

Dag Hammarskjöld and his approach to the United Nations, Collective Security and Intervention

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Dag Hammarskjöld, the second Secretary-General of the United Nations, had a flexible approach to international law. On the one hand, he strongly relied on the principles of the UN Charter and general international law, on the other, he used a flexible and balanced *ad hoc* technique, taking into account values and policy factors whenever possible, to resolve concrete problems. Hammarskjöld had a tendency to express basic principles in terms of opposing tendencies, to apply a discourse of polarity or dualism, stressing for example that the observance of human rights was balanced by the concept of non-intervention, and recognizing that principles and precepts could not provide automatic answers in concrete cases. Rather, such norms would serve “as criteria which had to be weighed and balanced in order to achieve a rational solution of the particular problem”.¹ Very often it worked.

Dag Hammarskjöld has gone to history as an inspiring international personality injecting a dose of moral leadership and personal integrity into a world of power politics. He succeeded Trygve Lie as Secretary-General in April 1953, in the midst of the Cold War, and in addition to East-West rivalry he was confronted with Third World problems and the agonizing birth of the new Republic of Congo, a tumultuous crisis through which he lost his life in the Ndola air crash in September 1961.

Hammarskjöld set out his views on the role of the UN Organization and his approach to the UN Charter in the Annual reports to the General Assembly. In this context he developed a doctrine on the independence of the international civil servant, including an active role for the Secretary-General under an expansive interpretation of the Charter.

He did not make a very sharp distinction between law and politics. He did not look upon international law as mainly “written law”, but emphasized the whole international pattern of rules and behaviour. Already before Wolfgang Friedman had published his famous book on *The Changing Structure of International Law* Hammarskjöld used the distinction between the traditional “law of coexistence” and the more dynamic “law of cooperation”. The world, in his view was, slowly moving into the latter more advanced area, which included supranational decision-making.

During his time as Secretary-General (1953-61) Hammarskjöld set forth a number of general themes regarding the functioning of the UN, but he did not articulate specific

¹ Oscar Schachter, Dag Hammarskjöld and the Relation of Law to Politics, 56 *American Journal of International Law (AJIL)* 1962, pp. 2-5. Quotation at p. 5. Hammarskjöld recognized that there was a tension between principles and concrete needs; by taking account of both, he sought to achieve (in his own words) “that combination of steadfastness of purpose and flexibility of approach which alone can guarantee that the possibilities which we are exploring will have been tested to the full”. *Ibid.*

doctrines on intervention or collective security. Nevertheless, as we shall see, he was a forerunner in the field of what today is called human security.

1. Legal “roots” and intellectual background

Dag Hammarskjöld was born in 1905 in Jönköping, Sweden, the fourth son of Hjalmar Hammarskjöld, President of the Göta Court of Appeal and a member of the Swedish Government which at this time negotiated the dissolution of union between Sweden and Norway.

Hjalmar Hammarskjöld had studied trade law and legal history under professor Paul Laband in Strassburg and he later fulfilled his doctorate at Uppsala University with a thesis on contracts of affreightment (1886). He was appointed professor of law at Uppsala in 1891, served as an unpolitical Minister of Justice in 1901-02, and was appointed member of the Hague Permanent Court of Arbitration in 1904. During most of World War I he served as Prime Minister (1914-17) and pursued a “strict” policy of neutrality which was widely criticized for being legalistic and, at the same time, biased to the advantage of Germany through the application of the principle of “normal trade” (“courant normal”). In the Prime Minister’s own words, he wanted Sweden and the other Nordic countries to stand up for the law of neutrality for the benefit of European civilization. Hammarskjöld authored a joint Nordic diplomatic note to the belligerent states to this effect.² In 1924 he published the treatise *La neutralité en général*.³

Dag’s elder brother Åke (1893-1937) became in 1920 a member of the legal secretariat of the League of Nations. During 1922-36 he was the Registrar of the Permanent Court of International Justice in the Hague. In that function he assisted the President of the Court, Judge Max Huber. When Huber was appointed arbiter in the dispute between the United Kingdom and Spain in the Spanish Zone of Morocco Claims in 1923 he asked Åke Hammarskjöld to function as Secretary of the arbitration commission. They cooperated smoothly and Hammarskjöld was probably involved in the substance of the different decisions that were delivered during 1924 and 1925. He published a number of international law articles,⁴ was appointed judge of the PCIJ in 1936, but died prematurely the following year. Dag always held him in high esteem.

Dag’s eldest brother, Bo Hammarskjöld (1891-1974), was appointed member of the Supreme Administrative Court of Sweden in 1934 and a District Governor in 1935. The father and his sons were groomed in a typical Swedish civil service tradition (“ämbetsmannatradition”), where the concepts of “duty” and “responsibility” reflected time-honoured values.

Oscar Schachter, who was a member of the UN Secretariat between 1953-66, has said of Dag Hammarskjöld that “he had a manifest pride in his family’s legal background” and that he “regarded himself as a man of law”.⁵

² Joint Swedish-Danish-Norwegian note of November 12, 1914, which protested against the widening of the concept of contraband and the rigour of the maritime blockades in “contravention of the freedom of the seas”.

³ Hjalmar Hammarskjöld’s international law activities were noteworthy. His membership of the Permanent Court of Arbitration led to his chairing the proceedings in the Casablanca affaire (Germany v. France) in 1909. He was also one of three arbitrators in the Gridbådarne dispute (between Sweden and Norway) the same year. During the 1920’s he served as Chairman of the Committee of Experts for the Progressive Codification of International law of the League of Nations, and as President of the International Law Association.

⁴ Åke Hammarskjöld, The Permanent Court of International Justice and its Place in International Relations, *Journal of the Royal Institute of International Affairs* 1930, pp. 567-597; Persönliche Eindrücke aus Walter Schückings Richtertätigkeit, *Die Friedenswarte* 1935, pp. 214-217; Les immunités des personnes investies de fonctions internationales, *Recueil des Cours de l’Académie de Droit International*, Paris 1937; and the posthumous booklet *Jurisdiction Internationale*, Leiden 1938.

⁵ Schachter, 56 *AJIL* 1962, p. 1.

Already as a young man Hammarskjöld was interested in medieval religious thinking. His early correspondence includes references to mystics like Meister Eckhart (c. 1260-1327) and Thomas a Kempis (1380-1471). Later he also referred to Thomas Aquinas (1225-74), the more empiric and realist philosopher who tried to combine Christian doctrine with Aristotelian thinking, and St. John of the Cross (1542-91), who combined Christian mysticism with religious reformism and poetry. What these thinkers had in common was a focus on meditation and seclusion, a stress on the importance of a man's inner life in relation to God in preparation for individual choices and individual action. Hammarskjöld was through his life attracted to this personal approach to moral decision-making. It also connected to the societal values of "duty" and "responsibility" conveyed by his father and the pious-moral influence exerted by his mother.⁶ Thus, while the wish to "do good" in concrete cases seems to be inherited from his mother, it has been said that the ideals "duty, righteousness and self-less service" were inherited from the Swedish paternal tradition.⁷

Some time after Hammarskjöld's appointment as Secretary-General he stated the following in the U.S. radio program "This I believe":

"From generations of soldiers and government officials on my father's side I inherited a belief that no life was more satisfactory than one of selfless service to your country - or humanity. This service required a sacrifice of all personal interests, but likewise the courage to stand up unflinchingly for your convictions concerning what was right and good for the community, whatever were the views in fashion.

From scholars and clergymen on my mother's side I inherited a belief that, in the very radical sense of the Gospels, all men were equals as children of God . . .

But the explanation of how man should live a life of active social service in full harmony with himself ..., I found in the writings of those great medieval mystics ... who in "singleness of mind" ...had found strength to say Yes to every demand (expressing) ...the needs of ... neighbours ..., and to say Yes also to every fate life had in store (and to follow the call of perceived duty)".⁸

After Hammarskjöld's death, the manuscript of a diary was found in his New York apartment. Together with it was a letter addressed to a Swedish friend and diplomat, where Hammarskjöld described the text "as a sort of *white book* concerning my negotiations with myself - and with God".⁹ The diary was published in Sweden in 1963 as *Vägmärken*. An English translation was published in 1964 under the title of *Markings*.¹⁰ The entries do not tell us anything about Hammarskjöld "on the job" as Secretary-General (other than obliquely), but they tell us something about his thinking on values and personal guidelines. His religious and moral reliance on Meister Eckhart and Thomas Aquinas (in that order) was confirmed. In addition, it became clear (or was confirmed) that he had an intense relationship to world literature as such. He obviously used the works of Joseph Conrad, Herman Hesse, Henrik Ibsen, Dostojevskij and others for personal reflection in situations where decisions needed to be taken. It was manifest already from his early correspondence that these and

⁶ He had received Thomas a Kempis' *De imitatione Christi* from his mother Agnes in 1921 and kept the book for the rest of his life. It has been said about Agnes Hammarskjöld that she "had a warm, deep, and unsophisticated piety - a piety that never brooded upon theological or philosophical questions, being more accurately described as the piety of a practising faith which, with all-embracing kindness, endeavored as much as possible to help men in need." Gustaf Aulén, *Dag Hammarskjöld's White Book, An Analysis of Markings*, Fortress Press /Gleerup, Philadelphia 1969, p. 14.

⁷ Gustaf Aulén, *ibid*.

⁸ Statement for "This I believe", radio program hosted by Edward Murrow, 1953. See "Old Creeds in a New World" in Wilder Foote (Ed.), *The Servant of Peace, A Selection of the Speeches and Statements of Dag Hammarskjöld*, The Bodley Head, London 1962, p. 23 f.

⁹ The letter is rendered on the introductory page in Dag Hammarskjöld, *Markings*, translated from the Swedish by Leif Sjöberg & W.H. Auden, with a foreword by W.H. Auden, Alfred A. Knopf, New York 1964.

¹⁰ *Supra*.

other authors played a significant role in his world of ideas since student years.¹¹ Dostojevskij's *The Brothers Karamazov* included references to each individual's universal responsibility for other individuals, to the ideas of "service to mankind" and "brotherhood and inclusiveness of men", and to individual action "for the sake of the future". The novel foreshadowed the ethics of Albert Schweitzer and Hammarskjöld always kept a copy of it in his apartment. He felt that Conrad's novels, above all *Lord Jim* and *Heart of Darkness*, conveyed a strong moral message; and that Herman Melville's *Moby Dick* and Ibsen's *Brand* caught the dilemmas of strong-willed individuals who frantically pursued, in constant uphill battles, their chosen path of life.

Hammarskjöld was not afraid of uphill battles. He saw the appointment as Secretary-General as a challenge and a chance to be of real service to the international community. At last he was in a position to put into action the ethics of Albert Schweitzer embraced by himself, the ideal of service to man. His diary entries following April 7, 1953 (the day of his election by the General Assembly upon the recommendation of the Security Council) seemed to express a certain self-confidence: "To say Yes to life is at one and the same time to say Yes to oneself".¹² He was ready to take on a role of leadership visavis the international community.¹³

2. The introduction of peacekeeping

Hammarskjöld is best known for his innovative approach to the UN Charter. First we shall address the matter of peacekeeping, which was not mentioned in the Charter.

Hammarskjöld adopted and elaborated the idea of peacekeeping in the aftermath of the British-French intervention in the Suez area in 1956. This intervention, against the regime of president Nasser, was a clear violation of the UN Charter and even the United States condemned its NATO allies for it. It was Hammarskjöld's task to handle the crisis with the support of the UN bodies he could use for the purpose. His innovative approach to the UN Charter had two dimensions during the Suez crisis:

First, as the French-British veto power blocked the Security Council he had to rely on the General Assembly. As a procedural matter he used the Uniting for Peace resolution of 1950 to summon an extra Emergency Session of the Assembly.

Second, this General Assembly Session was used by the Secretary-General and the Canadian Foreign Minister Lester Pearson to introduce a change in the substance of the law of the Organization. This was the concept of peacekeeping, the interposition of a military peace operation in the conflict area, with the consent of the parties to the conflict. On 7 November, 1956, the General Assembly adopted a resolution which launched the first peacekeeping operation (PKO) in UN history, the UN Emergency Force in the Middle East (UNEF).¹⁴

¹¹ See *Dag Hammarskjöld, Ungdomsårens vittnesbörd, Brev och uppteckningar 1925-1931*, edited by Karl E. Birnbaum, Stockholm, 2001.

¹² *Markings*, p. 92.

¹³ Article 97 of the UN Charter stipulates that the Secretary-General "shall be the chief administrative officer of the Organization". Obviously Hammarskjöld was prepared to use this administrative platform for political and humanitarian action when that was possible and - in his view - called for.

¹⁴ This UN peace operation was established through the following resolutions of the General Assembly: Resolution 998 (ES-1) of November 4, 1956, where the Secretary-General was asked to prepare a plan for an "emergency force" to secure and supervise the upcoming armistice in the Suez conflict, resolution 1000 (ES-1) of November 5, 1956, which approved the plan of the Secretary-General, and resolution 1001 (ES-1) of November 7, 1956, which launched the UNEF operation. The

Although UN observer missions had been fielded in 1948 and 1949, the deployment of *armed troops* to assist in the implementation of agreements reached between the UN and parties to a conflict added a new dimension to international relations. To govern these operations Hammarskjöld laid down the principles of (1) consent from the parties involved, (2) impartiality from the UN side, and (3) non-use of force from the UN side, unless in self-defence.

Consent from the territorial state (the state on whose territory the UN troops should be deployed) and consent from the other states involved was a necessary requirement for the operation to be set in motion. The *impartiality* of peacekeepers was necessary to retain the confidence of the parties concerned, since PKOs as a crisis management technique are based upon cooperation and not enforcement. However, the military dimension of peacekeeping was clear from the right to use force in *individual self-defence*. Hammarskjöld also defended *mission defence*, that peacekeepers could use force to defend the tasks of the mission in accordance with the mandate.

Over the years the above principles were confirmed and others were developed, including

- that the operation is under UN military command, under the political authority of the Security Council (not the General Assembly), with executive control entrusted to the Secretary-General;
- that the operation has the backing of the international community;
- that the force is multinational in composition, selected in consultation with the parties to the conflict and (during the cold war) that troops from the five permanent member states of the Security Council did not participate.

When UNEF was established Hammarskjöld considered it a new departure. “It is” he said, “certainly not contrary to the Charter, but it is in a certain sense outside the explicit terms of the Charter.

PKOs were not foreseen under either Chapter VI or Chapter VII of the Charter, they fell somewhere in between, and not surprisingly the unwritten Chapter VI½ has been suggested as their legal basis. It is submitted that this “VI½ perception” is legally defensible and politically useful; legally defensible because, even if based on consent, PKOs are a more ambitious involvement than anything provided for in Chapter VI; politically useful because it shows that innovations, even without textual support, can be legitimised under the system of the Charter if they fulfil the purposes of the United Nations.

3. Hammarskjöld’s dynamic approach to the law of the UN Charter

role of the General Assembly (instead of the Security Council) in this case is explained by Hammarskjöld’s use of the 1950 Uniting for Peace resolution, which resulted in the convocation of an Emergency Special Session (ES).

Dag Hammarskjöld was appointed Secretary-General five years after Hans Morgenthau had published his influential realist opus *Politics among Nations*. In a speech in 1956 he had reason to comment on the chasm between idealism and realism. Assertions that the UN had failed were often misleading, he said:

“Do we refer to the purposes of the Charter? They are expressions of universally shared ideals which cannot fail us, though we, alas, often fail them. Or do we think of the institutions of the United Nations? They are our tools. We fashioned them. We use them. It is our responsibility to remedy any flaws there may be in them”.

And he continued:

“This is a difficult lesson for both idealists and realists, though for different reasons. I suppose that, just as the first temptation of the realist is the illusion of cynicism, so the first temptation of the idealist is the illusion of Utopia.”¹⁵

Hammarskjöld was an idealist in the sense that he believed in the purposes and principles of the UN Charter and in the possibilities of the UN Organization.¹⁶ At the same time, he was a realist in the sense that he did not want to stretch the potential capacities of the Organization too much if member states were not ready for it. For example, he opposed the idea of a standing UN peace-keeping force, because he felt it was politically premature in view of the strong feelings related to national sovereignty harboured by many states, and also because he felt it was unpractical to have a ready-made military unit standing by when it was much better to tailor a unit to the specific demands of an upcoming situation.¹⁷

It goes without saying that he wanted the UN to respond to the demands of the international community, and in reflecting how that should be done he fell back on a distinction between existing legal norms and innovative procedures. On the one hand he could refer to the normative framework of the UN in a natural law oriented manner that included an implicit element of staticism. Thus in 1956 he stated that the “principles of the Charter are, by far, greater than the Organization in which they are embodied, and the aims which they are to safeguard are holier than the policies of any single nation or people”.¹⁸ On the other hand, he often used a dynamic and evolutionary approach to the system of the UN Charter, arguing for example that although the objectives and rules of the Charter were binding, the working methods of the system should be supplemented through new procedures:

“As is well known, such an evolution has in fact taken place, and it has thus been recognized that such new procedures may be developed when they prove productive in practice for

¹⁵ “An International Administrative Service”, From an Address to the International Law Association at McGill University, Montreal, 30 May, 1956. See Wilder Foote (Ed.), *The Servant of Peace, A Selection of the Speeches and Statements of Dag Hammarskjöld*, The Bodley Head, London 1962, p. 116.

¹⁶ In an implicit reference to the UN in *Markings* he writes that the object of his task (the UN) is only “a feeble creation of men’s hands - but you have to give your all to this human dream for the sake of that alone which gives it reality” (p.110). At another point he writes about what obviously is the UN, that it is a dream “which refuses to share you with anybody or anything else: the greatest creation of mankind - the dream of mankind” (p. 115).

¹⁷ Brian Urquhart, *Hammarskjöld*, The Bodley Head, London/Sydney/Toronto 1973, p. 230.

¹⁸ Statement during the Suez crisis, October 31, 1956. Official Records of the Security Council, 751st meeting. Quoted in Urquhart (1973), p. 174.

efforts towards the objectives of the Charter. In this respect, the United Nations, as a living organism, has the necessary scope for a continuous adaptation of its constitutional life to the needs".¹⁹

This organic approach was in line with his views on the Uniting for Peace resolution of 1950 and the establishment of UNEF in 1956. Hammarskjöld had a dynamic conception of the UN Organization. His successor, U Thant, once remarked (in essence) that although the provisions of the Charter were almost sacred to Hammarskjöld, he nevertheless was prone to use his great gift for innovation and improvisation. He "discovered new ways to help keep the peace"- an emergency force in one situation, an observer group in another, and a UN presence in a third context.²⁰

The dynamic approach of Hammarskjöld was also stressed by his collaborator in the UN Secretariat, Ralph Bunche. Bunche indicated in a speech in 1964 that Hammarskjöld consciously strove to make the UN a progressive force for human advancement. Wherever there was a conflict situation, actual or threatening, he believed the UN should actively seek to contain or avert it:

"by quiet diplomacy when the circumstances permitted, in the form of good offices if the parties themselves demonstrated an inability to deal with the situation; and, if necessary by overt United Nations action".

Bunch added that Hammarskjöld saw clearly that the UN "must do more than hold meetings and talk and adopt resolutions".²¹ Hammarskjöld said himself at a press conference, early in 1959, that the UN simply must respond to those demands which may be put to it. If those demands would go beyond the "present capacity", that must not, in itself, be a reason to exclude action. The capacity of the Organization could prove to be bigger than expected. He referred to the Organization as a machine, thrusting its way through the terrain of international politics.

"I do not know the exact capacity of this machine. It did take the very steep hill of Suez; it may take other and even steeper hills".²²

Hammarskjöld was not confronted with the issues of human security and humanitarian intervention until the summer of 1960, but he had reason to comment upon some of the elements of that discourse before that. With regard to the protection of national sovereignty he referred in a speech in 1953 to the classical Chinese philosopher and poet Tao-Tse-Tung, who is reported as stating that whoever wants to grip the world and shape it will fail, because the world is a spiritual thing that cannot be shaped. Hammarskjöld later in his speech made clear that the United Nations

¹⁹ From the Introduction to the Annual Report of the Secretary-General on the Activities of the Organization 1958-59, 22 August, 1959. Wilder Foote (Ed.), *The Servant of Peace, A Selection of the Speeches and Statements of Dag Hammarskjöld* (hereinafter referred to as *Speeches*), p. 223.

²⁰ U Thant, "Looking ahead", Address given at Columbia University, January 7, 1964. See Andrew N. Cordier and Wilder Foote (Eds.), *The Quest for Peace, The Dag Hammarskjöld Memorial Lectures*, Columbia University Press, New York and London 1965, p. 40. However, in his speech, U Thant did not stress the dichotomy between respect for existing provisions on the one hand and a dynamic use of new methods on the other. This emphasis has been added by the present author in a koskenniemiian vein.

²¹ Ralph J. Bunche, "The United Nations Operation in the Congo", in Cordier & Foote (1965), p. 121 f.

²² Quotation by Lester B. Pearson in Cordier & Foote (1965), p. 100.

“has no power to encroach upon the national sovereignty of any state against the will of its government and people. It would indeed not only be against the letter and the spirit of the Charter of the United Nations to attempt to impose its will in domestic matters. It would also be against the elementary wisdom expressed in Tao-Tse-Tung’s law of life. You cannot grip the world and shape it as a material thing. You can only influence its development if you recognize and respect it as a thing of the spirit”.²³

With regard to the protection of human rights Hammarskjöld said in 1956 that behind the Universal Declaration of 1948 “we find literally thousands of people who directly and indirectly participated actively in its drafting”.²⁴ He thereby implied that the Declaration was not mainly a contribution of the West. He further stated that the Declaration could be called a “universal expression” on the subject in a world where the memory was still fresh of some of the worst infringements of human rights ever experienced in history.

With regard to the principle of collective security Hammarskjöld sometimes referred to the Chapter VII procedure of the Charter as a necessary requirement for armed action.²⁵ At the same time he was prone to relate the matter of collective security and the UN objective of maintaining the peace to the other objectives of the Charter. Not surprisingly, he then used a contextual approach:

“We know that the question of peace and the question of human rights are closely related. Without recognition of human rights we shall never have peace, and it is only within the framework of peace that human rights can be fully developed.”²⁶

In a similar tenor he also saw the creation of the UN as something going beyond the exclusive interests of states and governments. In 1958 he made the point that the UN was not a new idea. The Organization was a body for collective efforts established after centuries of human struggle.

“It is the logical and natural development from lines of thought and aspiration going far back into all corners of the earth since a few men first began to think about the decency and dignity of other men”.²⁷

The choice of emphasis on “men” instead of “states”, and on “dignity” instead of “security”, is perhaps telling for how Hammarskjöld regarded the objectives of the UN Charter. Collective security included human dignity. Or, as we would express it today: collective security is not only state security but also human security.

In Hammarskjöld’s view, peace was not solid without human rights, and human rights were not fully realized unless peace was at hand. The interests of the international society of states could and should not differ from the interests of mankind. Such

²³ *Speeches*, Wilder Foote (1962), p. 43.

²⁴ “The International Significance of the Bill of Rights”, Address at Celebration of the 180th Anniversary of the Virginia Declaration of Rights 1776-1956, Williamsburg, Virginia, 14 May 1956. Wilder Foote, *Speeches* (1962), p. 106.

²⁵ Cf his remark in the address “The Development of a Constitutional Framework for International Cooperation”, Chicago, 1 May 1960. Wilder Foote, *Speeches* (1962), p. 256.

²⁶ “Human Rights and the Work for Peace”, Address at the 50th Anniversary Dinner of the American-Jewish Committee, New York, 10 April 1957. Wilder Foote, *Speeches* (1962), p. 127.

²⁷ “The Uses of Private Diplomacy”, Address to a Meeting of Members of both Houses of Parliament under the auspices of the British Group of the Inter-Parliamentary Union, London, 2 April 1958. Wilder Foote, *Speeches* (1962), p. 174.

views are often consistent with a liberal approach to the issue of intervention for humanitarian purposes, but in the absence of specific statements by Hammarskjöld on the interpretation of the UN Charter in this respect, there is nothing to indicate that he would accept *unilateral* humanitarian intervention in the face of the non-use of force rule in Article 2(4) of the Charter.

Another thing would presumably be a multilateral armed intervention for humanitarian purposes, conducted by UN or regional troops, against the background of an unspecific mandate by the Security Council. Collective humanitarian intervention is not controversial if the Security Council has specifically authorized it under Chapter VII, but it will be controversial if the Security Council, within the framework of its given mandate, has not foreseen the need for armed humanitarian action and consequently has not covered it within the mandate. It was in this obscure area of imprecision Hammarskjöld found himself, when, in August 1960, massacres threatened in the Congo.

4. The problem of intervention

The UN Charter does not contain an explicit principle of non-intervention addressed to *states*, but the existence of such a principle is strongly conveyed by a number of its provisions. Article 2(1) reaffirms the sovereign equality of states, the famous Article 2(4) prohibits the use of force against *inter alia* “the territorial integrity and political independence of any state”, and Article 2(7) prohibits *the Organization* “to intervene in matters which are essentially within the domestic jurisdiction of any state”. Although Article 2(7) is not explicitly addressed to states, the norm it expresses is by analogy applicable also in interstate relations. As a consequence, the principle of non-intervention that flows from the Charter goes beyond the use of force prohibition and also covers other severe forms of intervention, sometimes called “dictatorial” intervention, namely premeditated government action posing a threat to the national sovereignty of a target state. It can safely be concluded that during the 1960s the majority presumption was that armed intervention was always forbidden, unless consent was given by the Government in question. This basically, but not exclusively, “Third World” position was asserted against the position of some Western states in the early phase of the Congo crisis.

The political situation in the new Republic of Congo deteriorated in the summer of 1960 with violent demonstrations against the former colonial masters, the Belgians, who displayed a manifest economic presence in the country. The wealthy copper province of Katanga, under the local political leader Moïse Tshombe, but *de facto* ruled by the Union Minière Company, declared itself independent on 11 July. Katanga was partially protected by Belgian troops. Prime Minister Lumumba of the Central Government, and most developing states, saw this as a military intervention in the domestic affairs of Congo. The Soviet Union and the Eastern bloc agreed. This was the situation when the Congo crisis landed on the desk of the UN Security Council.

Resolution 143 of 14 July 1960 was adopted and called upon Belgium to withdraw its troops “from the territory of the Republic of the Congo”. Thus the Charter principle of national sovereignty and territorial integrity was upheld. Further, the Security Council decided:

“ to authorize the Secretary-General to take the necessary steps, in consultation with the Government of the Republic of the Congo, to provide the Government with such military assistance as may be necessary until, through the efforts of the Congolese Government with the technical assistance of the United Nations, the national security forces may be able, in the opinion of the Government, to meet fully their tasks”.

The text underlined some of the emerging principles of peace-keeping: consent of and cooperation with the territorial (host) state.

Immediately after the adoption of resolution 143 Hammarskjöld sent an appeal to a number of African governments for the contribution of troops to a UN force later called ONUC.

The Central Government wanted more of UN intervention, Belgium wanted less, and Hammarskjöld tried to strike a balance between them - in accordance with the UN Charter as he interpreted it. The principle of non-intervention and its two interpretations - whether to assist or not to assist the Central Government in a constitutional dilemma - now developed into a controversy between the Secretary-General and Prime Minister Lumumba. Hammarskjöld had opted for a strict interpretation of Article 2(7), but he would soon modify that position when the constitutional issues were affected by immediate humanitarian concerns.

Lumumba had realized by late August that there was no hope of bringing Hammarskjöld to help him militarily against Katanga. He had to use the *Armée Nationale Congolaise* for this purpose. A military campaign was mounted and in order to reach Katanga the ANC first had to move against the province of Kasai. Here another secessionist regime was in power. The Baluba leader Albert Kalonji had proclaimed the “independent state of South Kasai”, based on the town (and “capital”) of Bakwanga and financed through regional diamond production. This secessionist move was also related to the traditional tribal rivalry of the Baluba and Lulua peoples in Kasai.

In late August, Congolese soldiers began to be airlifted into Kasai and without adequate logistic support, especially in the form of food supplies, they started to fend for themselves and live off the land. On 26 August, the ANC occupied Bkwanga. Soon thereafter, when the troops were in the process of requisitioning food and vehicles in order to move into Katanga, shooting started. The soldiers turned against the local Balubas and the situation degenerated into tribal warfare, including atrocities against defenceless civilians. At one point, a mass of people took refuge in a missionary school and more than seventy men, woman and children were savagely killed by soldiers using machetes. This was one of several tribal massacres that occurred during these days of August. Hundreds of Balubas were reported killed, according to WHO and Red Cross officials who visited the area at that time. Other reports indicated that villages had been pillaged and burned and their inhabitants,

including children, killed simply on the ground that they were Balubas.²⁸ The almost casual ordering of the military movement that led to the Kasai massacres deeply shocked Hammarskjöld “and led him to think that Lumumba had become totally irresponsible”.²⁹

Hammarskjöld felt - and made clear to his associates - that the UN Organization could not stand aside and remain passive in what he called “a case of incipient genocide”. He indicated that the Central Government had to accept this and could not negate the humanitarian responsibility of the UN. True, the Bakwanga situation was a delicate one for the UN to interfere in, against the background of Article 2(7) of the UN Charter, against the background of Hammarskjöld’s own position on the mandate and the principle of non-intervention, and because the Central Government could easily argue that, in accordance with its sovereign rights, it had to deal forcefully with yet another secessionist movement. But, on the other hand, Hammarskjöld concluded in a cable to his emissary Andrew Cordier in Leopoldville:

“Prohibition against intervention in internal conflicts cannot be considered to apply to senseless slaughter of civilians or fighting arising from tribal hostilities”.³⁰

After a meeting with the Congo Advisory Committee in New York, he authorized the interposing of UN troops, “using force if necessary, to stop the massacre”.³¹

As it happened, after 2 September, the situation calmed down and there was no need to act upon these instructions.

In reporting to the Security Council on 9 September Hammarskjöld referred to the atrocities as actions that could not be viewed merely as examples of internal conflict.

“They involve a most flagrant violation of elementary human rights and have the characteristics of the crime of genocide since they appear to be directed toward the extermination of a specific ethnic group, the Balubas.”³²

Hammarskjöld did not at this point ask for an extended ONUC mandate to deal with the humanitarian threats. His moralic gut reaction was - as is shown by the cable to Cordier in Leopoldville - that it was not necessary. But diplomatic prudence would of course have it that any humanitarian crossing of the border line between peace keeping and peace enforcement should be accepted by the Security Council, and, in cases of immediate humanitarian emergency, that such acceptance at least should be registered *ex post facto*.

Hammarskjöld’s position in principle was clear. We can assume that it was not exclusively a legal position. Hammarskjöld’s moral “do good” inclination influenced by his Christian values, must have played its part, as must an inner feeling that this

²⁸ Report by the Secretary-General in the Security Council, SCOR, 896th Mtg., 9 September 1960, para 100.

²⁹ Urquhart (1973), p. 435.

³⁰ All quotations of Hammarskjöld’s (unpublished) statements from Urquhart (1973), p. 438.

³¹ *Ibid.*

³² SCOR, 896th Mtg., 9 September 1960, para 101.

was a situation when he was not prepared to compromise with his personal conviction. In his report to the General Assembly he made clear:

“You try to save a drowning man without prior authorization.”³³

There was probably also a policy element of human rights involved. Hammarskjöld was normally not a driving force in the field of human rights. On the arenas of diplomacy and massmedia the issue of human rights was tainted with Cold War controversy and Hammarskjöld regularly approached it with caution.³⁴ In this case, however, he was prepared to use the Secretary-General’s power of interpretation to protect human rights and play the card of “incipient genocide” to increase his power of persuasion. There has been references to “the politics of international law”³⁵ and this may be part of the picture. To Hammarskjöld, certainly, it was a question of values and of intermingling of law and morality. He was not alien to the incorporation of extra-legal elements in the process of international law. Although he laid heavy emphasis on Article 2(7) of the Charter, he nevertheless thought that the Bakwanga massacres were outside the scope of that provision. At this point in time, his personal ethics coincided with the natural law proposition that *lex scripta* had to be reconciled with a law of higher order.

Moreover, the situation with UN troops in the area of atrocities was conducive to action. Hammarskjöld had in a speech on human rights some years earlier said that if

“the recognition of human dignity means to give others freedom from fear, then that recognition cannot be simply a question of passive acceptance. It is a question of the positive action that must be taken in order to kill fear.”³⁶

At the same time, as Brian Urquhart has pointed out, Hammarskjöld believed that “a reliable and just world order could only be built pragmatically by making precedents and by case law”.³⁷ In that sense, he was a political realist.

5. Conclusion: The Brahimi, ICISS, High Level Panel, and Annan Reports on Future Action

In August 2000 the Panel on United Nations Peace Operations submitted its Report to the Secretary-General. “The Brahimi Report”, so called after the Panel’s chairman, the Algerian diplomat Lakhdar Brahimi, had been asked to assess the shortcomings of the Peace Operations system and to make recommendations for the future. Among other things, the Report stressed the need to have more effective collection and assessment of information at UN Headquarters, “including an enhanced conflict early

³³ Statement on UN Operations in Congo before the General Assembly, 17 October 1960.

³⁴ Fröhlich (2002) even makes the point that Hammarskjöld’s efforts to soften and dampen the East-West conflict of the Cold War constantly were at the expense of an active UN human rights policy. See p. 370 f.

³⁵ Martti Koskenniemi, *The Politics of International Law*, 1 *European Journal of International Law* 1990, p. 4 ff.

³⁶ “The International Significance of the Bill of Rights”, Address at Williamsburg, Virginia, 14 May 1956, in Wilder Foote (Ed.), *The Servant of Peace* (1962), p. 107.

³⁷ Brian Urquhart, *International Leadership: The Legacy of Dag Hammarskjöld*, *development dialogue* 1987:1, p. 12.

warning system that can detect and recognize the threat or risk of conflict or genocide.”³⁸ The desire on the part of the Secretary-General, Mr. Kofi Annan, to extend additional protection to civilians in armed conflicts (one form of “rights beyond borders”)³⁹ was noted as a positive development. So were the actions of the Security Council to give UN peacekeepers explicit authority to protect civilians in conflict situations.

“Indeed, peacekeepers - troops or police - who witness violence against civilians should be presumed to be authorized to stop it, within their means, in support of basic United Nations principles and, as stated in the report of the Independent Inquiry on Rwanda, consistent with ‘the perception and the expectation of protection created by [an operation’s] very presence’.”⁴⁰

However, the presumption referred to was somewhat diluted in the next paragraph of the report, where the panel expressed concern about the credibility and achievability of a blanket mandate in the human protection area. There was said to be hundreds of thousands of civilians in current UN mission areas who are exposed to potential risks of violence, and UN forces “could not protect more than a small fraction of them even if directed to do so”. The conclusion was that “[i]f an operation is given a mandate to protect civilians”, it must also be given “the specific resources needed to carry out that mandate”.⁴¹

In the final analysis, this formulation does not seem to exclude human protection in the absence of a specific mandate, since the following text was included in the Executive Summary of the report:

“Moreover, United Nations peacekeepers - troops or police - who witness violence against civilians should be presumed to authorize to stop it, within their means, in support of basic United Nations principles. However, operations given a broad and explicit mandate for civilian protection must be given the specific resources needed to carry out the mandate.”⁴²

In September 2001 the independent International Commission on Intervention and State Sovereignty (ICISS) delivered its report on the issue of humanitarian intervention.⁴³ The Commission had been established by the Canadian Government to respond to the challenge of “no more Rwandas” and it was co-chaired by Gareth Evans (Australia) and Mohamed Sahnoun (Algeria). The ICISS report argues that sovereign states have a responsibility to protect their own citizens, but when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states. The report avoids the terminology of humanitarian intervention and refers instead to “intervention for human protection purposes”, this in response to

³⁸ Report of the Panel on United Nations Peace Operations, transmitted to the Secretary-General on 17 August 2000, para 6(d). See www.un.org/peace/reports/peace_operations/docs/part1.htm.

³⁹ The expression “rights beyond borders” was used by Kofi Annan during the debate in the General Assembly in the autumn of 1999, in the wake of NATO’s “humanitarian intervention” in Kosovo, as an argument in the discourse on human rights v. sovereignty.

⁴⁰ Para 62 of the full report.

⁴¹ Para 63 of the full report.

⁴² Executive Summary, under the heading “Implications for peacekeeping: the need for robust doctrine and realistic mandates”.

⁴³ ICISS, *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, International Development Research Centre, Ottawa, Canada, December 2001, Gareth Evans (Co-Chair) & Mohamed Sahnoun (Co-Chair).

the opposition by humanitarian agencies towards any so called militarization of the word “humanitarian”. The ICISS report aims at restarting the sovereignty-intervention debate in terms of a “responsibility to protect”, rather than in terms of a “right to intervene”. The report initiates a discussion on rules, procedures and criteria for determining whether, when and how to intervene, but does not specifically deal with military intervention during a UN peacekeeping operation, a less sensitive scenario, one would imagine, than many others.

In a communiqué of the InterAction Council, meeting in Berlin in June 2002, it was stated, as often before in similar statements, that

“It is unacceptable for the international community to stand idly by in the face of widespread atrocity and gross violation of human rights”.⁴⁴

The communiqué recognized the problem with unilateralist claims of the right to intervene on humanitarian grounds, but wanted the international community to agree upon clear criteria for (presumably collective) humanitarian intervention in the absence of Security Council authorization “in situations where that authorization is prevented by the use of the veto”.⁴⁵ Again, there was no mention of intervention by peacekeepers acting under a UN mandate, although such mandate would not authorize military action for humanitarian purposes. With regard to that kind of situation, Hammarskjöld’s natural law related instinct, focused on “a responsibility to protect”, remains almost unique in the intervention discourse. It is noteworthy, though, that this idea has been brought into the present millennium by Brahimi and his colleagues. Whatever the outcome of the general debate on humanitarian intervention, Hammarskjöld’s limitation of the issue to UN peace operations has a realistic and constructive ring about it, that is as relevant today and will be as relevant tomorrow as it was in August 1960.

In December 2004 the so called High Level Panel Report was delivered by Gareth Evans of International Crisis Group and 15 other distinguished experts. The theme was “Threats, Challenges and Change” and the task, given by the UN Secretary-General, was to suggest ways and means to strengthen the Collective Security system. The Panel recommended, among other things, that the UN should be prepared to intervene for humanitarian purposes and suggested (like ICISS) that the Security Council should use certain criteria for deciding when such intervention should be undertaken. These criteria included a proportionality assessment, judging whether the military option corresponds to the seriousness of the situation, and a prognostication, weighing the chances of success. If there is a finding of either lack of proportionality or bad prognosis no military intervention should be undertaken.

On 21 March 2005 the General Assembly distributed Secretary-General Kofi Annan’s Report on the future of the UN. It was called “In larger freedom: towards development, security and human rights for all”. In the section on the use of force it is written:

⁴⁴ InterAction Council, 20th Plenary Session, *Final Communiqué*, 7-10 June 2002, Berlin, Germany, para 20.

⁴⁵ *Ibid.*, para 21 and 24. In para 23 it was stated: “Humanitarian crises such as genocide or crimes against humanity rarely occur spontaneously. The international community must value initiatives to identify potential sources of conflict and strategies designed to redress them.”

“Finally, an essential part of the consensus we seek must be an agreement on when and how force can be used to defend international peace and security. In recent years, this issue has deeply divided Member States. They have disagreed ...whether they have the right - or perhaps the obligation - to use it protectively to rescue the citizens of other States from genocide or comparable crimes.”

This was *one* issue on which States had disagreed. The Secretary-General reverted to it later in the text:

“As to genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?”

Thus, Kofi Annan wants the Security Council to shoulder an increased responsibility in the field of human security and be prepared to launch a collective intervention in situations when there is a genuine need for it. In his Report he goes on to say:

“When considering whether to authorize or endorse the use of military force, the Council should come to a common view on how to weigh the seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed in stopping the threat ; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success. By undertaking to make the case for military action in this way, the Council would add transparency to its deliberations ... **I therefore recommend that the Security Council adopt a resolution setting out these principles and expressing its intention to be guided by them**”.

Hammarskjöld would have supported the idealistic ambitions of Kofi Annan, be he would also be tempered by a dose of political realism and, as a fall-back position, be quite prepared to seek to influence the Council *ad hoc*, if general guidelines could not be agreed upon.