (III). Nonetheless, while the right to compensation remains controversial, the right to restitution has received increasing recognition in the practice of States and organs of international organizations, not only as corollary of the right to return but also as a separate right in international law.

The practice of the Security Council has been considered important in this evolution from the very beginning as its pronouncements on the right to return confirmed that the content of this right went beyond the mere restoration of persons to their countries of origin, often far away from their actual homes. More precisely, the right to restitution has been said to be included in the Security Council’s reiterations of the right of refugees and displaced persons ‘to return to their homes’ which implies a right to recover the property owned by them at the time of their departure. In a recent resolution on the situation in Georgia, the Security Council confirmed this interpretation by emphasizing the importance of internally displaced persons being able to return “to their homes and property” as well as the fact that “individual property rights have not been affected by the fact that owners had to flee during the conflict and that the residency rights and the identity of those owners will be respected”.

This recent statement on Georgia is clearly the result of a gradual development in the Council’s practice, initiated by the Security Council’s early statements on Cyprus and continued in the 1990s with its involvement in the post-conflict design of Bosnia-Herzegovina. In resolution 820, the Security Council thus stressed that “all statements or commitments made under duress, particularly those relating to land and property, are wholly null and void and that all displaced persons have the right to return in peace to their former homes and should be assisted to do so”. Considering the importance of property issues in the Yugoslav conflict, Annex 7 of the Dayton Accords on refugees and displaced persons emphasized the right to return and established a Commission for the Restitution of their Property Claims (CRPC). According to Article X (5) of Annex 7 to the Dayton Accords, the Commission shall cooperate with other entities agreed by the Parties, or authorized by the Security Council, or established by the Dayton Accords. The CRPC is mandated to “receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or just compensation in lieu of return.” While the compensation mechanism has not quite worked in practice, it is important to note that the CRPC mandate, which gives the Commission extensive powers to determine the lawful owner of any property, incorporated the language of resolution 820 by stipulating that the Commission “shall not recognize as valid any illegal property transaction, including any transfer that was made under duress, in exchange for exit permission or documents, or that was otherwise in connection with ethnic cleansing.”

After the Commission on Restitution of Property Claims in Bosnia led to the restitution of some 200,000 homes, and the first real precedent for large-scale post-conflict property restitution as a right, the right to restitution has been included as a standard component in various other peace agreements, such as in Burundi, Nepal and Darfur, in whose conclusion the Security Council has had more or less ownership. However, with the exception of the Darfur Peace Agreement, most property restitutions mechanisms were rather established on an ad hoc basis and often directly involved UN peace-building missions. The United Nations Interim Administration Mission in Kosovo (UNMIK), for
instance, administered and managed the Housing and Property Directorate and Claims Commission, initially established by the UN Human Settlements Programme, which has decided over numerous property claims.\textsuperscript{302} The Land and Property Unit within the UN Transitional Administration in East Timor (UNTAET) equally developed proposals for institutionally addressing property questions;\textsuperscript{303} indeed, grievances that were left unaddressed are considered one of the reasons for the recent political violence in East Timor.\textsuperscript{304}

53 The practice of UNTAET, UNMIK and other property restitution mechanisms was eventually codified in the 2005 “Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons”;\textsuperscript{305} and to a certain extent also in the 2006 “Basic Guidelines and Principles on the Right to a Remedy and Reparation”.\textsuperscript{306} Whereas the Handbook on the Pinheiro Principles makes extensive reference to UNTAET and UNMIK, the Principles emphasize that “States are expected to demonstrably prioritise restitution rights”, and should therefore “not view rights to restitution and rights to compensation as necessarily of the same value when seeking durable solutions.”\textsuperscript{307} The Security Council peace operations have thus directly contributed to establishing the right to restitution as a distinct, primary norm of international law, which takes precedence over compensation and represents a standard component of sustainable conflict resolution and post-conflict reconstruction.

54 Nonetheless, not all peace operations mandated by the Security Council address these property-related activities where necessary. In Afghanistan, UNHCR and non-governmental organizations have engaged in activities to promote and assist restitution, including the provision of legal aid to returnees, on their own initiative. In Burundi, the Peace-building Fund, through UNHCR, has provided initial financial support to establish a national property claims mechanism.\textsuperscript{308} In view of the importance of property restitution for sustainable peace, the Secretary-General therefore called for a more consistent, systematic and comprehensive treatment of housing, land and property issues in his 2007 report on the protection of civilians in armed conflict. In this report, the Secretary-General specifically requested the Security Council to take “[r]estorative actions, such as the inclusion of the right to return and restitution of housing, land and property in all future peace agreements and all relevant Council resolutions, and the inclusion of housing, land and property issues as an integral part of future peacekeeping and other relevant missions, with provisions for dedicated, expert capacity to address these issues.”\textsuperscript{309} Although the Security Council does not refer to the right to restitution as such in its resolutions, its consistent reiterations of the right to return and the establishment of land and property units in its peace-building missions, in particular in Kosovo and East Timor, will probably lead to the inclusion of this norm in the Security Council’s framework on civilians in armed conflict which would further enhance its consolidation as an independent right in customary international law. The progressive stance that the Security Council has taken over the past decade in enforcing, developing and sometimes even making normative standards pertaining to human security certainly warrants predictions about the strengthening of international refugee protection through its future practice.
NOTES


97. Despite their notable differences, all of these fields of law have one common objective, which leads to overlapping and complementary functions: the protection of the individual. In addition to international humanitarian law and human rights, international criminal law should be mentioned in this context. However, an analysis of the relationship between these fields of law would exceed the scope of this study. On the relevance of international humanitarian law and human rights for international refugee protection see generally A. Edwards, ‘Crossing Legal Borders: The Interface Between Refugee Law, Human Rights Law and Humanitarian Law in the “International Protection” of Refugees’, in R. Arnold and N. Quénivet (eds.), International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law (2008), 421; M. Veuthey, ‘Réfugiés, droits de l’homme, droit humanitaire, paix et sécurité’, in V. Gowlland and L. Samson (eds.), Problems and Prospects of Refugee Law (1992), 49.


99. See Section 2.3, infra.

100. UN Doc. A/RES/36/148 (16 Dec. 1982), preamble. 5 (emphasis added).

on the topic in 1982 (UN Human Rights Commission, Human Rights and Mass Exoduses, Study by Mr. Sadruddin Ada Khan, Special Rapporteur UN Doc. E/CN.4/1503 (17 Feb. 1982). These activities eventually also led to the appointment of a Special Rapporteur on Internal Displacement whose role will be further discussed in Section 2.2, subheading 'Internally Displaced Persons', infra.


103. UNHCR Executive Committee Conclusion No. 74 (XLV) (1991), paras. (ii), (vii). In this context, ExCom also emphasized the need for a more active and effective utilization by States and UNHCR of United Nations and other qualified expert bodies.


105. UNHCR defined prevention as “the elimination of causes of departure, rather than the erection of barriers which leave causes intact, but make departure impossible.” Note on International Protection, UN Doc. A/AC.96/777 (9 Dec. 1991), para. 43. It was later emphasized that prevention sought to “attenuate the cause of departure or contain cross-border movements of populations” but that it was not “a substitute for asylum”: UN Doc. A/AC.96/799 (25 Jul. 1992), para. 26. Although preventive protection was a central feature of UNHCR’s strategy to find solutions to refugee problems between 1990 and 1993/4, it does not appear in more recent UNHCR documents anymore. However, prevention remains an important component of the agency’s activities and manifests itself, inter alia, in the following activities: reinforcing national protection capacities; addressing the problem of statelessness; protecting internally displaced persons; consolidating solutions in war-torn societies; organizing mass information campaigns to address broader problems of migration; and alerting the international community to the causes of forced displacement: See Follow-up to ECOSOC Resolution 1995/56: UNHCR Activities in Relation to Prevention, EC/46/SC/CRP.33 (28 May 1996).

106. Phuong notes that UNHCR’s initiatives therefore have to be linked with political efforts to protect the human rights of the civilian population at large and to resolve the conflict where it is the cause of displacement. See C. Phuong, International Protection for Internally Displaced Persons (2004), 123.

107. Tomuschat, for instance, characterizes this solution as “almost unchallengeable in theory” but dismisses it as “hard to translate into practice” since the Council has never again taken the view that a flow of refugees may constitute a threat to international peace and security after Iraq. While it is acknowledged that Tomuschat came to this conclusion in 1994 and could not take into account later developments, his assessment is still quite narrow in focus, especially as the Security Council tends to avoid articulating the precise nature of the threats to the peace and often confines itself to referring to the context or background of the situation (J.M. Farrall, United Nations Sanctions and the Rule of Law (2007), 85). See Tomuschat, supra note 102, at 77. See also Freeman, supra note 10, at 568; Dowty and Loescher, at supra note 10; Phuong, supra note 106, at 123. See generally on the responsibility of the country of origin, V. Gowlland-Debbas, ‘La responsabilité internationale de l’Etat d’origine pour des flux de réfugiés,’ in A. Pedone (ed.), Droit d’asile et des réfugiés (1997), 93.


109. See Dowty and Loescher, supra note 10, at 70-71.

110. Phuong, supra note 106, at 223.

111. UN Doc. S/PV.3238 (16 Jun. 1993). In the end, however, China did vote in favor of the resolution for two reasons. First, the “unique and exceptional” character of the situation, specifically identified by the representative of Pakistan as “the request by the legitimate government of Haiti that the Security Council make universal and mandatory the measures
recommended by OAS". Second, China and others argued that the prior action on the part of Organization of American States (OAS) and the General Assembly had established a framework that “warrant[ed] the extraordinary consideration of the Security Council and the equally extraordinary application of measures provided for in Chapter VII”.

113. Ibid.
116. Article 2 (7) of the UN Charter. In the past, intervention authorized by the Security Council in the form of initiatives to protect internally displaced persons, provide humanitarian relief, and hold the State inducing displacement responsible, have been attacked as unlawful in the light of the doctrine of non-intervention. UN Doc. S/PV.2982 (5 Apr. 1991), 46th session, 2982 meeting at 17, 27, 28-30, 31, 44-45, 63 (statements by Iraq, Yemen, Zimbabwe, Cuba, India and China).
117. UN Doc. S/RES/814 (26 Mar. 1993), preamble. The resolution subsequently established the UN Operation in Somalia II (UNOSOM II) and equipped it with enforcement powers inter alia to support the arms embargo imposed by resolution 733 (UN Doc. S/RES/733 (23 Jan. 1992), para. 5) and “to assist in the repatriation of refugees and the assisted resettlement of displaced persons [...] paying particular attention to those areas where major instability continues to threaten peace and security in the region”.
121. Ibid., para. 5-6; and UN Doc. 1171 (5 Jun. 1998), para. 5. The petroleum embargo was lifted in S/RES/1156 (16 Mar. 1998). The arms embargo and the travel ban are still in force.
122. UN Doc. S/RES/827 (25 May 1993) on the establishment of the ICTY and UN Doc. S/RES/955 (8 Nov. 1994) on the establishment of the ICTR.
123. ICTR Statute, Article 3 lit. d) and h); ICTY Statute, Article 5 lit. d) and h). See also Article 7 lit. d) and h) of the Rome Statute of the International Criminal Court, 2187 UNTS 90 (1 July 2002) [hereinafter: ICC Statute]. See S. Jaquemet, 'The Cross-Fertilization of International Humanitarian Law and International Refugee Law', (2001) 83 International Review of the Red Cross 651 at 673.
126. On the meaning of “ethnic cleansing” see Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 Feb. 2007, [2007] ICJ Rep., at 70, para. 190. See also Security Council resolution 918 concerning Rwanda in which the Council warned the warring factions that the killing of members of an ethnic group with the intention of destroying such a group, in whole or in part, “constitutes a crime under international law”, namely genocide: UN Doc. S/RES/918 (17 May 1994), preamble. Moreover, the Council strongly condemned the ongoing violence in Rwanda, and expressed its deep concern that the consequences of the violence in Rwanda, including the internal displacement of a significant percentage of the Rwandan population and the massive exodus of refugees, constituted a humanitarian crisis of “enormous proportions” (Ibid., preamble. 8).
129. See Freeman, supra note 10, at 585.


132. See V. Gowlland-Debbas, ‘Concluding Reflections on the International Protection of Refugees’, in V. Chetail and V. Gowlland-Debbas (eds.), Switzerland and the International Protection of Refugees/La Suisse et la protection internationale des réfugiés (2002), 269 at 281. Gowlland-Debbas refers in this context to an emerging “ordre public” or international public policy which leads to the emergence of norms that are fundamental to the international community as whole.

133. See supra note 10.


135. UN Doc. A/RES/60/1 (16 Sept. 2005), paras. 138 and 139.

136. UN Doc. S/RES/1556 (30 Jul. 2004), preamble. It is revealing that the Security Council once again attributed major responsibility for the displacement to cross-border incursions to non-State actors, the Janjaweed militias.


139. UN Doc. S/RES/1674 (28 Apr. 2006), preamble and para. 4.


141. In the case of East Timor (Portugal v. Australia), Preliminary Objections, Judgment of 30 Jun. 1995, [1995] ICJ Rep. 90, at 104, para. 32. The Court found it unnecessary to decide whether certain Security Council resolutions could be binding in nature, since it was sufficient, for the purposes of the question before the Court, to determine that the Security Council has not intended to establish the alleged violation.

142. In a critical consideration of the responsibility to protect, The Economist recently noted: “Perhaps its greatest drawback is also one of its touted merits: that it is so carefully crafted to conform with the current UN charter, which makes the Security Council the most important arbiter of war and peace.” The Economist, ‘Responsibility to protect: An idea whose time has come – and gone?’, 23 Jul. 2009, available at http://www.economist.com/world/international/displayStory.cfm?story_id=14087788 (last visited on 24 Jul. 2009).

143. Report of the Secretary-General on “Implementing the Responsibility to Protect”, UN Doc. A/63/677 (12 Jan. 2009), at 26, para. 60. In this report, a “timely and decisive response” is only one of three pillars in the implementation of the responsibility to protect. The other two pillars are “the protection responsibilities of the State” and “international assistance and capacity-building”, which also emphasizes the role of humanitarian organizations such as UNHCR. The original conception of the responsibility to protect, as conceived by the ICISS, also divided the principle into three different phases: prevention, reaction, and rebuilding.

144. Kelsen, supra note 79, at 294.

145. Ibid., at 735.
146. See Gowlland-Debbas, supra note 130, at 63.
147. See Gowlland-Debbas, supra note 47, at 288.
148. See Bianchi, supra note 10.
152. UN Doc. S/RES/1208 (19 Nov. 1998). The UNHCR Executive Committee has endorsed this resolution: see, for instance, UNHCR Executive Committee Conclusion No. 87 (L) (1999); para. q, and Conclusion No. 94 (LIII) (2002), preamble.
154. Ibid., paras. 5, 6 and 9.
156. See Phuong, supra note 106, at 220.
157. Security concerns are often inherently linked to the security environment for refugees. Guerilla groups often attack refugees and displaced persons. With regard to the border region of Chad, Sudan and the Central African Republic, UNHCR has repeatedly reported cross-border raids by armed elements, rape and forced recruitment of Sudanese refugees were reported in eastern Chad. In response, UNHCR and its partners relocated over 80,000 refugees as a protection measure to seven camps further inland, away from the volatile border region in 2004. See UNHCR, Note on International Protection, A/AC.96/989 (7 Jul. 2004), 12, para. 42. See also the Statement by Mrs Sadako Ogata, UN High Commissioner for Refugees, at the UNICEF Executive Board (15 Jun. 1992) (cited in Kourula, supra note 4, at 258).
159. For a recent example see UN Doc. S/PRST/2008/18 (23 Mar. 2008), 1, on the protection of civilians.
160. For example, in a resolution extending the United Nations Mission in the Democratic Republic of Congo (MONUC), the Council emphasized that “such operations by the Armed Forces of the Democratic Republic of the Congo should be planned jointly with the Mission and in accordance with international humanitarian, human rights and refugee law and should include appropriate measures to protect civilians, and requests the Secretary-General to include in his reports to the Security Council an assessment of the measures taken to protect civilians”. UN Doc. S/RES/1794 (21 Dec. 2007), para. 7 (emphasis added).
161. In UN Doc. S/RES/1265 (17 Sept. 1999), para. 5, on the protection of civilians, the Council called on “States which have not already done so to consider ratifying the major instruments of international humanitarian, human rights and refugee law, and to take appropriate legislative, judicial and administrative measures to implement these instruments domestically” (emphasis added).

162. See Goodwin-Gill and McAdam, supra note 15, at 343-345.


167. UN Doc. S/RES/1314 (11 Aug. 2000), para. 6, in which the Security Council urged “Member States and parties to armed conflict to provide protection and assistance to refugees and internally displaced persons, as appropriate, the vast majority of whom are women and children”. See UNHCR, Note on International Protection, UN Doc. A/AC.96/713 (15 Aug. 1988), para. 36; UNHCR, Note on International Protection, UN Doc. A/AC.96/728 (2 Aug. 1989), paras. 8-19.

168. See ibid., at 473.


171. UN Doc. S/RES/1325 (30 Aug. 1999), preamble. See Article 8 (2) lit. b) (xxvi).


176. The Democratic Republic of the Congo (DRC) is a classic example in which the Security Council has applied peace operations as well as sanctions to improve the protection of refugee and IDP women and children, especially against non-State actors. In resolution 1596, for instance, the UN Security Council reiterated its serious concern regarding the presence of armed groups and militias in eastern DRC, although it did not specify the names of sanctioned groups. It then extended the arms embargo to “any recipient” in the country and included a travel ban on violators and the freezing of their assets, and referred to monitoring of these sanctions by the UN Mission in the DRC (MONUC). UN Doc. S/RES/1596 (18 Apr. 2005), para. 1.
179. See, for instance, UNHCR Executive Committee Conclusion No. 105 (LVII) (2006), preamble, “[r]ecalling that Security Council resolution 1325 (2000) on women and peace and security and the subsequent Action Plan (S/2005/636) provide an integrated framework for a consolidated international and UN-wide response to this challenge, that Security Council resolution 1261 (1999) and five subsequent resolutions on children and armed conflict, call on governments, parties to a conflict and other organizations, including UN bodies, to take wide-ranging action to protect children in armed conflict and afterwards, and that Security Council resolutions 1265 (1999), 1296 (2000) and 1674 (2006), similarly call on parties to armed conflict to ensure the protection of affected civilians, including women and children”. See also UNHCR Executive Committee Conclusion No. 107 (LVIII) (2007) on children at risk; Executive Committee Conclusion No. 99 (LV) (2004) on women and voluntary repatriation.

180. Although the number of internally displaced persons today (26 million) far exceeds the number of refugees (15.2 million). See UNCHR, 2008 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons (2009), 2.


182. UN Doc. S/RES/918 (17 May 1994), preamble.


185. The first version of the UNHCR Guidelines on involvement with IDPs required the request of the Secretary-General or another competent authority, such as the Security Council, in addition to other criteria such as the consent of the State concerned, a need for the particular expertise of UNHCR, and respect for the complementary mandates of other relevant organizations: UNHCR, ‘UNHCR’S Role with Internally Displaced Persons’, IOM/33/93-FOM/33/93 (28 Apr. 1993). A revised version was adopted in 2000: UNHCR, ‘Internally Displaced Persons: The Role of the High Commissioner for Refugees’, UN Doc. E/50/SC/INF.2 (20 Jun. 2000). The revised guidelines of 2000 additionally stipulate that UNHCR must have access to the population, adequate security for its staff, adequate resources, and “clear lines of responsibility and accountability with the ability to intervene directly with all parties concerns, particularly on protection matters.” Goodwin-Gill and McAdam observe that the operational rather than legal focus of these additional requirements reflects UNHCR’s functional rather than protection-based approach to IDPs. See Goodwin-Gill and McAdam, supra note 15, at 487.

186. See Barnett, supra note 150, at 252.

187. UN Doc. S/RES/1239 (14 May 1999), para. 2. The NATO bombings of Kosovo took place between 24 March and 10 June 1999. Before the operation started, UNHCR had established a large presence inside the province, and was engaged in protection and assistance activities for the internally displaced who numbered 260,000 when operations were suspended. See Statement by Mrs Sadako Ogata, United Nations High Commissioner for Refugees, to the Humanitarian Issues of the Peace Implementation Council, Geneva (6 Apr. 1999) (cited in Phuong, supra note 106, at 230).


Some commentators do not consider displacement caused by natural disasters, such as drought, floods or earthquakes, as internal displacement. They underline the element of coercion in the notion of forced displacement. Coercion is interpreted as requiring action, such as human rights violations, by the government or an insurgent group (See Proceedings of the American Society of Public International Law 1996, 559; and Norwegian Refugee Council, Institutional Arrangements for Internally Displaced Persons: The Ground Level Experience (1995), 7). However, as internal movements caused by natural disasters can have human rights implications and causes, the dividing line between natural and man-made disasters is not always entirely clear. The reluctance of authorities to allow for international relief, for instance, can directly trigger internal movements of population and/or aggravate the effects of natural disasters (see the example of Burma in 2008). Phuong therefore suggests that the decisive factor should be whether assistance and protection are made available by national authorities. See Phuong, supra note 106, at 30.


See Guiding Principles 3 (1) and 25 (1) as reflected in UN Doc. S/RES/1314 (11 Aug. 2000), para. 6; UN Doc. 1612 (26 Jul. 2005), preamble.


See Guiding Principles 10 and 11 and, as reflected in UN Doc. S/RES/1674 (28 Apr. 2006), preamble.


See Guiding Principle 25 (2) and as reflected in UN Doc. S/RES/1674 (28 Apr. 2006), para. 22.

UNHCR, Note on International Protection, UN Doc. A/AC.96/830 (7 Sept. 1994), at 9, para. 14. See also Goodwin-Gill and McAdam, supra note 15, at 27. International refugee protection can thus be distinguished into protection strictu sensu, that is legal guarantees, and protection lato sensu, which includes assistance and also protection in the narrow sense.

Article 23 of the 1951 Convention on public relief merely states that the Contracting States “shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals”.

The precedent was set by Sudan in 1972 when the Economic and Social Council requested that UNHCR coordinate “the assistance required for voluntary repatriation, rehabilitation, and resettlement of the refugees returning from abroad, as well as of persons displaced within the country” (UN Doc. E/RES/1705 (LIII) (27 Jul. 1972) (emphasis added)). A few months later, the General Assembly encouraged UNHCR to pursue its efforts on behalf of “refugees and other displaced persons”, referring here to internally displaced persons in Sudan (UN Doc. A/RES/2958 (XXVII) (12 Dec. 1972)). In 1975, the General Assembly equally approved continued humanitarian assistance to “Indo-chinese displaced persons” (UN Doc. A/RES/3455 (XXX) (2 Aug. 1976)) and
acknowledged an additional category of “special humanitarian tasks” undertaken by the High Commissioner (UN Doc. A/RES/3271 (XXIX) (10 Dec. 1974); UN Doc. A/RES/3454 (XXX) (9 Dec. 1975)). In the course of the 1970s, UNHCR’s mandate was expanded to include assistance activities *ratione materiae* and protection to “displaced persons” *ratione personae*. See Goodwin-Gill and McAdam, supra note 15, at 27.

207. As Türk notes: “Refugee protection today has become infinitely more complex and difficult as compared to the Cold War period. Fundamental humanitarian values, which were so painstakingly translated into clear legal commitments in the aftermath of the Second War, have come under attack in ways not experienced since 1945.” V. Türk, ‘Freedom from Fear: Refugees, the Broader Forced Displacement Context and the Underlying International Protection Regime’, in V. Chetail (ed.), *Mondialisation, Migration and Human Rights: International Law under Review* (2007), 475 at 476.

208. At the initiative of the UN Disaster Relief Coordinator, a draft convention on expediting the delivery of emergency assistance was developed and was examined by a group of international legal experts chaired by the then ILC Chairman, Laurel Francis, together with representatives of a number of UN agencies (see UN Doc. A/39/267/Add.2-E/1984/96/Add.2 (18 Jun. 1984)). The draft convention was submitted to the ECOSOC with the recommendation that it decide on further review by a group of governmental experts (*ibid.*, para. 9), however, no follow-up action was taken on the initiative. In 1990, the Secretary-General noted that “donors, recipient Governments, intergovernmental and non-governmental organizations have [...] expressed their opinion on the desirability of new legal instruments in order to overcome the obstacles in the way of humanitarian assistance” but that “a group of important non-governmental organizations has declared itself as not being in favour of such a convention” due to the risk weakening the progress so far achieved over the years in providing humanitarian assistance. In particular [...] it is assumed that the concept of national sovereignty as interpreted by some might reinforce the insistence of Governments on the non-interference in their internal affairs and thus render a convention counterproductive” (UN Doc. A/45/587 (24 Oct. 1990), paras. 41 and 44).


212. Articles 1 (3), 55, 56 of the UN Charter. As early as 1758, Vattel referred to assistance among states as “an act of humanity that hardly any civilized Nation [...] would refuse”, see E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations*
and of Sovereigns (Vol. III) (1758), translated by C.G. Fenwick (1916), 114. For a discussion of the principles of cooperation and solidarity in different legal instruments applied to the provision of humanitarian assistance, see ILC, supra note 209 (2009 Report), at 16.


214. See Phuong, supra note, at 226.


216. See Articles 13, 59-61, 108 of Geneva Convention IV; Article 70 (2) and (3) of Additional Protocol I. States, international governmental and non-governmental organizations have a right to offer and provide humanitarian assistance with the consent of the states or local authorities concerned; see, for instance, Article 59 ff. and Article 108 ff. of Geneva Convention IV and Common Article 3 to all Geneva Conventions; Article 64 and Article 70 of Additional Protocol I; Article 5 (c) and Article 18 (2) of Additional Protocol II.


220. As the Secretary General pointed out “[h]umanitarian emergencies, by causing the mass exodus of people, may constitute threats to international peace and security”. Report of the Secretary-General on the work of the organization, UN Doc. A/48/1 (10 Sept. 10 1993), para. 481. The initial impetus of the Security Council to address such humanitarian emergencies might thus be to prevent the further displacement; however, the Security Council has also increasingly used Chapter VII measures to address legal guarantees for the provision of assistance after such displacement has already happened.

221. UN Doc. S/RES/688 (5 Apr. 1991), para. 3 (emphasis added).


223. UN Doc. S/RES/929 (22 Jun. 1994), para. 3, referring to UN Doc. S/RES/925 (8 Jun. 1994), para. 4 (a) and (b).


225. UN Doc. RES/1199 (23 Sept. 1998), paras. 2 and 4 (c).


229. UN Doc. S/RES/752 (15 May 1992), para. 7. Comprehensive sanctions were imposed by UN Doc. S/RES/757 (30 May 1992), para. 7. See also UN Doc. S/RES/770 (13 Aug. 1992), para. 3, in

230. This crisis was the “prelude to the forcible transfer of the Bosnian Muslim civilians”. Prosecutor v. Krstić, Judgment, Case No. IT-98-33 (2 Aug. 2001), para. 615, see also paras. 88-90.

231. Ibid. para. 653.

232. Institut de Droit International/Sixteenth Commission, supra note 210, at 8, Section XIII., para. 3. See also the Guiding Principles on the Right to Humanitarian Assistance, adopted by the Council of the International Institute of Humanitarian Law (San Remo) in Apr. 1993, principle 7: “The competent United Nations organs and regional organisations may undertake necessary measures, including coercion, in accordance with their respective mandates, in case of severe, prolonged and mass suffering of populations, which could be alleviated by humanitarian assistance. These measures may be resorted to when an offer has been refused without justification, or when the provision of humanitarian assistance encounters serious difficulties”.


235. On further UN practice regarding this rule see Henckaerts and Doswald-Beck (eds.), supra note 71, 194-195 (Rule 55).

236. See H. Kelsen, Pure Theory of Law (1934), translated by M. Knight (1967), 191. With regard to the “The Abolition of the Dualism of Right and Obligation”, Kelsen argues: “The Pure Theory of Law eliminates this dualism by dissolving the concept of “person” as the personification of a complex of legal norms, by reducing obligation and subjective law (in the technical sense) to the legal norm which attaches a sanction to a certain behavior and makes the execution of the sanction dependent on an action directed at its execution”.

237. See, for instance, Geneva Convention IV, Articles 2 and 6; Additional Protocol I, Art. 51 (2), Article 52 (2), Article 85 (3) lit. 3 (a) and (5). See also Institut de Droit International/Sixteenth Commission, supra note 210, at 8, para. XI.1.

238. Article 8 (2) lit. b (iii) of the ICC Statute.


240. For the relevant resolutions see supra notes 221 to 227.


242. Ibid., para. 5 (emphasis added).

243. See Wood, supra note 58, at 78.


246. Article 1 lit. c) i) and ii) of the Convention on the Safety of UN Personnel. However, UN operations authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies are explicitly excluded from the scope of application of the Convention (Ibid., Article 2 (2)). In 2005, an Optional Protocol to the Convention was adopted which inter alia extended the protection
granted by the Convention, without the requirement of a declaration of exceptional risk, to “all other United Nations operations established by a competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control for the purposes of [...] delivering emergency humanitarian assistance” (Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, annexed to UN Doc. A/RES/60/42 (8 Dec. 2005), Article II(1)). However, the Optional Protocol includes an “opt-out” clause providing that “a host State may make a declaration to the Secretary-General of the United Nations that it shall not apply the provisions of this Protocol with respect to an operation [...] which is conducted for the sole purpose of responding to a natural disaster” (Ibid, Article II (3)). The travaux préparatoires of the Convention reveal that the inclusion of the requirement of a declaration of exceptional risk in the Convention, and the opt-out clause in its Optional Protocol, were both motivated by a concern for the principle of sovereignty and non-intervention in the domestic affairs of the receiving State. See ILC, supra note 209 (2007 Memorandum), at 124, paras. 205-206.

247. UN Doc. S/RES/1502 (26 Aug. 2003). In the preamble to this resolution, the Security Council makes explicit attacks to the Baghdad attacks.

248. Ibid., para. 3.

249. In a recent resolution concerning the Mission of the African Union to Somalia (AMISOM), the Security Council “recalls its resolution 1502 (2003) on the protection of humanitarian and United Nations personnel, calls on all parties and armed groups in Somalia to take appropriate steps to ensure the safety and security of AMISOM and humanitarian personnel, and grant timely, safe and unhindered access for the delivery of humanitarian assistance to all those in need, and urges the countries in the region to facilitate the provision of humanitarian assistance by land or via air and sea ports.” UN Doc. S/RES/1801 (20 Feb. 2008), para. 14 (emphasis added).

250. UN Doc. 1502 (26 Aug. 2003), preamble. Although the resolutions on the protection of civilians in armed conflict and children and armed conflict do not directly refer to this resolution they all contain clauses with consistent reference to the “safety, security and freedom of movement of United Nations and associated personnel, as well as personnel of international humanitarian organizations”: UN Doc. 1265 (17 Sept.), para. 9; UN Doc. 1296 (19 Apr. 2000), para. 12; UN Doc. S/RES/1674 (28 Apr. 2006), para. 22.

251. See Goodwin-Gill and McAdam, supra note 15, at 471 (original emphasis).

252. Article 1C of the 1951 Convention.

253. Türk emphasizes that despite the lack of express references to solutions, the status and standard of treatment envisaged by the 1951 Convention, as complemented by international human rights law, it is still “an important yardstick in the context of defining durable solutions” Türk, supra note 207, at 415.

254. UNHCR Statute, paras. 1 and 8 (c).

255. UNHCR Statute, para. 9.

256. UN Doc. A/RES/38/121 (16 Dec. 1983), preamble, underlining that voluntary repatriation is the “the most desirable and durable solution to problems of refugees”.

257. Türk, supra note 207, at 516.

258. See, for instance, UN Doc. S/RES/1785 (21 Nov. 2007), preamble, in which the Security Council emphasizes with regard to Bosnia and Herzegovina that the “comprehensive and coordinated return of refugees and displaced persons throughout the region continues to be crucial to lasting peace”.


262. In Case 41/74, Van Duyn v. Home Office [1975] 1 CMLR 1, at 18, the European Court of Justice considered that it was “a principle of international law which the EEC Treaty cannot be assumed to disregard in the relations between Member States, that a State is precluded from refusing its own nationals the right of entry or residence.”

263. Article 13 (2) of the UDHR states: “Everyone has the right to leave any country, including his own, and to return to his country” (UN Doc. A/RES/217A (III) (12 Dec. 1948). Article 12 (4) of the ICCPR chooses a different formulation in providing that: “No one shall be arbitrarily deprived of the right to enter his own country” (999 UNTS 171 (23 Mar. 1976).


265. See Chetail, supra note 261, at 11.

266. The General Assembly has recognized both the inherently political dimension of the problem and the inalienable “right to return” with regard to Palestinian refugees. See Goodwin-Gill, supra note 264, at 101 (FN 18).


269. UN Doc. S/RES/687 (3 Apr. 1991), para. 30 and 31. The statement was obviously made with regard to repatriation of civilians after the end of hostilities in international humanitarian law. For a discussion of voluntary repatriation with regard to international humanitarian law, refugee law and human rights see Chetail, supra note 261, at 6.


271. On Tajikistan see UN Doc. S/RES/999 (16 Jun. 1995), para. 8; on Rwanda see UN Doc. S/RES/1078 (9 Nov. 1996), preamble, para. 7; on Georgia/Abkhazia see UN Doc. S/RES/971 (15 Jan. 1995), preamble, paras. 5,6,7; on Kosovo see UN Doc. S/RES/1239 (14 May 1999), para. 4.

272. Ibid., para. 4 (emphasis added).


275. Agreements on a Comprehensive Political Settlement of the Cambodian Conflict, 31 ILM 183, 184 (23 Oct. 1991) [hereinafter: Cambodia Agreements]. The other two parts were an agreement covering international guarantees and a declaration regarding the rehabilitation and reconstruction of Cambodia.


279. The signing of the General Framework Agreement for Peace in Bosnia and Herzegovina, 35 ILM 75 (15 Dec. 1995) [hereinafter: Dayton Accords] in Paris was followed by Security Council resolution 1031 (1995) in which the Council welcomed the signing as well as the parties’ commitment to the right of all refugees to return to their homes of origins in safety and noted the UNHCR’s leading humanitarian role given to it by the Peace Agreement: UN Doc. S/RES/1031 (15 Dec. 1995), para. 8.

The Rambouillet Accord stipulated that the Security Council was to adopt a resolution under Chapter VII of the UN Charter, including the establishment of a multinational military implementation force in Kosovo. The Council passed resolution 1244 in which it mandated the international security presence as well as the international civilian presence to establish a secure environment in order to assure “the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo”. In Annex 2 to this resolution, the Security Council explicitly envisages that UNHCR supervise the safe and voluntary return of refugees. UN Doc S/RES/1244 (10 Jun. 1999), para. 9 (c) and 11 (k), and Annex 2, para. 7


281. UN Doc. S/RES/1470 (28 Mar. 2003), para. 16. The Abuja Ceasefire Agreement was signed between the government of Sierra Leone and the RUF.


283. See Newland and Meyers, supra note 260, at 27. Newland and Meyers note that “[d]espite problems associated with culture, cost, speed and so forth, UNHCR has welcomed the collaboration with peacekeeping forces. Working to implement the repatriation and reintegration components of comprehensive peace plans as in Cambodia, El Salvador and Mozambique, UNHCR has benefited from the improved security environment that peacekeepers help to establish. Specific activities such as quartering of demobilized troops, demining, repair of essential infrastructure and collection of weapons have made refugee return safer.”


286. Ibid., para. 2(b) (i). Of further relevance in this context is UN Doc. S/RES/1790 (18 Dec. 2007), preamble.

287. See, for instance, UN Doc. S/RES/1483 (22 May 2003), para. 8 (b) (on “the safe, orderly, and voluntary return of refugees and displaced persons” to Iraq) and UN Doc. S/RES/1806 (20 Mar. 2008), para. 4 (f) (on the “the voluntary, safe, dignified and sustainable return of refugees and internally displaced persons” to Afghanistan).

288. UNHCR, Handbook on Voluntary Repatriation: International Protection (1996), section 2.4; UN Doc. A/RES/49/169 (24 Feb. 1995), para. 9, in which the General Assembly [r]eiterates that voluntary repatriation, when it is feasible, is the ideal solution to refugee problems, calls upon countries of origin, countries of asylum, the Office of the High Commissioner and the international community as a whole to do everything possible to enable refugees to exercise freely their right to return home in safety and dignity”. Similar language can be found in most other General Assembly resolutions concerning international refugee protection: see, for instance, UN Doc. A/RES/56/137 (15 Feb. 2002), para. 10; UN Doc. A/RES/63/148 (27 Jan. 2009), para. 9.


290. UN Doc. E/CN.4/Sub.2/1997/31 (27 Mar. 1997), at 4. The Committee on the Elimination of Racial Discrimination explains this link in the following manner: “The flight of hundreds of thousands of refugees or displaced persons who leave their homes and properties empty, as a
result of an armed conflict, frequently results in such property being occupied by non-authorized people. Such is at present the case in the Great Lakes region, Bosnia and Herzegovina, Cyprus and elsewhere. \textit{After their return to their homes of origin all such refugees and displaced persons have the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated for any such property that cannot be restored. Furthermore, any commitments or statements relating to such property made under duress should be null and void.} \textquote{emphasis added}.  

291. UN Doc. A/RES/194 (III) (11 Dec. 1948), para. 11. The paragraph continues by instructing \textquote{the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations}.  


294. See Tomuschat, supra note 102, at 70, referring to the following resolutions on Cyprus: UN Doc. A/3212 (XXXIX) (1 Nov. 1974), para. 5; UN Doc. A/RES/34/30 (20 Nov. 1979), para. 7; UN Doc. S/RES/361 (30 Aug. 1974), para. 4.  


302. UNMIK Regulation 1999/23 (15 Nov. 1999) established the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC), implementing the right to return as recognized in Security Council resolution 1244. The HPD was mandated to \textquote{provide overall direction on property rights in Kosovo} \textquote{(ibid., section 1.1). The HPCC was established an independent organ of the Directorate to settle private non-commercial disputes concerning residential property referred to it by the Directorate until the Special Representative of the Secretary-General determines that local courts are able to carry out the functions entrusted to the Commission \textquote{(ibid., section 2.1).}  

303. Section 7.2 of UNTAET Regulation 1999/1 that \textquote{"UNTAE shall also administer any property, both as specified in section 7.1 of the present regulation and privately owned that was abandoned after 30 Aug. 1999, the date of the popular consultation, until such time as the lawful owners are determined." UNTAET was established by UN Doc. S/RES/1264 (15 Sept. 1999) and UN Doc. S/RES/1272 (25 Oct. 1999).}


306. 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, UN Doc. A/RES/60/147 (16 Dec. 2005), para. 18 [hereinafter: Basic Principles and Guidelines on a Right to Remedy and Reparation]. The Basic Principles and Guidelines are the result of more than 15 years of work by independent experts, Professors Theo van Boven and M. Cherif Bassiouni, as well as long-standing participatory process of consultations which involved Member States, international organizations and NGOs. As the title suggests, they establish the right to restitution as a secondary norm of international law, conditional upon a prior violation of human rights or international humanitarian law. This approach is notably different from the Pinheiro Principles, which establishes the right to restitution as a primary norm of international law (see discussion), but similar to the right to restitution, compensation, and rehabilitation included in Article 75 of the ICC Statute mentioned in the preamble of the Basic Principles and Guidelines.

307. FAO/IDMC/OCHA/OHCHR/UN-Habitat/UNHCR, Handbook on Housing and Property Restitution for Refugees and Displaced Persons (2007), 24. The Handbook comments Article 2.2 of the Principles as follows: “States shall demonstrably prioritise the right to restitution as the preferred remedy for displacement and as a key element of restorative justice. The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution.” (emphasis added).


309. Ibid., para. 57.
3. Normative Erosion of International Refugee Protection: Back to State Security

Since the early 1990s the Security Council has used its enforcement measures under Chapter VII to strengthen different aspects of international refugee protection. It has addressed the root causes of forced displacement, supported the assistance to and protection of refugees and IDPs in on-going conflict situations and promoted durable solutions. However, apart from these positive normative effects on the security of refugees and displaced persons, the Security Council has also been criticized for fuelling a backward trend to State security concerns, as illustrated by increasingly restrictive immigration and asylum policies, in particular after the attacks of 11 September 2001. By prioritizing these State security objectives over humanitarian considerations, the Security Council has been accused of eroding or even violating established protection standards through its inherently political actions.

Any such violation of norms of international refugee protection evidently presupposes the existence of limits of the Security Council’s enforcement powers. Although it is still contested which rules of general international law apply to Security Council actions, the Council is at least bound by the principles and purposes of the UN Charter which are reflected in internal UN documents such as the UNHCR Statute but also in treaties that were concluded under the auspices of the United Nations such as the 1951 Convention and the 1967 Protocol. As Gowlland-Debbas observes in this context, “[t]andis que le but principal de la Convention est de conférer aux réfugiés un statut dans le territoire des parties, elle est en même temps étroitement liée aux buts et principes de la Charte et à la Déclaration universelle des droits de l’homme.” Leaving aside the controversial question of judicial review by the ICJ, the only option a Member State has in case of an unlawful Security Council resolution is to challenge the legality of this binding decision and unilaterally decide not to comply with it – conduct that would in turn have legal consequences for the State concerned.

Even below the level of a clearly established violation of international law, however, the Security Council’s practice may weaken refugee protection standards. By using its powers
under Chapter VII of the UN Charter, the Security Council may temporarily suspend norms and treaty obligations related to international refugee protection or subordinate them to the enforcement of other rules of international law. Repeated action may then lead to a permanent erosion of normative standards. Such practices will have a particularly negative impact on norms of customary international law whose formation or consolidation may have previously benefited from the Security Council’s actions, for instance, in the context of the protection of civilians. The following discussion will therefore examine the principal measures by which the Security Council has addressed international refugee protection, peace operations and economic sanctions, in order to assess the erosion of international protection standards in view of the Security Council’s recent initiatives to address human security alongside traditional security considerations.

3.1 Erosion Through UN Peace Operations

As humanitarian organizations such as UNHCR have become increasingly involved in countries of origin and zones of active conflict, they have witnessed massive violations of human rights and international humanitarian law, have seen their assistance being manipulated for military strategies and their refugee camps being heavily militarized. The humanitarian space, first defined by the President of Médecins Sans Frontières as a “space of freedom in which we [humanitarian organizations] are free to evaluate needs, free to monitor the distribution and use of relief goods, and free to have a dialogue with the people”, has shrunk over the past decades for a variety of reasons linked to an increasingly complex political and security situation. As a result, UNHCR has become more and more dependent on the guidance of the Security Council and the (military) support of UN peace operations when providing in-country protection and assistance to refugees and displaced persons. Although the necessity of this interaction has been widely acknowledged and even welcomed, it is argued that the close cooperation between UNHCR with its humanitarian, non-political mandate and the politically authorized peace operations has also had negative normative effects, in particular with regard to the creation of safe areas and the erosion of established principles of humanitarian action.

3.1.1 Peace Operations and the Creation of Safe Areas: The Right to Leave and to Remain?

Although the Security Council has strengthened the right to return in various resolutions, its actions leading to the establishment of so-called “safe havens” in zones of conflict have rather negatively influenced the normative content of the correlative right to leave. Chimni describes these safe havens or safe areas as a “clearly demarcated space in which individuals fleeing danger can seek safety within their own country”. The creation of safe areas has as its aim not only to protect civilians who already live in these areas, but also to provide a temporary refuge. It has thus been argued that these safe areas find their origin in the concept of “preventive protection” and a “right to remain” as an alternative to the right to leave and seek asylum, especially in the wake of the adoption of Security Council resolution 688. Although this resolution did not explicitly mention the creation of safe areas, it did have a strong humanitarian focus on the civilian population that led the United States, France, and Great Britain to send military forces without the consent of the government of Iraq. However, given Turkey's pronounced
interest in preventing any refugee flows into its territory, the establishment of safe areas through this multinational force has been questioned for its true intention: the protection of State interests of potential asylum countries or of the physical safety of internally displaced persons. Goodwin-Gill, for instance, notes that resolution 688 remains “ambiguous” and “controversial”,321 in part, because it implicitly sanctioned Turkey’s policy and intended to work around it. Others have even claimed that the willingness of the international community to acquiesce to Turkey’s closed policy through the establishment of safe havens challenged the principle of non-rejection at the frontier, as an element of the norm of non-refoulement.322

The concept of safe areas was again and more officially applied in 1993 when the Security Council, acting under Chapter VII, passed resolution 819 setting up a safe area in Srebrenica. Resolution 824 extended the concept to the towns of Zepa, Tuzla, Sarajevo, Gorzade, and Bihac.323 Like in Iraq, the safe havens in Bosnia were created as a direct consequence of a third party’s refusal to accept Bosnian refugees, without the consent of the parties to the conflict. Due to a lack of military protection, two of the six allegedly safe havens eventually fell to the Serbs, and the entire male population of Srebrenica was massacred without any reaction from UN Protection Force (UNPROFOR) mandated to protect these areas. At the same time, the Security Council also established safe areas in Rwanda by authorizing a French intervention force to “contribute to the security and the protection of displaced persons, refugees and civilians at risk”,324 including through the establishment and maintenance of secure humanitarian areas.325 Consequently, France blocked the application of Rwandans’ asylum demands on the basis that they were being protected inside their own country while thousands of IDPs were killed in context of the Rwandan genocide.326 By legitimizing the creation of safe havens, the Security Council has thus weakened the established right to leave and seek asylum. According to Hathaway and Neve, the substantively unclear “right to remain” offered instead was nothing more than “a hollow rationalization offered by powerful States for their clear infringement of the right to seek asylum.”327

Despite the mixed experience of the 1990s, and in particular the critical failure to protect the internally displaced in Rwanda and Srebrenica, the Security Council has renewed its willingness to consider the “appropriateness and feasibility of temporary security zones and safe corridors” for the protection of civilians and the delivery of assistance in situations characterized by the threat of genocide, crimes against humanity and war crimes in resolution 1296 on the protection of civilians.328 From a normative point of view, this provision will not necessarily contribute to the erosion of the right to leave. In times of internal armed conflict, safe areas may arguably prove to be useful as a measure of last resort in order to ensure the protection of civilians if the Security Council’s actions to address the root causes of displacement have failed; however, where the Security Council decides to establish safe havens in the future, a credible military force will be crucial for the protection of the internally displaced persons in these areas.329 In line with UNHCR’s approach to internal displacement, safe havens should only be adopted on the basis of humanitarian considerations and with due respect for the right to leave and seek asylum.330
3.1.2 Peace Operations and UNHCR’s Humanitarian Mandate

The inevitable interface between humanitarian organizations like UNHCR and the Security Council and its authorized military peace operations has drawn renewed attention to a broader debate to the balance between “humanitarian” and “political” mandates in the UN system. It is difficult to clearly classify mandates into certain categories. Measured by the effects of their activities, even peacekeeping mandates could be understood as humanitarian operations – especially in the light of the purposes of the UN Charter (Article 1 (3)) – because they mitigate the impact of armed conflict resulting in human rights violations as well as flows of displaced persons and refugees; however, the use of force has political effects which may counteract the humanitarian objectives of such action as illustrated by the above-discussed safe-areas. The on-going discussion about the potential conflict between political and humanitarian mandates therefore concentrates mainly on the primary responsibilities and functions of the organs concerned. In particular, it has been questioned whether the increased interaction of humanitarian organizations such as UNHCR with the Security Council will compromise the humanitarian principles of impartiality, neutrality, independence, and the consent of the host State.

In order to understand this criticism it is important to note that these humanitarian principles originate in the mandate of the International Committee of the Red Cross which is markedly different from the mandate of UNHCR. Paragraph 2 of the UNHCR Statute merely states that “the work of the High Commissioner shall be of an entirely non-political character, it shall be humanitarian and social”. This clause was included at the outset of the Cold War when political tensions were high and afterwards only used occasionally to underline the “humanitarian nature” of asylum. In contrast, the humanitarian principles of the ICRC, enshrined in its Statutes and in the Geneva Conventions, are the result of best practices, promoting the legitimacy of the ICRC and the effectiveness of its functions in difficult environments. While UNHCR as part of the overall UN system is not directly bound by these principles, they still represent the precondition for the enjoyment of the protection granted to humanitarian organizations by the Geneva Conventions. When UNHCR expanded its functions to activities to countries of origin in the early 1990s, ExCom and the High Commissioner began to equate attributes of “non-political” and “humanitarian” in its mandate with the established ICRC principles of “neutrality”, “impartiality”, “independence” and the “consent” of the parties concerned. The reasons for UNHCR’s increased use of the ICRC’s principles are thus a mixture between doctrinal reorientations towards involvement with political situations at the root of displacement and operational difficulties in conflict situations to which the established Red Cross principles seemed to offer a promising solution.

Nevertheless, the effect intended by the invocation of these principles to maintain or enlarge humanitarian space was somewhat paradoxically counteracted by UNHCR’s increasing cooperation with the Security Council and its peace operations. Although the Security Council has generally preferred not to directly request UNHCR to provide in-country protection in conflict settings, it has urged and supported the Secretary-General’s decisions to send the UNHCR to places such as the former Yugoslavia or the Great Lakes Region in order to “defuse the situation”. Consequently, UNHCR has been active, often in a leading capacity, in virtually all major humanitarian emergencies,
including those in which the consent of the host State was not given.\textsuperscript{338} As shown above, today UNHCR cooperates with the Security Council’s peace operations in all phases of displacement, from prevention of refugee flows to voluntary repatriation. Already in 1992 High Commissioner Ogata had described the dangers resulting from this cooperation for the foundations of humanitarian action by stressing that

\begin{quote}
"[t]here are understandable and obvious differences between the humanitarian aims of UNHCR and the political objectives of the Security Council. Linking the two could at least potentially jeopardize our neutrality and impartiality and affect our ability to work in security and confidence on both sides of a front-line. But the security conditions on the ground left us with little choice."
\end{quote}

The Security Council has tried to solve this dilemma between the need for military protection and the resulting weakening of humanitarian principles by a two-pronged strategy.

First of all, the Council has stressed the significance of these principles for the safety of relief workers but also to ensure humanitarian access to affected populations. Only humanitarian organizations that respect these principles would qualify for a potential right to humanitarian access under international humanitarian law in light of the Security Council’s recent practice. Resolution 1502 on the safety of humanitarian personnel clearly underlines the “importance for humanitarian organizations to uphold the principles of \textit{neutrality, impartiality and humanity} in their humanitarian activities”.\textsuperscript{340}

Second, the Security Council has changed the structure of its peace operations by creating so-called integrated missions in which a Special Representative of the Secretary-General holds the overall responsibility for political, military and humanitarian responses. These integrated missions provide for a larger civilian component for field administration and training for both military and civilian personnel.\textsuperscript{341} Accordingly, the Security Council has used its framework resolutions on the protection of civilians in armed conflict to request the Secretary-General to ensure that UN personnel involved in peacemaking, peacekeeping and peace-building activities have appropriate training in international humanitarian law, human rights and refugee law, including child and gender-related provisions, negotiations and communication skills, cultural awareness and civilian-military coordination, and urged States and relevant international and regional organizations to take similar measures.\textsuperscript{342}

Opinions about these integrated missions largely diverge: Several critics argue that integration by implication further undermines the impartiality and neutrality of humanitarian action, while others claim that humanitarian space can be better protected through integrated structures than in situations of fragmentation, because the humanitarian perspective is a part of the mission itself.\textsuperscript{343} Given their country-specific designs, it is difficult to generally assess at this point whether integrated missions will ultimately halt or even reverse the current erosion of the humanitarian principles, and the simultaneous reduction of humanitarian space. However, they may certainly represent potential tools at the Security Council’s disposal to reconcile the tensions between political and humanitarian mandates related to international refugee protection within its overall framework on the protection of civilians in armed conflict.
In addition to UN peace operations, economic sanctions are another important Security Council measure with the potential to strengthen but also weaken norms of international refugee protection. Whereas peace operations have largely influenced international refugee protection through practice in the field, sanctions have a more direct impact on the development of international norms. In addition to ordering the targeted entity to abandon conduct considered to constitute a threat to international peace and security, resolutions containing sanctions may temporarily suspend – on the basis of Article 25 and 41 of the UN Charter – some of the subjective rights of States and even non-State actors, thus rendering partly or entirely lawful a reaction which would otherwise have been contrary to international law. Although derogation from established norms of international law is likely to require an element of deliberateness on the part of the Security Council, the erosion of international refugee protection has mostly resulted from the unintended effects of its enforcement actions. Some of these side-effects have been mitigated by so-called targeted sanctions which were adopted due to the widespread dissatisfaction with comprehensive sanctions, especially their devastating humanitarian effects. However, it is submitted here that even targeted sanctions have negatively affected international refugee protection, notably in the counter-terrorism context.

3.2.1 Impact of Sanctions on Socio-Economic Rights of Refugees

The indiscriminate impact of comprehensive sanctions on the human rights of civilian populations was observed as early as 1992 by the UN Mission sent to Iraq to assess the post-conflict damage after the First Gulf War. In its report to the Security Council, the Mission noted that sanctions imposed by the Council may have a particularly heavy socio-economic impact on vulnerable social groups such as women, children and displaced persons. For this reason, the mission called for an immediate lifting of the sanctions. Although socio-economic rights alone do not represent a sufficient ground to obtain refugee status, the 1951 Convention does provide for certain socio-economic entitlements of refugees such as housing, employment and education in their respective countries of asylum on a non-discriminatory basis. Moreover, international human rights law offers complementary protection that is independent from refugee status.

As the practice of the Security Council during the 1990s revealed, sanctions may normatively weaken these socio-economic rights of displaced persons at different stages of their displacement. On the one hand, most countries that are the target of sanctions are refugee-producing, and their negative human rights record frequently gives rise to internal tensions. The isolation of States facing comprehensive sanctions may further aggravate the internal situation and lead to more forced population movements which, in turn, create or exacerbate a threat to international peace and security. On the other hand, sanctions also affect refugee populations in third States whose economies may already suffer from the presence of large numbers of refugees. Although Article 50 of the UN Charter provides that third States faced with “special economic problems” arising from preventive or enforcement measures have a right to consult with the Security Council, this mechanism has had only limited success. Sanctions may hence degrade conditions in the country of origin, and in the country of asylum at the same time. With
regard to Haiti in 1993, for instance, former High Commissioner Ogata underlined that “the political stalemate, combined with a deteriorating economy and biting sanctions, have kept alive the risk of a major outflow” from the country while calling “to all Governments in the region to maintain an open, humanitarian policy of admission for those who are compelled to flee.”

18 Whereas the Council is authorized by Article 41 to impose measures interrupting economic relations, it is also required by Article 24 (2) in conjunction with Article 1 of the UN Charter to promote respect for human rights, including social and economic rights, to solve problems of a humanitarian character, and to settle international disputes in conformity with international law, including refugee law, human rights and humanitarian law. In view of this obligation under the UN Charter, the Council has included humanitarian exceptions in most comprehensive sanctions regimes, permitting, subject to the supervision of the sanctions committee, the delivery of foodstuffs, medical supplies, cooking and heating fuel and materials essential for civilian needs. Nonetheless, humanitarian organizations have still reported the infliction of suffering leading to hunger, malnutrition and deaths of vulnerable persons, Iraq being the most prominent example. Part of the problem is certainly the political nature of economic sanctions under the UN Charter and the message they are supposed to send to governments or parties threatening or breaching international peace and security. In decisions on the imposition, suspension or lifting of sanctions, political and traditional security concerns have often outweighed humanitarian considerations on behalf of refugees, IDPs and other vulnerable populations.

19 Against the background of the proliferation of sanctions measures during the 1990s, numerous proposals and pressure from diverse sources have attempted to reconcile these political and humanitarian concerns. The General Assembly has renewed efforts to render the Council politically accountable and has initiated discussion within subsidiary organs, including the Special Committee on the Charter of the United Nations and the Sixth Committee, on different issues related to the implementation of sanctions regimes. The Committee on Economic, Social and Cultural Rights has equally criticized the socio-economic impact of sanctions and made a number of proposals in its General Comment No. 8 for ensuring that such rights find appropriate consideration in the design of sanctions measures. Moreover, other subsidiary organs, such as UNICEF, specialized agencies such as WHO, or non-governmental organizations such as the ICRC, have underlined the limits set by the human rights, humanitarian law and refugee law framework.

20 The policy process that was thus set in motion finally resulted in the move from comprehensive sanctions to targeted sanctions regimes which illustrates particularly well the increasing emphasis on human security in the Security Council’s activities. In theory, targeted sanctions differ from comprehensive sanctions in two ways. First, they more effectively target the political elite committing acts considered reprehensible by the international community, via arms embargos, financial sanctions, and travel restrictions. Second, targeted sanctions are more focused on the protection of vulnerable social groups (for example, children, women, the elderly, and refugees) from collateral damage by exempting specified commodities (such as food and medical supplies) from the embargo on a more institutionalized basis. However, while targeted sanctions have meanwhile fully replaced comprehensive sanctions, concerns about the humanitarian impact of sanctions measures remain a challenge to the Security Council’s actions with
regard to international refugee protection. Accordingly, the 2005 Summit Outcome document recognized that sanctions remain an important tool for maintaining international peace and security without recourse to the use of force but also stressed the need “to ensure that sanctions are carefully targeted in support of clear objectives” and that they are “implemented in ways that balance effectiveness to achieve the desired results against the possible adverse consequences, for populations and third States.”

The Security Council itself has recognized this double-edged nature of sanctions and made efforts to prevent the erosion of socio-economic standards and possible human rights violations by reiterating the need to assess the impact of sanctions on vulnerable populations, for instance, in its resolutions on children and armed conflict.

### 3.2.2 Sanctions as Impediments to Humanitarian Access

The imposition and lifting of sanctions do not only directly weaken the socio-economic rights of refugees and displaced persons but they also have a significant impact on humanitarian organizations themselves, namely on their ability to gain access to refugees in order to provide international protection and assistance. Although the Security Council has often required Member States and other relevant actors to allow for humanitarian assistance, its own actions may de facto represent more serious impediments to humanitarian access. In this respect, in resolution 51/242 on Annex II of the Supplement to an Agenda for Peace, entitled “Question of sanctions imposed by the United Nations”, the General Assembly emphasized that “[h]umanitarian assistance should be provided in an impartial and expeditious manner. Means should be envisaged to minimize the particular suffering of the most vulnerable groups, keeping in mind emergency situations, such as mass refugee flows.”

Under the comprehensive sanctions regime in the Federal Republic of Yugoslavia (Serbia and Montenegro) and Bosnia, for instance, the delivery of humanitarian assistance was impeded or delayed in a number of instances due to the slow granting of authorizations by the sanctions committee for the Federal Republic of Yugoslavia (Serbia and Montenegro) as a result of case-by-case processing. Consequently, UNHCR closely cooperated with the committee by streamlining a procedure of prompt humanitarian exemptions from sanctions since 1993, thus promoting their mutual understanding of each other’s interests and constraints. The end result was a clear and almost automatic exemption procedure whose raison d’être was to ensure the effectiveness of the delivery of humanitarian relief items and thus also international protection. According to one observer, it could not have been claimed that the sanctions committee had in any way hampered the provision of international protection in the Federal Republic of Yugoslavia or in Northern Bosnia-Herzegovina by the time sanctions were lifted at the end of 1995. The Security Council could therefore not be accused of having contributed to violations of human rights when initially imposing the sanctions without automatic exemption of humanitarian goods.

After this ad hoc cooperation between UNHCR and the FRY (Serbia and Montenegro) sanctions committee, it took different attempts to reform exemption procedures, such as the rather unsuccessful Oil-For-Food Program, before the practice of the sanctions committees showed some improvements. Besides the impractical and lengthy item-specific exception procedure mainly applied during comprehensive sanctions regimes, institution-specific exemptions now allow recognized international humanitarian
organizations – NGOs like Oxfam, the Red Cross and the Red Crescent Societies, or intergovernmental organizations like UNHCR – blanket exemptions to import items to support their activities on the ground. Country-specific exemptions also take into account the specificities of each sanctions episode. Consequently, the humanitarian and legal considerations that led the Security Council to address the erosion of socio-economic standards in the first place have also resulted in an institutional learning process in favor of the protection of vulnerable populations for the Security Council's sanctions committees.

3.2.3 Sanctions and the Securitization of Refugee Flows: Asylum-Seekers as Potential Terrorists?

While the socio-economic impact of targeted sanctions may be substantially less than for comprehensive sanctions, the adoption of the Security Council counter-terrorism resolution 1373 has shown that targeted measures may have new and equally negative effects on international refugee protection. In the wake of the terrorist attacks of 11 September 2001, this resolution linked refugee status with acts of terrorism, thus reinforcing a general trend towards the securitization and criminalization of refugee flows. More precisely, the Security Council called on States to take “appropriate measures” to ensure that asylum seekers have not “planned, facilitated or participated in the commission of terrorist acts”, and to “ensure [...] that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists”.

The resolution further alludes to the so-called exclusion clause of Article 1 F(c) of the 1951 Convention by declaring that: “Acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also to contrary to the purposes and principles of the United Nations.”

Although resolution 1373 does not impose targeted sanctions in the classical sense, it obliges UN Member States to freeze all funds and other financial assets of persons who commit or attempt to commit terrorist acts or support such activities, and also provides for the criminalization of certain acts in the domestic laws of States. At the same time, the resolution does not provide a definition of terrorist acts and leaves it to implementing States to designate the entities that are targeted by sanctions at the domestic level. Resolution 1373 is therefore frequently associated with the targeted sanctions regime established under resolution 1267 against Al-Qaida and the Taliban but leaves wider discretion at the implementation level. Although the Security Council’s statements on international refugee protection were only made in the recommendatory part of this resolution, its quasi-legislative character and the discretion left to Member States in the implementation of its provisions form the general context in which the normative effects of this resolution have to be interpreted.

Given the level of specificity in the Security Council’s language, it is submitted here that its statements on the substantive content of international refugee law may directly weaken well-established standards under the regime of the 1951 Convention, which already contains specific rules governing the definition of a refugee and the denial of refugee status. As State security concerns have always been a part of the international protection regime, these rules arguably provide to some extent for exclusion from
refugee status in the case of “terrorist acts”. Article 1 F (c), for instance, has been the subject of a long-standing debate that may have been closed by the Security Council’s declaration that terrorism is “contrary to the acts contrary to the purposes and principles of the United Nations”. In addition, the Security Council may have invited for a progressive interpretation of other relevant clauses of the 1951 Convention. As Allain observes, by basing themselves on resolution 1373, States may “look to breathe new life into Article 33 (2) of the 1951 Convention”, which provides for an exception to the principle of non-refoulement in case of security concerns of the country of asylum. Such a reinterpretation of the provisions of 1951 Convention could also find support in Article 103 of the UN Charter, which allows the Security Council to override existing treaty law when adopting mandatory measures under Chapter VII. Yet, it is to be kept in mind that the principle of non-refoulement, as the foundational element of international refugee protection, is not only enshrined in Article 33 of the 1951 Convention, but is also customary international law and may even have acquired the status of a peremptory norm of international law, or ius cogens. Consequently, it is not only binding for parties to the 1951 Convention but also for the Security Council.

While the principle of non-refoulement sets the benchmark for the implementation of resolution 1373 by States, the Security Council’s statements have nonetheless nourished existing national policies aimed at the containment of refugee flows. The British Anti-Terrorism, Crime and Security Act, for instance, provides the Secretary of State with the power to “certify” a suspected international terrorist. In an asylum appeal, Section 33 further allows him to certify that the 1951 Convention does not apply so that the appellant does not benefit from the protection of non-refoulement “because Article 1(F) or 33(2) applies to him” and that his removal from the United Kingdom would be “conducive to the public good”. In Suresh, a national security case in Canada concerning the exception of Article 33 (2) of the 1951 Convention, involvement in “terrorism” was a basis for deportation, but terrorism was not defined in the relevant legislation. Former High Commissioner Lubbers thus rightly notes that “there have been examples of measures that – even though they may have been adopted in good faith – have negatively affected people in need of international protection. In some cases, carefully built refugee protection standards may have been eroded by the application of unduly restrictive legislative or administrative measures.”

Considering this impact of resolution 1373 on national and international refugee protection, the Security Council has further elaborated on the terms of resolution 1373 which already generally require counter-terrorism measures to be “in conformity with international law”. After first emphasizing in resolution 1456 that “States ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law”, the Security Council has reiterated this formulation in connection with all 1373 follow-up resolutions. Resolution 1624 even explicitly refers to the right to seek asylum and 1951 Convention as well as the right to non-refoulement. Interestingly, these formulations are nearly identical with the relevant resolutions of the General Assembly which has used its general competence over international refugee protection to keep a watchful eye on the counter-terrorism activities of the Security Council. Similar to comprehensive sanctions, the normative effects of the Security Council’s targeted
sanctions on international refugee protection do not evade the political checks and balances of the UN system. Nevertheless, with its counter-terrorism resolutions, the Security Council has once again “chosen to make dispositions in an area governed by precise principles of public international law”.390

A critical appraisal of the Security Council’s considerable contribution to the development of international refugee protection in some areas therefore has to acknowledge that the normative activism of this political organ may also have negative repercussions on the rules of international law governing the protection of refugees.

NOTES


311. Gowlland-Debbas, supra note 83, at 201.

312. These legal consequences would result from a violation of Article 25 of the UN Charter as occasionally emphasized by the Security Council (UN Doc. S/RES/232 (1966) on South Rhodesia; UN Doc. S/RES/686 (2 Mar. 1991) on Iraq.). On the scope and content of Article 25 of the UN Charter see N. Thomé, Les Pouvoirs du Conseil de Sécurité au regard de la Pratique Récente du Chapitre VII de la Charte des Nations Unies (2005), 228. For a discussion of the legal consequences of such non-compliance see K. Doering, ‘Unlawful Resolution of the Security Council and their Legal Consequences’, (1997) 1 Max Planck Yearbook of United Nations Law 91 at 99. See also M. Koskenniemi, supra note 77, at 342, stating that the “right ‘of last resort’ of member States [sic!] to decide, for themselves, on whether an act has been ultra vires is difficult to reject – despite the evident problems it causes to the credibility of the collective security system.”

313. See Newland and Meyers, supra note 260, at 17.

314. In the preamble to UN Doc. S/RES/941 (23 Sept. 1994), for instance the Security Council took note "of the information provided by the United Nations High Commissioner for Refugees (UNHCR) and the International Committee of the Red Cross (ICRC), and that contained in other relevant reports (UN Doc. S/1994/265 and UN Doc. S/1994/674), particular regarding grave violations of international humanitarian law affecting the non-Serb population in those areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces".


316. On the “right to leave” see supra notes 263 and 264.

318. See Phuong, supra note, at 137.


320. The idea for the establishment of safe areas originated in international humanitarian law which presupposes the consent of the warring parties for the creation of neutralized zones (compare, for instance, Art. 23 of the Geneva Convention Relative to the Treatment of Prisoners of War (75 UNTS 135, 12 Aug. 1949) [hereinafter: Geneva Convention III], Art. 14 and 15 of the Geneva Convention IV. The question of consent to the so-called Operation Provide Comfort in Iraq is problematic. Minear and Weiss argue that Operation Provide Comfort was based on consent, because the UN had negotiated memoranda of understanding with governmental authorities several times (L. Minear and T. Weiss, Mercy Under Fire: War and the Global Humanitarian Community (1995), 171). On the other hand, Landgren points out that the safe zone was established in a military climate and was not based on consent (K. Landgren, ‘Safety Zones and International Protection: A Dark Grey Area’, (1995) 7 International Journal of Refugee Law 436).

321. As Goodwin-Gill observes further: “Turkey’s decision to close its border to Kurdish refugees, and the support or non-object of a substantial number of members of the international community, if it did not breach non-refoulement (understood as a general principle of international law that included the dimension of non-rejection at the frontier), certainly consolidates the exception provided by safe havens”. G.S. Goodwin-Gill, The Refugee in International Law (1996), 141.


325. See Landgren, supra note 320, at 448.


327. Ibid.


330. As the UNHCR Executive Committee emphasized “activities on behalf of internally displaced persons must to undermine the institution of asylum, including the right to seek and enjoy in other countries asylum from persecution”. UNHCR Executive Committee Conclusion No. 75 (XLV) (1994), para. 1.

332. While peacekeeping forces were once perceived as neutral, it is precisely in the pursuance of providing protection to civilians by, for example, establishing safe areas, that they have sacrificed their once neutral and impartial role.

333. Newland and Meyers, for instance, note that “[t]he authorization of military force to deliver humanitarian assistance in the context of a Chapter VII, UN peace-enforcement operation is a contradiction in terms if one accepts the honoured rhetoric of neutrality and impartiality of humanitarian assistance. The statute of UNHCR insists that the High Commissioner’s work is of a strictly non-political character. But a Chapter VII action is inherently and unmistakably political.” Newland and Meyers, supra note 260, at 27.

334. See K. Sugino, ‘The “Non-Political and Humanitarian” Clause in UNHCR’s Statute’, (1998) 17 Refugee Survey Quarterly 34, at 40. See also G.S. Goodwin-Gill, ‘The Politics of Protection’, (2008) 27 Refugee Survey Quarterly 8, for a historical analysis of UNHCR’s non-political mandate. He concludes as follows: “It is unrealistic to imagine that the problem of refugees can ever be entirely non-political, and just as the politicisation of protection can constrain options for action, so can over emphasis of otherwise humanitarian considerations.” (Ibid., at 21)

335. As High Commissioner Ogata stated in 1994: “[H]umanitarian action in premised on the principles of impartiality and neutrality. Impartiality means helping victims on all sides of the sides of the conflict. Neutrality means more than being independent from political goals and considerations. This is the essence of what I would call ‘humanitarian space’. The pursuit of humanitarian space requires negotiations to obtain consent.” Sadako Ogata, ‘Role of Humanitarian Action in Peacekeeping’, Keynote Address at 24th Annual Vienna Seminar (5 Jul. 1994). See also Sugino, supra note 334, at 43.


338. See Newland and Meyers, supra note 260, at 18.


340. UN Doc. S/RES/1502 (26 Aug. 2003), preamble. The principle of “independence” was probably deliberately omitted as many humanitarian organizations are not independent. In fact, contrary to the ICRC, the UN is a political organization and UNHCR is authorized and mandated by political bodies such the General Assembly, the UN Secretariat and on certain occasions by the Security Council.

341. See also Palley, supra note 331, at 167.

342. UN Doc. S/RES/1265 (17 Sept. 1999), para. 14. The Council equally underlined the importance of civilian police as a component of peacekeeping operations and recognized the role of police in assuring the safety and well-being of civilians in para. 15.


345. For an overview of the indiscriminate effects of different sanctions regimes see Reisman and Stevick, supra note 8.


347. See Goodwin-Gill and McAdam, supra note 15, at 314.
See Articles 17 to 30 of the 1951 Convention. Strictly speaking, the Convention does not grant any rights but only imposes obligations on States parties to the Convention.

See, for instance, the 1966 International Covenant on Economic Social and Cultural Rights as the most pertinent human rights instrument in this context: 993 UNTS 3 (3 Jan. 1976). On complementary protection through human rights see generally McAdam, supra note 11.

See Kourula, supra note 4, at 257.


See generally Reinisch, supra note 8.

In each of the comprehensive sanctions regimes the Security Council has exempted the export of certain humanitarian supplies to the targeted State. For this purpose, the Council has identified particular categories of items of humanitarian supplies that may be exempt with the approval of the respective sanctions committee. Among the particular items exempted from targeted sanctions regimes have been: medical supplies (all comprehensive sanctions regimes), UN Doc. S/RES/253 (29 May 1968), para. 3(d) (Southern Rhodesia); UN Doc. S/RES/661 (6 Aug. 1990), para. 3(c) (Iraq); UN Doc. S/RES/917 (6 May 1994), para. 7(a) (Haiti); UN Doc. S/RES/757 (30 May 1992), para. 4(c) (FRYSM); UN Doc. S/RES/820 (17 Apr. 1993), para. 12 (Bosnian Serbs). In most comprehensive sanctions regimes the exemption of medical supplies has operated without controversy. In the case of Iraq, however, the ability of the government was restricted by the "no dual use requirement" which meant that medical and other exempted supplies could not be exported to Iraq if they had the potential for diversion or conversion into military use; educational equipment and material (Southern Rhodesia): UN Doc. S/RES/253 (29 May 1968), para. 3(d); information materials (Southern Rhodesia and Haiti): UN Doc. S/RES/253 (29 May 1968), para. 3(d) (Southern Rhodesia) and UN Doc. S/RES/917 (6 May 1994), para. 8 (Haiti); foodstuffs (all comprehensive sanctions regimes): UN Doc. S/RES/253 (29 May 1968), para. 3(d) (Southern Rhodesia); UN Doc. S/RES/660 (6 Aug. 1990), para. 3(c) (Iraq); UN Doc. S/RES/917 (6 May 1994), para. 7(a) (Haiti); UN Doc. S/RES/757 (30 May 1992), para. 4(c) (FRYSM); UN Doc. S/RES/820 (17 Apr. 1993), para. 12 (Bosnian Serbs); petroleum and petroleum products (Haiti): UN Doc. S/RES/917 (6 May 1994), para. 7(c)-(d) (Haiti) (when authorized by the Haiti Sanctions Committee or requested by the President and Prime Minister of Haiti and approved by Committee); and foodstuffs (FRYSM): UN Doc. S/RES/943 (13 Sept. 1994), para. 3; UN Doc. S/RES/970 (6 May 1994), para. 7(b). Among the categories the Council exempted, it listed the following: "materials and supplies essential for civilian need" (Iraq; UN Doc. S/RES/687 (8 Apr. 1991), para. 20); and "commodities and products essential for humanitarian need" (FRYSM, UN Doc. S/RES/760 (18 Jun. 1992), sole para.; Bosnian Serbs, UN Doc. S/RES/942 (23 Sept. 1994), para. 7(b); Haiti, UN Doc. S/RES/917 (6 May 1997), para. 7(b)).

See Kourula, supra note 4, at 258.

See e.g. UN Doc. A/RES/51/193 (10 Feb. 1997) in which it encourages the Security Council to provide special reports in accordance with Articles 15 and 24 of the Charter', and UN Doc. A/RES/49/58 (17 Feb. 1995), UN Doc. A/RES/50/51 (29 Jan. 1996), UN Doc. A/RES/50/58E (12 Dec. 1995), and UN Doc. A/RES/51/208 (17 Dec. 1996), inviting an examination of the special economic problems confronting States in carrying out sanctions, under Article 50 of the Charter. This has led to a series of reports, such as from the Secretary-General and the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, on means of improving the mechanisms and criteria concerning the implementation and lifting of sanctions (see, for instance, UN Doc. A/50/361 (22 Aug. 1995), UN Doc. A/50/423 (12 Sept. 1995),


359. Since the late 1990s, three international initiatives have been undertaken to consolidate previous proposals and to improve approaches to the targeting of sanctions, with the goal of increasing their effectiveness. The first of these, the Interlaken Process (http://www.seco.admin.ch/themen/00513/00620/00639/index.html?lang=en), was initiated by the Swiss Government in 1998 and focused on targeted financial sanctions. The second initiative, the Bonn-Berlin Process, (http://www.bicc.de/index.php/publications/studies/studies-no-6) organized by the Foreign Office of Germany in 2000, focused on arms embargoes and travel sanctions. The third initiative in this triad, the Stockholm Process on the Implementation of Targeted UN Sanctions (http://www.smartsanctions.se/), was coordinated by the Swedish Ministry of Foreign Affairs, and took place during 2002.


363. See *ibid.*, at 258.


365. According to Kourula, the procedure provided a noteworthy departure from the delivery-by-delivery requests for authorizations, originally adopted in the guidelines of the committee. See Kourula, *supra* note 4, at 263.


367. See Kourula, *supra* note 4, at 263.

368. The Oil-for-Food Program was established by Security Council resolution 986 (UN Doc. S/RES/986 (14 Apr. 1995) and basically allowed the Iraqi government to sell oil in order to purchase items that were not embargoed under the comprehensive economic sanctions. Certain items, such as raw foodstuffs, were expedited for immediate shipment. However, requests for most items, including such simple things as pencils and folic acid, were reviewed in a process that typically took about six months before shipment was authorized. By the time that the comprehensive sanctions were lifted in 2003, the majority of the population was dependent on food rations from the Oil-for-Food Program. Loescher estimates that about 60 percent of the

369. See Tostensen and Bull, supra note 360, at 381.


371. See Gowlland-Debbas, supra note 5, at 298; Goodwin Gill, supra note 98; Noll, supra note 98.

372. UN Doc. S/RES/1373 (28 Sept. 2001), para. 3(f), (g). As Penelope Mathew observes, the Council probably drew this language from the General Assembly’s Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, annexed to UN Doc. A/RES/51/210, ‘Measures to Eliminate International Terrorism’ (17 Dec. 1996), para. 3, but with omitting the references to the importance of the safeguards of the 1951 Convention. See P. Mathew, ‘Resolution 1373 – A Call to Pre-empt Asylum Seekers? (or ‘Osama, the Asylum Seeker’), in J. McAdam (ed.), Forced Migration, Human Rights and Security (2008), 19 at 25.

373. UN Doc. S/RES/1373 (28 Sept. 2001), para. 5; see also UN Doc. S/RES/1377 (12 Nov. 2001), preamble. Article 1 F(c) of the 1951 states that “[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: [...] (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”

374. For a discussion of the quasi-legislative effects of this Security Council resolution see generally Alvarez, supra note 9, at 196; Abi-Saab, supra note 9.


376. See Goodwin-Gill and McAdam, supra note 15, at 195.

377. On this debate see generally Goodwin Gill and McAdam, supra note 15, at 184-189.

378. See Allain, supra note 322, at 546.

379. As occurred in the ICJ’s interim decision in the Lockerbie case: Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment of 27 Feb. 1998, [1998] ICJ Rep. 3. The principle at issue was whether extradition could only take place on the basis of an extradition treaty. The two States demanding surrender of two Libyan nationals did not have extradition treaties with Libya, and they thus argued that the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 Sept. 1971, was not applicable. See I. Brownlie, The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations (1998), 221.

380. Despite the lack of clear consensus on whether the Security Council may also encroach on customary international law when maintaining international peace and security, most authors and courts agree that these encroachments are limited by peremptory norms of international law. See generally E. de Wet, supra note 8, 187. For a recent decision in the counter-terrorism


382. The power may be exercised, “if the Secretary of State reasonably [...] (a) believes that the person’s presence in the UK is a risk to national security, and (b) suspects that the person is a terrorist”. Anti-Terrorism, Crime and Security Act, 2001 Chapter 24, section 21 (1). Moreover, Section 33 allows the Secretary of State, in an asylum appeal, to certify that the 1951 Convention does not apply, in other words that the is not entitled to the protection of non-refoulement because article 1F or article 33(2) apply, and the removal of the applicant from the United Kingdom would be conducive to the public good.


385. R. Lubbers, ‘Message’, in M.N. Schmitt and G.L. Beruto (eds.), Terrorism and International Law: Challenges and Responses (2003), 13 at 13. Goodwin-Gill and McAdam succinctly underline that “[i]t is one thing to state as a matter of policy that terrorism is contrary to the purposes and principles of the United Nations, but quite another to translate that policy into a rule of law.” Goodwin-Gill and McAdam, supra note 15, at 196. See also Ruud Lubbers’ statement as acting High Commissioner before the Security Council in 2002 UN Doc. S/PV.4470 (7 Feb. 2002), at 3, in which he underlines that “we must ensure Governments avoid making unwarranted linkages between refugees and terrorism.”

386. UN Doc. 1373 (28 Sept. 2001), para. 3 (g).


388. UN Doc. S/RES/1624 (14 Sept. 2005), preamble and para. 4, “[r]ecalling in addition the right to seek and enjoy asylum reflected in Article 14 of the Universal Declaration and the non-refoulement obligation of States under the Convention relating to the Status of Refugees adopted on 28 Jul. 1951, together with its Protocol adopted on 31 Jan. 1967 (‘the Refugees Convention and its Protocol’), and also recalling that the protections afforded by the Refugees Convention and its Protocol shall not extend to any person with respect to whom there are serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations” (original emphasis).


390. Brownlie, supra note 379, at 223.
4. Conclusion: Balancing an Ambivalent Practice

The contemporary regime of international refugee protection constitutes a dynamic set of explicit and implicit rules and standards centered on the 1951 Convention as well as the UNHCR Statute and complemented by international human rights and humanitarian law. In the absence of any notable codifications at the universal level, the evolution of the regime has mostly been fostered through the expansion of UNHCR’s mandate by subsequent General Assembly and ECOSOC resolutions. While the General Assembly, in cooperation with ECOSOC and ExCom, seemed to have the monopoly on the development of international refugee protection for a very long time, the Security Council has become an increasingly important actor in the protection regime of the post-Cold War era. In its various activities related to international refugee protection, the Security Council has not drawn its normative authority from the UNHCR Statute or the 1951 Convention. Instead it has based its actions on the UN Charter which stipulates that the Security Council has primary responsibility for maintenance of international peace and security, taking precedence over the General Assembly’s traditional mandate. By using its wide discretion under the UN Charter, the Security Council has thus gradually brought international refugee protection within the steadily expanding ambit of the maintenance of international peace and security.

Since the early 1990s the Security Council’s enforcement actions have linked massive refugee flows resulting from grave violations of human rights and international humanitarian law with threats to international peace and security. Advancing notions of State and individual responsibility to address the root causes of displacement, the Security Council has subsequently taken enforcement measures under Chapter VII of the UN Charter, identifying State and non-State actors as the potential source of persecution. While confirming the applicability of the right to return in cases of mass exodus, the Security Council has supported UNHCR’s expanding activities to create the conditions conducive to a safe and dignified repatriation and reintegration of refugees to their countries of origin through the conclusion and implementation of comprehensive peace agreements. In this context, the Council has also addressed solutions to property issues in mandates for post-conflict peace-building missions. It is through these missions that the
Security Council has contributed to establishing the right to restitution as a distinct norm of international law and an important precondition for durable peace.

3 As its activities have increasingly focused on human security alongside State security, the Security Council has also recognized the necessity to address the situation of refugees and the growing number of IDPs during displacement. As a result, various fundamental aspects of international refugee protection were included in the Security Council’s normative framework on the protection of civilians in armed conflict. This framework codifies and develops the Security Council’s practice by combining the strengths of different fields of international law pertinent to the security of individuals. Since the Security Council resolutions on the protection of civilians contain norms of general application without any temporal or situation-specific limitations, they have contributed to the crystallization or consolidation of customary international protection standards, possibly even to their making. Attacks against refugee and IDP camps, as well as the deliberate denial of humanitarian assistance, including attacks against humanitarian personnel, may now constitute threats to international peace and security, and be followed by the imposition of economic sanctions or the authorization of peace operations. As a consequence, the Security Council has become a central forum for the strengthening of norms related to protection, and assistance given to refugees and internally displaced persons, in particular vulnerable groups such as women and children, throughout the continuum of the forced displacement process.

4 On the downside, the erosion of normative protection standards through Security Council authorized sanctions and peace operations illustrates the risks involved in the development of international law through the *ad hoc* and selective decisions of a political organ that weighs humanitarian considerations against traditional security concerns. By legitimizing peace operations to protect safe areas in Iraq, Bosnia and Rwanda, the Council has prevented internally displaced persons from leaving their country of nationality and seeking asylum abroad. At the same time, the Security Council has promoted UNHCR’s involvement in active zones of conflict which has made the refugee agency highly dependent on the protection of these peace operations to the detriment of its humanitarian and non-political mandate. Yet, although the paradigm shift from the security of States towards human security has clearly had erosive effects on norms of international refugee protection, it has also led in reforms of the Security Council’s enforcement measures as shown by its sanctions regimes. Whereas comprehensive sanctions have often had a disastrous humanitarian impact on vulnerable civilian populations, by encroaching on their socio-economic rights and by impeding access to humanitarian assistance, the move to targeted sanctions has mitigated some of these adverse and mostly unintended effects on the framework of international refugee protection.

5 Even without judicial review by the International Court of Justice, the Security Council’s actions have also been frequently checked and balanced by other political organs of the UN system with more general competence over international refugee protection. The unwarranted links made between terrorists and refugee status in the context of the counter-terrorism resolutions, for instance, have been met with reaffirmations of the requirement to comply with international human rights, international humanitarian law and refugee law, and in particular with the principle of *non-refoulement*. Despite undeniable negative repercussions of its political actions, the Security Council’s practice has thus predominantly had a positive influence on the normative development of
international refugee protection. Considering the recent evolution of its scope of action towards the security of individuals, it is likely that the Security Council will continue to strengthen international refugee protection by adapting it to the challenges of the complex security environment of the 21st century.
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