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Annex I Request for advice

Annex IIa Members of the working group on humanitarian intervention

Annex IIb Members of the Advisory Council on International Affairs

Annex IIc Members of the Advisory Committee on Issues of Public International Law

Annex III Article 7 of the Statute of Rome for an International Criminal Court

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I Introduction

On 12 October 2000 the Dutch Minister of Foreign Affairs, acting on behalf of the government, asked the Advisory Committee on Issues of Public International Law (CAVV) and the Advisory Council on International Affairs (AIV) to produce a joint advisory report on the issues raised by humanitarian intervention. In the letter requesting the report (reproduced in Annex I) the government states:

‘The ban on the use of force by states outside their territory, as laid down after the Second World War in the Charter of the United Nations, is based on the notion that sovereign states have an individual responsibility to maintain law and order within their own borders. In practice, though, they do not always fulfil this responsibility. The Security Council has therefore sometimes permitted military intervention in the territory of another state, on the basis of Article 39 of Chapter VII of the Charter, with the objective of ending widespread human suffering. Experience shows, however, that the Security Council is not always able to take effective measures in time. In situations of this kind a country (or a group of countries) can decide to attempt to end such human rights violations either by force or by the threat of force, without the authorisation of the Security Council and without the consent of the country concerned. Such cases can be classified as ‘humanitarian intervention’ according to the definition given in the advisory report drawn up in 1992 by the CAVV and the Advisory Committee on Human Rights and Foreign Policy (ACM).[1]

‘Although humanitarian intervention can be justified on political and moral grounds, it has no clear and generally accepted legal foundation. If the law is not developed on this point, two dangers will arise. First, as long as humanitarian intervention has no clear and generally endorsed legal basis, it can be invoked as a cover for military operations of a different nature. Second, the position of international law may inadvertently be undermined if it does not provide for intervention in cases of flagrant violations of universally accepted human rights.’ The Minister therefore considered it crucial that the concept of humanitarian intervention be further developed: ‘This means on the one hand drawing up clear guidelines to which humanitarian intervention would have to adhere, and on the other hand establishing as broad a support base as possible for the more precise definition of this concept.’

In his letter, the Minister of Foreign Affairs requested the CAVV and the AIV to look both at what was necessary or desirable from a political and moral point of view and at what was possible from the point of view of international law. In the light of the relationship between political, moral and legal considerations, he asked the CAVV and the AIV to produce a joint report on the question of how the international community’s ability to end large-scale violations of human rights in a particular country could be enhanced. The CAVV and the AIV might start, he wrote, by listing possible ways of increasing the Security Council’s potential for action. This could include looking at the option of amending the right of veto. In addition, the Minister requested the two advisory bodies to consider the question of how the concept of humanitarian intervention could be given clearer shape under international law.

1 See ACM and CAVV, advisory report No. 15, ‘The use of force for humanitarian purposes - Enforcement action for humanitarian purposes and humanitarian intervention’, The Hague, 1992.

This advisory report was drawn up by a working group consisting of the entire CAVV plus a combined 'Humanitarian Intervention Committee' of the AIV.[2] On 31 March 2000 the draft text was adopted at a session of the AIV, and the final text was approved at a joint meeting of the CAVV and the Humanitarian Intervention Committee of the AIV. To support their deliberations, the two bodies commissioned research from G. Molier of the University of Groningen. Molier was asked to determine, in the light of the reports on a number of discussions within the General Assembly of the United Nations and the Security Council, whether states' perception of the legality of humanitarian intervention without Security Council consent is changing. The CAVV and the AIV wish to record their gratitude to Molier for completing this work so quickly.

After setting out the basic principles (Chapter II), this report examines various general moral and political aspects of the issue of humanitarian intervention (Chapter III). Chapter IV then describes certain aspects of humanitarian intervention with a Security Council mandate, and in this connection looks at possible changes to the way in which the Security Council functions. Chapter V, which discusses humanitarian intervention without a Security Council mandate, focuses on the international law aspects of the use of force between states. Chapter VI, on the legitimacy of humanitarian intervention, analyses the relationship between the moral, political and international law aspects of humanitarian intervention. The report ends with a number of conclusions and recommendations (Chapter VII).

2 The members of the working group are listed in Annex II to this report, which also lists the members of the AIV and the CAVV.

II Basic principles

II.1 Approach

The CAVV and the AIV have decided to approach the issue of humanitarian intervention in such a way as to bring together the moral, political and international law aspects. The relationship between these aspects differs from one humanitarian emergency to the next, depending on previous history, political momentum and the specific circumstances involved.

The political and public debate on NATO intervention in the humanitarian emergency in Kosovo has once again demonstrated the importance of such an all-embracing approach. In this connection, not enough distinction is always made between the legality of intervention - its compatibility with current international law - and its legitimacy. The legitimacy of intervention largely depends on the political and moral considerations used to justify it, but certainly cannot be determined without also taking legal aspects into account. It can therefore only be assessed on the basis of a broad-based appraisal of all three elements. The fact that the intervening countries enjoy firm, widespread support within the international community may, for example, be a contributing factor to the legitimacy of an operation. Although this does not necessarily have any implications for the legality of intervention under current law, the legitimacy of intervention may provide some indication of the generally perceived desirability of a given action and so point the way to possible legal developments in the future.

From the point of view of international law, the norm-setting aspects of the issue of humanitarian intervention have a particularly important part to play. In this connection, inherent conflicts emerged in the course of the 1980s and 1990s. How, for example, can the ban on intervention under international law and the ban on the use of force between states be reconciled with the significant developments that have taken place in international law regarding the protection of fundamental human rights? These humanitarian developments have given international law a dynamic of its own. It no longer merely focuses on relations between states, but also on the individual and collective rights of people or groups of people.

The resulting conflict between non-intervention and the ban on force on the one hand, and the growing importance of humanitarian considerations on the other, is equally apparent in the political debate on humanitarian intervention. Particularly since the end of the Cold War, there has been an increasing recognition that the international community cannot afford to tolerate large-scale violations of human rights. At the same time it has been noted that, in practice, intervention on humanitarian grounds often also serves purely national interests. It is furthermore argued that the importance to all states of maintaining a workable system of national sovereignty cannot be lightly ignored. This includes the principle of non-intervention, which also serves an essentially humanitarian purpose - that of preventing warfare.

The CAVV and the AIV feel that the international law debate and the political debate on the issue of humanitarian intervention are closely related and cannot be seen in isolation. In drawing up this report they have therefore decided that, after a separate examination of the moral, political and legal aspects, these should also be discussed in relation to one another.

II.2 A working definition of 'humanitarian intervention'

The use of the term 'humanitarian intervention' often leads to misunderstandings. In order to clarify things, the 1992 report by the ACM and the CAVV made a clear distinction between three different kinds of intervention which for everyday purposes are all referred to as 'humanitarian intervention', but each give rise to a completely different debate and have a completely different dynamic:

(1) provision of assistance without the consent of the country concerned in order to alleviate acute emergencies that constitute a threat to the lives of large numbers of people;

(2) authorisation by the Security Council of the use of force on the basis of Chapter VII of the UN Charter in response to situations involving large-scale violations of human rights in a given country;

(3) intervention by a state or group of states, involving the use or threat of force, on the territory of another country in response to grave, large-scale violations of human rights that are taking place there, without the prior authorisation of the Security Council.

Although in all three situations the reason for intervening is that the lives of large groups of people are threatened, there are great differences in the manner of intervention and in the legal grounds on which such intervention is, or could be, based. The first situation falls within the category of 'humanitarian emergency assistance'.[3] Under certain circumstances - for instance when the government of the country in which the situation has occurred refuses to accept humanitarian assistance or when consent is given but is then followed by systematic obstruction - such a situation can lead to the use of force under the powers of the Security Council as laid down in Chapter VII of the UN Charter. Humanitarian emergency assistance will not be discussed here further as a separate topic. In this connection, incidentally, it is still felt that the rules on enhancing the coordination of UN humanitarian emergency assistance laid down in General Assembly Resolution 46/182 should be further developed into a convention on humanitarian emergency assistance.[4]

In the second kind of intervention - the use of force with Security Council authorisation - the key issue is whether, on the basis of Article 39 of the UN Charter, a given situation can be considered a threat to international peace and security. Assessing this (from a political point of view) is primarily the task of the Security Council. If the Council decides that the situation justifies intervention, it alone is authorised - under the terms of Chapter VII of the UN Charter - to order that military enforcement measures be taken. If such an order is given in response to large-scale violations of human rights, this can be seen as a specific application of the general enforcement instrument. Although the CAVV and the AIV would therefore prefer to describe such a situation as 'enforcement action for humanitarian purposes', they note that in political debate such measures are regularly labelled 'humanitarian intervention'. For the purposes of this report - whose aims include examining the way in which the Security Council functions - the terms 'humanitarian intervention with the authorisation of the Security Council' or 'authorised

3 See General Assembly Resolution 46/182 of 19 December 1991, entitled 'Strengthening of the coordination of humanitarian emergency assistance of the United Nations' and the AIV's advisory report entitled 'Humanitarian aid: redefining the limits', The Hague, 1998.

4 See also p. 3 of the advisory report by the ACM and the CAVV (1992).

humanitarian intervention' will therefore be used. Strictly speaking, however, the term 'humanitarian intervention' is only applicable to the third of the situations described above: the use of force to prevent or put an end to large-scale violations of human rights, without either the prior consent of the country concerned or Security Council authorisation. It is precisely this kind of situation that creates the greatest political and legal problems. In general terms, the CAVV and the AIV believe that 'humanitarian intervention' (in the strict sense) can best be defined as follows:

'The threat or use of force by one or more states, whether or not in the context of an international organisation, on the territory of another state:
(a) in order to end existing or prevent imminent grave, large-scale violations of fundamental human rights, particularly individuals' right to life, irrespective of their nationality;
(b) without the prior authorisation of the Security Council and without the consent of the legitimate government of the state on whose territory the intervention takes place.'

For the purposes of this report, the terms 'humanitarian intervention without the authorisation of the Security Council' or 'unauthorised humanitarian intervention' will be used.

A number of general aspects of the two definitions of humanitarian intervention used here can be mentioned before proceeding with the analysis. Humanitarian intervention concerns the protection of individuals' rights irrespective of their nationality. Intervention designed to protect subjects of the intervening state (or a third state) or get them to a place of safety does not qualify as humanitarian intervention.[5] Furthermore, the legitimate government of the state on whose territory the intervention takes place must not have requested the intervening state or states to intervene and must not tolerate their presence - otherwise the action is no longer 'humanitarian intervention' but simply humanitarian assistance. Grave, large-scale violations of fundamental human rights must also be taking place. The questions of what 'large-scale' means, and which rights are involved, are subject to differing interpretations. The report will return to this in Chapter VI.[6] Finally, a threat to international peace and security as a result of the grave, large-scale violations of fundamental human rights is not a separate or additional condition, since such an internationally recognised violation of the international rule of law need not necessarily and in all circumstances constitute a threat to international peace and security. The report will also return to this point later.

5 The question of whether the intervening state can invoke the right of individual or collective self-defence, under the terms of Article 51 of the UN Charter, will not be discussed here.

6 See item 2a of the assessment framework described there.

III Moral and political aspects

III.1 Sovereignty and humanity[7]

In his speech to mark the opening of the United Nations General Assembly in September 1999, Secretary-General Kofi Annan presented the representatives of the UN community of nations with the following dilemma: ‘To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask, not in the context of Kosovo, but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of states had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorisation, should such a coalition have stood aside and allowed the horror to unfold? To those for whom the Kosovo action heralded a new era when states and groups of states can take military action outside the established mechanisms for enforcing international law, one might ask: Is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances?’[8]

The dilemma outlined by the Secretary-General in his speech can be broadly summed up as a conflict between (a) the ban on armed intervention and respect for territorial integrity and (b) the duty to uphold and promote human rights. Should the emphasis be on preventing the use of force between states and maintaining stable relations between them, or does ‘humanity’ - the protection of citizens’ fundamental rights - deserve priority? The relationship between these two interests is exceedingly complicated and fraught with contradictions, and offers no basis for clear choices.

Any infringement of the ban on the use or threat of force, as laid down in Article 2(4) of the UN Charter, must be viewed as a fundamental violation of the ‘constitution of the international state community’. Except in cases of immediate self-defence, such infringement is, according to the UN Charter, the sole prerogative of the Security Council. The right of veto enjoyed by the permanent members of the Council is an acknowledgement of the fact that any such infringement must be based on a consensus among the major powers. If intervention takes place in the absence of such a consensus, the major powers may respond by distancing themselves from the international order enshrined in the UN Charter, thereby undermining the said order and giving rise to dangerous tension and insecurity. It is also argued that a deterioration in relations between the permanent members of the Security Council may ultimately have much graver implications for mankind than a humanitarian disaster within a state. The essence of this argument is that respect for human rights, protection of minorities and development of democracy

7 In this connection the term ‘humanity’ refers to the individual and collective rights of non-state players (‘mankind’, peoples and minorities - see the ACM report entitled ‘Collective Rights’, The Hague, 1995). Some analyses speak in similar terms of a conflict between order and justice (Danish Institute of International Affairs, ‘Humanitarian Intervention. Legal and Political Aspects’, Copenhagen, 1999) or between order and self-determination (S. Hoffmann, ‘The Ethics and Politics of Humanitarian Intervention’, Notre Dame, 1996; M. Ignatieff, ‘Whose Universal Values? The Crisis in Human Rights’, Amsterdam, 1999).

8 For the full text, see United Nations Press Release SG/SM/7136, GA/9596.

depend on international stability, based on the relevant procedures agreed within the UN. It is important to realise here that, in principle, states continue to provide the best framework for upholding fundamental human rights. This is because states can be called to account for their behaviour; they can, and must, use their internal monopoly on the use of force to promote those rights. The 'international community' lacks the resources necessary for this, and can only play a complementary role.

From the point of view of 'humanity', however, universal respect for fundamental human rights is also seen as a precondition for a stable international order, as an aspect of the 'constitution of the international community'. According to this line of reasoning, international failure to take action against large-scale violations of human rights is not only wrongful - because, for example, it violates the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) - but also encourages repressive regimes to use, or continue to use, harsh methods in order to maintain their own positions of power. It is precisely these regimes that are most likely to undermine international order as violence within their borders 'spills over' to other countries. Passivity on the part of the international community thus not only leads to greater human suffering and injustice, but can also threaten collective security, since oppressed or threatened individuals or groups may take the law into their own hands and resort to increasingly drastic forms of action. According to this view, any international order that tolerates genocide or other flagrant violations of human rights is by definition unstable. National and international order are closely connected, and both largely derive their legitimacy and stability from their ability to protect individuals or groups against violence and arbitrary treatment.

The conflict that has arisen since the 1980s between (a) respect for territorial integrity and the ban on the use or threat of force and (b) the duty, which is still only assumed, to put an end to large-scale violations of human rights is not only due to the increased scope for armed intervention following the end of the Cold War. At least as important is the increasing tendency in international dealings to take account of the interests and rights of individuals and peoples rather than just states.[9] Human rights have increasingly become a 'shared responsibility' of both states and the international community. The state remains - and must remain - primarily responsible for protecting individuals, but in this respect can be called to account by international forums which have developed increasingly sophisticated monitoring mechanisms for this purpose. At the same time, however, the ban on the use or threat of force is firmly anchored in the UN Charter and has proved a vital factor in maintaining stability between states.

9 This changing outlook is apparent from a number of statements made by three successive UN Secretaries-General. While still in office, Javier Pérez de Cuéllar said: 'We are clearly witnessing what is probably an irresistible shift in public attitudes towards the belief that defence of the oppressed in the name of morality should probably prevail over frontiers and legal documents' (Report of the Secretary-General, in: UN Yearbook 1991, para 11). In a UN document published in 1991, Boutros Boutros-Ghali went even further: 'It is now increasingly felt that the principle of non-interference with the essential jurisdiction of states cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity' (quoted in P. Malanczuk, 'Humanitarian Intervention and the Legitimacy of the Use of Force', Amsterdam, 1993, p. 29). A more recent statement on the subject was made by Kofi Annan in his speech to the General Assembly in 1999: 'State sovereignty, in its most basic sense, is being redefined by the forces of globalisation and international cooperation. The state is now widely understood to be the servant of its people, and not vice versa. At the same time, individual sovereignty - and by this I mean the human rights and fundamental freedoms of each and every individual as enshrined in our Charter - has been enhanced by a renewed consciousness of the right of every individual to control his or her own destiny' (United Nations Press Release SG/SM/7136, GA/9596).

The developments in the field of human rights outlined above have had a far-reaching impact on the principle of state sovereignty, which was a key element of the UN Charter when it was drawn up in 1945. Furthermore, the broader process of 'internationalisation' (i.e. the growing importance of international agreements, membership of international organisations and economic interdependence, as well as the increasingly prominent role of international non-governmental organisations and the media) has greatly reduced state sovereignty in practical terms. Accordingly, the need to strike a proper balance between the ban on the use of force between states and human rights is more pressing than ever.

Human rights have become an essential factor in international relations. However, it is also important to know what means the international community is able, willing or allowed to use in upholding human rights. This cannot be determined without looking at the nature of the humanitarian crises that call for intervention and the attitude of the international community. It is against this background that the CAVV and the AIV will examine how the Security Council's effectiveness can be enhanced, and whether - and if so, how - clearer guidelines for humanitarian interventions can be developed.

III.2 Changing patterns of conflict

The involvement of the international community in violent conflicts and humanitarian crises has substantially increased since the end of the Cold War. This is reflected in the number of Security Council resolutions on humanitarian crises and a consequent increase in the number of UN peacekeeping troops and military coalitions deployed around the globe on 'crisis management' or humanitarian missions. At the same time, the international security situation has changed. Whereas the Cold War was marked by global rivalry between the superpowers, many countries are now discovering that they are no longer of sufficient strategic importance to the erstwhile foes to qualify for international assistance. In the absence of such assistance and the necessary political backing, legitimacy and executive capacity, many of the governments involved are no longer able to keep so-called 'ethnic tensions' under proper control.[10] Some states are disintegrating or on the verge of doing so, and the governments of various countries have resorted to harsh repressive measures in an attempt to maintain unity. Since entire societies become involved in such conflicts, it is no longer clear who belongs to the warring parties. Wars and humanitarian crises are thus increasingly indistinguishable.

The traditional distinction between 'intra-state' and 'inter-state' wars has also become blurred since the end of the Cold War. Conflicts within states now often lead to conflicts between them, and vice versa. To begin with, the root causes of such armed conflict often lie abroad. Furthermore, in many cases of 'spill-over' conflict (Rwanda/Zaire) it is not simply a matter of flows of refugees leading to subsequent fighting. Since many national frontiers do not coincide with ethnic, religious or cultural boundaries, conflicts may continue to have transnational consequences even in the absence of flows of refugees. Under such circumstances, armed conflict may continue to smoulder away beneath the surface and flare up later near earlier scenes of fighting.[11]

10 In this context it is customary to speak of 'ethnic conflicts', but this term is not entirely accurate. In practice, 'ethnic' conflicts are just as likely to be based on religious, regional, political and socioeconomic group identities.

11 Examples are the former Yugoslavia, the Caucasus and the Great Lakes region of Africa.

The emergence of these patterns of conflict has confronted the international community with a number of major problems. The 'total' nature of existing wars and civil wars often makes it impossible to intervene successfully by diplomatic means. Economic sanctions, too, have only a limited effect, as their impact only becomes apparent in the long term, whereas the prevention of genocide or mass slaughter of civilians calls for rapid, decisive action. What this ultimately means is that military intervention is often the only way left to prevent or contain a catastrophe. During the 1990s, however, it became apparent that intervening states can scarcely distinguish between the warring parties and the civilian population. Under such circumstances, traditional peacekeeping methods such as the deployment of lightly armed UN troops in between identifiable belligerent groups have little or no success. One reason for this is that the peacekeepers do not have either the mandate or the equipment necessary to put an end to the large-scale human misery that accompanies the new patterns of conflict. Efforts to maintain the status quo or facilitate the provision of humanitarian aid are all too easily interpreted as giving undue preference to one or other of the warring parties. As a result, peacekeeping forces find themselves drawn into escalating conflicts, with all the risks that this entails (including the risks to which military personnel are exposed).[12]

III.3 States' attitudes towards armed intervention

Frustrating experiences with the UN operations in Somalia (UNOSOM II) and Bosnia (UNPROFOR) have convinced many suppliers of UN troops that, in peacekeeping operations which do not enjoy the explicit, genuine consent of all the belligerent parties, the military units involved must be capable of operating at high levels of violence. This applies a fortiori to humanitarian intervention, since by definition the consent of the state where the intervention takes place is not forthcoming. According to prevailing military doctrines, the intervening force must therefore be prepared for an operation that may escalate into all-out combat. The deployed forces must therefore have the capacity to prevent escalation.[13] For this reason, many military doctrines make no distinction - at least as regards the deployment of military resources - between warfare and enforcement operations. There is, of course, a distinction to be made between operational objectives, since military force used in enforcement operations must explicitly remain at the service of the mandate formulated by the Security Council or the humanitarian objective of the operation.[14] This requires restraint and, where possible, efforts to establish a degree of consent among the parties involved, monitoring of compliance with agreements, and great emphasis on cooperation.

Even where military resources are deployed on a large scale, it is by no means certain that armed intervention will prove successful. In order to have some chance of success against intervention forces armed with modern equipment, less well-equipped parties in

12 Advisory Council on Peace and Security, 'Innocence Lost: The Netherlands and UN Operations', The Hague, 1995, p. 16.

13 Accordingly, it must be possible, as the level of violence increases, to place ever greater emphasis on the integrated deployment of an increasingly wide range of military resources. For example, in ground operations of any appreciable size it may be necessary to provide units with heavy equipment from the very outset. Furthermore, the possibility of deploying air and sea forces in preparation for or support of intervention by ground forces must in principle be kept open. In this connection, see RNLA Doctrine Publication III ('Peace operations'), The Hague, 1999, p. 79; and AIV, 'Developments in the international security situation in the 1990s: from unsafe security to insecure safety', The Hague, 1999, p. 37.

areas affected by crises have begun resorting to adapted strategies that are sometimes referred to as 'asymmetrical warfare'.[15] They attempt to shift the scene of the fighting to an urban setting which is difficult to oversee ('urban warfare'), they are prepared to accept large numbers of casualties in order to achieve limited military successes, they use attrition tactics (e.g. by delaying negotiations), they show deliberate disregard for humanitarian scruples, and they make abundant use of small arms (which are readily obtainable).[16] Intervention forces deployed in order to end a humanitarian emergency are often unable to respond effectively to such tactics. In situations of asymmetrical conflict, despite the robust equipment that is often available to modern armed forces, intervening troops are at considerable personal risk and the success of the operation cannot be taken for granted. Quite apart from this operational and military difficulty, there are countless political, socioeconomic and emotional problems that arise whenever attempts are made to turn a 'total' war situation into one of security and relative stability in the short term.

The perceived need to deploy military resources on a large scale in enforcement operations, coupled with uncertainty as to whether such intervention will succeed, has confronted the international community with a number of complicated dilemmas. Increasingly, states feel compelled either to remain aloof from conflicts with an urgent humanitarian component or else to intervene in them on a large scale and for long periods. Given the huge cost of military intervention, the risks to the troops deployed, and the limited military resources that are available, the very governments that have access to the right equipment appear to be the most reluctant to intervene. This reluctance increases further when the political interests and spheres of influence of major powers are involved, or when the legal basis for armed intervention is unclear.

It can be concluded from the foregoing that states prefer not to intervene unless there are compelling reasons to do so. As a rule, such reasons are not purely humanitarian, but form part of broader geopolitical and security considerations. Experience shows that states will not intervene against allies, friendly governments, major powers, or states within major powers' immediate sphere of influence, however badly their governments may behave.

At the same time, it is apparent that the reluctance of states to intervene on other states' territories is connected with governments' political uncertainty about actions that do not serve their national interests in the narrowest sense of the term, namely defence of their own territory.[17] This reluctance is all the greater when the crisis is taking place in an area that is geographically remote or of little strategic value or interest to the media.

14 Some doctrines distinguish between warfare and 'Military Operations Other Than War' (MOOTW). The distinction here is not so much between levels of violence as between operational objectives (see, for example, L. Freedman, 'The Revolution in Strategic Affairs', Adelphi Paper 318, Oxford, 1998, p. 47, note 4). Indeed, the British publication Strategic Defence Review does not even make this distinction. The term 'intervention' is used for all forms of military action at the upper end of the spectrum of violence, irrespective of whether the armed force in question is being used to defend NATO territory, in a classic scenario elsewhere (Kuwait) or to end a complex conflict within a state.

15 L. Freedman, 'The Changing Forms of Military Conflict', in: Survival, Vol. 40, No. 4 (Winter 1998-1999), p. 41.

16 For more on the proliferation of small arms, see AIV, 'Conventional arms control: urgent need, limited opportunities', The Hague, 1998.

Conversely, the closer the crisis is to home, the greater the pressure to intervene. The effects of such crises (flows of refugees, 'spill-over', etc.) are clearly visible and may, moreover, undermine regional security. Such considerations almost inevitably result in a selectiveness which in itself is difficult to reconcile with the principle of identical responses to identical situations, on which the international rule of law should ideally be based.

For the time being, only the United States has armed forces with sufficient strategic resources to play a significant global security role. After forty years of Cold War, however, the USA is clearly less keen than it was to continue its role as a global player. The current American attitude is reflected in a presidential directive that took effect shortly after the withdrawal from Somalia.[18] The gist of this directive is that the USA will only take part in peacekeeping missions if this is in keeping with 'national interests'[19], if there is a convincing 'exit strategy', if the USA itself is in military command, if there is broad-based support for the mission among the American public, and if 'victory' is assured. In the light of these conditions, some[20] have pointed out that the principles of national sovereignty and non-intervention are not only invoked by weak regimes fearful that the international community may only too readily decide to intervene in internal crises. These principles are also invoked by states that possess the military resources for armed intervention, but this time in order to prevent the emergence of a moral duty to intervene that 'will become just as much of a political straitjacket as the legal ban on intervention was under the system established by the Treaty of Westphalia'.[21]

To sum up, there can be no doubt that fundamental human rights are an increasingly important factor in international relations. However, this cannot be said to have resulted in a growing willingness to intervene militarily at global level. Quite apart from the question of whether the use of force is always the most appropriate way of preventing or ending a humanitarian emergency, it is apparent that the very governments with the resources to intervene are the ones most reluctant to do so, especially outside their own regions or in the absence of a clear legal basis for action.

17 See, for example, E. Luttwak, 'A Post-heroic Military Policy', in: Foreign Affairs, Vol. 75, No. 4 (July-August 1996), pp. 33-44.

18 Presidential Directive 25, issued in May 1994.

19 The results of a debate organised in 1996 by the Commission on American National Interests give a clue as to what this term means. The debate was conducted by various members of Congress, government officials and political analysts. According to them, there are only five 'vital national interests' that would compel the USA to intervene: the threat of attack with weapons of mass destruction, the emergence of a hostile major power in Europe or Asia, the emergence of a hostile power at sea or on the frontiers of the USA, collapse of the economic, financial or environmental system, and the survival of allied nations. Very important national interests are the regional proliferation of weapons of mass destruction and aggression against allied nations. Together with political pluralism and democracy in strategically important regions, large-scale violations of human rights are considered ordinary national interests. Less significant interests are trade deficits and democracy in general. It should be noted that the above definition of national interests has not prevented the USA from taking part - admittedly after some hesitation - in IFOR/SFOR in Bosnia and KFOR in Kosovo.

20 Hoffmann (1996), pp. 34-35.

21 P.H. Kooijmans, 'Het non-interventiebeginsel herijkt' ('The principle of non-intervention revisited'), Internationale Spectator, October 1996.

IV Humanitarian intervention with a Security Council mandate

IV.1 The role of the Security Council

In the 1990s, the Security Council showed itself willing to consider not only the use of force between states but also large-scale violations of human rights - on the basis of its powers as laid down in Chapter VII of the UN Charter - as threats to international peace and security justifying armed intervention. In doing so, the Council was abandoning the distinction that it had made during the Cold War between strategic security issues and humanitarian considerations.[22] It was against this background that the Security Council took measures during the 1990s regarding internal situations in Iraq, former Yugoslavia, Liberia, Somalia, Haiti, Angola, Rwanda, Burundi, Zaire, Albania, the Central African Republic, East Timor, Sierra Leone and the Democratic Republic of Congo. Destabilisation and disorder in these countries did indeed have an international dimension, for example in the form of flows of refugees or the threat of hostilities spreading to other countries. In its resolutions on the subject, the Security Council sometimes - but by no means always - referred to this dimension. It can even be argued that in the course of the 1990s the Council deliberately distanced itself from the argument that a threat to international peace and security can only be invoked in cases where the conflict has an 'international dimension'. The operation in Somalia was the first in which the Security Council authorised intervention in an internal conflict under the terms of Chapter VII of the UN Charter (Resolution 794)[23] without invoking possible international dimensions of the conflict. This example was later followed by Chapter VII operations in Rwanda (Resolution 929)[24] and Haiti (Resolution 940).[25] Evidently the Council nowadays sees internal conflicts with large-scale humanitarian implications as threats to international peace 'in their own right', thus giving a broad interpretation to Article 39 of the Charter.

By emphasising the unique nature of the circumstances surrounding each of these operations, the Security Council hoped to avoid creating precedents. However, the more often the Council invokes exceptional circumstances, the less easily it can maintain that its decisions are incidental. The Council appears to recognise this. Resolution 1080 (1996) on the use of force in Zaire does not refer to the 'unique and complex'

22 However, the Security Council had already defined the violations of human rights in Rhodesia (1966) and South Africa (1977) as threats to international peace and security in order to declare embargoes against them. At the time it was above all Asian and African developing countries which - with Soviet support - pressed for the provisions of Chapter VII of the UN Charter to be applied to the two countries. In Western circles such a definition was considered improper, as the situations in South Africa and Rhodesia did not actually constitute international military threats.

23 Resolution 794 (1992): '...the unique character of the present situation in Somalia and mindful of its deteriorating, complex and extraordinary nature, requiring an immediate and exceptional response.'

24 Resolution 929 (1994): 'the current situation in Rwanda constitutes a unique case which demands an urgent response by the international community.'

25 Resolution 940 (1994) on Haiti: 'the unique character ... its deteriorating, complex and extraordinary nature, requiring an exceptional response.'

nature of the situation, but simply notes, without stating any reasons, that the situation 'demands an urgent response by the international community'.

In discussing the aforementioned developments it needs to be emphasised that the Security Council is first and foremost a political forum.[26] Its authority and its place within the international community are based on confidence that it will carry out the provisions of the UN Charter properly, and also on acknowledgement of the role played by the permanent members in world politics, including their influence on the Council's decision-making procedures (vetoes). This may lead to situations in which the Security Council cannot take action even where it would be appropriate, for instance in a grave humanitarian emergency. In the 1990s the Council proved capable of adopting far-reaching resolutions, such as those concerning Somalia, Bosnia and Haiti. On the other hand, it made no statements about intervening in the domestic situations of permanent members (Tibet, Chechnya) or about becoming militarily involved in conflicts such as the one in Algeria.

Another major restriction on the Security Council's scope for action is the fact that actual intervention depends on the willingness of UN Member States to provide the necessary military resources. The United Nations itself could only enforce compliance if there were independent UN armed forces. Although the UN Charter does make provision for such armed forces, the chances that it will ever actually materialise must still be considered very slight.[27] Thus, apart from political considerations, practical factors also play an important part in Security Council resolutions: even if the Council can agree on the seriousness of a situation within a given state, it must also find out whether enough UN Member States are willing to provide military resources (through a UN operation or a 'coalition of the willing'). In the past, the unwillingness of Member States to provide such resources in sufficient quantities has confronted the UN with problems which in a number of cases have limited - sometimes seriously - its capacity to initiate or carry out peacekeeping missions.

IV.2 Changes to the way in which the Security Council functions

In the debate on the effectiveness of the Security Council, there are two opposing views. On the one hand, it is argued that, after a highly dynamic period in the first half of the 1990s, the Council's ability to take effective action is now hampered by the distrustful attitude of the Russian Federation and China towards the Western permanent members. Without a fundamental change of course, it is said, the Council risks being constantly left on the sidelines because of its members' growing inability to agree among them-

26 Nonetheless, the Council remains bound by international law. In the Admissions Case (1948), for example, the International Court of Justice concluded that 'the political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgement' (Conditions of admission of a state to membership in the United Nations, Advisory Opinion of May 28th 1948, p. 64).

27 This is illustrated by the response to efforts by the Netherlands, under former Foreign Minister Hans van Mierlo, to get a UN brigade established. For varying reasons, both the permanent members of the Security Council and a large number of non-aligned countries were unenthusiastic about the idea. At the moment, therefore, there does not appear to be widespread support for a UN army. For further aspects of this issue, see D. Leurdijk (ed.), 'A UN Rapid Deployment Brigade. Strengthening the capacity for quick response', The Hague, 1995.

selves. On the other hand, it is pointed out that the Council is still experiencing the most active period it has known since first being set up. Those who take this view emphasise that today, after a dip halfway through the 1990s owing to the major problems that arose in connection with certain UN missions (UNOSOM and UNPROFOR), there are once again nearly 40,000 troops authorised for various UN missions. Furthermore, analysis of the use of the veto shows that the permanent members of the Security Council made only very limited use of it during the 1990s[28], while the number of Council resolutions rose. According to this view, the prospects for greater effectiveness and legitimacy of the Security Council may not be at all bad, provided that some gradual adjustments are made. In actual fact, however, the prospects for greater effectiveness do not look at all promising. Discussions on the reform of the Security Council - both in formal UN forums such as the Open-Ended Working Group[29] and in informal discussion groups such as the Carlsson Group[30] - have ground to a complete halt.

The discussions on reform are currently focused on increasing the membership of the Security Council and limiting the right of veto. As regards the first of these issues, the candidatures of Germany and Japan for permanent membership of the Council are an important topic of debate within the Open-Ended Working Group. However, these candidatures will not receive broad-based political backing unless attention is simultaneously paid to the wishes of non-Western countries to be better represented on the Council. This is one of the main stumbling blocks. The problem is that the non-Western countries are completely unable to agree which states should represent Asia, Latin America and Africa.[31]

28

Period	China*	France	UK	USA	Russia/SU	Total
Total	**5**	**18**	**32**	**72**	**120**	**247**
1996-1999	2	-	-	2	-	4
1986-1995	-	3	8	24	2	37
1976-1985	-	9	11	34	6	60
1966-1975	2	2	10	12	7	33
1956-1965	-	2	3	-	26	31
1946-1955	1	2	-	-	79	82

* *From 1946 to 1971 the Chinese seat on the Security Council was occupied by the Republic of China (Taiwan), which used its veto just once (to prevent Mongolia's admission to the UN in 1955).* The AIV and the CAVV emphasise that the number of times a veto was actually used is not the only indicator of the Security Council's effectiveness. The above table does not indicate how often a proposed resolution was turned down because a permanent member had threatened to veto it, or how often permanent members agreed, under great pressure and after protracted negotiations, to a toned-down text. Nor does it give any clue as to the importance of the resolutions that were vetoed.

29 The full name is 'Open-Ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and other Matters related to the Security Council'.

30 The Carlsson Group - also known as the Group of Sixteen - was set up at Sweden's instigation to discuss a broad range of possible UN reforms in an informal atmosphere. Its members are Australia, Brazil, Canada, the Czech Republic, Egypt, India, Indonesia, Ireland, Ivory Coast, Jamaica, Japan, Mexico, the Netherlands, South Africa, South Korea and Sweden.

31 In addition, the candidatures of Germany and Japan themselves are by no means uncontested. Countries such as Italy and India are very unhappy at the assumption that these two candidates are entitled to permanent seats (including the right of veto).

The discussions on possible changes to the right of veto are also deadlocked. The permanent members of the Security Council are unwilling to accept an amendment to the UN Charter that would allow their right of veto to be reviewed. Nor are they open to 'softer options' such as a statement that they will refrain from using their vetoes in matters that do not concern Chapter VII of the Charter (international peace and security). Eventually, the most recent report by the Open-Ended Working Group (dated 30 July 1999) could do no more than recommend that the discussions be continued in 2000.

The issue on which the Minister's request for an advisory report focuses with regard to the functioning of the Security Council is whether increasing the Council's membership and changing the existing right of veto would really enable the Council to become more effective, especially in humanitarian emergencies. In the discussions on reform, in any case, this issue has been subordinated to other objectives such as better representation, greater equality and more openness. It is only with regard to the last of these objectives that the Security Council has made progress in recent years. More than in the past, meetings are now held in open session. The provision of information to, and interaction with, the General Assembly have also improved considerably. At the same time, however, this has resulted in rather less substantive Security Council debates. These are becoming more and more ceremonial in nature, and the real negotiations are increasingly taking place elsewhere - outside the formal sessions of the Security Council. This trend could well continue if the membership of the Council were substantially increased. Moreover, increased membership could lead to the emergence of fixed political (North-South) coalitions that would hamper the decision-making process within the Council just as they do in the General Assembly. In general, the nature of discussions in the General Assembly is such that it can tolerate such difficulties, but the same cannot be said of the Security Council, where decisions must sometimes be reached with great urgency. Here again, the AIV and the CAVV emphasise that greater Security Council effectiveness does not necessarily depend on the abolition or limitation of the right of veto. In fact, such changes could ultimately mean that the permanent members come to see the Security Council as an increasingly unsuitable forum for agreeing on possible intervention.

In the light of the foregoing, the CAVV and the AIV consider it unlikely that the proposals now being discussed within the UN regarding changes in the way that the Security Council functions will produce results in the foreseeable future. Although increased membership of the Council and limitation of the right of veto may increase support for the Security Council and enhance its legitimacy, it remains uncertain what impact this will have on its effectiveness.

V Humanitarian intervention without a Security Council mandate

As indicated in the previous chapter, the debate on reform of the Security Council seems unlikely to bear much fruit for the time being. This means that emergencies in which, for political reasons, the Council is unable or unwilling to reach effective decisions may continue to occur in the future. From the point of view of international law, therefore, the issue of whether, in exceptional circumstances, states should be allowed to engage in humanitarian intervention without Security Council authorisation is still very relevant.

In the opinion of the CAVV and the AIV, the following key questions must be answered in this connection:

(1) Can the use of force for humanitarian purposes without a Security Council mandate be seen as a newly emerging right based on developing customary law?

(2) Alternatively, can reference to a humanitarian emergency serve as legal justification for intervention which, under current international law, must still be deemed wrongful?

These questions will first of all be answered in the light of current international law. Section V.2 will then examine how the legal framework could, and should, be further developed.

V.1 The international legal framework

The predominant component of the general international legal framework is the UN Charter. First of all one may refer to Article 2(4) of the Charter, which bans the use of force and stipulates that states' territorial integrity must be respected. The Charter provides for three exceptions to the ban on the use of force between states:

(1) Articles 42 and 53: the possibility of using armed force with the authorisation of the Security Council after the latter has determined, under the terms of Article 39, that there is a threat to international peace and security (see also Chapter IV of this report);

(2) Article 51: the right of individual or collective self-defence;

(3) Article 107: action against the enemies of the founders of the UN during the Second World War. This exception is no longer of any relevance.

The AIV and the CAVV take the view that, except in the three situations just mentioned, Article 2(4) of the Charter lays down a peremptory ban (ius cogens) on the use or threat of force and hence does not leave any legal latitude for armed intervention on the territory of another state without the latter's consent. This is confirmed by the *traveaux preparatoires*, the context of the various relevant provisions and the relationship between them, and various General Assembly resolutions.[32]

32 In this connection, the most relevant resolutions are: (a) the Declaration on the Inadmissibility of Intervention (Resolution 2131 (XX), 1965); (b) the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (Resolution 2625 (XXV), 1970); and (c) the Definition of Aggression (Resolution 3314 (XXIX), 1974).

Legal basis
In the literature, however, what is known as the ‘link theory’ has been invoked as a possible basis for unauthorised humanitarian intervention under current law. According to this theory, the failure of the system of collective security enshrined in the UN Charter revives a presumed rule of customary law from the period before the UN was established concerning the legality of humanitarian intervention.[33] Regarding this point, the AIV and the CAVV still subscribe to the conclusion of the 1992 report by the ACM and the CAVV that there are a number of objections to the link theory which justify the conclusion that it cannot serve as a legal basis for humanitarian intervention. The most serious objection concerns the presumption that a rule of customary law forming a legal basis for humanitarian intervention had developed at some time before 1945. Furthermore, there are no good examples from state practice before 1945, nor is there the necessary *opinio iuris* on the subject. Secondly, it may be wondered whether such a pre-existing rule of customary law can co-exist with the Charter. One of the aims of the drafters of the Charter was to reformulate the right to use force (ius ad bellum) by establishing the three aforementioned exceptions to the ban on its use.

Justification
The question then arises whether justification for unauthorised humanitarian intervention can be adduced on the basis of customary international law as it now stands. It has long been acknowledged in customary international law that there are circumstances in which the wrongfulness of certain actions by states may be precluded or in which states may not be held legally responsible for such actions - a principle summed up in the saying ‘necessity knows no law’. Some potential justificatory grounds under customary law have been described in a number of draft articles by the UN’s International Law Commission (ILC) as part of the doctrine of state responsibility. The debate on the subject continues.

The first such ground that springs to mind is the ‘state of necessity’ referred to in Article 33 of the ILC draft on state responsibility.[34] According to the comments on Article 33 by the Special Rapporteur and the ILC, this article cannot form a basis for

33 The link theory effectively entails applying the rebus sic stantibus rule to the provisions of the UN Charter concerning the protection and promotion of international peace and security, thereby creating a new exception to the ban on the use of force as laid down in Article 2(4) of the Charter, alongside the existing exceptions.

34 Article 33 reads as follows:
‘1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:
(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.
2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:
(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or
(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or
(c) if the State in question has contributed to the occurrence of the state of necessity.’

unauthorised humanitarian intervention.[35] This is because a state of necessity cannot be invoked to justify violations of peremptory rules of international law, such as the ban on the use or threat of force. Furthermore, this ground has very seldom been invoked in more recent instances of humanitarian intervention.[36] On the basis of these arguments, the CAVV and the AIV conclude that Article 33 does not provide justification for unauthorised humanitarian intervention.

The question also arises whether the principle of 'distress' as referred to in Article 32 of the same ILC draft on state responsibility could provide justification for humanitarian intervention.[37] In his report, the Special Rapporteur emphasises that the field of application of Article 32 (particularly with regard to ships and aircraft), as it has evolved historically, should not be extended too far beyond that specific context 'and certainly not into the general field of humanitarian intervention'.[38] The United Kingdom, on the other hand, was 'critical of the limitation of Article 32 to persons in the care of the state concerned' and called 'for the draft articles explicitly to recognise emergency humanitarian intervention'.[39] The Special Rapporteur responded by reiterating the view that such a situation should be dealt with under Article 33 rather than under the principle of distress.[40] In this connection, the AIV and the CAVV emphasise that the United Kingdom's argument (which is not subscribed to by the other permanent members of the Security Council) only applies to actions of extremely limited size and purpose and hence does not apply to the kinds of intervention discussed in this report, which are aimed at preventing or ending large-scale violations of fundamental human rights.

The AIV and the CAVV conclude from the foregoing that current international law does not provide sufficient legal basis for unauthorised humanitarian intervention. Nor, according to the currently prevailing interpretation, can the existing customary law grounds of 'state of necessity' or 'distress' be invoked to justify such intervention.

35 International Law Commission, Second Report on State Responsibility by James Crawford, Special Rapporteur, A/CN.4/498/Add.2, Paragraphs 286-287, and Report of the International Law Commission on the work of its fifty-first session 3 May-23 July 1999, A/54/10, p. 185, Paragraphs 384 and 387.

36 The only example up to 1980 was the Belgian rescue operation in Congo in 1960. On that occasion the Security Council did not take a position with regard to this argument. See also A/CN.4/498/Add.2, p. 26, note 527.

37 Article 32 reads as follows:
'1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.
2. Paragraph 1 shall not apply if the state in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril.'

38 A/AC.4/498/Add.2, p. 23, Paragraph 272.

39 Ibid., p. 22, Paragraph 269.

40 Aforementioned ILC Report, A/54/10, p. 180, Paragraph 367.

V.2 Development of the law

However, the question arises whether the very fact of invoking a humanitarian state of necessity can in itself be seen as a justification for unauthorised intervention that must still be deemed wrongful under current international law. In fact, can one speak of a newly emerging right of unauthorised humanitarian intervention, based on developing customary law?

The first factor to be taken into account in answering such questions is the relationship between the UN Charter and general international law. In this connection one must refer to the pronouncement by the International Court of Justice in the Nicaragua case '... that the United Nations Charter ... by no means covers the whole area of the regulation of the use of force in international relations'.[41] At the same time, the AIV and the CAVV have already concluded that it is not possible for an old rule of customary law to co-exist with the UN Charter as a legal ground for humanitarian intervention. However, this does not mean that identical treaty rules and rules of customary law on the same subject cannot co-exist. The Court has explicitly acknowledged this possibility and has also pointed out that 'there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter 'supervenes' the former, so that the customary international law has no further existence of its own'.[42] What is true is that a distinction can be made between identical treaty rules and rules of customary law when it comes to interpreting and applying them.[43]

However, in order to find possible answers to the two questions posed above - thereby deviating from the provisions of the UN Charter banning the use of force - one must examine state practice based on *opinio iuris*. This can indicate an evolution in customary law, or the beginnings of one. However, a number of problems arise at this point:

(1) State practice involving unauthorised humanitarian intervention since 1945 has been very limited. Against this background, account must be taken of the following pronouncement by the International Court of Justice in the Nicaragua case in 1986: '...that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule'.[44] Although 'reliance by a State on a novel right or an unprecedented excep-

41 I.C.J. Reports, 1986, p. 94, Paragraph 176.

42 I.C.J. Reports, 1986, p. 95, Paragraph 177.

43 'A State may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because the treaty establishes what that State regards as desirable institutions or mechanisms to ensure implementation of the rule. Thus, if that rule parallels a rule of customary international law, two rules of the same content are subject to separate treatment as regards the organs competent to verify their implementation, depending on whether they are customary rules or treaty rules' (I.C.J. Reports, 1986, p. 95, Paragraph 178).

44 I.C.J. Reports, 1986, p. 98, Paragraph 186.

tion to the principle might, if shared in principle by other States, tend towards a modification of customary international law'[45], it will be particularly difficult for a new legal basis for humanitarian intervention to emerge via customary law.

(2) In this light, one might be inclined to attach greater importance to the legal views expressed by states. Yet here again there are a number of problems. The situations and circumstances in which states express their legal position may result in greatly varying lines of reasoning. They may, for example, be defending a prior instance of humanitarian intervention in the face of international opinion or before the Security Council, or they may be defendants in legal proceedings before the International Court of Justice. Again, they may be involved in a Security Council debate on the need or scope for authorised humanitarian intervention or the granting of authorisation for that purpose, or in a General Assembly debate without there being a specific crisis. Once again, the AIV and the CAVV believe that reference should be made to the pronouncement in the 1986 Nicaragua case. Although the Court stated that 'it would ... seem apparent that the attitude referred to expresses an opinio iuris respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter', in the same paragraph it went on to say that this opinio iuris 'may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions...'.[46]

On the basis of the Official Records of the 54th United Nations General Assembly (September 1999), most of which was taken up with the debate on unauthorised humanitarian intervention and NATO action in connection with Kosovo, and the Provisional Verbatim Records of the Security Council - as regards debates concerning a humanitarian emergency[47] - the AIV and the CAVV conclude that these debates do not point to the existence of a universal *opinio iuris* on the legality of humanitarian intervention. The CAVV and the AIV note that, in the 54th General Assembly debate on unauthorised humanitarian intervention, states did use terms such as 'legitimate', 'justified', 'in accordance with the provisions and/or purposes and principles of the UN Charter' and 'in accordance with general international law'. However, the use of such terms does not in itself mean that a body of customary international law is emerging on the subject, for no opinio iuris appears to be materialising, particularly given the differing views of major countries such as Russia, China and India.

From the debate taking place within the UN one may conclude that it is above all Western countries that are seeking a justification for unauthorised humanitarian intervention. In the case of the intervention in the Kosovo crisis, no agreement was reached within NATO on the legal basis for the action, which was carried out without the express authorisation of the Security Council. Although there was a consensus on the need for intervention, each Member State had its own views regarding the justification for it. Even NATO's new Strategic Concept (Washington, May 1999), in which 'non-Article 5

45 Ibid., p. 109, Paragraph 207.

46 I.C.J. Reports, 1986, p. 100, Paragraph 188.

47 The debates examined concern the humanitarian crises in Iraq (the Kurdish question), Somalia, Bosnia-Herzegovina, Liberia, Rwanda, Haiti, Albania, Sierra Leone, the Central African Republic, Kosovo and East Timor.

operations' (i.e. operations other than for self-defence) and 'crisis response operations' occupy an important place, does not clarify the legal basis for humanitarian intervention without the authorisation of the Security Council. Nor were things made any clearer by the views expressed by NATO Member States during the debate at the 54th General Assembly. One may have to await the arguments put forward during the proceedings instituted by the Federal Republic of Yugoslavia against a number of NATO Member States - including the Netherlands - before the International Court of Justice. Be that as it may, and aside from a few instances of humanitarian intervention that were eventually tolerated by the international community, it must be pointed out that the exercise of a unilaterally posited right - by any state or group of states - to engage in humanitarian intervention undermines the basic structure of the UN Charter.[48] It is therefore vital, in a field as sensitive as this, to pursue efforts aimed at generating the broadest possible support within the international community.

In this connection the AIV and the CAVV also point out that, even if a regional *opinio iuris* regarding a legal basis for humanitarian intervention is emerging, the fundamental question remains whether such a development of customary law is possible if it conflicts with peremptory (*ius cogens*) rules such as the ban on the use or threat of force, unless that exception is deemed to form an integral part of the said ius cogens rules.

In the light of the foregoing, the CAVV and the AIV note not only that there is currently no sufficient legal basis for humanitarian intervention without a Security Council mandate, but also that there is no clear evidence of such a legal basis emerging. At the same time, however, the AIV and the CAVV acknowledge that nowadays it is no longer possible, in interpreting and applying international law, to ignore situations in which fundamental human rights are being or threaten to be violated on a large scale and the international community is taking no action to stop or prevent this. In this connection, the AIV and the CAVV attach great importance to the increasing significance of the international duty to protect and promote fundamental human rights. In their view, this duty forms the basis for the further development of a customary law justification for humanitarian intervention without a Security Council mandate.

Article 2(2) of the UN Charter has a particularly important part to play in this connection. It requires states to comply in good faith with obligations arising from the Charter. These include rules aimed at the international protection and promotion of human rights. The latter are spelt out in greater detail in, inter alia, Articles 55 and 56 of the Charter, on the basis of which a large number of UN treaties and resolutions have been drawn up. For the sake of brevity, only the Universal Declaration of Human Rights (1948), the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights (1966) and the Convention on the Prevention and Punishment of the Crime of Genocide (1948) will be mentioned here. These human rights instruments - and the enforcement procedures laid down in them - have, together with rules of customary law, introduced an essential and irreversible limitation to the principle of

48 In contrast to what is stated in the main text, CAVV members Dr. E.P.J. Myjer and Prof. K.C. Wellens take the view that, in the absence of an unambiguous statement in NATO's Strategic Concept in favour of the current exclusive rights of the competent UN bodies regarding the exceptions to the ban on force, the mere decision to leave open the possibility of deviating from that ban in order to carry out 'non-Article 5 operations' - which would not necessarily only be carried out with UN consent and under UN authority - in itself undermines the basic structure of the UN Charter.

respect by the UN for matters that essentially lie within the domestic jurisdiction of a state (Article 2(7) of the UN Charter).[49]

Also relevant here is the pronouncement by the International Court of Justice in the case concerning the Barcelona Traction Light and Power Company, Ltd (1970). In it, the Court held that there are certain rights in whose protection 'all states can be held to have a legal interest'.[50] According to the Court, the obligations involved here are obligations towards all states (*erga omnes*). In this connection, one may also refer to the Declaration of the Second World Conference on Human Rights (Vienna, 1993), which stated that the 'promotion of all human rights is a legitimate concern of the international community'. A third, extremely recent example of the erosion of national legal authority in the interests of human rights is the pronouncement by the British Law Lords in March 1999 concerning the extradition of the former Chilean President Augusto Pinochet. This stated that, although the doctrine of state immunity is still of great importance, it cannot be invoked to protect a present or former head of state against prosecution for 'international crimes in the highest sense', such as torture.

In the opinion of the AIV and the CAVV, the international duty to protect and promote the rights of individuals and groups has thus developed into a universally valid obligation that is incumbent upon all the states in the international community, both individually and collectively. This duty is having an increasing impact on the development and operation of international law, which originally had a largely inter-state character and was designed to serve raison d'etat. The CAVV and the AIV therefore consider it extremely desirable that, as part of the doctrine of state responsibility, efforts be made to further develop a justification ground for humanitarian intervention without a Security Council mandate.

It is important that a framework for assessing unauthorised humanitarian intervention be established in order to appraise and adopt a justification on the subject. The possibility that such justification may eventually develop into a legal ground cannot be excluded. In this connection, too, an assessment framework can play an important part. The CAVV and the AIV consider that, when establishing and interpreting this framework, on the basis of the notion of 'approximate treaty application',[51] every effort should be made to approximate to the procedures and mechanisms provided for in the UN system of collective security enshrined in the UN Charter. The assessment framework will be discussed in further detail in Chapter VI.

49 See, inter alia, Prof. C. Flinterman, 'Soevereiniteit en de Rechten van de Mens' ('Sovereignty and Human Rights'), Inaugural Speech, University of Utrecht, January 2000.

50 I.C.J. Reports 1970, p. 33, Paragraph 33.

51 This principle is described as follows by Sir Hersch Lauterpacht:
'It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument - not to change it.' (Admissibility of Hearings of Petitioners by the Committee on South-West Africa, Separate opinion of Sir Hersch Lauterpacht, I.C.J. Reports 1956, p. 46), quoted in the Gabcikovo-Nagymaros case, 25 September 1997, Paragraph 75.

It must be emphasised that there is a danger of states abusing unauthorised humanitarian intervention if a right to engage in such intervention is explicitly recognised. One cannot, therefore, do more than acknowledge the possible occurrence of situations involving such grave violations of human rights that a state may feel compelled to intervene. That state will then have to account to the international community for its actions (through the Security Council or the General Assembly), for in principle such intervention constitutes a grave infringement of the international rule of law and can only be justified if the intervening state can demonstrate that it had to act as it did in order to prevent or contain an even graver infringement of that selfsame rule of law. In the event that the competent UN bodies fail to take or authorise action that is perceived as humanly unavoidable, the essential international duty to protect fundamental human rights could constitute the legal ground that justifies deviating from the ban on the use of force as laid down in the UN Charter.

Nevertheless, preference should be given to measures involving the use of force by the Security Council (authorised humanitarian intervention) or by a regional institution with Security Council authorisation, among other things because institutional and procedural safeguards designed to prevent possible abuse will then apply. Further basic principles can be formulated in this connection, thereby clarifying the relationship between the maintenance of international peace and security on the one hand and the international protection of human rights on the other.[52] Although, formally speaking, this cannot lead to a restriction of the power of the Security Council to interpret Article 39, it can help to achieve a clearer, more consistent interpretation of that article and to strike a proper balance between the UN's various objectives. These basic principles could in due course be laid down in a Security Council or General Assembly resolution.

52 As proposed by the Zimbabwean representative at the special session of the Security Council held on 31 January 1992 at head-of-state and government leader level (Provisional Verbatim Records S/PV.3046, 1992, p. 131).

VI The legitimacy of humanitarian intervention

The considerations in the previous chapter led to the conclusion that there is currently no reason to assume a legal basis, or an emerging legal basis, for humanitarian intervention without the authorisation of the Security Council. Nevertheless, the authors of this report feel that there are sufficient moral, political and legal reasons to try and develop a separate justification for such humanitarian intervention. As already indicated in Chapter V, in order to prevent states from abusing this justification to further their own political aspirations, one cannot do more than generally acknowledge the possible occurrence of situations involving such grave violations of human rights that states may feel compelled - if peaceful means are no longer effective - to intervene militarily. Such states will then have to account publicly for their military intervention before the UN.

The foregoing implies that, in the absence of agreement among the permanent members of the Security Council, the maximum degree of legitimacy must be obtained by other means. First of all, therefore, a state or group of states should attempt to obtain Security Council authorisation for the use of force for humanitarian purposes by means of a draft resolution. Its terms of reference should be as detailed as possible (identity of the states authorised to intervene, objectives of the operation, scale and duration of the authorisation, duty to report). Should this attempt to obtain authorisation fail, the next logical step is to submit the matter to the General Assembly, taking the procedure laid down in the Uniting for Peace resolution[53] as a basis.[54] The General Assembly must then adopt a resolution recommending action by at least a two-thirds majority.[55]

The text of the Uniting for Peace resolution indicates that the General Assembly can be convened in one of two ways if it is not already in session: (a) at the request of a majority of UN members, and (b) at the request of the Security Council (since this is a procedural matter, the right of veto does not apply).[56] The CAVV and the AIV feel that the General Assembly should preferably be convened at the request of the Security Council. Not only does this invest the resolutions to be adopted by the General Assembly with greater political authority, but it also tackles the core of the problem raised in the letter requesting this advisory report, by avoiding the use of a veto in cases where action is called for.

The involvement of the General Assembly, as advocated here, is a logical step in view of both the secondary responsibility of this principal UN body for the maintenance of

53 General Assembly Resolution 377 (V), 3 November 1950.

54 The key passage of this resolution reads as follows:
'The General Assembly resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force, when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any nine members, or by a majority of the Members of the United Nations'.

international peace and security (alongside the primary responsibility of the Security Council) and the General Assembly's repeated involvement in efforts to protect human rights in the past.

VI.1 The use of an assessment framework

The involvement of the General Assembly can lend maximum legitimacy to humanitarian intervention that is not authorised by the Security Council. However, it remains questionable whether the General Assembly is capable of sufficiently decisive and rapid action to fulfil a constructive role in every humanitarian crisis. Nor is it certain that, in future humanitarian emergencies, UN Member States will always display the political will to discuss the option of intervention in the General Assembly. In view of such objections, the possibility remains that humanitarian intervention without a Security Council mandate and without General Assembly involvement will again occur in the future. Such intervention may well be justifiable on moral and political grounds, but - as already indicated in this report - there is no clear legal basis for it. Nevertheless, the CAVV and the AIV believe there are sufficient reasons, pending further development of a justification based on customary law, to consider humanitarian intervention admissible in extreme cases and as an 'emergency exit'.[57] The AIV and the CAVV believe that, at a minimum, an assessment framework is necessary in order to evaluate such intervention.

55 In pursuance of the principle of 'approximate treaty application' (see Note 51), and mindful of the aforementioned primacy of the UN system of collective security based on the Charter and the associated peremptory ban on the use of force, two members of the CAVV, Dr. E.P.J. Myjer and Prof. K.C. Wellens, consider that the use of force for humanitarian purposes (as referred to in the cases described) without the prior authorisation of the Security Council is only acceptable if no effort has been spared to obtain the necessary consent within the system of the Charter according to the rules of international law. These steps must be capable of being assessed. The Security Council must primarily pronounce on the admissibility of such use of force for humanitarian purposes by giving its opinion on a substantive draft resolution. If such a resolution is vetoed, the General Assembly must - before use of force outside the UN (in the exceptional cases referred to) can be considered admissible - pronounce on it on the basis of its secondary (shared) responsibility for peace and security, given that the General Assembly is the only UN body apart from the Security Council that is competent to authorise such a deviation from the ban on force on the UN's behalf (see N. White, 'The legality of bombing in the name of humanity', in: Journal of Conflict and Security Law 5 (2000), pp. 27-43). In order to pronounce on the resolution, the General Assembly must be convened in emergency special session by means of a procedural resolution based on the Uniting for Peace resolution (see General Assembly Resolution 377 A(V) 'Uniting for Peace' (3 November 1950), UN Doc. A/1775), for which a majority of nine members of the Security Council is in practice sufficient (cf. Zieger/Rhode/Brokelmann/Khan in B. Simma, 'The Charter of the United Nations, a Commentary' (1994), p. 346: 'Hence there now appears to exist a rule that the convening of special sessions is a procedural matter not affected by the right of veto.'). In Wellens' and Myjer's view, the submission of the two resolutions referred to, and if possible a General Assembly resolution pronouncing thereon, are the very least that can be deemed a usable procedural and substantial criterion for the use of force other than under the terms of the Charter.'

56 The Security Council has made such a request to the General Assembly on a number of occasions in the past, and permanent members have also voted against the draft resolution on those occasions, e.g. during the Suez crisis (France, United Kingdom) and in connection with Afghanistan (Soviet Union).

57 Danish Institute of International Affairs, 'Humanitarian Intervention. Legal and Political Aspects', Copenhagen, 1999, p. 116.

Such a framework can clarify the minimum conditions to be satisfied. It can also help to structure deliberations within the UN (Security Council or General Assembly) on specific instances of intervention. At the same time, it can provide the UN community of nations with a basis for assessing instances of unauthorised humanitarian intervention that have already taken place and for tolerating them in appropriate cases, provided that sufficient account has been taken of 'legitimacy considerations'.

An assessment framework can also be of importance to the further development of the law regarding humanitarian intervention, as it offers a starting-point for gaining international acceptance for a separate legal ground justifying unauthorised humanitarian intervention (in which humanitarian necessity prevails over the law banning the use of force). This is one reason why the CAVV and the AIV consider it so important, when establishing and interpreting an assessment framework, that every effort be made to approximate to the procedures and mechanisms provided for in the UN system of collective security enshrined in Chapter VII of the UN Charter, on the basis of the notion of 'approximate treaty application'.

At the same time, the possibility cannot be excluded that the development of an assessment framework will also result in the basic principles and norms that it contains being incorporated into the Security Council's own deliberations. Indeed, such use of an assessment framework already appears to be open to discussion.[58] This could certainly help to structure the debate within the Security Council in the run-up to intervention, but cannot guarantee more effective decision-making by the Council, and would be of very little use in cases where, for political reasons, the Council is already unable or unwilling to reach a decision.

VI.2 Basic outlines of an assessment framework

As regards humanitarian intervention without Security Council authorisation, the AIV and the CAVV very much favour the development of an assessment framework as a minimum precondition for unauthorised humanitarian intervention, rather than a mere list of disconnected criteria. The idea behind this is that intervening states should not only satisfy certain criteria, but should also comply with a number of procedural safeguards and substantive considerations. In the light of this, there are four key questions that need to be answered. These will be dealt with separately below.

(1) Which states should be allowed to engage in humanitarian intervention?[59]

(a) The protection of a broadly interpreted right to life belongs to the category of obligations (*obligationes erga omnes*) in whose fulfilment all states are deemed to have a legal interest. Although every state has thus a legal interest in the observance of the right to life, in practice the operational details of the humanitarian intervention will in general be determined by the overall political context and the situation that has led to the military action. In this connection, the CAVV and the AIV take the view that states engaging in humanitarian intervention can be expected to be party to regional and universal conventions for the protection of human rights. It also goes without saying that

58 This topic may possibly be discussed in autumn 2000 at the United Nations Millennium Summit preceding the 55th General Assembly.

59 In the context of this report, the term 'states' is specifically used to mean 'a state or group of states'.

the intervening states should not themselves be in any way involved in the grave violations of fundamental human rights that the intervention is designed to combat.

(b) Taking account of the other features of the assessment framework described here, preference could also be given, for operational reasons, to involvement of countries in the region, since it is these that will in practice be capable of intervening or providing essential logistic support in good time. However, care must be taken to ensure that their geographical proximity does not encourage abuse.

(c) For these and other reasons, preference should be given to humanitarian intervention by a group of states acting under the auspices of an international organisation. The conditions and safeguards contained in an assessment framework are more likely to be observed in an institutional context than when the military action is undertaken by an individual state. From a procedural point of view, one should try to ensure that the collective intervention takes place within, or with support from, a regional organisation under the terms of Chapter VIII of the UN Charter.

(2) When should states be allowed to engage in humanitarian intervention?

(a) The situation must be one in which fundamental human rights are being or are likely to be seriously violated on a large scale and there is an urgent need for intervention. The situation that springs to mind here is violation of a broadly interpreted right to life by the legitimate government of a country. This definition includes both a qualitative element ('gravely' and 'fundamental') and a quantitative one ('on a large scale'). Grave violations of fundamental human rights include not only extermination by means of summary executions and deliberate armed or police attacks on arbitrary civilian targets, but also torture, taking of hostages, rape, and grave infringements of human dignity such as humiliating treatment.

(b) As regards 'crimes against humanity' - which to some extent cover a broader field - the AIV and the CAVV explicitly refer to the Statutes of the Yugoslavia and Rwanda Tribunals and Article 7 of the Statute of Rome for an International Criminal Court (see Annex III). Not all the violations described in Article 7 constitute sufficient grounds for humanitarian intervention in themselves. A number of other conditions must also be satisfied, such as the urgency of the need for intervention. What is very important, nevertheless, is that the 'widespread' and 'systematic' nature of human rights violations are no longer cumulative conditions for international intervention. Furthermore, the AIV and the CAVV emphasise that grave, large-scale violations of fundamental human rights can also be committed by non-state players and can thus constitute grounds for humanitarian intervention.

(c) The legitimate, internationally recognised government is unable or unwilling to provide the victims with appropriate care. It does not appeal to third states or international organisations for assistance, and refuses them access to its territory. Indeed, the fact that authorities are willing but unable to uphold the rule of law and so prevent large-scale violations of human rights has been identified by the UN Secretary-General as one of the factors that the Security Council should take into account when reaching decisions on the subject.[60] One can also envisage situations in which any

60 Paragraph 40 of the Recommendations formulated by the Secretary-General in the Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, S/1999/957. See also Security Council Resolution 1265 (1999) of 17 September 1999.

form of government or other authority is totally absent. In such cases, the authorisation required under international law in order for foreign troops to set foot on the country's territory cannot be granted. Nor, in general, will an occupying force grant authorisation for humanitarian intervention.

(d) Humanitarian intervention may involve either an internal crisis or an essentially internal humanitarian emergency with international implications that may be limited (flows of refugees across borders) or extensive (regional destabilisation). The demonstrable threat of an internal or international armed conflict is not in itself sufficient to satisfy the conditions for humanitarian intervention. At the same time, a threat to international peace and security owing to grave, large-scale violations of fundamental human rights is not a separate condition for intervention.

(e) The humanitarian emergency can only be reversed or contained by deploying military resources. In that case, however, the primary objective of the intervention must be humanitarian. This means that the operation must be aimed at preventing or ending the humanitarian emergency referred to. The intervening state must make the humanitarian objectives of the intervention clearly known in advance to the international community and to the state on whose territory the intervention will take place, in order to minimise the risk of Article 51 of the UN Charter being invoked and to allow subsequent international monitoring. Even though national security or other interests may play a part in the decision to intervene, these must be clearly subordinate to the humanitarian objective of the intervention. Ideally, the promotion of the international rule of law (including the upholding of human rights) and national interests should coincide.

(f) The intervening state has, in good faith but to no avail, exhausted all the appropriate non-military means of action against the state that is violating human rights. These include attempts to end the humanitarian crisis with support from civil society in the state concerned, as well as efforts through regional or international organisations responsible for monitoring the upholding of human rights. Such efforts include submitting (or arranging for the submission of) a draft resolution to the Security Council. If the permanent members of the Security Council cannot reach agreement, the next logical step is to follow the procedure described earlier in this chapter.[61] Account must also be taken here of a possible rapid deterioration in the humanitarian emergency, which may necessitate immediate military action. Waiting to see whether the full range of non-military alternatives has been exhausted may actually prove counterproductive, as it may create the impression in the areas affected by the crisis that the international community cannot make its mind up to intervene. Once a crisis has escalated into uncontrollable chaos, even military action will no longer have any effect.

(3) What conditions should states satisfy during humanitarian intervention?

(a) Humanitarian intervention must be in proportion to the gravity of the situation. This largely concerns the manner in which force is used or threatened. The rules of humanitarian law are fully applicable here. In this connection it may be assumed

61 I.e. a draft Security Council resolution authorising the use of force, possibly followed by a General Assembly debate, on the basis of the procedure laid down in the Uniting for Peace resolution. See, however, the reservations expressed by Prof. K.C. Wellens and Dr. E.P.J. Myjer (Note 55).

that the Geneva Conventions of 1949 are customary law and must be fully complied with. If the intervention is carried out by a group of states which are not all party to the Additional Protocols of 1977 and other humanitarian law conventions[62], the rules of customary law on the subject must be taken into account.[63] States that fail to satisfy the proportionality requirement may find themselves facing unforeseen legal complications.[64]

(b) A second proportionality requirement concerns the implications for international peace and security. If, in themselves or because of their consequences, the grave, large-scale violations of fundamental human rights constitute a threat to international peace and security, the humanitarian intervention must not itself constitute an even greater threat to international peace and security. In other cases, where the violations of human rights or their consequences do not constitute a pre-existing threat to international peace and security, the very act of humanitarian intervention may itself constitute a threat to international peace and security. The CAVV and the AIV acknowledge that a dilemma may arise here: the use or threat of force must be firm enough to produce the desired effect, but must also be sufficiently controlled to avoid destabilising conditions in the region, since that may result in even greater loss of life than that which led to the actual intervention.

(c) The impact of the humanitarian intervention on the national structure of the country against which the intervention is directed must be limited to what is necessary in order to attain the humanitarian objective. This may nevertheless mean that the intervention is designed to alter the structure of a state and forms of authority in order to ensure that human rights are upheld in the future (for example through free elections). In the 1990s, the part played by national governments in large-scale violations of fundamental human rights was in some cases so great that the violations could only be ended by attacking the regime in power.

(d) The states engaging in humanitarian intervention must report to the Security Council immediately and in detail on the reason for the operation, its scale, its progress and its likely duration.

(4) When and in what way should states end their humanitarian intervention?

(a) The intervening states must undertake in advance to suspend the humanitarian intervention as soon as the state concerned is willing and able to end the large-scale violations of human rights by itself or the Security Council or a regional organisation acting with Security Council authorisation takes enforcement measures involving the use of force for the same humanitarian purposes.

62 Including the Convention for the protection of cultural property in the event of armed conflict (1954) and its protocols, the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (1980) and its protocols, the Ottawa Convention banning anti-personnel landmines (1997) and the Statute of the International Criminal Court (1998).

63 In this connection the CAVV and the AIV refer to an inquiry by the International Committee of the Red Cross (due to be published in 2001) into rules of customary law in the field of humanitarian law.

64 This would allow the state on whose territory the intervention takes place not only to invoke Article 51 of the UN Charter, but also to submit a claim for damages.

(b) The intervening states must end their intervention when its objective, namely the cessation of violations of human rights, has been attained. Here again, the proportionality requirement must be taken into account, although much will depend on the specific circumstances. In situations involving grave, large-scale violations of human rights, the conditions for safeguarding those rights effectively in the short term are often lacking. On the one hand, therefore, the intervention must not be ended prematurely, and the conditions for a post-conflict peace-building process must be in place. On the other hand, to avoid jeopardising the attainment of its humanitarian objective, the operation must not exceed a reasonable length of time.

VII Conclusions and recommendations

In recent years, numerous academic studies and international conferences have dwelt at length on the problems of humanitarian intervention. However, these efforts have not produced a unanimous, unambiguous answer to the question of whether - and, if so, under what circumstances and conditions - armed intervention in order to restore respect for human rights is called for and legitimate. Nor have the cases in which states have invoked humanitarian grounds, whether or not during armed interventions, done enough to help clarify the issue.

A clear analysis of the problems of humanitarian intervention requires a clear definition of the topic. In the past, widely varying interpretations of the term 'humanitarian intervention' have often led to misunderstandings. Humanitarian intervention is strictly defined as follows:
'The threat or use of force by one or more states, whether or not in the context of an international organisation, on the territory of another state:
(a) in order to end existing or prevent imminent grave, large-scale violations of fundamental human rights, particularly individuals' right to life, irrespective of their nationality;
(b) without the prior authorisation of the Security Council and without the consent of the legitimate government of the state on whose territory the intervention takes place.'

Although the term 'humanitarian intervention' should therefore only refer to the use of force for humanitarian purposes *without* Security Council authorisation, for everyday purposes the use of force with Security Council authorisation is also labelled humanitarian intervention. In view of this, the CAVV and the AIV prefer to distinguish between 'humanitarian intervention *with* a Security Council mandate' and 'humanitarian intervention without a Security Council mandate'.

General framework
From an international law point of view as well as from a moral and political one, assessment of humanitarian intervention entails taking account not only of the ban on the use of force between states and respect for territorial integrity, but also of the obligation to uphold and promote human rights. *In the opinion of the AIV and the CAVV, both form an essential part of the international order based on the UN Charter, and both are of great importance to the stability and durability of that order.*

During the 1990s, however, there was a growing conflict between the ban on the use or threat of force and the obligation to uphold and promote human rights. This is not only due to the increased scope for armed intervention following the end of the Cold War. At least as important is the increasing tendency in international practice to take account of the interests and rights of the individual, rather than just state sovereignty. In this connection, states are increasingly being called to account by international forums. Partly as a result of this, the concept of state sovereignty, as incorporated into the UN Charter when it was drawn up 1945, is changing considerably in practical terms. At the same time, the ban on the use or threat of force has remained firmly anchored in the UN Charter and has proved a vital contributing factor to the stability of relations between states.

These developments are taking place against the background of a changing international security situation following the end of the Cold War. Many of the conflicts in the 1990s

involved the disintegration of states, and the governments of various countries have resorted to harsh repressive measures in an attempt to maintain unity. Since entire societies become involved in such conflicts, it is no longer clear who belongs to the warring parties. Wars and humanitarian crises are thus increasingly indistinguishable. Given the huge cost of military intervention, the uncertainty that it will be successful, the risks to which military personnel are exposed, and the limited military resources that are available, many governments with access to the necessary military potential are reluctant to intervene in such conflicts. *In this connection, the AIV and the CAVV conclude that, although human rights are playing an increasingly important role in international relations, this has not resulted in a proportionately greater willingness to intervene militarily, except in highly exceptional and grave circumstances.*

The Security Council

The end of the Cold War has also had a major impact on the decision-making process within the Security Council. The Council has proved willing to interpret its powers under Chapter VII of the UN Charter broadly, and hence has come to view not only the use of force between states but also large-scale violations of human rights as threats to international peace and security. At the same time, however, it is apparent that the political nature of the decision-making process within the Security Council and its dependence on the willingness of Member States to make troops available have resulted in a selectiveness which makes the Council unable or unwilling to intervene in every humanitarian emergency to an equal degree. *The AIV and the CAVV conclude that there is no satisfactory answer to the question raised as to how the effectiveness of the Security Council in humanitarian emergencies can be enhanced, at least if the existing degree of support for the Security Council is to be maintained.*

The deliberations within the UN on the reform of the Security Council have focused on increasing the Council's membership and limiting the right of veto. In view of the extremely difficult negotiations that have taken place between UN Member States, it does not seem likely that these deliberations will produce results in the foreseeable future. *Moreover, the CAVV and the AIV feel that increasing the membership of the Security Council and limiting the right of veto would not necessarily result in a more effective Security Council.* Although such adjustments may increase the legitimacy of the Security Council among the UN Member States, they may also complicate the decision-making process considerably. In addition, limiting the right of veto could ultimately mean that the permanent members come to see the Security Council as an increasingly unsuitable forum for agreeing on possible action.

A legal basis for unauthorised humanitarian intervention?

Whether or not the debate on the reform of the Security Council bears fruit, it seems likely that situations in which the Council is unwilling or unable, for political reasons, to intervene by force in humanitarian emergencies will continue to occur in the future. As a result, the question of whether states are entitled, on humanitarian grounds, to intervene by force on other states' territory without Security Council authorisation remains as relevant as ever. *The CAVV and the AIV conclude that current international law provides no legal basis for such intervention, and also that no such legal basis is yet emerging. At the same time, they believe that it is no longer possible to ignore the increasingly perceived need to intervene in situations where fundamental human rights are being or are likely to be violated on a large scale, even if the Security Council is taking no action. In this connection, the AIV and the CAVV attach great importance to the growing significance of the international duty to protect and promote fundamental human rights.*

A justification under international law?

Regarding the question as to how the concept of humanitarian intervention can be more clearly formulated in terms of international law, the AIV and the CAVV refer to customary international law, which acknowledges that there are circumstances in which the wrongfulness of certain actions by states is precluded or in which states cannot be held legally responsible for such actions - a principle summed up in the saying 'necessity knows no law'. The 'justificatory grounds' are set out in a number of draft articles drawn up by the UN's International Law Commission (ILC) as part of its debate on state responsibility. *The CAVV and the AIV consider it desirable - given the growing significance of the international duty to protect and promote human rights - that a separate justification for humanitarian intervention should be worked out as part of the doctrine of state responsibility.*

The CAVV and the AIV are aware that an explicitly recognised justification for humanitarian intervention without a Security Council mandate may be abused by states to further their own political aspirations. One cannot, therefore, do more than generally acknowledge the possible occurrence of situations involving such grave, large-scale violations of human rights that states feel compelled to intervene militarily. The intervening states will then have to account to the UN for their military intervention, for in international law such intervention constitutes an infringement of the international rule of law. In the opinion of the AIV and the CAVV, such an infringement can only be justified if the intervening states can demonstrate that they had to act as they did in order to prevent or oppose a far graver infringement of that selfsame rule of law.

The foregoing implies that, if the permanent members of the Security Council are unable to reach agreement, the maximum degree of legitimacy must be obtained by other means. *The soundest procedure for doing this is that states should first of all attempt to obtain formal Security Council authorisation for the use of force for humanitarian purposes by means of a draft resolution. This should have as detailed terms of reference as possible. Should this attempt to obtain Security Council authorisation fail, the next logical step is to submit the matter to the General Assembly, taking the procedure laid down in the Uniting for Peace resolution as a basis.*

An assessment framework

The involvement of the General Assembly helps to generate maximum legitimacy for humanitarian intervention without Security Council authorisation. However, this procedure will not always be successful. The possibility therefore remains that humanitarian intervention without a Security Council mandate and without General Assembly involvement will again occur in the future. Such intervention may well be justifiable on moral and political grounds, but there is as yet no clear legal basis for it. *Nevertheless, the CAVV and the AIV believe there are sufficient reasons, pending the further development of a justification based on international law, to consider humanitarian intervention admissible in extreme cases and as an 'emergency exit'. The AIV and the CAVV believe that, at a minimum, an assessment framework is necessary in order to evaluate such intervention. Such a framework will clarify the minimum conditions to be satisfied by states. It can also help to structure deliberations within the UN on specific instances of intervention. At the same time, it can provide the UN community of nations with a basis for assessing cases of unauthorised humanitarian intervention that have already taken place and for tolerating them provided that sufficient account has been taken of 'legitimacy considerations'. In the opinion of the CAVV and the AIV, an assessment framework, if strictly observed, can encourage international acceptance of a separate justification for unauthorised humanitarian intervention under international law, in which humanitarian necessity prevails over the law banning the use of force.*

At the same time, the AIV and the CAVV believe the possibility cannot be excluded that the development of the assessment framework described here will also lead to the basic principles and norms that it contains being incorporated into the Security Council's own deliberations. This could certainly help to structure the debate within the Security Council in the run-up to intervention, but cannot guarantee more effective decision-making by the Council, and would be of very little use in cases where, for political reasons, the Council is already unable or unwilling to reach a decision.

The AIV and the CAVV have identified four key questions that need to be answered in connection with the assessment framework proposed here. These questions, which are discussed separately in the report, are as follows:

(1) Which states should be allowed to engage in humanitarian intervention?
(2) When should states be allowed to engage in humanitarian intervention?
(3) What conditions should states satisfy during humanitarian intervention?
(4) When and in what way should states end their humanitarian intervention?

The AIV and the CAVV emphasise that this assessment framework must be considered, in appropriate cases, as a minimum precondition for unauthorised humanitarian intervention.

The Netherlands' policy goals

In his letter requesting this advisory report, the Minister of Foreign Affairs asked the AIV and the CAVV to look both at what was necessary or desirable from a political and moral point of view and at what was possible from the point of view of international law. As already indicated in the report, the CAVV and the AIV first of all consider it desirable to develop a separate justification for humanitarian intervention without Security Council authorisation, and one that enjoys broad international support and clearly reflects the increased international significance of human rights. *In this connection, the CAVV and the AIV suggest that the Netherlands should actively promote the development of such a justification, together with an assessment framework for humanitarian intervention.*

Earlier in this report, the AIV and the CAVV proposed that efforts be made to obtain maximum legitimacy for humanitarian intervention by following a procedure beginning with the submission of a draft resolution to the Security Council. In the event that the permanent members of the Security Council fail to reach agreement, the next logical step is to submit the matter to the General Assembly, taking the Uniting for Peace procedure as a basis. *The AIV and the CAVV believe that the Netherlands can investigate whether, and if so how, this procedure can be shaped so that it is politically acceptable to a large majority of UN Member States and does not slow down or indeed paralyse the UN's decision-making process.*

As regards the development of an assessment framework for humanitarian intervention, the AIV and the CAVV believe that the Netherlands can in principle pursue two strategies:

(1) *First, the CAVV and the AIV consider it important that the Netherlands, together with like-minded countries, should attempt to achieve agreement in Western circles (the European Union, NATO and possibly also the Organisation for Security and Cooperation in Europe) on an assessment framework for their own use, along the lines set out in this report. The resulting criteria, procedural safeguards and substantive considerations relating to humanitarian intervention could be put to use wherever possible in these organisations' own decision-making processes, and in UN debates in which they are involved.*

(2) Second, the Netherlands should, at appropriate moments, encourage debates on humanitarian intervention and the establishment of an assessment framework through the UN, for example in the Security Council and other competent UN forums (the Open-Ended Working Group, the Special Committee on Peacekeeping) or through an informal group of like-minded countries ('Friends of ....'). For the time being, debates on humanitarian intervention cannot be conducted without stirring up memories of Kosovo and the sensibilities of certain influential UN Member States (such as Russia and China) on the subject. In view, among other things, of the political debates and international law complications - also referred to in this report - that followed the NATO intervention, it may also be assumed that, when it comes to armed international intervention, the great majority of UN Member States prefer the unambiguous legal justification and the powerful political basis provided by a Security Council mandate.

As regards the UN discussions on the reform of the Security Council, the CAVV and the AIV emphasise that these are unlikely to result in recommendations that will make the Council more effective. Nevertheless, the two bodies believe that the Netherlands should continue to be involved in these discussions, particularly in view of their relevance to the debate on wider reform of the UN.

Despite the circumspection that this suggests, there is still a great deal that the international community can do in terms of early warning, early action and prevention of humanitarian crises, and the Netherlands can play a role in this connection. The first form of prevention that springs to mind is the further elaboration and specification of Dutch foreign policy objectives in the fields of democratisation, promotion of human rights, good governance, poverty reduction and socioeconomic development. One can also envisage specific forms of international assistance which can help to tackle the problems of weak states, such as assistance in developing state structures, forms of regional decentralisation and a certain degree of cultural autonomy. Support for an independent press and measures to combat media that stir up hatred may also be useful in this connection.

Such aspects lie beyond the scope of this report, but the AIV and the CAVV note that one can scarcely overestimate the importance of an integrated approach to Dutch foreign policy, in which - in the light of, *inter alia*, Article 90 of the Dutch Constitution - the promotion of the international rule of law, human rights policy, development cooperation and security policy are treated as an interrelated whole.

Professor K.C. Wellens
Chairman, Advisory Committee on Issues
of International Public Law

Professor R.F.M. Lubbers
Chairman, Advisory Council on
International Affairs

P.O. Box 20061
2500 EB The Hague

The Hague, 12 October 1999

Dear Professor Wellens and Professor Lubbers,

The ban on the use of force by states outside their territory, as laid down after the Second World War in the Charter of the United Nations, is based on the notion that sovereign states have an individual responsibility to maintain law and order within their own borders. In practice, though, they do not always fulfil this responsibility. The Security Council has therefore sometimes permitted military intervention in the territory of another state, on the basis of a broad interpretation of article 39 of Chapter VII of the Charter, with the objective of ending widespread human suffering.[1] Experience shows, however, that the Security Council is not always able to take effective measures in time. In situations of this kind a country (or a group of countries) can decide to attempt to end such human rights violations either by force or by the threat of force, without the authorisation of the Security Council and without the consent of the country concerned. Such cases can be classified as 'humanitarian intervention' according to the definition given in the advisory report drawn up in 1992 by the Advisory Committee on Issues of International Public Law and the Advisory Committee on Human Rights and Foreign Policy'.[2]

Although humanitarian intervention can be justified on political and moral grounds, it has no clear and generally accepted legal foundation. If the law is not developed on this point, two dangers will arise. First, as long as humanitarian intervention has no clear and generally endorsed legal basis, it can be invoked as a cover for military operations of a different nature. Second, the position of international law may inadvertently be undermined if it does not provide for intervention in cases of flagrant violations of universally accepted human rights. I therefore consider it crucial that the concept of humanitarian intervention be further developed. This means on the one hand drawing

1 Art. 39. 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.'

2 Advisory Committee on Issues of International Public Law and the Advisory Committee on Human Rights and Foreign Policy, advisory report No. 15: 'The use of force for humanitarian purposes - Enforcement action for humanitarian purposes and humanitarian intervention', The Haque, 1992.

up clear guidelines to which humanitarian intervention would have to adhere, and on the other hand establishing as broad a support base as possible for the more precise definition of this concept.

A look will need to be taken at what is necessary or desirable from a political and moral point of view as well as at what is possible from the point of view of international law. Given the interplay of political, moral and legal considerations, I hereby request the Advisory Council on International Affairs (AIV) and the Advisory Committee on Issues of International Public Law (CAVV) to issue a joint report on the question of how the international community's ability to end flagrant violations of human rights in a particular country can be enhanced. The advisory committees might start by listing possible ways of increasing the Security Council's potential for action. This could include looking at the option of amending the right of veto. In addition, I request both committees to consider the question of how the concept of humanitarian intervention can be given clearer shape under international law.

Since I have to publish a policy document on this subject, I would appreciate it if you could submit your report by the end of March 2000.

Yours sincerely,

(Signed)

J.J. van Aartsen
Minister of Foreign Affairs

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Article 7 of the Statute of Rome for an International Criminal Court

Crimes against humanity

1. For the purpose of this Statute, 'crimes against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

a) Murder;

b) extermination;

c) enslavement;

d) deportation or forcible transfer of population;

e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

f) torture;

g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

i) enforced disappearance of persons;

j) the crime of apartheid;

k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2 For the purpose of paragraph 1:

a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

b) 'extermination' includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

c) 'enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

d) ‘deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

e)‘torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

f) ‘forced pregnancy’ means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

g) ‘persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

h) ‘the crime of apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

i) ‘enforced disappearance of persons’ means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.

LIST OF ABBREVIATIONS

ACM	Advisory Committee on Human Rights and Foreign Policy
AIV	Advisory Council on International Affairs
CAVV	Advisory Committee on Issues of Public International Law
ICJ	International Court of Justice
IFOR	Implementation Force
ILC	International Law Commission
NATO	North Atlantic Treaty Organisation
SFOR	Stabilisation Force
UN	United Nations
UNOSOM	United Nations Operation in Somalia
UNPROFOR	United Nations Protection Force

Advisory reports published by the Advisory Council on International Affairs (available in English)

1 AN INCLUSIVE EUROPE, *October 1997*

2 CONVENTIONAL ARMS CONTROL: urgent need, limited opportunities, *April 1998*

3 CAPITAL PUNISHMENT AND HUMAN RIGHTS: recent developments, *April 1998*

4 UNIVERSALITY OF HUMAN RIGHTS AND CULTURAL DIVERSITY, *June 1998*

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