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The Normative Erosion of International Refugee Protection through UN Security Council Practice

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Abstract

Since the early 1990s, the UN Security Council has used its enforcement measures under Chapter VII of the UN Charter to address different aspects of international refugee protection from the root causes of forced displacement to the search for durable solutions to the refugee problem. At the same time, however, the Security Council has been criticized for impelling trends towards state security concerns that have emerged in the refugee-protection regime over the past two decades. By establishing safe areas in Iraq, Bosnia, and Rwanda, or linking refugee status to terrorism, the Security Council has been accused of violating established refugee-protection standards. This paper seeks to use the prism of international refugee protection to draw a more nuanced picture of the normative effects of SC actions on the development of international law generally. Shifting the analytical focus from the much-discussed responsibility of the Security Council for wrongful acts, it is submitted that the practice of the Security Council has had a considerable influence on the development and even making of norms in the field of international refugee protection, thereby eroding established refugee-protection standards. This normative erosion through the inherently political actions of the Security Council will be assessed with regard to the principal measures by which the Security Council has addressed international refugee protection, namely peace operations and economic sanctions.

Key words

comprehensive sanctions; displaced persons; human rights; humanitarian access; integrated missions; international humanitarian law; international refugee protection; peace operations; refugee status; safe havens; targeted sanctions; terrorism; United Nations Security Council

1. Introduction

Since the early 1990s, the UN Security Council has used its enforcement measures under Chapter VII of the UN Charter to address different aspects of international refugee protection.[1] Having linked massive flows of refugees with threats to

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1 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'. See UNHCR, *Note on International Protection*, UN Doc. A/AC.96/830 (1994), at 8, para. 12. Accordingly, the term 'refugee' is considered in its broad and inclusive meaning, with emphasis on the element of coercion and the continuum

international peace and security in the case of Iraq in the early 1990s,[2] the Security Council has increasingly dealt with the root causes of forced displacement such as massive violations of human rights and international humanitarian law, supported the assistance to and protection of refugees and internally displaced persons (IDPs) in ongoing conflict situations, and promoted durable solutions to displacement.[3] Over the years, these activities have led to the emergence of a normative framework centred on the Security Council's agenda topic, 'The Protection of Civilians in Armed Conflict',[4] which places the individual – and not the state – at the core of its understanding of international security. At the same time, however, the Security Council has been criticized for fuelling backwards trends towards state security concerns that have emerged in the refugee-protection regime during the past two decades.[5] The Security Council thus prevented displaced persons from seeking asylum by creating so-called safe havens for civilians in Iraq, Rwanda, and Bosnia, and also made unwarranted links between refugee status and terrorism in the wake of the terrorist attacks of 11 September 2001. By prioritizing state security objectives over humanitarian considerations, the Security Council has been accused by scholars and practitioners of violating established protection standards through its inherently political actions.[6]

Any such violation of norms of international refugee protection evidently presupposes the existence of limits of the Security Council's enforcement powers.[7] Although it remains controversial which rules of general international law apply to its actions, the Security Council is at least bound by the principles and purposes of the UN Charter while acting within the internal legal order of the United Nations. These principles and purposes are reflected in internal UN documents such as the

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of the displacement process. It includes other categories relevant to the Security Council's practice such as persons at risk of displacement, internally displaced persons, and returnees, but excludes voluntary forms of migration. See ibid., at 8, paras. 24, 25.

2 See UN Doc. S/RES/688 (1991).

3 The Security Council has, for instance, addressed the violations of human rights and humanitarian law in Somalia (UN Doc. S/RES/751 (1992), UN Doc. S/RES/814 (1993)) and Haiti (UN Doc. S/RES/940 (1994)); has continuously called on or even required parties to an armed conflict to ensure humanitarian access in various situations such as Sierra Leone (UN Doc. S/RES/1132 (1997)) and Kosovo (UN Doc. RES/1199 (1998)), as well as Sudan, Chad, and the Central African Republic (UN Doc. S/RES1778 (2007)); and has emphasized the right to return of displaced persons after conflicts in Bosnia (S/RES/820 (1993)), Rwanda (UN Doc. S/RES/1078 (1996)), and East Timor (S/RES/1272 (1999)).

4 So far, the Security Council has passed four general resolutions on the 'Protection of Civilians in Armed Conflict': UN Doc. S/RES/1265 (1991), UN Doc. S/RES/1296 (2000), UN Doc. S/RES/1674 (2006), UN Doc. S/RES/1894 (2009). The above-described framework further includes resolutions on other specific topics such as 'children and armed conflict' (UN Doc. S/RES/1261 (1999), UN Doc. S/RES/1314 (2000), UN Doc. S/RES/1379 (2001), UN Doc. S/RES/1460 (2003), UN Doc. S/RES/1612 (2005), UN Doc. S/RES/1882 (2009)); 'women and peace and security' and 'sexual violence' (UN Doc. S/RES/1325 (2000), UN Doc. S/RES/1820 (2008), UN Doc. S/RES/1888 (2009), UN Doc. S/RES/1889 (2009)).

5 On the development of 'Transnational Policies Aimed at "Containing" Refugee Flows', see A. Hurwitz, *The Collective Responsibility of States to Protect Refugees* (2009), 2.

6 For a more specific discussion of these accusations, including references, see sections 2 and 3 of this article.

7 In *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion of 28 May 1948, [1948] ICJ Rep. 57, at 64, the Court held that 'the political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for judgment'. See also A. J. P. Tammes, 'Decisions of International Organs as a Source in International Law', (1958) 94 RdC 261, especially at 344; B. Conforti, 'Le rôle de l'accord dans le système des Nations Unies', (1974) 142 RdC 203; S. Lamb, 'Legal Limits to United Nations Security Council Powers', in G. S. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999), 361.

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Statute of the UN High Commissioner for Refugees (UNHCR),[8] but also in treaties concluded under UN auspices such as the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.[9] Leaving aside the controversial question of judicial review by the International Court of Justice (ICJ), the only option a member state has in case of an unlawful SC 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.[10]

This article intends to use the prism of international refugee protection to draw a more nuanced picture of the normative effects of SC actions on the development of international law generally. For, even below the level of a clearly established violation of international law, the Security Council's practice may weaken refugee-protection standards. Considering that its resolutions frequently contain statements about the pertinent rules of international law in connection with the treatment of a particular case or matter, the Security Council's measures inevitably have normative effects on international refugee protection.[11] Whereas the Security Council's actions cannot be said to represent the generality of the requisite state practice in the same way as certain General Assembly resolutions, the consistent and uniform reiteration of obligations by the Security Council may result in widespread state practice.[12] If this practice subsequently finds general acceptance in the *opinio juris* of UN member states, it may contribute to the crystallization or consolidation of customary international law.[13] While the influence of SC measures on customary international law arguably does not depend on their compulsory character, binding SC resolutions will have a greater impact on law development and – where they

8 The UNHCR Statute is annexed to UN Doc. A/RES/428 (V) (1950).

9 See V. Gowlland-Debbas, 'La Charte des Nations Unies et la Convention de Genève du 28 Juillet 1951 Relative au Statut des Réfugiés', in V. Chetail (ed.), *La Convention de Genève du 28 Juillet 1951 Relative au Statut des Réfugiés 50 Ans Après: Bilan et Perspectives* (2001), 193, at 201. References to the 1951 Convention Relating to the Status of Refugees (189 UNTS 150; hereafter, '1951 Convention') include the 1967 Protocol Relating to the Status of Refugees (606 UNTS 267; hereafter, '1967 Protocol'), which incorporates the 1951 Convention and removes the temporal and geographic limitations of the Convention.

10 These legal consequences would result from a violation of Art. 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 (1991) on Iraq). 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 MPYUNL 91, at 99.

11 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*'. R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), 5 (emphasis added). 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.

12 The International Committee of the Red Cross (ICRC) extensively referred to the practice of the Security Council in situations of armed conflict in its recent study on customary international humanitarian law. See J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, Vol. 1: *Rules* (2005), e.g., at 194–202.

13 This interplay between the Security Council's practice and its acceptance by states was addressed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadić* case. See *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94–1, A.C., 2 October 1995, paras. 74–78. 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 Art. 25 of the UN Charter.

diverge from existing legal rules – law-making.[14] 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 by virtue of Article 103 of the UN Charter. Repeated action may then lead to a permanent erosion of normative standards. In light of this triad of law enforcement, law development, and law-making, the following discussion will examine the principal measures by which the Security Council has addressed international refugee protection, namely peace operations (section 2) and economic sanctions (section 3), in order to assess the erosion of international protection standards in view of the Security Council's recent practice to address human security alongside traditional security considerations.

2. Erosion through UN peace operations

As humanitarian organizations such as the UNHCR have become increasingly involved in countries of origin and zones of active conflict,[15] they have witnessed massive violations of human rights and international humanitarian law.[16] They 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',[17] has shrunk over the past decades for a variety of reasons linked to an increasingly complex political and security situation. As a result, the 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, the close co-operation between the UNHCR, with its humanitarian, non-political mandate, and the politically authorized peace operations has also provoked critical voices, in particular with regard to the creation of safe areas and the erosion of established principles of humanitarian action.

14 On the Security Council's 'legislative' activities, see generally S. Talmon, 'The Security Council as World Legislature', (2005) 99 AJIL 175; J. Alvarez, 'Hegemonic International Law Revisited', (2003) 97 AJIL 873; P. Szasz, 'The Security Council Starts Legislating', (2002) 96 AJIL 901, at 901; J. Alvarez, *International Organizations as Law-Makers* (2006), 184; G. Abi-Saab, 'The Security Council as Legislator and as Executive in Its Fights against Terrorism and against Proliferation of Weapons of Mass Destruction: The Question of Legitimacy', in R. Wolfrum and V. Röben (eds.), *Legitimacy in International Law* (2008), 109.

15 See K. Newland and D. W. Meyers, 'Peacekeeping and Refugee Relief', (1998) 5 *International Peacekeeping* 15, at 17.

16 See, e.g., UN Doc. S/RES/941 (1994), referring to UN Doc. S/1994/265 (1994) and UN Doc. S/1994/674 (1994), 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.

17 J. Grombach Wagner, 'An IHL/ICRC Perspective on Humanitarian Space', (2005) 32 *Humanitarian Practice Network*, available online at www.odihpn.org/report.asp?ID=2765. See also Inter-Agency Standing Committee, *Background Document: Preserving Humanitarian Space, Protection and Security*, WO/0803/2583/7 (26 February 2008).

2.1. 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,[18] 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 and the corresponding duty to admit.[19] 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'.[20] The creation of safe areas has the aim not only to protect civilians who already live in these areas, but also to provide a temporary refuge.[21] It has therefore 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. Former UN High Commissioner for Refugees Sadako Ogata characterized this 'right to remain' as:

> the basic right of the individual not to be forced into exile [which] is implicit in the right to leave one's country and to return there. In its simplest form it could be said to include the right to freedom of movement and residence within one's own country.[22]

The establishment of safe areas was first controversially discussed in the wake of the adoption of SC Resolution 688 on Iraq.[23] 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 Iraqi government in 1991.[24] 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

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18 See UN Doc. A/RES/3212 (XXIX) (1974), para. 5, endorsed by UN Doc. S/RES/365 (1974), on Cyprus; UN Doc. S/RES/820 (1993), para. 7, on Bosnia; UN Doc. S/RES/999 (1995), para. 8, on Tajikistan; UN Doc. S/RES/1078 (1996), preamble, para. 7, on Rwanda; UN Doc. S/RES/971 (1995), preamble, paras. 5, 6, 7, on Georgia/Abkhazia; UN Doc. S/RES/1239 (1999), para. 4, on Kosovo.

19 On the 'right to leave', see Art. 13(2) of the Universal Declaration of Human Rights, which states: 'Everyone has the right to leave any country, including his own, and to return to his country' (UN Doc. A/RES/217A (III) (1948). Art. 12(4) of the International Covenant on Civil and Political Rights chooses a different formulation in providing that 'No one shall be arbitrarily deprived of the right to enter his own country', 999 UNTS 171 (1976). See generally G. S. Goodwin-Gill, 'Right to Leave, Return and Remain', in V. Gowlland-Debbas (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues* (1996), 93.

20 See B. S. Chimni, 'The Incarnation of Victims: Deconstructing Safety Zones', in N. Al-Naumi and R. Meese (eds.), *International Legal Issues Arising under the United Nations Decade of International Law* (1995), 823, at 825. See generally H. Yamashita, *Humanitarian Space and International Politics: The Creation of Safe Areas* (2004).

21 See C. Phuong, *International Protection for Internally Displaced Persons* (2004), 137.

22 UNHCR, *Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, to the Forty-Ninth Session of the Commission on Human Rights* (3 March 1993).

23 UN Doc. S/RES/ 688 (1991). See C. Helton, *The Price of Indifference: Refugees and Humanitarian Action in the New Century* (2002), 172; see more generally S. Ogata, 'The Right to Remain', (1993) 92 *Refugees* 11.

24 The idea of the establishment of safe areas originated in international humanitarian law, which presupposes the consent of the warring parties to the creation of neutralized zones. Compare, for instance, Art. 23 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (75 UNTS 135) and Arts. 14 and 15 of the 1949 Geneva Convention Relative to the Protection to Civilian Persons in Time of War (75 UNTS 287) (hereafter, 1949 Geneva Conventions). A strong argument against consent in the case of Iraq is the fact that Saddam Hussein's government attacked the zone in Irbil by an incursion in September 1996. However, it is important to point out that the safe zones in Northern Iraq were backed by credible military strength. On the problematic question of consent, see L. Minear and T. Weiss, *Mercy under Fire: War and the Global Humanitarian Community* (1995), 171; and K. Landgren, 'Safety Zones and International Protection: A Dark Grey Area', (1995) 7 IJRL 436.

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',[25] partly 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 principle of *non-refoulement*.[26]

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.[27] As in Iraq, the safe havens in Bosnia were created as a direct consequence of a third party's refusal to accept Bosnian refugees and 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 the 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 protection of displaced persons, refugees and civilians at risk',[28] including through the establishment and maintenance of secure humanitarian areas.[29] 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 during the Rwandan genocide.[30] By legitimizing the creation of safe havens in the context of its enforcement actions, 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'.[31]

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.[32] From a normative point of view, this provision will not necessarily contribute to

25 G. S. Goodwin-Gill, *The Refugee in International Law* (1996), 141.
26 See J. Allain, 'The *Jus Cogens* Nature of *Non-Refoulement*', (2002) 13 IJRL 533, at 544. As Frelick notes, 'UN Resolution 688 is important both for what it does and does not say', B. Frelick, 'Refugee Rights: The New Frontier of Human Rights Protection', (1998) 4 *Buffalo Human Rights Law Review* 261, at 265.
27 UN Doc. S/RES/819 (1993) and UN Doc. S/RES/824 (1993).
28 UN Doc. S/RES/929 (1994), para. 2.
29 See Landgren, *supra* note 24, at 448.
30 See J. Hathaway and A. Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', (1997) 10 HHRJ 115, at 136.
31 Ibid.
32 UN Doc. S/RES/1296 (2000), para. 15.

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. Yet, where the Security Council decides to establish safe havens in the future, a credible military force will be crucial for the effective protection of the internally displaced persons in these areas.[33] 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.[34]

2.2. Peace operations and the UNHCR's humanitarian mandate

The inevitable interface between humanitarian organizations like the UNHCR and the Security Council, in particular through its authorized peace operations, has drawn renewed attention to a broader debate on the balance between 'humanitarian' and 'political' mandates in the UN system. It is difficult to clearly classify mandates into certain categories.[35] Measured by the effects of their activities, even peacekeeping mandates could be understood as humanitarian operations – especially in 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 that may counteract the humanitarian objectives of such action as illustrated by the above-discussed safe areas.[36] The ongoing 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 the UNHCR with the Security Council will compromise the humanitarian principles of impartiality, neutrality, independence, and the consent of the host state.[37]

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 (ICRC), which is markedly different from the mandate of the 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 'human-

33 Report of the Secretary-General on the protection of civilians, UN Doc. S/1999/957 (1999), Recommendation 39, at 21. See also Goodwin-Gill, *supra* note 19, at 103.

34 As the UNHCR Executive Committee emphasized, 'activities on behalf of internally displaced persons must not 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. l.

35 See generally C. Palley, 'Legal Issues Arising from Conflicts between UN Humanitarian and Political Mandates: A Survey', in Gowlland-Debbas, *supra* note 19, at 151.

36 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.

37 See Newland and Meyers, *supra* note 15, at 27.

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itarian nature' of asylum.[38] In contrast, the humanitarian principles of the ICRC, enshrined in its Statutes and in the 1949 Geneva Conventions, are the result of best practices, promoting the legitimacy of the ICRC and the effectiveness of its functions in difficult environments.[39] While the 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 the UNHCR expanded its functions to activities in countries of origin in the early 1990s, the UNHCR's Executive Committee (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.[40] The reasons for the 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.[41]

Nevertheless, the effect intended by the invocation of these principles to maintain or enlarge humanitarian space was somewhat paradoxically counteracted by the UNHCR's increasing co-operation with the Security Council and its peace operations. Although the Security Council has generally preferred not to directly request the 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 African Great Lakes Region in order to 'defuse the situation'.[42] Consequently, the UNHCR has been active, often in a leading capacity, in virtually all major humanitarian emergencies, including those in which the host state has not given its consent.[43] Today, the UNHCR co-operates with the Security Council's peace operations in all phases of displacement, from prevention of refugee flows to voluntary repatriation. In 1992, High Commissioner Ogata had already described the dangers resulting from this co-operation for the foundations of humanitarian action by emphasizing that:

> [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 jeopardise our neutrality and impartiality and affect our ability to

38 See S. Kyoichi, 'The "Non-Political and Humanitarian" Clause in UNHCR's Statute', (1998) 17 *Refugee Survey Quarterly* 33, 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.

39 See Kyoichi, *supra* note 38, at 44–5. Of course, the humanitarian mandate of UNHCR was also partly based on the practice of its predecessor organizations, the Nansen Office for Refugees and the International Refugee Organization (IRO).

40 See S. Ogata, 'Role of Humanitarian Action in Peacekeeping', Keynote Address at 24th Annual Vienna Seminar (5 July 1994). See also Kyoichi, *supra* note 38, at 43.

41 See Kyoichi, *supra* note 38, at 43. On the activities of the ICRC with regard to refugees, see C. Wenger, 'Le Comité de la Croix-Rouge et les Réfugiés', in C. Constantopoulos, *The Refugee Problem on Universal, Regional and National Level* (1987), 3–38.

42 UN Doc. S/PRST/1996/1 (1996), in connection with S/PRST/1995/41 (1995).

43 See Newland and Meyers, *supra* note 15, at 18.

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> work in security and confidence on both sides of a front-line. But the security conditions on the ground left us with little choice.[44]

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 with normative and pragmatic components. First of all, the Security 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 humanitarian principles would qualify for a potential right to humanitarian access under international humanitarian law, as consistently reiterated in the Security Council's practice.[45] Resolution 1502 on the protection of humanitarian personnel in conflict zones clearly underlines the 'importance for humanitarian organizations to uphold the principles of *neutrality, impartiality and humanity* in their humanitarian activities'.[46] And, 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.[47] These integrated missions provide for a larger civilian component for field administration, and training for both military and civilian personnel.[48] 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, negotiation, and communication skills, cultural awareness, and civilian–military co-ordination, and urged states and relevant international and regional organizations to take similar measures.[49]

Opinions about these integrated missions largely diverge: several critics argue that integration by implication further undermines the impartiality and neutrality of humanitarian action, whereas 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.[50] Considering that

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44 S. Ogata, 'Refugees: Challenge of the 1990s', Statement at the School for Social Research, New York (11 November 1992).

45 The precedent was set in the case of Iraq; see UN Doc. S/RES/ 688 (1991), para. 3. Further examples include UN Doc. S/RES/794 (1992), Preamble 3, on Somalia; UN Doc. S/RES/929 (1994), para. 3, referring to UN Doc. S/RES/925 (1994), paras. 4(a), 4(b), on Rwanda; UN Doc. S/RES/1132 (1997), para. 2, on Sierra Leone; UN Doc. RES/1199 (1998), paras. 2, 4(c), on Kosovo; UN Doc. S/RES/1234 (1999), para. 9, UN Doc. S/RES/1355 (2001), Preamble and para. 19, on the Democratic Republic of Congo (DRC); UN Doc. S/RES/1778 (2007), para. 17, on Sudan, Chad, and the Central African Republic.

46 UN Doc. S/RES/1502 (2003), Preamble (emphasis added).

47 Although these integrated missions certainly have their predecessors in the increasingly multifunctional UN peace operations of the 1990s, the concept of 'integrated mission' was first developed to ensure the effective division of tasks among the different actors involved in the implementation of the peace in Kosovo in 1999. It was subsequently further refined in the UN missions in East Timor, Sierra Leone, Afghanistan, Liberia, the DRC, Burundi, Haiti, Iraq, Ivory Coast, and Sudan. See E. B. Eide et al., *Report on Integrated Missions: Practical Perspectives and Recommendations*, Independent Study for the Expanded UN ECHA Core Group, May 2005, 12.

48 See also Palley, *supra* note 35, at 167.

49 UN Doc. S/RES/1265 (1999), para. 14.

50 See Eide et al., *supra* note 47, at 7.

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integrated missions are designed according to the specific necessities of the respective country situation and do not underlie common standards besides the overarching principle of 'integration',[51] it is difficult to assess at this point whether they will ultimately halt or even reverse the current erosion of humanitarian principles, and the simultaneous reduction of humanitarian space.[52] However, integrated missions may certainly evolve into useful practical 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.

3. Erosion through sanctions regimes

In addition to UN peace operations, economic sanctions are another important SC 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 had a more direct impact on the development of international norms. Besides ordering the targeted entity to abandon conduct considered to constitute a threat to international peace and security, sanctions resolutions may temporarily suspend – on the basis of Articles 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 that would otherwise have been contrary to international law.[53] 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 that were adopted due to the widespread dissatisfaction with comprehensive sanctions, especially due to their devastating humanitarian consequences. However, as the following discussion will show, even targeted sanctions have negatively affected international refugee protection, notably in the counterterrorism context.

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51 In his revised Note of Guidance on Integrated Missions, the UN Secretary-General defined integration as 'the guiding principle for the design and implementation of complex UN operations in post-conflict situations and for linking the different dimensions of peacebuilding (political, development, humanitarian, human rights, rule of law, social and security aspects) into a coherent strategy. An integrated mission is based on a common strategic plan and a shared understanding of the priorities and types of programme interventions that need to be undertaken at various stages of the recovery process', UN Secretary General Note of Guidance of Integrated Missions (9 February 2006), para. 4, available online at http://reliefweb.int/node/22464. For an overview of different UN missions with varying degrees of integration, see H. Hänggi and V. Scherrer, 'Recent Experience of Integrated Missions in Security Sector Reform', in H. Hänggi and V. Scherrer (eds.), *Security Sector Reform and UN Integrated Missions: Experience from Burundi, the Democratic Republic of Congo, Haiti, and Kosovo* (2008), 3–25, at 9.

52 The UN Secretary-General continues to underline that an 'integrated approach and integration arrangements can yield significant benefits for humanitarian operations' if these integration arrangements 'take full account of recognized humanitarian principles, allow for the protection of humanitarian space, and facilitate effective humanitarian co-ordination with all humanitarian actors'. See UN Secretary-General Decision No. 2008/24 on Integration (26 June 2008), at 1 (para. i(d)), available online at www.undg.org/docs/9898/Integration-decision-SG-25-jun-08.pdf.

53 See L. Picchio Forlati and L.-A. Sicilianos, *Les sanctions économiques en droit international* [*Economic Sanctions in International Law*] (2004), 293.

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3.1. Impact of sanctions on socioeconomic 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 UN Mission noted that sanctions imposed by the Security Council might have a particularly heavy socioeconomic impact on vulnerable social groups such as women, children, and displaced persons. Although socioeconomic rights alone do not represent a sufficient ground to obtain refugee status,[54] the 1951 Convention does provide for certain socioeconomic entitlements of refugees such as housing, employment, and education in their respective countries of asylum on a non-discriminatory basis.[55] Moreover, international human-rights law offers complementary protection that is independent of refugee status and also applies to displaced persons more generally.[56] Considering the humanitarian and human-rights situation of the vulnerable populations in Iraq, the UN Mission accordingly called for an immediate lifting of the sanctions.[57]

As the subsequent practice of the Security Council during the 1990s revealed, sanctions may indeed normatively weaken the socioeconomic 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 other states whose economies may already suffer from the presence of large numbers of refugees.[58] 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.[59] Sanctions may thus degrade conditions in the country of origin and in the country of asylum at the same time. This is why former High Commissioner Ogata underlined with regard to the situation in Haiti in 1993 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

54 See G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (2007), at 314.

55 See Arts. 17–30 of the 1951 Convention. Strictly speaking, the Convention does not grant any rights, but only imposes obligations on states parties to the Convention.

56 See, e.g., the 1966 International Covenant on Economic Social and Cultural Rights as the most pertinent human-rights instrument in this context (993 UNTS 3). On complementary protection through human rights, see generally J. McAdam, *Complementary Protection in International Refugee Law* (2006).

57 Letter from the Secretary-General Addressed to the President of the Security-Council, UN Doc. S/22366 (1991), para. 18. See also Committee on Economic, Social and Cultural Rights, *General Comment 8: The Relationship between Economic Sanctions and Economic Social and Cultural Rights*, UN Doc. E/C.12/19997/8 (1997).

58 See P. Kourula, 'International Protection of Refugees and Sanctions: Humanizing the Blunt Instrument', (1997) 9 IJRL 255, at 257.

59 See G. L. Burci, 'The Indirect Effects of United Nations Sanctions on Third States: The Role of Article 50 of the UN Charter', (1995) 2 *African Yearbook of International Law* 157. For the general practice on Art. 50 of the UN Charter, see B.-O. Bryde and A. Reinisch, 'Article 50', in B. Simma (ed.), *The Charter of the United Nations*, 784–7. See also *infra* note 64.

'to all Governments in the region to *maintain an open, humanitarian policy of admission* for those who are compelled to flee'.[60]

Whereas the Security Council is authorized by Article 41 of the UN Charter 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.[61] In view of these obligations under the UN Charter, the Security 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.[62] 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 thus often outweighed humanitarian considerations on behalf of refugees, IDPs, and other vulnerable populations.[63]

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 Security Council politically accountable and has initiated discussions 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.[64] The Committee on Economic, Social and Cultural Rights has equally criticized the socioeconomic 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.[65] Moreover, other UN subsidiary organs such as the UN Children's Fund (UNICEF),

60 UNHCR, Addendum to the Report of the United Nations High Commissioner for Refugees, UN Doc. A/47/12/Add.1 (1993), para. 8 (emphasis added).

61 See generally A. Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions', (2001) 95 AJIL 851.

62 See generally J. M. Farrall, *United Nations Sanctions and the Rule of Law* (2007), 106ff.

63 See Kourula, *supra* note 58, at 258.

64 See, e.g., UN Doc. A/RES/51/193 (1997) in which the General Assembly encourages the Security Council to provide special reports in accordance with Arts. 15 and 24 of the UN Charter, and UN Doc. A/RES/49/58 (1995), UN Doc. A/RES/50/51 (1996), UN Doc. A/RES/50/58E (1995), and UN Doc. A/RES/51/208 (1996), in which the General Assembly calls for an examination of the special economic problems confronting states in carrying out sanctions under Art. 50 of the UN 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, e.g., UN Doc. A/50/361 (1995), UN Doc. A/50/423 (1995), and UN Doc. A/51/356 (1996)). The Security Council took note of theses developments, inter alia, in UN Doc. S/24728 (1992) and UN Doc. S/25035 (1992).

65 See Committee on Economic, Social and Cultural Rights, *supra* note 57.

specialized agencies such as the World Health Organization (WHO), or humanitarian organizations such as the ICRC have underlined the limits set by the human-rights, humanitarian-law, and refugee-law framework.[66]

The policy process that was thereby 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 condemnable by the international community, via arms embargoes, financial sanctions, and travel restrictions. And, second, targeted sanctions are more focused on the protection of vulnerable social groups (e.g., 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.[67] 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. The 2005 Summit Outcome document recognized that sanctions remain an important means of 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, including socio-economic humanitarian consequences, for populations and third states'.[68] The Security Council itself has equally acknowledged this double-edged nature of sanctions and made efforts to prevent the erosion of socioeconomic standards and possible human-rights violations by reiterating the need to assess the impact of sanctions on vulnerable populations, such as in its resolutions on children and armed conflict.[69]

3.2. Sanctions as impediments to humanitarian access

The imposition and lifting of sanctions not only directly weaken the socioeconomic rights of refugees and displaced persons, but they may also have a significant impact on humanitarian organizations, namely on their ability to gain access to refugees in order to provide international protection and assistance. Although the Security Council has often required UN member states and other relevant actors to allow for humanitarian assistance,[70] its own actions may de facto also represent serious

66 See studies and reports by C. von Braunmühl and M. Kulessa, *The Impact of Sanctions on Humanitarian Assistance Activities: Report of a Study Commissioned by the United Nations Department of Humanitarian Affairs* (1995); WHO, *The Impact of UN Sanctions on the Population in Iraq since the Gulf Crisis*, WHO/EHA96.1 (March 1996); UNICEF, *Impact of Reduction in Food Ration on the Most Vulnerable Children and Women* (October 1994). See also the work of the Inter-Agency Standing Committee on the humanitarian impact of sanctions established pursuant to UN Doc. A/RES/46/182 (1991) and its resulting statement to the Security Council in UN Doc. S/1998/147 (1998).

67 See A. Tostensen and B. Bull, 'Are Smart Sanctions Feasible?', (2002) 54 WP 373, at 373.

68 World Summit Outcome, A/RES/60/1 (2005), paras. 106–108.

69 UN Doc. S/RES/1314 (2000), para. 15.

70 See *supra* note 45, and accompanying text.

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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*'.[71]

Under the comprehensive sanctions regime in the Federal Republic of Yugoslavia (Serbia and Montenegro) and Bosnia, for example, the delivery of humanitarian assistance was hampered or delayed in a number of instances due to a slow case-by-case processing and granting of authorizations by the Sanctions Committee for the Federal Republic of Yugoslavia. The UNHCR has therefore joined efforts with the Sanctions Committee by streamlining a procedure of prompt humanitarian exemptions since 1993. This procedure brought the members of the Committee and the UNHCR into a close working relationship and enhanced their understanding of each other's interests and constraints. The end result was a clear procedure, allowing for almost automatic exemptions from sanctions, whose *raison d'être* was to ensure at all times the effectiveness of the delivery of humanitarian relief items and, ultimately, of international protection.[72] According to one observer, it could not have been criticized that the Committee had in any way impeded the provision of international protection in the Federal Republic of Yugoslavia (Serbia and Montenegro) or in Northern Bosnia–Herzegovina when the sanctions were lifted at the end of 1995.[73] The Security Council itself could also not be accused of having acted *ultra vires*, for example, by contributing to violations of human rights when it imposed its initial sanctions without automatic exemptions for humanitarian goods.[74]

After this ad hoc co-operation between the UNHCR and the Sanctions Committee for the Federal Republic of Yugoslavia, it took different attempts to reform exemption procedures, such as the unsuccessful Oil-for-Food Program in Iraq,[75] 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 blanket exemptions now allow recognized international humanitarian organizations – such as the UNHCR, the Red Cross and the Red Crescent Societies, or Oxfam – to import items to support their activities on the ground. Country-specific exemptions also take into account

71 UN Doc. A/RES/51/242 (1997), para. 15 (emphasis added). See also the Supplement to an Agenda for Peace Agenda for Peace: UN Doc. A/50/60-S/1995/1 (1995), para. 66, in which the Secretary-General called sanctions a 'blunt instrument'. The Secretary-General's view was generally supported by the Security Council in a presidential statement: UN Doc. S/PRST/1995/9 (1995).

72 The procedure provided a major deviation from the delivery-by-delivery requests for authorizations, originally adopted in the guidelines of the committee. For a critical assessment of the development of the sanctions procedure, see Kourula, *supra* note 58, in particular at 263.

73 See ibid., at 263, citing DPI Press Release, SC/6086 (1995), containing a statement issued by Ambassador Emilio J. Cardenas, Chairman of the Security Council Committee established pursuant to UN Doc. S/RES/724 (1991) concerning Yugoslavia, indicating that, on 15 August 1995, the Committee had approved, among others, the UNHCR's requests for supply of fuel and helicopter flights, submitted to the Committee the previous day.

74 See Kourula, *supra* note 58, at 263.

75 UN Doc. S/RES/986 (1995). On the humanitarian impact of the Oil-for-Food Program, especially with regard to international refugee protection, see G. Loescher, 'A Disaster Waiting to Happen', *The Guardian*, 2 February 2003, available online at www.guardian.co.uk/world/2003/feb/02/iraq.immigration.

the specificities of each sanctions episode.[76] Consequently, the humanitarian and legal considerations that led the Security Council to address the erosion of socioeconomic standards in the first place have also resulted in an institutional learning process in favour of the protection of vulnerable populations for the Security Council's Sanctions Committees.

3.3. Sanctions and the securitization of refugee flows: asylum seekers as potential terrorists?

While the socioeconomic impact of targeted sanctions may be substantially smaller than that of comprehensive sanctions, the adoption of the SC counter-terrorism Resolution 1373 has shown that targeted measures may have new and similarly negative effects on international refugee protection.[77] Adopted in the wake of the terrorist attacks of 11 September 2001, Resolution 1373 linked refugee status with acts of terrorism, thus reinforcing a general trend towards the securitization and criminalization of refugee flows.[78] 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'.[79] The resolution further alludes to the so-called exclusion clause of Article 1F(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'.[80]

Although the Security Council's statements on international refugee protection were only made in the recommendatory part of the resolution, Resolution 1373 is generally said to have a quasi-legislative nature, which distinguishes it from other

76 See Tostensen and Bull, *supra* note 67, at 381.

77 UN Doc. S/RES/1373 (2001). The first time the Security Council adopted a general resolution on international terrorism in which it appeared to identify refugees and asylum seekers as potential participants was in October 1999. See UN Doc. S/RES/1269 (1999).

78 See V. Gowlland-Debbas, 'The Link between Security and International Protection of Refugees and Migrants', in V. Chetail (ed.), *Mondialisation, migration et droits de l'homme: Le droit international en question* [*Globalization, Migration and Human Rights: International Law under Review*] (2007), 281, at 298; G. S. Goodwin-Gill, 'Forced Migration, Refugee Rights and Security', in J. McAdam (ed.), *Forced Migration, Human Rights and Security* (2008), 1; G. Noll, 'Securitizing Sovereignty? States, Refugees, and the Regionalization of International Law', in E. Newman and J. van Selm (eds.), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (2003), 277.

79 UN Doc. S/RES/1373 (2001), paras. 3(f), 3(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' (1996), para. 3, but 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 McAdam, *supra* note 78, at 25.

80 UN Doc. S/RES/1373 (2001), para. 5; see also UN Doc. S/RES/1377 (2001), Preamble. Art. 1F(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'.

situation-specific enforcement measures.[81] As Resolution 1373 does not directly 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.[82] 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. As a result, Resolution 1373 is frequently associated with the targeted sanctions regime established under Resolution 1267 against al Qaeda and the Taliban but gives wider discretion at the implementation level.[83]

Given the quasi-legislative tenor of Resolution 1373 in combination with the discretion left to UN member states, the Security Council's statements on the substantive content of international refugee law may have far-reaching erosive effects on the well-established standards under the regime of the 1951 Convention than the other above-discussed measures. As state security concerns have always been integral to the international protection regime, the 1951 Convention already contains specific rules governing the definition of a refugee and the denial of refugee status, which arguably also provide to some extent for exclusion from refugee status in the case of 'terrorist acts'.[84] However, as the UNHCR explained in its recent Statement on Article 1F of the 1951 Convention, it is the seriousness of the alleged act and the degree of individual responsibility that may lead to exclusion from refugee status as determined on a case-by-case basis, including a high standard of proof.[85] In contrast, the Security Council, by declaring that terrorism is contrary to the purposes and principles of the United Nations, generally suggests that terrorist acts and even mere affiliation with a terrorist organization could be sufficient for the denial of refugee status.[86]

While the Security Council has thus attempted to close a long-standing debate on the precise content and applicability of Article 1F(c),[87] its pronouncements on exclusion from refugee status could also invite a progressive interpretation of other relevant clauses of the 1951 Convention. As Allain observes, states may use Resolution 1373 'to breathe new life into article 33 (2) of the 1951 Convention', which provides for an exception to the principle of *non-refoulement* by allowing a country of asylum to expel a refugee if the refugee threatens the national security of the country

81 For a discussion of the quasi-legislative nature of Res. 1373, see the references in *supra* note 14.

82 See generally Alvarez, *supra* note 14, at 196; Abi-Saab, *supra* note 14.

83 UN Doc. S/RES/1267 (1999). On the implementation of anti-terrorism resolutions at the national level, see generally A. Bianchi, 'Security Council's Anti-Terror Resolutions and Their Implementation by Member States: An Overview', (2006) 4 JICJ 1044.

84 See Goodwin-Gill and McAdam, *supra* note 54, at 195. See also UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees* (4 September 2003), para. 41.

85 See UNHCR, *UNHCR Statement on Article 1F of the 1951 Convention* (July 2009), at 23ff.

86 SC resolution UN Doc. S/RES/1377 (2001) underlines that 'any other form of support' for acts of terrorism is contrary to the purposes and principles of the United Nations. For a critical assessment, see ibid., at 26.

87 See generally Goodwin Gill and McAdam, *supra* note 54, at 184–9.

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concerned.[88] Such a reinterpretation of the provisions of the 1951 Convention could be justified by reference to Article 103 of the UN Charter, which enables the Security Council to override existing treaty law when adopting mandatory measures under Chapter VII.[89] From a normative point of view, these concerns may be mitigated by taking into account the status of the principle of *non-refoulement* as the foundational element of international refugee protection, which is not only enshrined in Article 33 of the 1951 Convention and customary international law, but has possibly also acquired the status of a peremptory norm of international law, or *jus cogens*.[90] Consequently, it is binding not only for parties to the 1951 Convention, but also for the Security Council.[91]

Nonetheless, while the principle of *non-refoulement* sets the benchmark for the implementation of Resolution 1373 by states, SC statements have still nourished existing national policies aimed at the containment of refugee flows.[92] Section 21 of the 2001 British Anti-Terrorism, Crime and Security Act, for instance, provided the Secretary of State with the power to 'certify' a suspected international terrorist.[93] In an asylum appeal, section 33 further allowed him to certify that the 1951 Convention did not apply so that the appellant did 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'.[94] 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.[95] Former High Commissioner Lubbers thus rightly notes that:

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88 See Allain, *supra* note 26, at 546. Art. 33(2) of the 1951 Convention reads: 'The benefit of the present provision [on the prohibition of *refoulement*] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.' While Art. 1F of the 1951 Convention will lead to the cancellation of refugee status on the basis of exclusion and expulsion *ex tunc*, Arts. 32 and 33(2) may result in the withdrawal of protection from *non-refoulement ex nunc*. See UNHCR, *supra* note 84, paras. 13–17.

89 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 February 1998, [1998] ICJ Rep. 3. See I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (1998), 221.

90 For a discussion of the status of the principle of *non-refoulement*, see Goodwin-Gill and McAdam, *supra* note 54, at 206ff.

91 On the limits imposed on SC action by *jus cogens*, see generally E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004), 187–91. For a recent decision in the counter-terrorism context, see Case T-315/01, *Yassin Abdullah Kadi v. Council and Commission*, [2005] ECR II-3649.

92 See R. Bruin and K. Wouters, 'Terrorism and the Non-Derogability of *Non-Refoulement*', (2003) 15 IJRL 5.

93 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).

94 Anti-Terrorism, Crime and Security Act 2001, Chapter 24, section 33(1) lit. (a) and (b). The German Asylum Procedures Act provides for a similar conflation of Arts. 1F and 33(2) of the 1951 Convention, as criticized by the UNHCR, *supra* note 85, at 16.

95 *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, File No. 27790. See O. C. Okafor and P. L. Okoronkwo, 'Re-Configuring Non-Refoulement? The Suresh Decision, "Security Relativism", and the International Human Rights Imperative', (2003) 15 IJRL 30. For an overview of further terrorism-related immigration cases at the national and regional levels, see B. Saul, 'Exclusion of Suspected Terrorists from Asylum: Trends in International and European Refugee Law', (2004) 26 *IIIS Discussion Paper (University of Oxford)*, at 5.

> 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.[96]

Considering this impact of Resolution 1373 on national and international refugee protection, the Security Council has further elaborated on the terms of the resolution, which already generally require counterterrorism measures to be 'in conformity with international law'.[97] 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.[98] Resolution 1624 even explicitly refers to the right to seek asylum and to the 1951 Convention, as well as to the principle of *non-refoulement*.[99] Interestingly, these formulations are nearly identical to the relevant resolutions of the General Assembly, which has used its general competence over international refugee protection to keep a watchful eye on the counterterrorism activities of the Security Council.[100] Similarly to comprehensive sanctions, the normative effects of the Security Council's targeted sanctions on international refugee protection thus do not evade the political checks and balances of the UN system. Nevertheless, with its counterterrorism resolutions, the Security Council has once again 'chosen to make dispositions in an area governed by precise principles of public international law'.[101]

4. Conclusion

The erosion of refugee-protection standards through peace operations and economic sanctions authorized by the Security Council illustrates the risks involved in the development of international law through the ad hoc and selective decisions of a political organ that weighs humanitarian concerns against traditional state security considerations. By legitimizing peace operations to protect safe areas in Iraq, Bosnia, and Rwanda, the Security Council has prevented internally displaced persons from leaving their country of nationality and seeking asylum abroad, thus supporting the emergence of a substantively unclear 'right to remain'. At the same time, the Security Council has promoted the UNHCR's involvement in active zones of conflict,

96 R. Lubbers, 'Message', in M. N. Schmitt and G. L. Beruto (eds.), *Terrorism and International Law: Challenges and Responses* (2003), 13, at 13. See also Ruud Lubbers's statement as acting High Commissioner before the Security Council in 2002 (UN Doc. S/PV.4470 (2002), at 3), in which he underlined that 'we must ensure Governments avoid making unwarranted linkages between refugees and terrorism'.

97 UN Doc. 1373 (2001), para. 3(g).

98 UN Doc. S/RES/1456 (2003), para. 6.

99 UN Doc. S/RES/1624 (2005), Preamble and para. 4.

100 See, e.g., UN Doc. A/RES/51/210 (1996), para. 5; UN Doc. A/RES/57/219 (2003), para. 1; UN Doc. A/RES/62/159 (2008), Preamble and para. 1. See also UN Doc. A/RES/63/185 (2009), para. 3.

101 Brownlie, *supra* note 89, at 223. 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 54, at 196.

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. Such practices have had a particularly negative impact on norms of customary international law whose formation or consolidation may have previously benefited from the Security Council's actions, such as the right to return, or the obligation to grant humanitarian access.

Nonetheless, the paradigm shift in the Security Council's agenda from the security of states towards human security has also led to reforms of its enforcement measures, in particular of its sanctions regimes. While comprehensive sanctions have often had a disastrous humanitarian impact on vulnerable civilian populations, by encroaching on their socioeconomic rights and by impeding access to humanitarian assistance, the move to targeted sanctions has alleviated some of these adverse and mostly unintended effects on the framework of international refugee protection. Even without judicial review by the ICJ, 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 such as the General Assembly. The unwarranted links made between terrorism and refugee status in the context of the Security Council's counterterrorism 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*.

It is obvious that the collective responses by a political organ to violations of international law can be neither automatic nor impartial, as they largely depend on the political consensus reached in view of various power arrangements and state interests. As Hans Kelsen once observed, the purpose of the Security Council's enforcement powers 'is not: to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law'.[102] However, the Security Council's influence on international refugee protection certainly demonstrates how the law selects and converts political decisions into legally significant elements, which escape the realm of political decision-making processes to form and transform normative standards.[103] Considering the complex security challenges of the twenty-first century, the Security Council is likely to continue pronouncing itself on various aspects of international refugee protection, especially on the protection of civilians in armed conflict. A critical appraisal of the Security Council's considerable contribution to the development of international refugee protection should therefore acknowledge the negative normative repercussions that may potentially result from its politically motivated actions.

102 H. Kelsen, *The Law of the United Nations* (1951), 294.

103 See V. Gowland-Debbas, 'The Functions of the United Nations Security Council in the International Legal System', in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Law and International Politics* (2000), 277, at 287.