Israel Law Review **50**(1) 2017, pp 3–23. © Cambridge University Press and The Faculty of Law, The Hebrew University of Jerusalem, 2017.
doi:10.1017/S0021223716000315

Humanitarian Assistance and the Security Council

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Over the years, the Security Council has on several occasions dealt with humanitarian assistance issues. However, it is Security Council Resolution 2165(2014), related to the situation in Syria, that has brought the role of the Security Council to the forefront of the debate. It is against this background that the article discusses the legal issues arising from Security Council action facilitating humanitarian assistance to be delivered in situations of non-international armed conflict.

Following a brief survey of relevant practice of the Security Council related to humanitarian assistance, the article considers the relevance, if any, of Article 2(7) of the Charter of the United Nations (UN) to humanitarian assistance to be delivered in such situations. It then moves on to analyse whether a rejection by the territorial state of humanitarian aid to be delivered by third parties may amount to a situation under Article 39 of the UN Charter. It then considers in detail whether (at least implicitly) Resolution 2165 has been adopted under Chapter VII and, if this is not the case, whether it can be still considered to be legally binding.

The article finally considers what impact the adoption of Security Council Resolution 2165 might have on the interpretation of otherwise applicable rules of international humanitarian law and, in particular, the right of third parties to provide humanitarian assistance in a situation of a non-international armed conflict in spite of the absence of consent by the territorial state, and the obligations that members of the Security Council, permanent and non-permanent, have under Common Article 1 of the Geneva Conventions when faced with a draft resolution providing for the delivery of humanitarian assistance, notwithstanding the absence of consent by the territorial state.

Keywords: Security Council, humanitarian assistance, Chapter VII, Article 2(7) United Nations Charter, non-international armed conflict, international humanitarian law, Geneva Convention

1. Introduction

Parties to an armed conflict, be it of an international or non-international character, have the obligation, under certain conditions, to allow the passage of humanitarian assistance.[1] This obligation

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[1] See generally, inter alia, Felix Schwendimann, 'The Legal Framework of Humanitarian Access in Armed Conflict' (2011) 93 *International Review of the Red Cross* 993; Yoram Dinstein, 'The Right to Humanitarian Assistance' (2000) 53(4) *Naval War College Review* 77; Heike Spieker, 'The Right to Give and to Receive Humanitarian Assistance' in Hans-Joachim Heintze and Andrej Zwitter (eds), *International Law and Humanitarian Assistance: A Crosscut through Legal Issues Pertaining to Humanitarianism* (Springer 2011) 7–31, 13, as well as the various contributions in Andrej Zwitter and others (eds), *Humanitarian Action: Global, Regional and Domestic Legal Responses* (Cambridge University Press 2014); Sarah R Denne, 'Rethinking Humanitarian Aid in the Post-Gulf War Era: The International Committee of the Red Cross Takes the Lead' (2008) 39 *Case Western Reserve Journal of International Law* 867; Claudia McGoldrick, 'The Future of Humanitarian Action: An ICRC Perspective' (2011) 93 *International Review of the Red Cross* 965; Kate Mackintosh, 'The Principles of Humanitarian Action in International Humanitarian Law', *Humanitarian Policy Group Report 5*, Overseas Development Institute, March 2000, http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/305.pdf.

is enshrined in Article 70 of the First Additional Protocol to the Geneva Conventions (Additional Protocol I);[2] is implied in Article 14 of the Second Additional Protocol to the Geneva Conventions (Additional Protocol II);[3] and is also contained, in respect of situations of belligerent occupation, in Article 59(1) of the Fourth Geneva Convention.[4] What is more, this obligation not to impede humanitarian assistance has by now also become part and parcel of customary international law in both international and non-international armed conflicts.[5] Nonetheless, parties to armed conflicts frequently fail to abide by this obligation. This raises the almost obvious question whether the Security Council may take action when confronted with such situations.

The relevance of this particular issue has been highlighted by the adoption of Security Council Resolution 2165 of 14 July 2014[6] (most recently extended by virtue of Security Council Resolution 2258 of 22 December 2015[7]) concerning the situation in Syria; by the thematic Security Council Resolution 2175 of 29 August 2014 on the 'protection of civilians in armed conflict',[8] as well as by Security Council Resolution 2179 (2014) on the conflict between Sudan and South Sudan.[9]

This article will first outline, albeit with a somewhat broad brush, the practice of the Security Council when it comes to dealing with humanitarian assistance issues in situations of armed conflict; and will then discuss some general legal issues related to the Security Council's practice. It then moves on more specifically to some of the questions raised by Security Council Resolution 2165. Lastly, the article will discuss the possible impact of Security Council practice on the understanding of otherwise applicable rules of international humanitarian law.

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[2] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (AP I), art 70.

[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (AP II), art 14.

[4] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV), art 59; Michael Bothe, Karl Joseph Partsch and Waldemar A Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd edn, Martinus Nijhoff 2013) 482; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross (ICRC)/Martinus Nijhoff 1987) paras 2790ff; Jean S Pictet (ed), *Commentary on Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) 319–20.

[5] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. I: Rules* (ICRC and Cambridge University Press 2005, revised 2009) (ICRC Study) 193, r 55 provides: 'The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control'.

[6] UNSC Res 2165 (14 July 2014), UN Doc S/RES/2165.

[7] UNSC Res 2258 (22 December 2015), UN Doc S/RES/2258.

[8] UNSC Res 2175 (29 August 2014), UN Doc S/RES/2175.

[9] UNSC Res 2179 (14 October 2014), UN Doc S/RES/2179, operative para 20, which (inter alia) provides: 'Further demands that all parties involved provide humanitarian personnel with full, safe and unhindered access to civilians in need of assistance and all necessary facilities for their operations, in accordance with international law'. See also UNSC Res 2265 (10 February 2016), UN Doc S/RES/2265, preambular para 5, which in its relevant part reaffirmed the need to facilitate 'safe, timely and unhindered humanitarian access to all areas by humanitarian agencies and personnel, consistent with … the relevant provisions of international law'.

2. SURVEY OF RELEVANT PRACTICE OF THE SECURITY COUNCIL RELATED TO HUMANITARIAN ASSISTANCE

It is particularly since the early 1990s that the Security Council has been engaged in dealing with the denial of humanitarian assistance in the context of armed conflict. Thus, inter alia, with respect to the situation in northern Iraq, after having recalled Article 2(7) of the UN Charter[10] and having considered that the flow of refugees across international borders constituted a threat to peace and security in the region, the Security Council '[i]nsist[ed] that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq'.[11] In Resolution 752, concerning the conflict in Bosnia and Herzegovina, the Council, '[*c*]*all*[*ed*] *on* all parties and others concerned to ensure that conditions are established for the effective and unhindered delivery of humanitarian assistance', still without any reference to Chapter VII of the UN Charter.[12] The Security Council has made similar calls over the years with regard to the conflicts in Angola,[13] Somalia,[14] Armenia/Azerbaijan,[15] Georgia,[16] Rwanda,[17] Afghanistan,[18] Yugoslavia/Kosovo,[19] the Democratic Republic of the Congo (DRC),[20] Sudan (Darfur),[21] Israel/Palestine (Gaza),[22] and finally Syria, even before the adoption of Resolution 2165.[23]

On several of these occasions – from the first time in Security Council Resolution 757 concerning the situation in Bosnia and Herzegovina in 1992,[24] leading up to Resolution 1970 concerning Libya[25] – the Council also explicitly acted within the framework of Chapter VII. Inter alia, it has thus '[d]emand[ed] that all parties and others concerned create immediately the necessary conditions for unimpeded delivery of humanitarian supplies'.[26] Yet, on most occasions the Security Council has stopped short of adopting specific *decisions* on the matter.

Moreover, it was once again the conflict in Bosnia and Herzegovina and the creation of the United Nations Protection Force (UNPROFOR) that triggered the practice of the Security Council to include in the mandate of peacekeeping operations a Chapter VII-based right to,

[10] Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI (UN Charter).
[11] UNSC Res 688 (5 April 1991), UN Doc S/RES/688, operative para 3.
[12] UNSC Res 752 (15 May 1992), UN Doc S/RES/752, operative para 8.
[13] UNSC Res 851 (15 July 1993), UN Doc S/RES/851, operative para 19; UNSC Res 966 (8 December 1994), UN Doc S/RES/966, operative para 10; UNSC Res 1213 (3 December 1998), UN Doc S/RES/1213, operative para 7.
[14] UNSC Res 746 (17 March 1992), UN Doc S/RES/746, operative para 3.
[15] UNSC Res 853 (29 July 1993), UN Doc S/RES/853, operative para 11.
[16] UNSC Res 876 (19 October 1993), UN Doc S/RES/876, operative para 7.
[17] UNSC Res 918 (17 May 1994), UN Doc S/RES/918, operative para 10.
[18] UNSC Res 1378 (14 November 2001), UN Doc S/RES/1378, operative para 4.
[19] UNSC Res 1199 (23 September 1998), UN Doc S/RES/1199, operative para 5(d).
[20] UNSC Res 1234 (9 April 1999), UN Doc S/RES/1234, operative para 9.
[21] UNSC Res 1574 (19 November 2004), UN Doc S/RES/1574, operative para 11.
[22] UNSC Res 1860 (8 January 2009), UN Doc S/RES/1860, operative para 2.
[23] For details see Sections 5.1, 5.2, 6 below.
[24] UNSC Res 757 (30 May 1992), UN Doc S/RES/757.
[25] UNSC Res 1970 (26 February 2011), UN Doc S/RES/1970.
[26] UNSC Res 758 (8 June 1992), UN Doc S/RES/758, operative para 8.

https://doi.org/10.1017/S0021223716000315 Published online by Cambridge University Press

inter alia, 'ensure the safe delivery of humanitarian assistance' to the respective conflict area,[27] including, in the case of Bosnia and Herzegovina, the safe areas created by the Security Council itself.[28] This practice has continued most recently, for example, with regard to the UN Organization Mission in the DRC (MONUC). Furthermore, in the case of Libya, the flight ban ordered by the Council when adopting Resolution 1973 was specifically referred to as 'constitut[ing] an important element for … the safety of the delivery of humanitarian assistance'.[29]

Yet, it seems somewhat far-fetched to argue, as has been done, that the Chapter VII-based authorisation contained in the said Resolution – 'to use all necessary means to protect civilians and civilian-populated areas under threat of attack'[30] – was intended to also encompass proactive measures to enable the passage of humanitarian assistance.[31]

Finally, it is also important to recall that the Security Council has on various occasions confirmed that the creation of 'impediments to the delivery of humanitarian assistance constitute[s] a serious violation of international humanitarian law'.[32] The Council has stated also that 'those who commit or order the commission of such acts will be held individually responsible in respect of such acts'.[33] It is thus somewhat surprising that, unlike the ICC Statute,[34] neither the Statute of the International Criminal Tribunal for the former Yugoslavia[35] nor that of the International Criminal Tribunal for Rwanda[36] contain references to such acts as constituting war crimes falling within the jurisdiction of the respective tribunal.

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There are four overarching issues concerning Security Council action related to access for humanitarian action:

- the relevance of Article 2(7) of the UN Charter when it comes to non-international internal armed conflicts;
- the scope of application of Chapter VII of the UN Charter;
- the impact of Security Council practice on general rules of international humanitarian law; and

[27] UNSC Res 787 (16 November 1992), UN Doc S/RES/787, operative para 18.
[28] UNSC Res 752 (n 12) operative para 9.
[29] UNSC Res 1973 (17 March 2011), UN Doc S/RES/1973, preambular para 17.
[30] ibid operative para 4.
[31] For such a proposition, see Heike Montag, 'United Nations Involvement in Humanitarian Assistance: Competences of the Security Council to Face Today's Obstructions' in Andrej Zwitter and others (eds), *Humanitarian Action: Global, Regional and Domestic Legal Responses* (Cambridge University Press 2014) 123.
[32] UNSC Res 819 (16 April 1993), UN Doc S/RES/819, operative para 8.
[33] UNSC Res 794 (3 December 1992), UN Doc S/RES/794, operative para 5.
[34] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute).
[35] Statute of the International Criminal Court for the former Yugoslavia annexed to UNSC Res 827 (25 May 1993), UN Doc S/RES/827 (ICTY Statute).
[36] Statute of the International Criminal Court for Rwanda annexed to UNSC Res 955 (8 November 1994), UN Doc S/RES/955 (ICTR Statute).

- possible obligations of Security Council members arising under Common Article 1 of the Geneva Conventions[37] and Article 1 of Additional Protocol I when voting in the Security Council on instances where a state or non-state actor obstructs humanitarian action.

3. SECURITY COUNCIL ACTION RELATED TO HUMANITARIAN ASSISTANCE AND ARTICLE 2(7) OF THE UN CHARTER

It is almost banal to state that under Article 2(7) of the UN Charter, the United Nations is not in a position to intervene in matters that are essentially within the domestic jurisdiction of a state, subject obviously to Chapter VII measures. This raises in particular the question whether the Security Council, when not (yet) acting under Chapter VII, may nevertheless address obstacles to humanitarian assistance which are created by a given territorial state that is party to a non-international armed conflict.

It should be noted first, however, that, as is well-known, the very concept of domestic jurisdiction, as enshrined in Article 2(7) of the UN Charter, is, as the PCIJ stated, of a dynamic nature: 'The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations'.[38] It then stands to reason that the very fact that non-international armed conflicts in general, and relief actions connected to such types of conflict in particular, have become the subject of regulation by way of both international treaty (Additional Protocol II) and customary law,[39] clearly suggests that the question of such humanitarian assistance does *not* fall (or no longer falls) within the domestic jurisdiction of the territorial state concerned.

Furthermore, Article 3 of Additional Protocol II itself is proof that it is only legitimate means, in particular means not prohibited by the Protocol itself, that might be used in fighting insurgencies. This in turn means that methods of warfare prohibited by Additional Protocol II are considered by the Protocol *itself* not to come within the domestic jurisdiction of the state of the territory in which the conflict takes place. Such means and methods include using starvation of the civilian population as a method of warfare prohibited by Article 14 of Additional Protocol II.

Additionally, Article 8(2)(b)(xxv) of the ICC Statute penalises the starvation of civilians and, in particular, the wilful impeding of relief supplies at least as far as international armed conflicts are concerned.[40] It is true that a parallel provision is missing in sub-paragraph (e) of Article 8(2) of the ICC Statute as far as non-international armed conflicts are concerned. This is as a result of the position taken by a number of states during the negotiation process leading to the adoption of

[37] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31 (GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85 (GC II); Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135 (GC III); GC IV (n 4).
[38] *Nationality Decrees in Tunis and Morocco* Advisory Opinion (1922) PCIJ Rep (Ser B No 4) 24.
[39] ICRC Study (n 5) 193, r 55.
[40] ICC Statute (n 34) art 8.

https://doi.org/10.1017/S0021223716000315 Published online by Cambridge University Press

the ICC Statute that even if such a prohibition did exist with respect to non-international armed conflicts, it did not – at least in 1998 – entail individual criminal responsibility.[41] Even if that view, regarding the absence of criminal liability, were to be true (and would still be true today), it would still not mean that, as a matter of state responsibility, such acts fall within the domestic jurisdiction of the state concerned. Moreover, in enacting legislation implementing the ICC Statute, a number of states (including Germany) have since taken the position that the creation of such impediments, even in non-international armed conflicts, does amount to a war crime.[42] As mentioned above,[43] the Security Council itself has taken the position – inter alia with regard to Somalia, in a situation which at the time amounted at most to a non-international armed conflict – that such acts generate individual criminal responsibility. This, once again, hints at least at an emerging criminalisation of starvation of civilian populations even in the context of non-international armed conflicts.

Furthermore, the International Law Commission, in its work on the 'protection of persons in the event of disasters', while dealing with situations to which the rules of international humanitarian law are *not* even applicable[44] considered the question whether consent to external assistance may be validly withheld to be governed by international law and ripe for codification.[45] *A fortiori*, the same considerations must apply in situations of armed conflict, even of a non-international character, which – at least since 1949 – have been governed by applicable rules of international humanitarian law.

Finally, Security Council resolutions related to humanitarian action in the context of non-international armed conflicts – and *not* (or at least not explicitly) based on Chapter VII of the UN Charter, such as Resolution 2165[46] – have almost always been adopted unanimously. Moreover, such resolutions have also largely been accepted by the vast majority of the UN membership and have rarely ever, if at all, met with objections by the state concerned. This practice has to be taken into account when considering the applicability – or rather the non-applicability – of Article 2(7) of the UN Charter to the withholding of humanitarian assistance in light of Article 31(3)(b) of the Vienna Convention on the Law of Treaties[47] as constituting relevant subsequent

[41] Herman von Hebel and Darryl Robinson, 'Crimes Within the Jurisdiction of the Court' in Roy S Lee (ed), *The International Criminal Court – The Making of the Rome Statute – Issues, Negotiations, Results* (Kluwer Law International 1999) 105; Darryl Robinson and Herman von Hebel, 'War Crimes in Internal Conflicts: Article 8 of the ICC Statute' (1999) 2 *Yearbook of International Humanitarian Law* 193, 208.

[42] cf the Act to Introduce the Code of Crimes against International Law (*Völkerstrafgesetzbuch*) 2002 (Germany), s 11 ('War crimes consisting in the use of prohibited methods of warfare'), which provides: '(1) Whoever in connection with an international armed conflict *or with an armed conflict not of an international character* … 5. uses starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival or impedes relief supplies in contravention of international humanitarian law shall be punished with imprisonment for not less than three years …' (emphasis added).

[43] cf UNSC Res 746 (n 14).

[44] cf International Law Commission (ILC), Draft Articles on the Protection of Persons in the Event of Disasters (2014), UN Doc A/69/10, art 21 (Relationship to international humanitarian law) which provides: '[t]he present draft articles do not apply to situations to which the rules of international humanitarian law are applicable'.

[45] cf ILC, Report on the Work of the Sixty-Third Session (2011), UN Doc A/66/10, Ch IX, paras 275–87.

[46] As to the question whether Security Council Resolution 2165 is based on Chapter VII, see Sections 5.1 and 5.2.

[47] Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331.

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practice. Accordingly, states may not rely on the principle of domestic jurisdiction vis-à-vis Security Council action even when the Council merely acts under Chapter VI, rather than relies on its powers under Chapter VII of the UN Charter.

This brings one to the next issue – namely whether the Security Council may also invoke Chapter VII with regard to the refusal of states (or of non-state armed groups) to let humanitarian assistance reach populations in need.

4. SECURITY COUNCIL ACTION UNDER CHAPTER VII UN CHARTER RELATED TO HUMANITARIAN ASSISTANCE

There is now abundant and unchallenged Security Council practice confirming that even non-state actors may be addressees of Chapter VII measures, given that the Council routinely addresses Chapter VII resolutions to 'all parties' of a given non-international armed conflict,[48] including local de facto governments, rebel groups and other insurgents.[49]

As to the more general question, whether impediments by parties to an armed conflict to humanitarian assistance trigger the Chapter VII powers of the Security Council, it is first worth recalling the very careful wording of the resolution adopted by the Institut de Droit International at its Bruges 2003 Session. The Institut had merely stated that 'a refusal to accept a bona fide offer of humanitarian assistance [might] … lead to a threat to international peace and security', thereby triggering the competence of the Security Council to take measures under Chapter VII of the UN Charter. This in turn means that, in the Institute's view, such a refusal does not per se constitute a threat to the peace under Article 39 of the Charter.[50]

Indeed, it seems that under current Security Council practice, it is either the *consequences* of a refusal to accept humanitarian assistance leading in particular to cross-boundary flows of refugees, or the underlying (be it international or non-international) *armed conflict itself* which opens the path for Chapter VII enforcement measures. Indeed, ever since the early 1990s the Security Council has considered cross-boundary consequences of a non-international armed conflict to possibly constitute a threat to the peace under Article 39 of the Charter.

As to non-international armed conflicts as such, it suffices to refer to the *Tadić* decision of the ICTY on the tribunal's jurisdiction. It confirmed, as is well known, that even non-international armed conflicts 'according to the settled practice of the Security Council and the common understanding of the United Nations membership in general [are being] … classified as a "threat to the peace" and dealt with under Chapter VII',[51] beginning with the Congo crisis in the early 1960s.

[48] For further details see Stefan Talmon, 'Article 2(6)' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) 252, 271 marginal note 54.
[49] ibid.
[50] cf generally, as to the work of the Institut de Droit International leading to the adoption of the Bruges resolution on humanitarian assistance, see Robert Kolb, 'De l'assistance humanitaire: la resolution sur l'assistance humanitaire adoptée par l'Institut de droit international à sa session de Bruges en 2003' (2004) 86 *International Review of the Red Cross* 859.
[51] ICTY, *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, Trial Chamber, 2 October 1995, para 30.

This again thus constitutes subsequent practice by the members of the United Nations at large, that indeed the notion of 'threat to the peace' as contained in Article 39 may include, as one of its species, internal armed conflicts.[52]

Specifically, with regard to humanitarian assistance this approach was confirmed, if there was need, by Security Council practice during the early years of the civil war in Somalia. As early as 1992 the Council adopted Resolution 767 in which it '[u]rge[d] all parties, movements and factions in Somalia to facilitate the efforts … to provide urgent humanitarian assistance to the … population in Somalia' without, however, yet acting under Chapter VII.[53] It was only Security Council Resolution 794 that determined that the *conflict in Somalia as such* 'exacerbated by the obstacles being created to the distribution of humanitarian assistance' constituted a threat to international peace and security.[54] This enabled the Council to start '[a]cting under Chapter VII of the Charter of the United Nations, authori[zing the …] use [of] all necessary means to establish … a secure environment for humanitarian relief operations in Somalia'.[55]

This practice is in line with Security Council practice concerning the fight against piracy off the coast of Somalia. Again, it is not the piracy as such that is thought to trigger the Chapter VII powers of the Security Council. Rather, the Council again referred to 'the incidents of piracy and armed robbery against vessels … off the coast of Somalia [that] exacerbate the situation in Somalia'.[56] Put otherwise, it is the situation in Somalia, rather than the acts of piracy or the denial of humanitarian assistance, which the Security Council views as constituting a threat to international peace and security in the region.

Having thus outlined the more *general* issues related to the Council's powers with regard to facilitating humanitarian assistance in the context of armed conflicts, one should also consider some of the more *specific* questions raised by the adoption of Security Council Resolution 2165 concerning the situation in Syria (and its successor resolutions). This resolution constitutes the latest major development of the Security Council's practice when dealing with humanitarian assistance issues.

5. Humanitarian Assistance and the Role of the Security Council in light of Security Council Resolution 2165

There are three essential elements in Security Council Resolution 2165: (i) the Council, following its practice in the case of Somalia, determined that 'the deteriorating humanitarian situation in Syria constitutes a threat to peace and security in the region';[57] (ii) while deliberately *not* making explicit reference to Chapter VII, the Security Council still underscored that 'Member States are

[52] ibid.
[53] UNSC Res 767 (24 July 1992), UN Doc S/RES/767, operative paragraph 3.
[54] UNSC Res 794 (3 December 1992), UN Doc S/RES/794, preambular para 3.
[55] ibid operative para 10.
[56] UNSC Res 1816 (2 June 2008), UN Doc S/RES/1816, preambular para 12.
[57] UNSC Res 2165 (n 6) preambular para 18.

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obligated under Article 25 of the UN Charter to accept and carry out the Council's decisions';[58] and (iii) the Security Council '[d]ecide[d] that the United Nations humanitarian agencies and their implementing partners', indeed only those, are authorised to use routes across conflict lines and certain border crossings in order to ensure that humanitarian assistance reaches people in need, with a mere 'notification to the Syrian authorities' rather than requiring authorisation by the Syrian government.[59]

Resolution 2165 raises various legal questions the relevance of which extends beyond this very resolution, namely:

- whether it has been implicitly adopted under Chapter VII of the Charter;[60]
- if that is not the case, whether the Security Council was nevertheless in a position to adopt a legally binding resolution;[61] and
- what Resolution 2165 says about the position of the Security Council and its members as to otherwise applicable rules of international humanitarian law when it comes to the delivery of humanitarian assistance.

Each question will be addressed in the following sections.

5.1. SECURITY COUNCIL RESOLUTION 2165: A HIDDEN CHAPTER VII RESOLUTION?

Since 1990 the Security Council has been developing – almost for the first time in the history of the UN Charter – quite significant practice in deciding upon measures under Chapter VII. In doing so, it also started a practice of clearly, and indeed very carefully, distinguishing between non-legally binding recommendations adopted under Chapter VI of the Charter on the one hand, and legally binding enforcement measures under Chapter VII on the other.[62] It has thereby strengthened the international rule of law as it provided member states with clearer guidance on the implementation of the Council's decisions under Article 25 of the Charter.

Given its background, one could have wondered whether the famous 1971 holding by the International Court of Justice (ICJ) in its *Namibia* advisory opinion – that the Security Council enjoys a general power to adopt legally binding decisions under Article 25 of the Charter, and thus can do so not only when acting under Chapter VII[63] – had stood the test of both time and the subsequent practice of the Security Council itself.

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[58] ibid preambular para 19.
[59] ibid operative para 2.
[60] See Section 5.1.
[61] See Section 5.2.
[62] Anne Peters, 'Article 25' in Simma and others (n 48) 787, 791 marginal note 8; Patrick Johansson, 'The Humdrum Use of Ultimate Authority: Defining and Analyzing Chapter VII Resolutions' (2009) 78 *Nordic Journal of International Law* 309.
[63] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* Advisory Opinion, [1971] ICJ Rep 16 [113] (*Namibia* Advisory Opinion); William E Holder, 'Comment, 1971 Advisory Opinion of the International Court of Justice on Namibia (South West Africa)' (1973) 5 *Federal Law Review* 119; Natalie K Hevener, 'The 1971 South-West African Opinion – A New International Juridical Philosophy' (1975) 24 *International and Comparative Law Quarterly* 791.

Yet the question of the Security Council's eventual general power to adopt legally binding resolutions beyond Chapter VII obviously arises only by reference to a specific resolution. Resolution 2165 was *not* adopted by virtue of the Chapter VII powers of the Council. It is true that the Council did make a determination within the meaning of Article 39 of the UN Charter. This is true notwithstanding the use by the Security Council of the somewhat limiting phrase relating to the existence of a mere 'threat to peace and security *in the region*'.[64] As a matter of fact, this limited formula has previously been used by the Security Council on a significant number of occasions when acting under Chapter VII.[65] What is more, the Council has even explicitly adopted resolutions 'acting under Chapter VII', starting with Resolution 1160 relating to Kosovo, without even making any kind of formal determination of the circumstances enumerated in Article 39 of the UN Charter. Yet, unlike most of its previous resolutions, although largely following its own previous practice in respect of Syria and the model of Resolution 2118,[66] in adopting Resolution 2165 on Syria, the Security Council, after having made the determination set out in Article 39 of the Charter, nevertheless shied away from formally invoking its power to adopt mandatory resolutions under Chapter VII of the Charter.

Thus, it is rather the overall text of the relevant resolution, in addition perhaps to its drafting history and explanations of vote following the adoption of the resolution, that may shed light on its legal character.[67] For one, it is striking that operative paragraph 11 of Security Council Resolution 2165 affirmed that the Council 'will take *further measures* in the event of non-compliance with this resolution or resolution 2139 (2014)'.[68] Yet within the Charter context the very term 'measures' is used exclusively in the context of 'enforcement measures' under Chapter VII.[69] Accordingly, the formula 'further measures' implies that the Council had already, in adopting Resolution 2165, taken such measures. Otherwise, it would have been logical, indeed almost compelling, to simply refer in operative paragraph 11 to the taking of 'measures' rather than to the taking of 'further' measures.

Moreover, Security Council Resolution 2139 – a forerunner to Resolution 2165 to which the latter makes specific reference and which also dealt with the Syrian crisis – was undoubtedly adopted *not* under Chapter VII,[70] and used different language. In that resolution the concluding

[64] UNSC Res 2165 (14 July 2014), UN Doc S/RES/2165, preambular para 18 (emphasis added).
[65] eg UNSC Res 1160 (31 March 1998), UN Doc S/RES/1160; UNSC Res 1701 (11 August 2006), UN Doc S/RES/1701, preambular para 10.
[66] UNSC Res 2118 (27 September 2013), UN Doc S/RES/2118.
[67] As to the interpretation of Security Council resolutions, see generally Michael C Wood, 'The Interpretation of Security Council Resolutions' (1998) *Max Planck Yearbook of United Nations Law* 73.
[68] UNSC Res 2165 (n 6) operative para 11 (emphasis added).
[69] UN Charter (n 10) arts 39, 40, 41, 45, 49 and 50. The same holds true for art 53(1) and art 94(2), which both also seem to refer to Chapter VII measures; cf Georg Ress and Jürgen Bröhmer, 'Article 53' in Simma and others (n 48) 854, 870 marginal note 81; Karin Oellers-Frahm, 'Article 94' in Simma and others (n 48) 1957, 1961 marginal note 23.
[70] UNSC Res 2139 (22 February 2014), UN Doc S/RES/2139, in operative para 4 the Security Council had merely '[d]emand[ed] that all parties, in particular the Syrian authorities, promptly allow rapid, safe and unhindered humanitarian access for United Nations humanitarian agencies and their implementing partners, including across conflict lines and across borders, in order to ensure that humanitarian assistance reaches people in need through the most direct routes'.

operative paragraph merely expressed the Council's intention 'to take further *steps*' in the event of non-compliance, rather than further measures.[71] This confirms that the Council is well aware of whether in a specific resolution (such as Resolution 2165) it chooses to adopt (enforcement) measures and will at a later point take such measures further, or whether instead it simply takes 'steps' not yet amounting to Chapter VII enforcement measures.

The concluding operative paragraph of Security Council Resolution 2118, again dealing with the Syrian crisis and particularly with the issue of chemical weapons, is also telling by way of a comparison. As in Resolution 2165, the Security Council had '[d]etermined that the use of chemical weapons in the Syrian Arab Republic constitutes a threat to international peace and security'.[72] Again, in line with Security Council Resolution 2165, it then made reference to the obligation of member states under Article 25 of the UN Charter to accept and carry out the Council's decisions.[73] Yet, in striking contrast to Resolution 2165, it decided to later '*impose measures under Chapter VII* of the United Nations Charter' in the event of non-compliance, rather than take '*further measures*' as in the case of Resolution 2165.[74] Accordingly, there is a clear hint that Resolution 2118, just like Resolution 2139 on Syria, had not yet been adopted under Chapter VII. This result is further confirmed by almost unanimous statements made after Resolution 2118 had been adopted.[75]

This again stands in contrast to Resolution 2165. Luxembourg, one of the drafters and sponsors of the resolution, not only referred in its statement after the vote to the legally binding character of the resolution the Council had just adopted, but also stated that the resolution's provisions 'are based on the observation that the ongoing deterioration of the humanitarian

[71] ibid operative para 17 (emphasis added).
[72] UNSC Res 2118 (n 66) preambular para 13.
[73] For that wording see also UNSC Res 2231 (20 July 2015), UN Doc S/RES/2231, preambular para 14.
[74] UNSC Res 2118 (n 66) operative para 21 (emphasis added).
[75] UNSC, Protocol of the 7038th Meeting (27 September 2013), UN Doc S/PV.7038, 4–9, 12, for the statements then made by the Russian Federation: 'The resolution does not fall under Chapter VII of the Charter of the United Nations and does not allow for any automatic use of coercive measures of enforcement … It reaffirms the agreement that was reached at the Russian-American meeting held in Geneva to the effect that any violations of those requirements as well as the use of chemical weapons by any party will be carefully investigated by the Security Council, which will stand ready to take action under Chapter VII of the Charter'; the United States: 'We sought a legally binding resolution, and that is what the Security Council has adopted … in the event of non-compliance, the Council will impose measures under Chapter VII of the Charter of the United Nations'; the United Kingdom: 'It imposes legally binding and enforceable obligations on the Syrian regime to comply with the decision adopted earlier this evening by the Organization for the Prohibition of Chemical Weapons (OPCW). It makes clear that the Council shall impose measures under Chapter VII of the Charter of the United Nations if there is non-compliance'; France: '… in case of the non-compliance of the Syrian regime in Damascus, measures will be taken under Chapter VII of the Charter of the United Nations. … It will, if necessary, impose measures under Chapter VII of the Charter to ensure that the objective is achieved'; Azerbaijan: 'It is critical that, while establishing concrete legally binding obligations, the resolution provides for review on a regular basis of implementation efforts in Syria and that, in the event of non-compliance, it envisages imposing measures under Chapter VII of the Charter of the United Nations'; Korea: 'It is also significant that the resolution reserves measures under Chapter VII of the Charter of the United Nations in a case of non-compliance'; and Argentina: '… it is also clear that should there be non-compliance, it is within the exclusive power of the Council to convene in order to assess and take measures that it deems appropriate under Chapter VII of the Charter'.

situation threatens peace and security in the region',[76] meaning that they are based on Chapter VII. The representative of the Russian Federation, in turn, referred to a possible authorisation of 'enforcement measures'[77] which constitute a sub-category of possible Chapter VII measures. However, the statement by the representative of the United States referred only to the fact that 'under Article 25 of the Charter of the United Nations Syria is obligated to accept and carry out the decisions made by the Security Council in the resolution'.[78]

This recalls previous occasions on which the Security Council has used language that, while being *mutatis mutandis* akin to the wording of Article 39, was still deliberately different. For example, Security Council Resolution 1695 (2006) on North Korea, rather than using the language of Article 39 of the Charter ('acting under Chapter VII'), stated instead (deliberately equivocally) that the Security Council was '[a]cting under its special responsibility for the maintenance of international peace and security'. In the same resolution, just one preambular paragraph earlier, the Security Council stated that the rocket launches by the Democratic People's Republic of Korea 'jeopardize peace, stability and security in the region and beyond', rather than that they would constitute a 'threat to international peace and security'.[79]

On these and other occasions the complete lack of a formal reference to the 'acting under Chapter VII' formula (as in Security Council Resolution 2165) or a mere reference to the Council '[a]cting under its special responsibility for the maintenance of international peace and security' (as in Security Council Resolution 1695) is necessary for obvious political or diplomatic reasons, in order to reach a consensus among the Security Council's permanent members, and to allow it to adopt a resolution in the first place, given the voting requirements enshrined in Article 27 of the UN Charter,[80] and further given the connotation of Chapter VII with possible military measures.

It is in those situations a matter of interpretation of the given resolution whether it was intended to constitute, and indeed constitutes, an exercise by the Security Council of its Chapter VII powers with the ensuing legal consequences inherent in the Chapter VII character (or not) of a resolution. In the case of Security Council Resolution 2165 concerning the situation in Syria there are, as demonstrated, good reasons to argue that, indeed, the resolution has been adopted by the Council acting under Chapter VII, notwithstanding the lack of an *express* reference thereto. There is still the need to address the question whether, if that is not the case, the Council can nevertheless adopt legally binding measures, as it claims it can, under its general powers as set out in particular in Article 24 of the Charter.

[76] UNSC, Protocol of the 7216th Meeting (14 July 2014), UN Doc S/PV.7216, 3 (Luxembourg).
[77] ibid 6 (Russian Federation).
[78] But see also the statement by the United States delegate which referred only to the fact that '… under Article 25 of the Charter of the United Nations Syria is obligated to accept and carry out the decisions made by the Security Council in the resolution': ibid 7.
[79] UNSC Res 1695 (15 July 2006), UN Doc S/RES/1695, preambular paras 12, 13.
[80] For a detailed analysis of the voting system under art 27 of the Charter (and in particular the 'veto') see Andreas Zimmermann, 'Article 27' in Simma and others (n 48) 871, 911 in particular marginal note 172.

5.2. SECURITY COUNCIL RESOLUTION 2165 AS A LEGALLY BINDING SECURITY COUNCIL RESOLUTION BEYOND CHAPTER VII?

The question whether the Security Council may adopt legally binding decisions beyond Chapter VII is almost as old as the Charter itself. Indeed, as early as 1947 the Secretary-General reminded the Council that the drafting history of the Charter demonstrates that Article 25 applies to *all* decisions of the Security Council. A proposal to limit the obligation to accept and carry out decisions of the Security Council to those decisions of the Council undertaken pursuant to the specific powers enumerated in the Charter had been put to a vote at San Francisco, but was rejected. This constitutes evidence that the obligation of the members to carry out the decisions of the Security Council was intended to apply equally to decisions made under Article 24 under the grant of specific powers.[81]

This argument, which is essentially based on the drafting history of the UN Charter, is further buttressed by the systematic interrelationship between Article 25 and Chapter VII. As the ICJ rightly noted as early as 1971, if Article 25 made reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the UN Charter – that is to say, if only such decisions had binding effect – then Article 25 would be superfluous and completely redundant, since this effect is already secured by Articles 48 and 49 of the Charter.[82] Besides, since Article 25 appears immediately after Article 24 in the part of the Charter that deals with the functions and powers of the Security Council, it obviously cannot be confined to decisions on enforcement action, but must apply to 'decisions of the Security Council' adopted in accordance with the Charter generally.

Moreover, the very reference in Article 24 to the Security Council's '*specific* powers' itself presupposes that the organ holding such specific powers must also have powers of a more *general* nature.[83] Otherwise, the inclusion of the term 'specific' in Article 24 would be completely redundant and senseless. Finally, the position of Articles 24 and 25 in the more general Chapter V of the Charter relating to the overall functions and powers of the Security Council rather than in Chapter VII, suggests that Article 25 applies both to decisions under the Council's general powers and to those adopted under Chapter VII.[84]

[81] UNSC, 91st Meeting of the Security Council (10 January 1947), SCOR 2nd Year, No 3, 45.
[82] *Namibia* Advisory Opinion (n 63) [113].
[83] Jost Delbrück, 'Article 24' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (2nd edn, Oxford University Press 2002) 442, 445 fn 10.
[84] Peters (n 62) 791 marginal note 11; David Schweigmann, *The Authority of the Security Council under Chapter VII of the UN Charter* (Brill/Nijhoff 2001) 27; Urs Saxer, *Die Internationale Steuerung der Selbstbestimmung und der Staatsentstehung* (Springer 2010) 467; Michael Krökel, *Die Bindungswirkung von Resolutionen des Sicherheitsrates der Vereinten Nationen gegenüber Mitgliedstaaten* (Duncker & Humblot 1977) 66; Wilhelm Kewenig, 'Die Problematik der Bindungswirkung von Entscheidungen des Sicherheitsrates' in Horst Ehmke and others (eds), *Festschrift für Ulrich Scheuner* (Duncker & Humblot 1973) 259; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart 2004) 37.

An overly restrictive view of Articles 24 and 25 also seems to be incompatible with the Council's 'primary responsibility for international peace and security' enshrined in the UN Charter and its very purpose. A more limited interpretation of Article 25 also seems to run counter to the foundations of the current system of collective security and would also dispossess the Security Council of the powers to meet its responsibilities.[85] It was this approach also that underpinned the ICJ's 1971 *Namibia* advisory opinion, when the Court indicated that 'when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member states to comply with that decision'. The Court also stated that to 'hold otherwise would be to deprive the principal organ of its essential functions and powers under the Charter'.[86]

The ICJ has also emphasised that it is a matter of interpretation whether a given resolution adopted by the Security Council is legally binding and that before a definite conclusion can be reached, a careful analysis is required in each case. More specifically, in order to make such a determination the wording of the document, its genesis and drafting history are to be taken into account, together with the legal basis (if that is referred to), relevant discussions and statements made before or after the adoption of the resolution, as well as other circumstances that may assist in determining the resolution's legal character.[87] Inter alia, whenever the Security Council uses firm language (such as 'decides', 'demands', 'orders') in contrast to a mere 'calling upon', 'urging' or 'requesting', this can be seen as an implied use of its authority to make legally binding decisions, even outside the framework of Chapter VII.[88] Therefore, when taken as a whole, there are good reasons to believe that the Security Council has the competence to adopt legally binding decisions without the need to rely formally on Chapter VII of the UN Charter.

Nevertheless, it cannot be denied that this understanding of Article 25 of the Charter remained (at least somewhat) controversial, in particular among some of the permanent members of the Security Council. This was the case until the 1990s, when the Security Council started its more active role of making use of its Chapter VII-based prerogatives. Indeed, an analysis of the Council's practice since 1990 up to Resolution 2165 might have hinted at an understanding under which only Chapter VII-based measures are to be considered legally binding. In particular, it had been argued that if indeed the meaning of Article 25 was to render all decisions of the Security Council legally binding, the words 'in accordance with the present Charter', contained in Article 25 of the Charter, were *superfluous*. Obviously, the wording qualifies Article 25 in that it refers only to those decisions of the Security Council that all member states agree to accept and carry out. This, in turn, can relate only to those decisions themselves being duly binding 'in accordance with the present Charter'. Otherwise, the language used in Chapter VI of the UN Charter, which is undoubtedly of a mere recommendatory character, itself would be contrary

[85] Delbrück (n 83) 444 fn 9.
[86] *Namibia* Advisory Opinion (n 63) [116].
[87] ibid [114].
[88] Eric Suy and Nicolas Angelet, 'Article 25' in Jean-Pierre Cot, Alain Pellet and Mathias Forteau (eds), *La Charte des Nations Unies: Commentaire Article par Article* (3rd edn, Economica 2005) 912.

to Article 25.[89] Moreover, the fact that the Charter itself distinguishes between *decisions* on the one hand and *recommendations* on the other indicates that the Security Council may make either binding decisions or non-binding recommendations.

What constitutes a novelty, however, is that by adopting Resolution 2165 the Security Council seems to have unequivocally confirmed the broad understanding of Article 25 in 'underscoring that Member States are obligated *under Article 25 of the Charter of the United Nations* to accept and carry out the Council's decisions'.[90] This is in line with earlier occasions – for example, when, in 1970, the Security Council called upon Portugal to comply with its resolutions in accordance with its obligations under Article 25 of the Charter.[91] What is crucial and noteworthy, however, is that any form of *enforcement* of such obligations by the Security Council vis-à-vis a state, or indeed a non-state entity, that is not acting in accordance with such obligations, must still be based on and couched specifically as a Chapter VII measure.

Another issue that arises is whether any inferences may be drawn, and if so which, from the Security Council's recent practice, and in particular Resolution 2165, as to the interpretation of applicable rules of treaty law or the current stage of customary law relating to the delivery of humanitarian assistance and, in particular, the question of consent.

6. SECURITY COUNCIL PRACTICE AND ITS INTERPRETATION OF INTERNATIONAL HUMANITARIAN LAW

While Security Council Resolution 2165 does not *directly* address the issue whether, under applicable rules of international humanitarian law, the consent of the Syrian government was needed in order to allow humanitarian access, even with regard to those parts of Syrian territory controlled by insurgents, there are still some hints as to the Security Council's understanding of the *ex ante* legal situation.

For one, in the said resolution the Security Council 'recalls that starvation of civilians as a method of combat is prohibited by international humanitarian law'.[92] By using the term 'recalling', which is descriptive of a pre-existing situation rather than prescriptive, the Security Council confirms, if ever there was need, the customary character of the underlying norm of international humanitarian law. The same is true, *mutatis mutandis,* for the obligation to protect 'personnel engaged in humanitarian relief activities', since the fulfilment of this obligation is referred to by the Council as being 'required by international humanitarian law'.[93]

Similar considerations apply, albeit in a more nuanced fashion, to the arbitrary withholding of consent. Rather than 'confirming' or 'noting' that such withholding constitutes a violation of

[89] For a critical position see *Namibia* Advisory Opinion (n 63) dissenting opinion of Judge Fitzmaurice, [113]–[114]; Rosalyn Higgins, 'The Advisory Opinion on Namibia: Which UN Resolutions are Binding under Article 25 of the Charter' (1972) 21 *International and Comparative Law Quarterly* 270.
[90] UNSC Res 2165 (n 6) (emphasis added).
[91] UNSC Res 290 (8 December 1970), UN Doc S/RES/290, operative para 9.
[92] UNSC Res 2165 (n 6) operative para 7.
[93] ibid operative para 8.

https://doi.org/10.1017/S0021223716000315 Published online by Cambridge University Press

international humanitarian law, the Security Council merely *notes the United Nations Secretary-General's view* that arbitrary withholding of consent for the opening of all relevant border crossings, including those under rebel control, constitutes a violation of international humanitarian law.[94] It is submitted that this nuanced wording is telling in itself.

This confirmation of certain rules of international humanitarian law stands in contrast to the position the Security Council has taken on the legality of providing humanitarian assistance without governmental permission. For one, the authorisation granted in Security Council Resolution 2165 to use rebel-controlled border crossings without prior authorisation by the Syrian government, as reconfirmed in Resolution 2258 (2015),[95] is limited both *ratione temporis* to an initial period of 180 days, and *ratione personae* to UN humanitarian agencies and their implementing partners.

Yet, had it been the position within the Security Council that under international humanitarian law humanitarian aid can be provided without authorisation by the Syrian government – at least when it comes to rebel-controlled areas and even without a specific Security Council mandate – it would have been far more natural to extend the right to deliver assistance to all relevant actors and not only UN agencies (which they would then possess in any event under general international law). It would also have been more natural to do so for an unlimited period of time especially since the obligation of the Syrian government to 'enable the immediate and unhindered delivery of humanitarian assistance', also contained in Security Council Resolution 2165, unlike the right to cross Syrian borders without *ex ante* permission, is *not* limited in time.[96]

Finally, two explanatory statements made after the vote – by Luxembourg and by the United States – are particularly telling. It is probably safe to assume that these two states were among those members of the Security Council most in favour of providing unimpeded access for humanitarian relief without the need for prior approval by the Syrian government. They nevertheless seem to have taken the position that such approval is required as a matter of routine, subject obviously to a binding Security Council decision, such as Resolution 2165 (2014) and currently in Resolution 2258 (2015). Thus, the Luxembourg representative stated, following the adoption of Resolution 2165, that from now onwards '[t]he consent of the Syrian authorities will *no longer* be necessary',[97] while the United States representative clarified her country's position that '[*b*]*y adopting that resolution*, the Council has opened four crossings to United Nations humanitarian agencies and their implementing partners without the need for approval from the regime'.[98] On the whole, it thus seems that, whether one likes it or not, relevant Security Council practice, as most recently enshrined in Resolution 2165 and its successor resolutions,

[94] UNSC, Report of the Secretary-General on the Implementation of Security Council Resolution 2139 (2014) (May 2014), UN Doc S/2014/365, para 51: 'The Government of the Syrian Arab Republic … is failing in that responsibility through its refusal to give consent to humanitarian organizations to use all means at their disposal, including the use of border crossings operated by opposition groups … Arbitrarily withholding consent for the opening of all relevant border crossings is a violation of international humanitarian law'.
[95] (n 7).
[96] UNSC Res 2165 (n 6) operative para 6.
[97] UNSC, Protocol of the 7216th Meeting (n 76) (emphasis added).
[98] ibid 6 (United States) (emphasis added).

https://doi.org/10.1017/S0021223716000315 Published online by Cambridge University Press

militates in favour of the position that, were it not for a specific Security Council decision to the contrary, humanitarian actors may not deliver aid unless permission by the territorial state is granted.

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Finally, consideration should be given to the question whether states, members of the Security Council (be they permanent or non-permanent members), are subject to legal obligations to take specific steps when faced with a situation where parties to an armed conflict impede humanitarian assistance missions and even use starvation as a method of warfare. In other words, are members of the Council subject to legal obligations when voting on a draft resolution akin to Security Council Resolution 2165?

7. COMMON ARTICLE 1 OF THE GENEVA CONVENTIONS, ARTICLE 1 OF ADDITIONAL PROTOCOL I AND VOTING IN THE SECURITY COUNCIL ON HUMANITARIAN ASSISTANCE

Common Article 1 of the four Geneva Conventions[99] provides that '[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances' ('à faire respecter la présente Convention en toutes circonstances' in the equally authentic French text). Soon after the adoption of the Conventions in 1949, the authoritative ICRC Commentary on the four Geneva Conventions had understood this provision as amounting to a legal obligation by third parties to prevent violations of the Conventions. The French text of the Commentary accordingly stated:[100] 'Ainsi encore, si une Puissance manque à ses obligations, les autres Parties contractantes … peuvent-elles – *et doivent-elles* – chercher à la ramener au respect de la Convention'.[101]

This interpretation was most recently confirmed by the ICRC's 2016 updated Commentary on the First Geneva Convention.[102]

The ICJ underlined and confirmed this obligation in its 2004 advisory opinion on the *Wall in the Occupied Palestinian Territory*. After finding that Israel had acted contrary to its obligations under the Fourth Geneva Convention, the Court further held that all contracting parties to the four Geneva Conventions are, given Common Article 1, 'under an obligation to ensure that the

[99] GC I–III (n 37); GC IV (n 4).
[100] Emphasis added.
[101] Comité International de la Croix-Rouge, Convention (I) pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, Geneva, 12 August 1949, Commentaire of 1952, art 1, https://ihl-databases.icrc.org/applic/ihl/dih.nsf/COM/365-570004?OpenDocument&xp_articleSelected=570004.
[102] ICRC, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Commentary of 2016, https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD#87_B, art 1(164) of which provides: 'The High Contracting Parties [of the Geneva Conventions] also have positive obligations under common Article 1, which means they must take proactive steps to bring violations of the Conventions to an end and to bring an erring Party to a conflict back to an attitude of respect for the Conventions, in particular by using their influence on that Party'.

https://doi.org/10.1017/S0021223716000315 Published online by Cambridge University Press

requirements of the instruments in question are complied with'.[103] Article 1(1) of Additional Protocol I reiterates this obligation when it comes to respecting the rules contained in that Protocol. The same holds true for Article 38(1) of the 1989 Convention on the Rights of the Child,[104] as well as most recently for Article 1(1) of the Third Additional Protocol to the Geneva Conventions.[105]

Most importantly, the obligations arising under Common Article 1 and under Article 1(1) of Additional Protocol I refer to the obligations under the respective instrument *in toto*. These obligations to secure respect are thus *not* limited to grave breaches of the four Conventions or of Additional Protocol I. Rather, they extend also to other violations of international humanitarian law that do not constitute grave breaches, including those contained in Article 70 of Additional Protocol I or, when it comes to occupied territory, those contained in Article 59 of the Fourth Geneva Convention.

At the same time, given that Common Article 3 does *not* address the issue of humanitarian access, and that Additional Protocol II does *not* contain a parallel obligation to Common Article 1 and Article 1 of Additional Protocol I, the *treaty-based* obligation to ensure respect does not arise with respect to humanitarian access in non-international armed conflicts. Nor does it obviously come into play when it comes to securing the obligation not to hinder humanitarian access *under customary law* or vis-à-vis non-state actors that are party to an armed conflict.

It remains doubtful, however, whether, as claimed by the ICRC,[106] there exists a *customary law-based* obligation to ensure respect for international humanitarian law applicable to violations of the law in non-international armed conflicts beyond the set of violations contained in Common Article 3, given that state practice on the matter is, to say the least, scarce,[107] and given further that the ICJ had referred in its *Nicaragua* judgment solely to the 'general principles of humanitarian law' contained in the Geneva Convention, and specifically its Common Article 3.[108]

To the extent that an obligation to ensure respect arises under Common Article 1 and/or Article 1 of Additional Protocol I (and also an obligation concerning non-international armed conflicts beyond violations of Common Article 3, provided one were to follow the ICRC's position on the matter), one then has to provide an answer for the next question: by the same token,

[103] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion [2004] ICJ Rep 136 [158]–[159].
[104] Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3.
[105] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) (entered into force 14 January 2007) 2404 UNTS 261 (AP III).
[106] ICRC Study (n 5) 511, r 144: 'Practice shows that the obligation of third States to ensure respect for international humanitarian law is not limited to implementing the treaty provision contained in common Article 1 of the Geneva Conventions and Article 1(1) of Additional Protocol I'.
[107] The only practice the ICRC then refers to are appeals by the ICRC; the study then goes on to state that 'these appeals were addressed to the international community, that no State objected to them and that several States not party to the Additional Protocols supported them', which 'practice', however, does not amount to sufficient state practice to bring about a new rule of customary international law, even more so since no proof of relevant *opinio juris* is being provided: ibid.
[108] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States*) Merits, Judgment [1986] ICJ Rep 14 [218].

are individual members of the Security Council, in exercising their membership rights therein, required also to fulfil this obligation, not least in light of the fact that such obligation is owed, given its *erga omnes* character, to all other contracting parties of the respective treaties?

It is true that in the *Behrami* and *Saramati*[109] cases before the European Court of Human Rights (ECtHR), the Court took a restrictive position with the following ruling:

> Since operations established by UNSC Resolutions under Chapter VII to secure international peace and security and since they rely for their effectiveness on support from member states, the [European] Convention [on Human Rights] cannot be interpreted in a manner which would subject the acts and omissions of Contacting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court.

In the opinion of the ECtHR, '[t]o do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations'. It would also, the Court found, 'be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided in the text of the Resolution itself'. The ECtHR then found[110] that:

> [its reasoning] equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remain crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim.

Briefly, the ECtHR thus held that the voting behaviour of states within the Security Council – being crucial to the effective fulfilment by the Security Council of its mandate and, consequently, by the United Nations at large of its overarching peace and security aim – is not subject to control by the ECtHR.[111] The Court thus, at least implicitly, took the position that any such voting would not be subject to the substantive obligations that a state otherwise has under the European Convention on Human Rights.[112] Transposing this holding to the present situation would mean that members of the Security Council could disregard their obligation to ensure respect for the Geneva Conventions or to Additional Protocol I when voting in the Council. They

[109] ECtHR, *Behrami v France*, App no 71412/ 01; *Saramati v France, Germany and Norway*, App no 78166/01, 2 May 2007.
[110] ibid para 67; Kjetil Mujezinovic Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test' (2008) 19 *European Journal of International Law* 509; Raffaella Nigro, 'The Notion of "Jurisdiction" in Article 1: Future Scenarios for the Extra-Territorial Application of the European Convention on Human Rights' (2010) 20 *Italian Yearbook of International Law* 9.
[111] Pasquale De Sena and Maria Chiara Vitucci, 'The European Courts and the Security Council: Between Dedoublement Fonctionnel and Balancing of Values' (2009) 20 *European Journal of International Law* 193.
[112] European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222.

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could thus also disregard their obligation to ensure that states do fulfil their obligations under Article 70 of Additional Protocol I or under Article 59 of the Fourth Geneva Convention.

Any such conclusion – apart from not being supported by legal argument but rather by some broad assumptions about the effectiveness of the system of collective security under the Charter – is, however, misleading. On the one hand, it contradicts the very idea that even the United Nations as such, and even more so individual members of the Council, are bound by fundamental human rights obligations. Besides, the judgment of the European Court of Human Rights disregards Article 103 of the UN Charter, which provision deliberately limits the overriding character of the Charter to obligations arising thereunder. Yet, there are no obligations whatsoever arising under the Charter prior to the adoption of a binding Security Council resolution. In particular, there are no such obligations for members of the Security Council, be they permanent or non-permanent members, arising under Article 103 of the Charter when voting upon a given draft resolution yet to be adopted.

There is no reason to assume, therefore, that individual members of the Security Council are not bound by their obligation to ensure respect for the Geneva Conventions and Additional Protocol I when voting in the Security Council. This does not mean that members of the Security Council would have to vote for any resolution.[113] Rather, to paraphrase the ICJ's holding in the *Bosnian Genocide* case,[114] the obligation of members of the Security Council, and the Security Council at large, is to consider and eventually employ all means reasonably available in order to prevent violations of the relevant provisions of the Fourth Geneva Convention and Additional Protocol I when addressing humanitarian access. It also entails an obligation for those permanent members that are parties to either the Geneva Conventions or Additional Protocol I or both to veto a resolution aimed at ensuring respect for Article 70 of Additional Protocol I or Article 59 of the Fourth Geneva Convention only if they believe that such a resolution cannot pursue that goal, and not for any other political reason. Otherwise, they would be violating their obligation to prevent the occurrence of such violations of international humanitarian law. Accordingly, state responsibility is incurred if a member state of the Security Council manifestly fails to support, or even puts off, possible Security Council measures aimed at ensuring respect for those provisions of international humanitarian law.

[113] For further criticism of the *Behrami and Saramati* judgment see Bernhard Knoll, 'Right without Remedies: The European Court's Failure to Close the Human Rights Gap in Kosovo' (2008) 68 *ZaöRV* 431; Marko Milanović and Tatjana Papić, 'As Bad As It Gets: The European Court of Human Rights' *Behrami and Saramati* Decision and General International Law' (2009) 58 *International and Comparative Law Quarterly* 267; Alexander Breitegger, 'Sacrificing the Effectiveness of the European Convention on Human Rights on the Altar of the Effective Functioning of Peace Support Operations: A Critique of Behrami & Saramati and Al-jedda' (2009) 11 *International Community Law Review* 155.

[114] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*), Judgment [2007] ICJ Rep 43.

https://doi.org/10.1017/S0021223716000315 Published online by Cambridge University Press

8. CONCLUDING REMARKS

The Security Council has at its disposal a whole tool box in cases where parties to a given armed conflict do not fulfil their respective obligations not to impede relief operations, or where they even use starvation as a method of warfare. It is obvious, however, that five members of the Security Council hold the keys to opening this tool box and eventually to making use of the various tools contained therein. It is thus even more important to reconsider the usage of these keys – the exercise of the veto power – but that obviously constitutes an issue that not only covers the very question of humanitarian access but also, as recent practice has reconfirmed, extends to the whole range of possible Security Council measures.

https://doi.org/10.1017/S0021223716000315 Published online by Cambridge University Press