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BOISSON DE CHAZOURNES, Laurence

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THE COLLECTIVE RESPONSIBILITY OF STATES TO ENSURE RESPECT FOR HUMANITARIAN PRINCIPLES

by Laurence Boisson de Chazournes

1. INTRODUCTION

To speak of the social or political responsibility of the international community to ensure respect for humanitarian principles is not as heretical as it might have seemed a few decades ago. Nor should it be when one speaks of this collective responsibility in a legal perspective, that is the duty of each state to ensure respect for humanitarian principles in relation to each other.

The international legal system has gradually accepted that some obligations such as those deriving from "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination" are "by their very nature ... the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes".

Third states can find a legal basis for their right to ensure respect of humanitarian principles in the notion of obligations erga omnes. This principle would be strengthened if the right of third states to conduct an actio popularis was accompanied by an obligation to ensure respect for humanitarian principles. This would give a deeper and more action-oriented meaning to the collective responsibility of states.

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1The expression "humanitarian principles" is used to mean both human rights law and international humanitarian law.


3Barcelona Traction Light and Power Company, ibid., para. 33, p. 32.

4For practical reasons, we shall use the term "third states" to refer to states that have not violated humanitarian principles. When we speak of collective responsibility, we mean responsibility assumed by all states.

Even if the obligation to ensure respect for humanitarian principles appears to have some ground in the international legal system, defining its legal parameters is a rather difficult task. This is due, in great part, to the lack of precision of how, in fact, it should be implemented. Should it be considered, for example, that states parties to human rights treaties are obliged to bring, under the inter-state procedures provided for by the treaties, claims in response to infringements committed by other states parties? However, an analysis of state practice demonstrates the reluctance of third states to consider themselves under a duty to allege the international responsibility of a state violating human rights. This situation would explain the paucity of inter-state claims brought under treaty-based mechanisms.

2. THE OBLIGATION TO ENSURE RESPECT FOR INTERNATIONAL HUMANITARIAN LAW

Given the rather theoretical nature of the notion of collective responsibility, it is worth considering how this principle has found application in international humanitarian law. In effect, the obligation to ensure respect for humanitarian principles has received its clearest

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7This was the position taken by the Consultative Assembly of the Council of Europe as regards the European Convention on Human Rights when in 1967 it adopted a resolution on the human rights situation in Greece which, *inter alia*, expressed the view that "in an important and serious case of this kind, the contracting Parties to the Convention have a duty to act under article 24 of the Convention and that, if they do not act as requested, the mechanism of collective guarantee of human rights set up by the Convention runs the risk of becoming meaningless" (Res. 346 (1967), *Yearbook of the European Convention on Human Rights* (1967) p. 96). Denmark, Norway, Sweden and the Netherlands filed an application under Article 24 of the Convention which referred expressly to the Consultative Assembly's resolution (*Yearbook of the European Convention on Human Rights* (1967) p. 586); see Kamminga, op.cit. n. 6, p. 185.

8See the contribution of V. Dimitrijević in the present volume.
formulation in common Article 1 of the four Geneva Conventions of 12 August 1949 and its Additional Protocol I of 1977. Common Article 1 provides: "The High Contracting Parties undertake to respect and to ensure respect for ... in all circumstances."

The International Court of Justice recognized the importance of the obligation defined in common Article 1, finding its origins in the field of general international law. International Conferences have also given credence to this obligation.

Common Article 1 establishes legal grounds for action against a state violating humanitarian law which are applicable in international armed conflicts, internal armed conflicts and all other situations covered by common Article 3 to the four 1949 Geneva conventions. It also emphasizes the non-reciprocal nature and absolute character of this fundamental obligation, which obliges states, whether or not parties to conflicts, to react to violations of international humanitarian

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9Convention (I) for the Amelioration of the Condition of Wounded and Sick 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, Convention (IV) relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS pp. 31, 85, 135, 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1977, 1125 UNTS pp. 3, 609.


11Resolution XXIII adopted by the Conference on Human Rights held in Teheran in 1968 provided, inter alia, that States parties to the Red Cross Geneva Conventions sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other states, even if they are not themselves directly involved in an armed conflict, Final Act of the International Conference on Human Rights, United Nations, A/CONF.32/41, p. 18. The same approach was adopted by the states participating in the CSCE Helsinki Summit, Helsinki 1992 Document, p. 57.
law regardless of the circumstances, so as to ensure respect for the aforementioned principles.\textsuperscript{12}

The Geneva Conventions and their Additional Protocol I offer states the means by which to enforce this obligation. This could, for example, include convening meetings of the High Contracting Parties, resorting to the Protecting Powers institution and its substitutes, enforcement of the repression of grave breaches system, in particular those calling for the greatest measure of mutual assistance in criminal matters, or resorting to the International Fact-Finding Commission recently established under Article 90 of Protocol I.\textsuperscript{13}

The obligation to ensure respect for humanitarian principles can also be implemented through other channels such as diplomatic action or public denunciation. It can also find application through the principle of universality of jurisdiction which implies that states should try or extradite alleged criminals.

Furthermore, common Article 1 can find concrete meaning within the framework of the United Nations. As such, actions so conducted give tangible meaning to Article 89 of Additional Protocol I to the Conventions, which reads as follows:

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\textsuperscript{13}Any state which made a declaration recognizing the competence of the International Fact-Finding Commission under Article 90 of Protocol I, be it or not a victim of violations of humanitarian principles, would be able to request the Commission to institute an inquiry "into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol" and "facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol" (Article 90, para. 2(e)), provided that the state against whom the allegation is made has made a similar declaration or accepts the \textit{ad hoc} competence of the Commission; see the contribution of A. Rosas in the present volume.
"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."

This Article provides that in certain circumstances ("in situations of serious violations"), the parties have a more stringent obligation to ensure respect for humanitarian principles: they have expressly committed themselves to act in co-operation with the United Nations to remedy such violations.

3. THE IMPLEMENTATION OF THE OBLIGATION TO ENSURE RESPECT OF HUMANITARIAN PRINCIPLES WITHIN THE FRAMEWORK OF THE UNITED NATIONS

The United Nations General Assembly, the Security Council and the Commission on Human Rights have on various occasions condemned violations of humanitarian principles. Among the means that have been used to confront such violations are calls to respect humanitarian principles; good-offices; the sending of observer missions and peace-keeping operations (whose mandate has included, inter alia, the promotion of humanitarian principles). The collective denunciations of abusive violations and the institutional actions which can be undertaken to monitor the promotion of humanitarian prin-


15S.C. Res. 693 of 20 May 1991 establishing the United Nations Observer Mission in El Salvador (ONUSAL) to monitor all agreements concluded by the two parties, which includes components on the respect of humanitarian principles.

16S.C. Res. 745 of 28 February 1992 on the establishment of a United Nations Transitional Authority in Cambodia (UNTAC) which has as part of its mandate the protection of humanitarian principles.
principles give substance to the implementation of collective responsibility of states to ensure respect for humanitarian principles.

The Security Council has also recently given a new dimension to this obligation, which could prove to be fruitful. In Resolution 681 (1990) of 20 December 1990, the Security Council, which was

"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 his 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 this 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 to report thereon to the Council."

The Security Council, referring to common Article 1, asked each contracting party to contribute meaningfully to the meeting of the states parties of the fourth Geneva Convention. The Security Council thus found, within the meaning of common Article 1, explicit grounds

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17I.e., the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, of 12 August 1949.
for the collective responsibility of states to ensure that international humanitarian law is respected.\textsuperscript{18}

During the Iraq-Kuwait conflict the Security Council, acting expressly under Chapter VII of the Charter of the United Nations, included stringent requests for respect for humanitarian law in its decisions\textsuperscript{19} and also dealt with Iraq's responsibility for violations of humanitarian principles. In its cease-fire resolution,\textsuperscript{20} the Security Council confirmed that Iraq was "liable under international law for any direct loss, damage, ... or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait". Claims for compensation of violations of humanitarian principles can clearly be brought before the Commission under this basis established by the Security Council\textsuperscript{21} to deal with the relevant claims. This mechanism offers yet another promising dimension to the obligation to ensure respect for humanitarian principles, identifying a means of practical implementation of the consequences deriving from state responsibility for humanitarian violations.

The Security Council has also taken another step by determining that large-scale and gross violations of humanitarian principles constitute threats to, or breaches of, the peace as qualified by Article 39 of the Charter of the United Nations\textsuperscript{22} and decided to take specific actions

\textsuperscript{18}See also Report submitted to the Security Council by the Secretary-General in accordance with Resolution 681 (1990), S/22472, 9 April 1991.


\textsuperscript{20}S.C. Res. 687 of 8 April 1991.

\textsuperscript{21}S.C. Res. 692 of 2 May 1991.

\textsuperscript{22}On the material scope of application of Article 39 of the Charter of the United Nations which encompasses threats to, and breaches of, the peace other than aggression, see H. Kelsen, The Law of the United Nations (London 1950) p. 438 and p. 736; see S.C. Res. 232 (1966) of 16 December 1966 in which the Security Council considered the racist regime of Southern Rhodesia as a threat to international peace and security.
under Chapter VII to confront such threats to, or breaches of, the peace.

Considering the action to be taken against the massive violations of humanitarian principles in Bosnia-Herzegovina, the Security Council, acting on the basis of Chapter VII, decided that violations of international humanitarian law constituted a breach of the peace under Article 39 of the Charter of the United Nations and determined that a wide range of measures should be taken in order to restore international peace. As with Resolution 688 of 5 April 1991 condemning "the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region", the Security Council enlarged its interpretation of Article 39 and found consistent patterns of gross violations of internationally recognized humanitarian principles to be threats to, or breaches of, the peace. It reiterated its interpretation with the adoption of 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".

Under Chapter VII the Security Council may indicate provisional measures, apply economic sanctions and all other peaceful means that may be necessary to maintain international peace and security. As a last resort, when all peaceful means have failed, it may decide to have recourse to military measures. In so doing, the Security Council may direct measures to put an end to the violation of humanitarian principles or, at a minimum, to diminish the suffering of victims.

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24It should be noted that while analysing how common Article 1 finds application within Chapter VII, we are focusing on the ius in bello to see how the obligation to ensure respect for humanitarian principles can benefit from implementation within this institutional pattern. Thus, the questions which arise in respect of the ius ad bellum are not considered although the application of fundamental principles such as the inadmissibility of the acquisition of territory by war or the right to self-defence also have their part in ensuring respect for humanitarian principles.
Obviously, the Council must take into account the circumstances of the breach of the peace involved. Humanitarian principles have value *per se* and should not be considered only when security issues which endanger international peace and security are at stake. The fundamental nature of humanitarian principles would have to be considered by the Security Council when it decides on the measures to be taken.

Gross violations of humanitarian principles are matters of international concern and not "matters which are essentially within the domestic jurisdiction". In addition, 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 would, in fact, benefit from the exception stated in Article 2, paragraph 7, of the United Nations Charter, which states that the principle of non-intervention in domestic affairs "shall not prejudice the application of enforcement measures under Chapter VII".

In view of this, humanitarian assistance decided by the Security Council under Chapter VII would not conflict with the domestic jurisdiction principle. But the provision of humanitarian assistance decided under Chapter VII must meet certain requirements:

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25The "novelty" of the question of organizing an international humanitarian operation and the political context which prevailed in the aftermath of the Gulf War, have to be taken into account if one wants to give an explanation of the content of Resolution 688 of 5 April 1991, and more specifically of its inconsistencies as regards Article 2, paragraph 7 of the Charter. 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* (1991) p. 114 at p. 132.

should be provided to people who are in need, in conformity with the principle of non-discrimination.27

Recently, the Security Council has authorized states "to use all necessary means"28 to apply its decisions. It should, however, maintain control over the way these decisions are implemented. Absence of control by the Security Council presents the risk that states are given a blank cheque and might abuse and exceed their powers, especially if they were to take military action.29,30 On the other hand, the absence of control by the Security Council could leave states without any pressing incentives to implement the measures and actions decided by this organ. In this context, it is regrettable that the collective security mechanisms provided for under Articles 43 to 49 of Chapter VII of the Charter of the United Nations have not yet been functioning as originally envisaged.

If the Security Council were to decide to send peace-keeping forces, it should first define their mandate, and extend it if necessary, so as to render effective the respect for humanitarian principles. Ideally, the peace-keeping forces should be in charge of guaranteeing, if necessary with recourse to armed force, the smooth administration of all humanitarian aid activities conducted by organizations such as the United Nations High Commissioner for Refugees (UNHCR), the United Nations Children's Fund (UNICEF), the International

27These criteria are similar to those prescribed by general international law which require that, to preclude 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 hallowed 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', Military and Paramilitary Activities in and Against Nicaragua, supra n. 9, p. 125, para. 243.


30It should be stressed that "any use of force, individual or collective, even when consistent with the Charter, is subject to the rules of international law applicable in armed conflict, in particular those codified in the Conventions and the Protocol", Sandoz et al., eds., op.cit. n. 11, p. 1035.
Committee of the Red Cross (ICRC) and non-governmental organizations (NGOs). The United Nations forces should also be in charge of, for example, the protection of civilians, access to detainee camps and the establishment of safe zones under international protection.

The restoration of international peace can be encouraged by the relationships referred to in Chapter VIII of the Charter which incorporates regional arrangements and agencies into the UN scheme. These relationships have been interpreted largely in terms of military operations and peace-keeping forces. Recent trends in international practice have shown that the Security Council has become involved in new types of collective security issues, such as gross violations of humanitarian principles. The cessation of these acts could benefit greatly from combined actions conducted both at the universal and at the regional level. At the European level, initiatives conducted by the Conference on Security and Co-operation in Europe (CSCE), the European Community or the Council of Europe could provide means by which to ensure the cessation of violation of humanitarian principles. This would offer new perspectives in interpreting Chapter VIII which would thus enlarge relationships between the United Nations and regional arrangements and agencies to include operational actions (other than military operations) to ensure respect for humanitarian principles.

In order to prevent the recurrence of gross violations of humanitarian principles, action should be taken to strengthen and solidify the restoration of peace. In this context, promotion of the respect of humanitarian principles is a necessary component of all actions.

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31Note the emphasis placed by the Secretary-General on the role of regional arrangements and institutions within the framework of maintaining and restoring peace in *An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping*, United Nations, 1992, p. 35 at p. 38.

32Considering the CSCE as a regional arrangement under the meaning of Chapter VIII of the Charter of the United Nations, the states participating at the CSCE Helsinki meeting declared that the CSCE would closely collaborate with the United Nations, particularly as regards the prevention and settlement of conflicts, *Helsinki Summit Declaration*, para. 25. See A. Bloed, "The CSCE: A New International Security Organization in Europe?", in H. Fischer, ed., *CSCE in Transition* (Publications of Bochum University 1993).
undertaken to sustain peace after the settlement of a conflict. It should be considered as a "post-conflict peace-building" measure as qualified by the Secretary-General, Boutros Boutros-Ghali, in his Agenda for Peace. Post-conflict promotional actions could also benefit from joint and complementary efforts between the United Nations and regional arrangements and organizations.

4. CONCLUSIONS AND RECOMMENDATIONS

From the above, the following conclusions and recommendations may be made:

1. Common Article 1 of the four Geneva Conventions of 12 August 1949 and their Additional Protocol I provide that states are under a general obligation to ensure respect for humanitarian principles. In implementing this obligation, states should utilize all the means they are legally entitled to use, be they diplomatic, treaty-based or institutional.

2. Recent trends have consolidated the United Nations Charter as a legal and institutional framework for prescribing action to ensure respect for humanitarian principles. This development has, without any doubt, strengthened the identification and enforcement of the duty to ensure respect for humanitarian principles. One must not overlook the richness of the resources of all of the United Nations Charter. This offers states new perspectives in their role as guarantors of the principle of respect for humanitarian principles.
3. All the United Nations organs should fulfil their mandates to remedy grave violations of humanitarian principles. In this respect, it should be stressed that Articles 10 to 14 provide the General Assembly with a wide range of functions and powers which can be used to ensure the redress of violations of humanitarian principles.

4. Actions undertaken under Chapter VII to ensure respect for humanitarian principles should be considered as a means of last resort, that is when no other action by the Security Council or other competent United Nations organ would prove to be effective in such grave and urgent situations.

5. The Security Council should not be selective in qualifying gross violations of humanitarian principles as threats to, or breaches of, the peace. There is a risk of a double standard ensuing. In this respect the veto power and the voting procedure could play a role against a potential double standard, but there is absolutely no guarantee of consistency. Because of this risk of selectivity it is very important that external checks and balances are also developed within the constitutional order of the United Nations system. They could be of a political nature such as the establishment by the General Assembly of a Committee which would provide opinions on the validity of the decisions of the Security Council. The International Court of Justice could also be requested by the General Assembly to give an advisory opinion on the legitimacy of a decision of the Security Council.

6. Joint and complementary efforts should be encouraged between the United Nations and regional arrangements and organizations with the purpose of improving the effectiveness of the implementation of collective responsibility to ensure respect of humani-

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36Art. 96, para. 1, of the Charter of the United Nations.
tarian principles. Operational actions and "post-conflict peace-
building" measures should be conducted on this basis.

7. The obligation to ensure respect for humanitarian principles
should not be interpreted too narrowly, that is in the sense of
providing only urgent humanitarian assistance. If such was the
case, it could become an easy alibi for states wishing not to
wholly assume their collective responsibility. There would be the
great risk that humanitarian assistance would become a pawn of
political interests, impossible of any meaningful implementation,
in particular as regards the guarantee of access to victims and
safety for people providing aid. The obligation to ensure respect
for humanitarian principles should be interpreted in a broad
sense, so as to include the search for a peaceful resolution of a
conflict based on the respect for fundamental human rights. The
promotion of respect for humanitarian principles as a "post-
conflict peace-building" measure to consolidate peace and prevent
any recurrence of gross violations of humanitarian principles
should also be part of this process.

8. However, long before actions to ensure respect for humanitarian
principles are taken, basic anticipatory measures should first be
taken. Problems such as the continuous deterioration of terms of
trade, debt crises and the arms trade must be faced head-on and
resolved. This approach would be far more effective than simple
remedial measures taken post facto because they would, in effect,
prevent the very emergence of threats to, or breaches of, the
peace. Such preventive measures would also facilitate and pro-
mote the implementation of the objectives set out in Articles 55
and 56 of the Charter of the United Nations, that is "the creation
of conditions of stability and well-being which are necessary for
peaceful and friendly relations among nations based on respect
for the principle of equal rights and self-determination of
peoples".