Common Article 1 of the Geneva Conventions revisited: Protecting collective interests

by
LAURENCE BOISSON DE CHAZOURNES and **LUIGI CONDORELLI**

At a time when the international community as a whole (States, international organizations, non-governmental organizations) is searching for an international public policy[1] for the promotion of humanitarian considerations, it is important to identify the legal principles on which such action could be based. This is all the more relevant as recourse to armed force is increasingly viewed as a means to an end in that context. When it comes to promoting values and interests of a collective character, the rudimentary nature of the international legal order is obvious. It is a system better acquainted, if not to say more at ease, with bilateral and contractual instruments and techniques. Notions such as *jus cogens*, *erga omnes* obligations and international crimes of the State are all important concepts. However, if they are to have due effect, there is a need for legal institutions and mechanisms to give them their full meaning. In that regard, the four Geneva Conventions for the protection of war victims, of 12 August 1949,[2] and their two Additional Protocols of 1977[3] offer some interesting prospects.

LAURENCE BOISSON DE CHAZOURNES and LUIGI CONDORELLI are professors at the Department of Public International Law and International Organization, Faculty of Law, University of Geneva.

Some fifty years ago, the drafting of these Conventions led to the inclusion in their common Article 1 of a provision that provides the nucleus for a system of collective responsibility.[4] It has since evolved and has furthermore attracted considerable attention. For this reason, the scope and content of that provision will first be assessed. The various dimensions it has acquired throughout its existence, and especially in the course of the last decade, will then be highlighted. Comments on the quasi-constitutional nature of such a norm in a society in search of a collective identity will be offered in conclusion.

Scope and content of common Article 1

Article 1 common to the four Geneva Conventions reads as follows: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". This provision was reiterated in Article 1, paragraph 4, of Additional Protocol I. As such, the obligation to respect and ensure respect

1 For an elaboration of the concept of international public policy, see V. Gowland-Debbas, "The right to life and genocide: the Court and an international public policy", L. Boisson de Chazournes/P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge University Press, Cambridge, 1999, p. 317. See also the dissenting opinion of Judge Koroma in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports, 1996, p. 556 ff.

2 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War.

3 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), and Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), both of 8 June 1977.

4 See L. Condorelli/L. Boisson de Chazournes, "Quelques remarques à propos de l'obligation des États de 'respecter et faire respecter' le droit international humanitaire 'en toutes circonstances'", C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC/Martinus Nijhoff, Geneva/The Hague, 1984, p. 18. Written at a time when Article 1 was seen rather as a sort of stylistic clause devoid of real legal weight, this article attempted, through study of early developments in international practice and following a prospective logic, to bring to light the various implications and effects of the duty to "respect and ensure respect". Fifteen years later, the present work re-examines this question, placing emphasis on aspects consonant with contemporary issues.

(which will also be referred to as common Article 1) applies to international conflicts and, indeed, to non-international conflicts to the extent that the latter are covered by common Article 3. While conflicts of a non-international character as defined by Additional Protocol II are not explicitly covered by the obligation to respect and to ensure respect, they can nonetheless be considered as indirectly falling within the purview of the provision, insofar as Protocol II is merely an elaboration of common Article 3 of the four Geneva Conventions, a fact stated in its Article 1, paragraph 1.

The obligation to respect and to ensure respect for humanitarian law is a two-sided obligation, for it calls on States both "to respect" *and* "to ensure respect" the Conventions. "To respect" means that the State is under an obligation to do everything it can to ensure that the rules in question are respected by its organs as well as by all others under its jurisdiction. "To ensure respect" means that States, whether engaged in a conflict or not, must take all possible steps to ensure that the rules are respected by all, and in particular by parties to conflict.

Some argue that such an interpretation was not the one originally envisaged by the drafters. They hold that Article 1 was not elaborated with the intention of imposing on States obligations which did not also derive from the other provisions of the Geneva Conventions. While this may be the case, an examination of the *travaux préparatoires* reveals that the negotiators at least bore in mind the need for the parties to the Conventions to do everything they could to ensure universal compliance with the humanitarian principles underlying the Conventions.[5]

This is nonetheless a minor consideration, since the historical interpretation of an international instrument can never prove decisive in identifying the current status of a legal norm. Far more relevant in this respect is the meaning conferred by international practice as it has developed since the instrument was adopted. Indeed, over the last half century the practice of States and international organizations,

5 Jean S. Pictet (ed.), *Commentary, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 21.

buttressed by jurisprudential findings[6] and doctrinal opinions, clearly supports the interpretation of common Article 1 as a rule that compels all States, whether or not parties to a conflict, not only to take active part in ensuring compliance with rules of international humanitarian law by all concerned, but also to react against violations of that law. Moreover, common Article 1 speaks of an obligation to respect and to ensure respect "in all circumstances", making the obligation unconditional and, in particular, not subject to the constraint of reciprocity.[7]

It is now widely accepted that the obligation contained in common Article 1 is binding on all States and competent international organizations. In its recent advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice reinforced this assertion, noting that "a great many rules of humanitarian law applicable in armed conflict are so fundamental" that "these fundamental rules are to be observed by all States whether or not they have ratified the Conventions that contain them".[8] The same Court, in its earlier decision on merits in the landmark *Nicaragua Case*, had specifically demonstrated the fact that the obligation referred to in common Article 1 forms part of customary international law.[9]

In diplomatic circles, common Article 1 has come to be seen by many as implying a universal obligation for States and international organizations (be they regional or universal) to ensure that this body of law is implemented wherever a humanitarian problem arises.

6 As for case law, see in particular the *in terminis* precedent, *infra*, notes 9 and 23.

7 This is in contrast to the obligation arising under the Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (18 October 1907). On the difference between the obligation discussed here and the one provided for in the 1907 Hague Convention, see *op. cit.* (note 4), p. 18.

8 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports, 1996, para. 79.

9 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits*, Judgment of 27 June 1986, I.C.J. Reports 1986, para. 220. This idea (already anticipated in Condorelli/Boisson de Chazournes, *loc. cit.* (note 4), pp. 20-22) led the Court to decide that a State commits an internationally wrongful act in breach of common Article 1 if it induces a party to a non-international armed conflict to act in a manner contrary to the humanitarian principles embodied in common Article 3.

The issue of implementation of international humanitarian law has thus become a more central feature in the activities of States and international organizations.[10]

Having set out the scope and content ascribed to common Article 1, attention will now focus on the various dimensions this provision has acquired over the years. First of all it is necessary to ascertain, on the basis of contemporary practice, what precise obligations are attached to the obligation to "respect [international humanitarian law] in all circumstances". Emphasis will then be placed on the corresponding obligation to "ensure respect".

The obligation to respect international humanitarian law in all circumstances

The significance of this obligation has already been stressed: the rule compels all subjects of law to which it is addressed to take all measures required by international humanitarian law, and to behave in all circumstances according to the rules and principles of this law. These circumstances are not necessarily confined to times of war. Various obligations are also binding upon States in peacetime, as is for example the obligation to disseminate international humanitarian law and to incorporate it in domestic legal systems. Contemporary practice, bolstered by the work of the ICRC, underscores the crucial importance of these obligations more than ever,[11] since compliance with the aforesaid duties in peacetime is obviously an essential factor in guaranteeing respect for international humanitarian law in times of armed conflict.

This said, international humanitarian law was nonetheless devised with war in mind, and with the aim of getting parties to a conflict to behave according to the rules applicable in such times. As

10 See A. Roberts, "Implementation of the laws of war in late 20th century conflicts", Part I, *Security Dialogue* (SAGE Publications, Oslo), vol. 29, no. 2, June 1998, p. 142.

11 See, e.g., Resolution 1 of the 27th International Conference of the Red Cross and Red Crescent (Geneva, 1999), with annexed declaration "The power of humanity" and "Plan of action for the years 2000-2003", in *IRRC*, No. 836, December 1999, pp. 878-895, or website: http://www.redcross.alertnet.org/en/conference/proceedings.asp.

pointed out above, common Article 1 clearly indicates that the State is under an obligation to do everything it can to ensure that the rules of international humanitarian law are respected both by its organs and by other entities under its jurisdiction (which in this context encompasses territorial jurisdiction as well as control exercised over individuals beyond national borders). It is thus obvious that the armed forces of a State must abide by the rules of international humanitarian law not only in their own national territory but also when fighting abroad. The decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the case of "Dusko" Tadic is a case in point, as the ruling stresses how important it is for a State's armed forces abroad to respect humanitarian law.[12]

The contribution of the 1999 Judgment in the *Tadic* case, however, is both more significant and less obvious than it would appear at first glance. In that case, the ICTY establishes that a State violates its obligations under international law not only when its armed forces abroad breach humanitarian rules, but also when the culprits, irrespective of their nationality, are persons acting under the command and control of the State, even if they do not belong to its armed forces. This effective control need only be of a general character, and it is not necessary to establish that every violation has been performed under the specific control of, or following a precise order emanating from, an organ of the State in question. This finding, especially when compared to the much more prudent and restrictive

12 *The Prosecutor* v. *Dusko Tadic*, ICTY Appeals Chamber, Judgment, The Hague, 15 July 1999, Case No. IT-94-1. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia) – Provisional Measures*, Order of 8 April 1993, ICJ Reports, 1993, p. 1, and Order of 13 September 1993, p. 325. On these, L. Boisson de Chazournes, "Les ordonnances en indication de mesures conservatoires dans l'affaire relative à l'application de la Convention pour la prévention et la répression du crime de génocide", *Annuaire français de droit international*, vol. XXXIX (1993), pp. 514-539. – In the human rights area see *Cyprus* v. *Turkey*, No. 8007/77, European Commission of Human Rights, *Decisions and Reports* 13 (1977), p. 85; *Loizidou* v. *Turkey*, 23 March 1995, *Yearbook of the European Court of Human Rights*, 38 (1995), p. 245. More generally see L. Condorelli, "L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances", *Recueil des cours de l'Académie de La Haye*, tome 189 (1984-VI), pp. 9-222, esp. pp. 86-92.

position taken by the International Court of Justice on the issue[13] (the "Tadic test" being undoubtedly less strict than the "Nicaragua test"), constitutes a highly significant jurisprudential development whose importance for the future of international humanitarian law must not be underestimated.

Circumstances in which a foreign State's armed forces can be engaged in military operations abroad may occur in the context of peace-keeping or peace-making operations undertaken directly or indirectly by the United Nations, and all the more so since the post-Cold War awakening of the Security Council. When such actions are merely "authorized" by the Security Council and the armed forces taking part thus remain under the command and control of the State to which they belong, the obligation to abide by international humanitarian law obviously rests wholly on that State. Nonetheless, the UN's duty in such cases will be to make sure that an operation launched with its endorsement and pursuant to its interests is carried out in conformity with the dictates of international law.[14] It is therefore the UN's special responsibility to *ensure respect* for international humanitarian law. On the other hand, if the operation is implemented directly by forces of the UN (e.g., Blue Helmets), in other words by its own organs placed under the "operational command" of the Secretary-General or his representative, its action directly involves the responsibility of the UN itself, notably with regard to the observance of humanitarian rules.[15] Despite this, the national contingents making up such forces also remain entities of their respective States. The latter do not relinquish control over them and retain, at the very least, "disciplinary command" over their personnel. This dual link — UN entity/State

13 *Loc. cit.* (note 9), paras 109 and 115-116.

14 See L. Condorelli, "Le statut des forces de l'ONU et le droit international humanitaire", *Rivista di Diritto Internazionale*, Anno 78, fasc. 4, 1995, pp. 881-906. Also sharing this view is D. Shraga, "The United Nations as an actor bound by international humanitarian law", in L. Condorelli/A.-M. La Rosa/S. Scherrer (eds.), *Les Nations Unies et le droit humanitaire/The United Nations and International Humanitarian Law*, Éditions Pedone, Paris, 1996, p. 330 ff.

15 On this point, see Shraga, *ibid.*, and also C. Emanuelli, "Les Forces des Nations Unies et le droit international humanitaire", *ibid.*, pp. 345-370.

entity — entails a two-pronged responsibility as to compliance with international humanitarian law.[16]

This interpretation of common Article 1 is endorsed today by the UN Secretary-General's Bulletin of 6 August 1999 entitled "Observance by United Nations forces of international humanitarian law", written "for the purpose of setting out fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control".[17] This document sets out the obligations of the UN with regard to the conduct of its forces, but alludes also to certain duties of States whose forces are participating in UN operations, with particular reference to the repression of breaches (Section 4) and the application of domestic law (Section 2).

The case of the conflict in ex-Yugoslavia illustrates and confirms that when engaging troops in military operations abroad, States have a duty to use their military personnel thus deployed to search for individuals accused of war crimes.[18] This was underscored by the establishment of the International Criminal Tribunals as venues for prosecution, heightening the need for cooperation in finding and bringing alleged criminals to justice. In other words this obligation, provided for by the Geneva instruments, is applicable wherever a State's armed forces might be operating, and not merely in that State's territory.[19]

These recent developments in international practice as to the circumstances in which respect for international humanitarian law

16 See Condorelli, *op. cit.* (note 14); also, by the same author, "Conclusions générales", in Condorelli/La Rosa/Scherrer, *op. cit.* (note 14), pp. 445-474.

17 UN Doc. ST/SGB/1999/13 of 6 August 1999; also available on the UN website (under "Peace and Security" heading): http://www.un.org/peace/st_sgb_1999_13.pdf. See Anne Ryniker, "Respect du droit international humanitaire par les forces armées des Nations Unies", *IRRC*, No. 836, December 1999, pp. 795-805, with text of the said UN document appended (in French and English).

18 See Articles 49, 50, 129, 146 common to the Geneva Conventions, and Article 85 of Additional Protocol I.

19 See A.-M. La Rosa, "Forces multinationales et instances pénales internationales: obligation de coopération sous l'angle de l'arrestation", H. Ascensio/E. Décaux/A. Pellet (eds.), *Droit international pénal*, Éditions Pedone, Paris (to be published shortly).

is required must not overshadow the general scope of the principle embodied in common Article 1. In truth, no circumstance can be invoked in support of any given breach of the obligations concerned. None of the legally recognized means apt to "remedy" the illegality of violations of international law — be it self-defence, recourse to counter-measures, consent of the victim or state of necessity — are of consequence or can be claimed as circumstances precluding wrongfulness in this particular field. This is because international humanitarian law escapes the general logic of reciprocity that normally prevails in the international legal system. There is no need to dwell on this already well-established principle;[20] suffice it to recall once again the above-mentioned Advisory Opinion of the International Court of Justice in 1996, in which the Court, confirming that "a great many rules of humanitarian law [are] so fundamental [that they] are to be observed by all States whether or not they have ratified the conventions that contain them",[21] bases this assessment on its characterization of such rules as "intransgressible principles of international customary law". While the exact significance and implications of the formula "intransgressible principles" may be debatable, this semantic innovation must at the very least be construed as crystallizing the notion that no circumstance may justify a "transgression" of such rules.[22]

Recently the ICTY has itself taken an even clearer stance on the issue by rejecting what it termed the *"tu quoque* principle", namely the argument based on the allegedly reciprocal nature of obligations created by the humanitarian law of armed conflict. Rebutting this argument, the Tribunal stressed that "... the bulk of this body of law lays down absolute obligations, namely obligations that are

20 A point already illustrated by Condorelli/Boisson de Chazournes in *op. cit.* (note 4).

21 *Loc. cit.* (note 8), para. 79.

22 L. Condorelli, "Le droit international humanitaire, ou l'exploration par la Cour d'une *terra* à peu près *incognita* pour elle", in L. Boisson de Chazournes/P. Sands, *op. cit.* (note 1), p. 234 ff. Also worthy of note is the fact that even when in "... an extreme circumstance of self-defence in which its survival is at stake", a State could not justifiably transgress those fundamental humanitarian principles. The dubious formulation of the final part of the 1996 Advisory Opinion entitled *Legality of the Threat or Use of Nuclear Weapons* should not be given a contrary interpretation. *Ibid.*, p. 239 ff.

unconditional or in other words not based on reciprocity". The Tribunal added: "This concept is already encapsulated in common Article 1 of the 1949 Geneva Conventions ...".[23]

From the fact that such fundamental rules may not be infringed in any circumstances, it follows that the Security Council cannot request States to implement sanctions in violation of humanitarian law. In other words, although Article 103 of the Charter asserts that the obligations of UN members under the Charter — thus including the duty under Article 25 to accept and carry out the decisions of the Security Council — prevail over their obligations under any other international agreement, this provision cannot apply to "Geneva law" obligations binding States as well as the UN itself, as these obligations stem from "intransgressible" norms that may never be justifiably contravened, either by the former or by the latter.

The various dimensions of the obligation to ensure respect

In its judgment of 14 January 2000, the International Criminal Tribunal for the former Yugoslavia stressed that "[as] a consequence of their absolute character, these norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State *vis-à-vis* another State. Rather (...) they lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a 'legal interest' in their observance and consequently a legal entitlement to demand respect for such obligations."[24]

The Geneva Conventions and Additional Protocol I provide means by which States can perform their obligation not only to respect, but also to "ensure respect" for international humanitarian law in all circumstances. They may, for instance, convene meetings of the High Contracting Parties in application of Article 7 of Protocol I;

23 *The Prosecutor* v. *Zoran Kupreskic and others*, ICTY Trial Chamber, Judgment, The Hague, 14 January 2000, Case No. IT-95-16-T, para. 517.

24 *Ibid.*, para. 519.

resort to the Protecting Powers institution and its substitutes; enforce the system of repression of grave breaches (in particular those calling for the greatest measure of mutual assistance in criminal matters); or call upon the International Fact-Finding Commission established under Article 90 of Additional Protocol I.[25]

The obligation to ensure respect for humanitarian principles can also be implemented through other channels, such as diplomatic action or public denunciation, as did, for example, the ICRC in the 1980s during the Iran-Iraq war when it made several public appeals to all Contracting Parties to ensure respect for the Geneva Conventions.[26] The obligation can also find application through the principle of universality of jurisdiction, which requires States either to try or to extradite alleged criminals in accordance with rules and principles of international law.

It is most interesting, however, to consider the meaning of Article 1 within the framework of the United Nations, for which common Article 1 has in the last ten years almost become a basic norm of behaviour. This evolution has paralleled the growing interest taken by the UN in the "management of crises and armed conflicts", be they international, internal or internationalized, although the Security Council rarely categorizes as such the armed conflict or crisis with which it is dealing.[27]

From an institutional standpoint, it is worth noting that the negotiators of Additional Protocol I established a relationship between the law of the United Nations and the body of rules applicable in times of armed conflict.[28] In its early years, the UN had no

25 See L. Condorelli, "L'inchiesta ed il rispetto degli obblighi di diritto internazionale umanitario", *Scritti degli allievi in memoria di Giuseppe Barile*, Padova, CEDAM, 1995, pp. 225-308.

26 *Op. cit.* (note 4), p. 27 ff.

27 With regard to the conflict in Bosnia and Herzegovina, see L. Condorelli/D. Petrovic, "L'ONU et la crise yougoslave", *Annuaire français de droit international*, vol. XXXVIII, 1992, pp. 31-60.

28 See É. David, "Méthodes et formes de participation des Nations Unies à l'élaboration du droit international humanitaire", pp. 87-113, and L. Boisson de Chazournes, "Les résolutions des organes des Nations Unies, et en particulier celles du Conseil de sécurité, en tant que source de droit international humanitaire", Condorelli/La Rosa/Scherrer, *op. cit.* (note 14), pp. 149-173.

desire to deal with the law of armed conflict, since it was busy promoting the prohibition of recourse to force and saw no point in being involved in conflict management. The situation changed in the late 1960s, in particular with the Teheran Conference on Human Rights (1968) and its ensuing Declaration. The Additional Protocols bridged the divide, allowing *jus in bello* to be dealt with by the United Nations.

Through its Article 89, Protocol I in fact opened the door to enforcement of international humanitarian law within the UN framework.[29] This article places the High Contracting Parties under a most stringent obligation to ensure respect for principles of humanitarian law, since they have expressly undertaken to act "in co-operation with" the United Nations in certain circumstances, namely when "serious violations" occur. The chosen formula clearly implies that the UN possesses the necessary jurisdiction to adopt appropriate measures to react to serious violations of international humanitarian law, for how otherwise could States "co-operate" with it if it was not competent to "operate" in the matter. This idea, a seed planted at the end of the 1970s, germinated in the 1980s and finally blossomed in the 1990s, as the awakening of the Security Council brought this provision to life and by the same token enhanced and even added new prospects for application of Article 1 common to the Geneva Conventions.

Within the UN system, the General Assembly, the Security Council and the Commission on Human Rights have on various occasions condemned violations of humanitarian principles.[30] Among the means used to deal with such violations were calls to abide by the existing rules; offers of good offices; dispatch of observer missions;[31] and initiation of operations dedicated to peace-keeping,

29 Article 89 of Protocol I reads as follows: "In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter."

30 L. Boisson de Chazournes, "The collective responsibility of States to ensure respect for humanitarian principles", in A. Bloed *et al.* (ed.), *Monitoring Human Rights in Europe*, Kluwer Academic Publishers, The Netherlands, 1993, pp. 247-260.

31 e.g., ONUSAL in El Salvador, UN Doc. S/RES/693 of 1991.

peace-enforcement or peace-building[32] whose mandate has included, *inter alia*, the promotion of humanitarian principles. The establishment by the Security Council of the International Criminal Tribunals for the former Yugoslavia[33] and for Rwanda[34] also falls within the purview of a collective willingness to ensure respect for international humanitarian law in cases where serious violations occur.

The same has to be said of the Rome Statute of 17 July 1998, creating the International Criminal Court (ICC), which was negotiated within the framework of a diplomatic conference convened under the aegis of the UN, the preparatory work having been concluded in its entirety within the UN framework and under the consistent encouragement of its organs. In this connection, the role assigned by the Statute to the Security Council should not be forgotten: Article 13(b) gives the Security Council the power to "trigger" the judicial mechanism of repression when it identifies as a threat to the peace a situation in which serious violations of humanitarian principles giving rise to criminal responsibility seem to have been perpetrated.

The steady deterioration in the situation of the Israeli-occupied Palestinian territories led first the Security Council, then the General Assembly, to add another dimension, as yet unexplored, to the obligation to ensure respect for humanitarian law.[35] Both

32 e.g., UNTAC in Cambodia, UN Doc. S/RES/745 of 1992.

33 Established by Security Council Resolution S/RES/827 (1993) of 25 May 1993, with amendments to the Statute in Resolution S/RES/1166 (1998) of 13 May 1998.

34 Established by Security Council Resolution S/RES/955 (1994) of 8 November 1994, with amendments to the statute in Resolution S/RES/1165 (1998) of 30 April 1998.

35 In Resolution S/RES/681 (1990) of 20 December 1990, the Security Council, "gravely concerned at the dangerous deterioration of the situation of all the Palestinian territories occupied by Israel since 1967, including Jerusalem, and at the violence and rising tension in Israel ..., called upon:

5. the High Contracting Parties to the said Convention to ensure respect by Israel, the Occupying Power, for its obligations under the Convention in accordance with article 1 thereof; and requested:

6. the Secretary-General, in co-operation with the International Committee of the Red Cross, to develop further the idea, expressed in this report, of convening a meeting of the High Contracting Parties to the said Convention to discuss possible measures that might be taken by them under the Convention and, for the purpose, to invite the Parties to submit their views on how the idea could contribute to the goals of the Convention, as well as on relevant matters, and report thereon to the Council."

organs called upon the UN Secretary-General, in cooperation with the International Committee of the Red Cross, to convene a meeting of the High Contracting Parties to the Fourth Geneva Convention. Referring to common Article 1, they asked each party for a meaningful contribution to this meeting. The Security Council and the General Assembly found, within the meaning of common Article 1, explicit grounds for collective responsibility with respect to the situation in the occupied territories.

A conference of the High Contracting Parties was eventually held on 15 July 1999. Adjourned very rapidly, it was seen by many as a non-event; this may be due to the current evolution of political circumstances in the Middle East and to a willingness to deal with this question outside the multilateral context of the United Nations. However, as was stressed during preparations for the conference, the High Contracting Parties did feel a need to meet more frequently in order to discuss issues relating to the application of the Geneva Conventions and Additional Protocols, and the role of the UN organs in identifying such a need should be underlined. In this regard, it is regrettable that the Plan of Action adopted in November 1999 at the 27th International Conference of the Red Cross and Red Crescent does not adequately reflect these concerns,[36] all the more so since such international meetings are also a useful means of heightening public awareness of humanitarian law and bringing issues of implementation and compliance under scrutiny, notably by NGOs and other members of international civil society.

Last but not least, the Security Council has taken another step in determining that gross violations of humanitarian law on a large scale constitute a threat to, or breach of, the peace under Article 39 of the Charter of the United Nations.[37] Specific counter-measures would then be required under the Charter's Chapter VII. Suffice it to mention Resolution 688 of 5 April 1991 condemning "the repression of the Iraqi civilian population in many parts of Iraq,

36 *Loc. cit.* (note 11).

37 For a thoughtful examination of this practice, see I. Österdahl, *Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter*, Iustus Förlag (Juridiska Föreningen i Uppsala), Uppsala, 1998.

including (...) in Kurdish populated areas" and Resolution 794 of 3 December 1992 "determining that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security" or the numerous resolutions denouncing the massive violations of humanitarian principles committed in Bosnia-Herzegovina[38] or, of late, in Kosovo.[39] These illustrate the new spin given by the Security Council to the obligation to ensure respect for humanitarian law.

Under Chapter VII a wide array of measures may be undertaken, ranging from so-called peaceful measures, such as economic sanctions, to military action. The Security Council has resorted to all means at its disposal to promote respect for humanitarian principles, going as far as euphemistically authorizing States to "use all necessary means" (up to and including armed force) to help implement its decisions, for instance to guarantee the safe conduct of humanitarian aid operations and dispatch of such aid.

A further step was taken in June 1999 when the Security Council gave its *ex post facto* political blessing to NATO air raids intended to put an end to violations of humanitarian law.[40] The legality of such action has been, and still is, hotly debated, some seeing it as prohibited by international law although morally justified,[41] while others consider that a legal basis already exists or is emerging, justifying the use of force as an *ultima ratio* when required to ensure respect for humanitarian principles in a situation of humanitarian concern.[42]

38 See, e.g., Security Council Resolutions 941 (1994) of 23 September 1994, 1019 (1995) of 9 November 1995, or 1034 (1995) of 21 December 1995.

39 See, e.g., Security Council Resolutions 1199 (1998) of 23 September 1998, 1203 (1998) of 17 November 1998, or 1239 (1999) of 14 May 1999.

40 Security Council Resolution S/RES/1244 (1999) of 10 June 1999.

41 B. Simma, "NATO, the UN and the use of force: Legal aspects", *European Journal of International Law*, vol. 10, no. 1, 1999, pp. 1-22.

42 A. Cassese, "*Ex iniuria ius oritur*: Are we moving towards international legitimation of forcible humanitarian counter-measures in the world community", *European Journal of International Law*, vol. 10, no. 1, 1999, pp. 23-30, and C. Greenwood, *International Humanitarian Law and the Laws of War, Preliminary Report for the Centennial Commemoration of the First Hague Peace Conference 1899*, available at the Dutch Ministry of Foreign Affairs' website: http://www.minbuza.nl/English/sumconferences.html.

Reliance upon the use of force, prompted by humanitarian considerations, to ensure respect for international humanitarian law has thus blurred the distinction between *jus ad bellum* and *jus in bello*. There is an evident trend towards militarization in the implementation of international humanitarian law. This may give rise to questions as to the risk of selective implementation of norms and principles of humanitarian law, owing to the political nature of the Security Council's decision-making process.

However, it might be useful to recall that those who are entitled to use force to achieve respect for international humanitarian law are, of course, themselves obliged to comply with its provisions in the conduct of their operations. In other words, the purpose of the intervention (*jus ad bellum*) in no way alters the *jus in bello* obligations which the intervening forces must scrupulously respect.

Another issue of great importance is the interplay of the principle of non-intervention and international humanitarian law, when the application of measures under Chapter VII is decided by the Security Council. Certain countries and representatives of international civil society have thus repeatedly called for the implementation of a "*droit d'ingérence humanitaire*"[43] (a fashionable and well-publicized French formula for a "right to interfere" for which an appropriate translation in English has not yet been found), showing the unease that failure to intervene arouses in contemporary international society. Some argue that the principle of non-intervention should be overridden in the event of grave and massive violations of humanitarian law, while others think it too closely related to the tenet of sovereignty to be disregarded. Nonetheless, it goes without saying that the debate must be placed in its proper perspective, that of the existing international legal system, which comprises UN law.

Most striking in this context is the fact that gross violations of humanitarian principles are regarded as matters of international

43 See in particular M. Bettati/B. Kouchner (eds.), *Le devoir d'ingérence*, Denoël, Paris, 1987. For a critical appraisal of the notion, see O. Corten/P. Klein, *Droit d'ingérence ou obligation de réaction?*, 2nd ed., Bruylant/Éditions de l'Université de Bruxelles, Brussels, 1996.

concern and not, to quote Article 2, paragraph 7, of the UN Charter, as "matters which are essentially within the domestic jurisdiction of any State". Moreover, it should be stressed that measures taken under Chapter VII to remedy violations of humanitarian principles should not be considered as a breach of the principle of non-intervention in the internal affairs of States. These measures in fact benefit from the exception also stated in Article 2, paragraph 7, according to which the said principle "shall not prejudice the application of enforcement measures under Chapter VII". The "novel" issue of international humanitarian interventions, and the political scene in the aftermath of the Gulf War in the early 1990s, must be taken into account in attempting to explain the substance of Resolution 688 of 5 April 1991 and more specifically its reference to Article 2, paragraph 7, of the Charter.[44] Practice has since tended to reconcile all these parameters, albeit sometimes at the political price of omitting any specific reference to the Charter's relevant chapter.

Humanitarian assistance decided by the Security Council under Chapter VII does not conflict with the safeguard of domestic jurisdiction. Nonetheless, humanitarian assistance on the basis of Chapter VII should meet certain requirements: it must be provided to people in need, and in conformity with the principle of non-discrimination. These criteria are similar to those prescribed by general international law, under which, to avoid claims of intervention in the internal affairs of a State, "an essential feature of truly humanitarian aid is that it is given 'without discrimination' of any kind" and is "limited to the purposes allowed in the practice of the Red Cross, namely, to 'prevent and alleviate human suffering' and 'to protect life and health and to ensure respect for the human being'".[45] The fundamental nature of these humanitarian principles has to be considered by the Security Council in selecting the measures to be taken, as well as by States, international organizations and other players when providing humanitarian assistance.

44 UN Doc. S/RES/688 of 5 April 1991. For a political and legal interpretation of Resolution 688, see P. Malanczuk, "The Kurdish crisis and allied intervention in the aftermath of the Second Gulf War", *European Journal of International Law*, vol. 2, no. 2, 1991, pp. 114-132.

45 *Nicaragua* v. *USA*, *loc. cit.* (note 9), para. 243.

This consideration is even more important in situations where recourse to force for humanitarian purposes tends to obstruct, or to detract from attention given to, other means of supplying assistance. Moreover, international humanitarian law, finding application in all circumstances, also takes effect in the phase which follows recourse to force and in which its unconditional and non-discriminatory nature are key features.[46]

Hence, the United Nations, having assumed the obligation to ensure respect for international humanitarian law, must adopt a number of measures in order to fulfil this duty. A recent example illustrating the scope of this development was the "open debate" launched by the Security Council in September 1999 on the protection of civilians in armed conflict. This debate was based on a report by the Secretary-General[47] and held in response to a wish expressed by the Council's President[48] for recommendations as to means "to improve both the physical and legal protection of civilians in situations of armed conflict". The Secretary-General met this request by suggesting a broad array of potential measures, either preventive or repressive, which fall within the logic of "ensuring respect" for international humanitarian law. While the tangible results of this debate are not particularly significant, the Council does clearly express in its final resolution "its deep concern at the erosion in respect for international humanitarian (...) law", as well as "its willingness to respond to situations of armed conflict where civilians are being targeted or humanitarian assistance to civilians is being deliberately obstructed, including through the consideration of appropriate measures at the Council's disposal".[49] Equally worthy of note is the number of States which alluded in the debate to collective responsibility linked to respect for international humanitarian law, some going so far as to refer explicitly to common Article 1 in this instance.

46 With regard to these principles, attention is drawn to the measures decided by the European Union in autumn 1999 to deliver fuel to the municipalities headed by political coalitions opposed to Slobodan Milosevic in Yugoslavia.

47 UN Doc. S/1999/957, of 8 September 1999.

48 UN Doc. S/PRST/1999/6, of 12 February 1999.

49 Security Council Resolution 1265 (1999), of 17 September 1999.

Concluding remarks about the quasi-constitutional nature of common Article 1

Undoubtedly, the obligation to respect and to ensure respect for humanitarian principles in all circumstances has acquired a special status not only in United Nations law, but more generally in the international legal order. This provision consequently belongs to a select group of norms and principles held by the international community to be of cardinal importance for the promotion of "elementary considerations of humanity":[50] the Martens Clause[51] is one; the obligation to respect and to ensure respect is another. Such norms play what may be termed a "constitutional role" in a system of collective security where humanitarian values have become a reason for the adoption of a large number of measures. Such a constitutional role is even more important given the proliferation of *sui generis* conflicts in which a wide range of non-State contenders (local warlords, drug traffickers ...) can be acknowledged as fully fledged parties. Hence, South Africa's representative to the United Nations, speaking on behalf of the Non-Aligned Group, recently referred to common Article 1 in much the same way as one would to a constitution, as an instrument of both great importance and flexibility, stating that it "constitutes the collective responsibility of the United Nations".[52]

Another trend to be noted is the increasing role played by the United Nations Security Council, a body that has become the

50 This formula was used by the ICJ in the *Corfu Channel* Case (United Kingdom *v.* Albania), 9 April 1949. On humanitarian principles as equivalent to these "elementary considerations of humanity", see P.-M. Dupuy, "Les 'considérations élémentaires d'humanité' dans la jurisprudence de la Cour internationale de Justice", R.-J. Dupuy (ed.), *Droit et justice — Mélanges en l'honneur de Nicolas Valticos*, Paris, Editions A. Pedone, 1999, p. 117.

51 According to this provision, in cases not covered by the Conventions, the Protocol or other international agreements, or in the case of denunciation of these agreements, "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."— Protocol I, Art. 1; see also the Geneva Conventions I (Art. 63), II (Art. 62), III (Art. 142), and IV (Art. 158).

52 This remark was made during the open debate convened on 16 September 1999 by the Security Council to discuss issues concerning the protection of civilians in armed conflicts. UN Doc. S/PV.4046 (summary), 17 September 1999.

main proponent of common Article 1. This entails a risk of selectivity insofar as political considerations might prevent the Council from acting unconditionally, i.e. in all circumstances where action is called for. Similarly, there remains a risk that the Council's recourse to humanitarian assistance may become a pawn of political interests, rather than the object of meaningful political action. To prevent this, the obligation to ensure respect for humanitarian law should be interpreted in a broad sense, so as also to include the search for peaceful means of conflict resolution based on respect for the values and principles of the UN Charter. While preventive action may be one such means, promoting meaningful negotiations might indeed be another.[53]

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53 See the proposals made by the Secretary-General in his report to the Security Council on Protection of Civilians in Armed Conflicts, UN Doc. S/1999/957, of 8 September 1999.

Résumé

L'article premier commun aux Conventions de Genève revisité : protéger les intérêts collectifs

par LAURENCE BOISSON DE CHAZOURNES et LUIGI CONDORELLI

Avec l'article premier commun aux Conventions de Genève et au Protocole additionnel I, les États parties à ces traités « s'engagent à respecter et à faire respecter [les obligations humanitaires] en toutes circonstances ». En engageant la responsabilité de la communauté des États parties aux principaux traités humanitaires à prendre les mesures qui s'imposent pour assurer le respect du droit humanitaire par un Etat tiers (notamment si cet État est une partie à un conflit armé), cette disposition contribue à la constitution d'un ordre public international. Les auteurs examinent tout d'abord les nouveaux développements par rapport à l'obligation de respecter le droit humanitaire (jurisprudence du Tribunal pénal international pour l'ex-Yougoslavie, nouvelles règles pour les opérations militaires conduites sous l'autorité des Nations Unies, etc.). Ils se penchent ensuite sur la pratique récente concernant l'obligation de faire respecter le droit international humanitaire, sans cacher les problèmes qui se posent, notamment pour l'indépendance de l'action humanitaire par rapport aux pouvoirs politiques.