Humanitarian Intervention

Legal and Political Aspects

DANISH INSTITUTE OF INTERNATIONAL AFFAIRS 1999

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Preface

This report was commissioned by the Government on 25 January 1999 from the Danish Institute of International Affairs (DUPI) and was submitted to the Minister for Foreign Affairs.

The Government's mandate to DUPI was contained in a letter from the Minister for Foreign Affairs, Mr. Niels Helveg Petersen, to the Chairman of the Board of DUPI, Professor, Jur.Dr.h.c. Ole Due. The mandate reads as follows:

"On behalf of the Government I request the Danish Institute of International Affairs to prepare a brief report on the political and legal aspects of the possibilities for intervention in situations where states, disregarding provisions of international law, cause conflicts which due to their far-reaching humanitarian consequences affect the international community as a whole.

The brief report should include an elucidation of the balance between state sovereignty and the possibilities for the international community to intervene in situations where massive violations of human rights take place, threatening the lives of a large number of innocent people. In this connection the report should address the question of whether and under what circumstances states, apart from self-defence, have the possibility of resorting to the use of military force in order to prevent an imminent humanitarian catastrophe (humanitarian intervention).

The report should take into account that present day conflicts are usually internal and that interstate conflicts are no longer the rule. Common to both types of conflicts is however, that they have in recent years been the cause of grave humanitarian emergencies for civilian populations.

The report should be ready for publication in the course of autumn 1999."

At its meeting 1 February 1999 the Board decided to accept the Government's request.

According to the mandate, the report focuses on the political and legal aspects of the question of whether and under what circumstances states have the possibility of resorting to humanitarian intervention. Questions concerning conflict prevention and the operational implementation of humanitarian intervention are outside the scope of the report.

The Board wishes to express its gratitude to the following experts with

whom there have been valuable consultations in the working process: Commissioner, Professor, dr.jur. Ole Espersen, Council of the Baltic Sea States; Professor, dr.jur. Peter Germer, Department of Law, University of Aarhus; Associate Professor, dr. jur. Frederik Harhoff, Faculty of Law, University of Copenhagen; Professor, Dr. Robert Jackson, University of British Columbia; Legal Counsellor Birgitte Juul, Judge Advocate General's Office; Assistant Professor Tonny Brems Knudsen, Department of Political Science, University of Aarhus; Professor, Dr. Martti Koskenniemi, The Erik Castren Institute of International Law and Human Rights, Faculty of Law, University of Helsinki; and Associate Professor Lars Adam Rehof, Faculty of Law, University of Copenhagen.

The report was prepared in DUPI's Department of Analysis by Svend Aage Christensen, Director of the Department of Analysis; Frede P. Jensen, Senior Research Fellow, dr.phil., DUPI; Jens Elo Rytter, PhD, LL.M., Faculty of Law, University of Copenhagen, and Kristoffer Vivike, MSc. in European Studies, DUPI. Ole Spiermann, PhD, LL.M. (Cantab.), has commented on the drafts through the process.

Issues concerning humanitarian intervention have been debated at a meeting of the DUPI Council and the report has been discussed at six meetings between the Board of the Institute and the research group. In accordance with the law establishing DUPI the report is submitted on the responsibility of the Board.

The members of the Board are the following: Professor, Jur.Dr.h.c. Ole Due (Chairman); Professor Nikolaj Petersen (Vice-Chairman); Senior Adviser Karsten Ankjær; Senior Research Fellow, dr.phil. Frede P. Jensen; Under-Secretary of State for Defence Mette Kjuel Nielsen; Associate Professor Marianne Rostgaard; Political Director, Ambassador Theis Truelsen; Professor, dr.oecon. Claus Vastrup and Professor, Dr. Ole Wæver.

The report was approved for publication by the Board on 29 October 1999.

Chapter I
Introduction

1. THE POLITICAL AND LEGAL BACKGROUND

1.1. Definition of humanitarian intervention

For the purposes of this report humanitarian intervention is defined as coercive action by states involving the use of armed force in another state without the consent of its government, with or without authorisation from the United Nations Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law.

1.2. Humanitarian intervention in the past

Normally, the birth of the doctrine of humanitarian intervention is associated with natural law and early international law. The "father" of international law Hugo Grotius (1583-1645) aspired to regulate international relations by introducing new political and moral standards, among others provisions concerning respect for sovereignty and contracted agreements. In order to promote international order he further refined the "just war" doctrine stressing that wars were only allowed if based on specific legal reasons. In his opinion a right to revolution existed, in extreme cases of tyranny, for the subjects of a prince. If, in this context, the suppressed subjects asked for support from a foreign power it might rightfully be given. So, his defence of humanitarian intervention was linked to the doctrine of legitimate resistance to repression and was, ultimately, based on the fact that a prohibition on the use of force was non-existing until the 20th century.

Grotius' ideas of humanitarian intervention were later on supported by many other eminent legal scholars. In the 19th century they were reflected in the majority of publications on the subject. Even though during the 19th century the principle of non-intervention gradually gained ground, it is generally acknowledged that, by the end of the 19th century, a majority of legal experts still acknowledged a right of humanitarian intervention.

This point of view was reflected in the state practice of the nineteenth century. In the framework of the balance of power and the European Concert,

a number of interventions/interferences justified on humanitarian grounds took place in the period from 1827 to 1908, cf. Chapter V.

In the twentieth century the doctrine of humanitarian intervention disappeared from state practice and gradually lost ground in international law. After World War I, the legitimate use of force was reduced to cases of self-defence and defence of international peace and security. This was stipulated in the Pact of Paris of 1928 and the UN Charter.

1.3. The legal framework of the UN Charter

From a legal point of view, the UN Charter in 1945 drew a line in the sand concerning a long discussion about the use of force and consequently also about the issue of humanitarian intervention.

The basic rule of international law concerning the prohibition on the threat or use of force in international relations is laid down in Article 2(4) of the UN Charter:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

The UN Charter only provides for two explicit exceptions[1] to the prohibition on the use of force in international relations in Article 2(4):

First, an exception is granted for the use of force in exercising the right of individual or collective self-defence in response to an armed attack against a state (Article 51 of the UN Charter). This provision gives expression to an established principle of customary law. 'Individual self-defence' means the state subject to armed attack defending itself. 'Collective self-defence' means other states helping the state in its defence, either based on an ad hoc request from this state or on the basis of a prior agreement on collective self-defence.

Secondly, the use of force can be mandated by the UN Security Council in case of a threat to or a breach of international peace or an act of aggression (Chapter VII, Articles 39 and 42 of the UN Charter).

1.4. Conditions during the Cold War

During the Cold War the will and the possibilities to intervene collectively for humanitarian purposes were almost non-existent. Nobody wanted to risk a third world war on that account. In addition, the majority of the UN members

considered the notion of humanitarian intervention a relic of colonialism and dissociated themselves vigorously from it. The amount of gross violations of human rights including genocide throughout this period was, however, a strong moral challenge to the international public opinion as well as to governments, which were forced, in most cases, to remain passive witnesses to the violations. The feeling of impotence gave rise to a dispute whether humanitarian intervention might be justified under specific circumstances. This was for instance discussed in the International Law Association in the 1970's.

1.5. The political change of the 1990´s

Although nothing changed in the legal framework concerning the use of force, humanitarian intervention again became an option in the 1990's, when world politics entered a less confrontational period. On several occasions the Security Council could agree to authorise interventions. Without incurring the risk of major war even interventions without authorisation from the Security Council became possible. In the latter cases the problem had been redefined since the Cold War: whether to accept relatively modest adverse effects on the international political and legal order in return for the possibility of saving the concrete victims in a given conflict. In a wider sense, however, this raises the question, whether in the longer term the principles of sovereignty, non-intervention and non-use of force may continue to be challenged without provoking international instability. Among the milestones testifying to this change are the interventions in Northern Iraq, Somalia, Bosnia, Rwanda, Haiti, Yugoslavia/Kosovo and East Timor.[2] Some of them have been authorised by the UN Security Council, others have not.

The mixed backgrounds and results of these interventions have highlighted two problems. The first is how to reconcile existing legal constraints on the use of force in cases where the Security Council fails to act (or fails to act effectively) with the increasing desire to protect civilians from widespread and severe deprivations of human rights. Such deprivations arise from internal conflicts due to civil war or to the persecution of citizens by their governments. The second is, that even in cases where there is a need and a desire to offer such protection there are political and instrumental limits and constraints on the ability of the international community to do so. In a most pressing way, these problems have activated the perennial issue of *order* and *justice* which will be introduced below and dealt with in more detail in the following chapter.

Already from the beginning of the 1990's it was reflected in numerous political statements that these problems had come into focus. In 1991, for instance, then Secretary-General of the United Nations, Javier Perez de Cuellar, stated in his Annual Report, "It is now increasingly felt that the principle of non-interference within the essential domestic jurisdiction of states cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity. The fact that in diverse situations the United Nations has not been able to prevent atrocities cannot be accepted as an argument, legal or moral, against the necessary corrective action, especially when peace is threatened." Such statements continued to be made in the 1990's by high UN officials and prominent international figures.

One of the fundamental questions raised by the experiences of the 1990's with interventions for humanitarian purposes is whether frequent and serious victimisation of civilian populations in intrastate conflicts will continue to occur. If the ethnic cleansings and genocides of the 1990's could be dismissed as erratic outbursts of blind violence rather than being seen as a more or less systemic or inherent feature of the present conditions, then, of course, we could allow ourselves to devote less attention to the question of humanitarian interventionism. The experiences of the 1990's give us certain clues to the answer. Unfortunately, they suggest that the international community will continue to be confronted with such events. The situation is further complicated by the fact that generally, the states where massive violations of human rights take place are at the same time the least susceptible to soft instruments of conflict resolution. These questions will be dealt with in Chapter II.

2. POLITICAL AND LEGAL PERSPECTIVES

2.1. Order and justice

Often, the controversy around a possible humanitarian intervention will express itself in terms of a conflict between concerns for order and justice. What is most important, to preserve stability and law internationally or to act to protect suffering or threatened individuals in a conflict? In concrete situations, order and justice are therefore often perceived as antagonistic concepts. In fact, one of the recurrent conundrums in political theory and international affairs thus concerns the relationship between order and justice.[3]

The relationship is so complex because it is neither a simple opposition, nor a question that can be 'solved' or defined away. A tension remains, even if the

two can often be reconciled. In one respect, order is a precondition for justice, in another justice is a precondition for order, and thirdly, one often has in concrete situations to balance the two against each other and decide how much of one to trade in order to obtain some of the other.

On the one hand it can be argued that order is a prerequisite for justice. Without some degree of political order and authority within states chaos and civil war might be the result. In that case protection of rights of individuals and minorities will be difficult to achieve. Without predictability in the relations between states facilitated by the principle of non-intervention and some degree of co-operation between the great powers, a climate of competition and international instability might ensue. In such an international environment states will tend to be more concerned about their national security and this is likely to constrain the international community's ability to take action in the case of massive violations of individual rights due to fear of further undermining international order. According to this line of reasoning maintenance of order is considered a moral and political imperative because domestic and international stability is a precondition for the pursuit and enforcement of other values such as human rights, minority rights, and democracy – and thereby justice for the greatest number. Such arguments are normally associated with realist thinking according to which efforts to establish and preserve domestic and particularly international order should be the main priority of statesmen.

On the other hand it can be argued that justice is a precondition for order. Without legitimacy based on individual rights, consensus on political rules of the game, and general acceptance of the definition of the community over which the governance is exercised, domestic orders are not only authoritarian and unjust but also fragile and vulnerable to breakdown. If traditional norms of sovereignty and non-intervention are not overruled by the international community when governments violate these principles on a massive scale, neither justice for the greatest number nor long-term domestic and international order will be secured, because oppressed groups and individuals will inevitably revolt against their rulers and internal conflict will spill over into international conflict. In short, domestic and international orders derive their legitimacy and stability from their ability to protect individuals and groups from arbitrary coercion and violence. This line of reasoning is associated with liberal thinking according to which protection of individual rights is not only a valuable goal in itself but also a precondition for long-term domestic and international order.

These two approaches reflect different assumptions about the relationship

between order and justice on the state level and on the international level as well as about the relationship between the two levels. Both approaches acknowledge that the main challenge is to protect the individuals from the extremes of power; either from too little (anarchy) or too much (tyranny) and are thus 'moral' in the sense that they attempt to address the question of how to secure 'justice' for the greatest number. The difference is not necessarily that some value order, and others value justice, but rather that the one side emphasises order as the precondition for justice, while the other stresses justice as the road to long-term order.

Thus, both positions are in principle about reconciling the two aims. However, this happens at a rather abstract and hypothetical level. In a concrete situation, one may often be forced to make trade-offs. At least in the short term, one will have to forego gains in justice (protecting individuals) in order to defend order or to accept a weakening of international order for the purpose of defending human rights.

A specific difficulty of such trade-offs relates to the question whether (and to what degree) one understands the current world order as an inter-state order, i.e. based on states and states' rights. In principle, an alternative order, based on individuals and their rights, can of course be imagined. The present world order has, through a long historical process, come to be based on states who co-operate in developing international law, diplomacy and other fundamental institutions, and increasingly also in extending joint protection directly to individuals.

If an act, motivated by justice, should detract from this state-based order, e.g. by flagrantly violating the principle of state sovereignty in order to save individuals' lives, it might be defended by two different arguments. One argument could be that this is merely an extension of an ongoing trend towards increased protection of individuals on the part of the present system and hence a development of the existing state-based order, not a derogation from it. Another more radical argument could be that this act may be a weakening of this order, but that it points towards another, less state-based, more individual-based humanitarian order. According to this radical perspective, human rights and international humanitarian law are not seen as emerging out of the state-based system, but are rather perceived as the building-blocks of an alternative, emerging, world order based on individuals and their rights.

The problem with this argument is that it has so far – in the absence of any realistic prospect of anything resembling 'world government' – been void of political structures. The existing international political order remains state based, although it has progressed far in the direction of extending direct rights

and thereby international status to individuals. In this latter perspective, the basic pillars of international order remain the states and their mutual co-operation and therefore it is a detraction from order as such, if the existing inter-state order is weakened. Therefore, concrete situations often imply a de facto trade-off between order and justice. One can try to define away the conflict between order and justice by strong assumptions about order leading to justice or justice leading to order. More realistically, however, we should accept that both sides in such debates may be seeking to maximise order as well as justice, but make different political choices when the two conflict.

We will return regularly to these approaches to order and justice and use them to structure the reflections on dilemmas and trade-offs in relation to humanitarian intervention.

2.2. State sovereignty and international protection of the individual

From a legal perspective there is a clear trend towards a changed scope of state sovereignty with regard to the way a state treats individuals and minorities within the state. Since 1945 the principle of international protection of human rights has progressively gained weight at the cost of the classical, highly prohibitive interpretation of state sovereignty. Chapter III takes a closer look at this development.

This development has been brought about, above all, by the adoption of international conventions for the protection of human rights. To the extent that a state has ratified these documents on human rights and humanitarian law, such issues (at least) no longer belong to the exclusive domain of this state. Still, it is a major problem that many states have made reservations to these documents.

The tendency is towards increasingly considering the individual, and not only the state, as a fundamental subject of international relations, and towards regarding the security and basic rights of individuals within the state, and not merely the absence of military conflict between states, as essential to the creation of stability and peace in the world.

State sovereignty is still a cornerstone of the international legal and political order, but to a growing degree the classical perception of sovereignty is challenged by the norm that the legitimacy of the exercise of the rights of sovereignty is dependent on respect for human rights and for the principle of representation. This is not an abrupt change from sovereignty to something else. The principle of sovereignty has throughout its 3-400 years history been continuously re-defined and modified. Although the form has been constant, the content has changed: what are the issues that a state can decide on its own

and what matters do not fall under the jurisdiction of the national sovereign? Especially in the 'OECD world' and most acutely in the EU, this development has been pushed so far that sovereignty is less a formula for fencing off an exclusive area of national control and more a ticket for admission to crucial international fora. (It still makes an enormous difference whether a unit is recognised as a sovereign state or not, and for instance Denmark has rights and influence that richer and more populous Bavaria does not have.) Sovereignty has to be invested into collective processes in order to lead to de facto influence, and this implies that fewer and fewer areas are reserved for exclusive national authority.

Most states, at least at the declaratory level, adhere to the norm that human rights issues no longer belong to the exclusive domain of the state and thus tend to take a positive view on international non-military interference in such matters – not least as concerns gross and massive violations of human rights. However, some states still disagree. Many third world states backed by China continue to argue that the principle of state sovereignty prohibits international interference in human rights issues. Even more divisive, of course, is the question of the modalities of such interference, especially if it takes on the form of armed intervention.

It might be added that in order for a truly humanitarian intervention to take place, considerations of justice are primary in the sense that they determine whether the *necessary* conditions for humanitarian intervention are present. For instance, serious violations of human rights or international humanitarian law are a necessary condition for humanitarian intervention.

Whether the *sufficient* conditions for humanitarian intervention are fulfilled will mainly be determined by considerations of order both at the national and the international level. In other words, it is in the order dimension that we are likely to find the binding constraints concerning humanitarian interventions even when the necessary conditions are fulfilled. If, for instance, the violations take place within the territory of one of the major powers the conditions will almost certainly be considered insufficient, since humanitarian intervention might put the international political order at risk. Problems of this type will be dealt with in Chapters II and VI, where the arguments for and against humanitarian intervention are tabled. They lead directly on to the long-standing discussion about criteria for humanitarian intervention which will also be presented in Chapter VI in connection with the *legal-political* analysis. The term "legal-political" is used repeatedly in the report. It refers to legal policy, which is the field where political questions concerning the law are asked: Does existing law provide solutions to societal problems in accordance

with society's values and aspirations? If not, are there ways to strengthen the existing legal regime? Or should the law be changed? It asks what the law ought to be (*de lege ferenda*) as opposed to what the law is (*de lege lata*).

2.3. International law and the interface between politics and law (de lege lata)

The complexities and dilemmas of the order/justice dimension are further aggravated when combined with the perspective of national and international decision-making. In situations with very serious violations of human rights decision-makers have to weigh the totality of the relevant political, legal, and moral considerations. As all considerations of importance to the situation are involved, this may be called the *general perspective*. The general perspective can and must take into account the whole set of complexities in the order/justice dimension. Besides the earnest of the human rights situation, a politically and legally most delicate matter is involved: possible military intervention in a foreign country. However, the sum of the political, legal, and moral considerations under the general perspective will tend to make the outcome unpredictable. The unpredictability at the level of political decision-making in combination with the many dilemmas in the order/justice dimension, nationally and internationally, make for still more unpredictability. This raises the question of the role of international law and of the relationship between political and legal considerations.

In contrast, the *legal perspective*, of course, has a clear focus on legal considerations and tends to emphasise normativity in the legal sense of the word. Still, as will be shown below, political and moral considerations are not absent in international law. Normally, as a very broad generalisation, the outcome of deliberations in the legal perspective are more predictable than in the general perspective since decisions are made on the basis of fairly unambiguous legal criteria. In the legal perspective it can be difficult to reconcile legal concerns within separate areas, for instance the rule of non-intervention with the rules for the protection of the individual, cf. the remarks on the asymmetry of international law in the following. It is evident that such tensions within the legal perspective may bring it into conflict with the general perspective which tends to emphasise concreteness. (Of course, the general perspective is not alien to normativity either, but in the moral-political sense).

International law is one of the answers to the state of uncertainty in the international system. Other answers to this problem are diplomacy and balance of power. A major task for international law has been to contribute to the protection of the rule of law by laying down rules on the independence and equality of the states and by establishing the framework for co-operation in

different areas. Since the Second World War international law has witnessed a steady expansion across a number of areas. A remarkable extension of its scope has occurred through, for instance, the signing of a number of conventions in the area of human rights which make the individual a subject of international law. This feature shows that international law has its own dynamics transcending the state-to-state logic. More so than balance of power and diplomacy, international law takes care of the interests of the individual and has the potential of overcoming the (as some see it, artificial) separation of the national and international realms.

With this modification, international law can still be regarded as a co-operative venture. States are attracted to international law by the expectation that it will further their interests. The word co-operation points to the main difference between national and international law. In the national legal order the existing rules can be enforced by the courts and the police, and they can be decided by a majority and imposed on a minority. Consequently, there is neither a need of self-help nor of co-operation.

In the realm of international law, the situation is different. Since the mechanisms for enforcement of the law are weaker than in national law, the norms of international law can only survive if, generally, states accept them and co-operate in good faith about actual compliance with them. As a starting point, states are only bound by the treaties they enter into (that is with the exception of customary law which is held to apply to all states). This is central to the very idea of sovereignty: internally sovereignty means that there is a supreme authority and therefore the law is above the subjects, but internationally sovereignty means that no power tops the individual states. Therefore, international law is not 'above' the states, it is 'among' them: they agree to establish rules among themselves. International law thereby does not detract from state sovereignty, it is a way for states to exercise their sovereignty – by deciding to create or adopt an international legal obligation. They limit themselves in order to gain the advantage of other states being constrained and thereby more predictable.

In a comparison between national legal systems and the international legal system, it can be perceived as a deficiency of the international legal order that participation in the judicial system of the International Court of Justice is voluntary and that states are reluctant to accept compulsory jurisdiction of the Court. The possibility of having an international court based on a system of compulsory jurisdiction similar to that known in domestic courts does not appear to be within reach. Not even the limited form of *accepted* compulsory jurisdiction is much in favour of the international community. Only one third

of the United Nations member states have accepted the compulsory jurisdiction of the International Court of Justice. Such a system is often characterised as "consensual jurisdiction". These conditions reflect the reality of international society and the co-operative nature of international law.

In addition, only the UN Security Council has enforcement authority, but merely in the cases mentioned in Chapter VII of the UN Charter (a threat to or a breach of international peace or an act of aggression), and only if none of the five permanent members of the Council use their veto.

In other words, there is an asymmetry between the means of enforcement and the potential for violations of international legal norms. Violators of for instance human rights norms are protected by the high standards of international law concerning state sovereignty and the non-use of force, whereas enforcement action against them is dependent on political organs and conditions and they need not accept compulsory international jurisdiction. However, it is a mistake to focus exclusively on the weaknesses of jurisdiction and enforcement when discussing the functions of international law. (This has been the basis for often denouncing international law as not law properly or not of any major importance). Most rules and obligations in international law are respected by most of the states most of the time – even in the many cases where enforcement is out of the question. Why? Because states generally do not want to be placed in situations where their acts can not be justified legally. International law does not 'run' international affairs; it is not a manual, which dictates foreign policy. Foreign policy decisions are made on all kinds of political considerations, but international law constitutes a limitation in the sense that states will usually do their utmost to find a line of action which can be defended legally. The main form of operation of international law is the demand for justification, which it imposes on the states.

With all its deficiencies, international law contributes to neutralise the element of unpredictability otherwise characteristic for international politics with its base-line of competition and power politics in the dealings of the states with each other. The smaller states, especially, value this aspect, although the weak enforcement mechanisms can make self-help a tempting option. For the small states the focus is on the protection that the law offers, rather than on the constraints it implies. For the major states that have the necessary capabilities, the temptation of self-help is of course greater.

The word predictability tells us that law has an important time dimension to it. Law is presence of the social past. Law is an organising of the social present. Law is a conditioning of the social future. The legal way of constituting society (the *legal* constitution) co-exists with constituting society through ideas (the

ideal constitution) and through the everyday willing and acting of society-members (the *real* constitution). Because law is one of the institutions of international order, estimating the strength and progress of international law is not a question of world politics gradually being judicialised. The yardstick should not be a world where law structures and decides international developments. World politics is and remains fundamentally politics, and international law serves to stabilise and improve the international political system. In the final account, international law will be judged according to how well it performs this function.

Seen from the general perspective of the decision-makers, it is clear that there is more to any decision than settling the legal issue. In a given case the legal analysis may lead to a clear-cut conclusion of the rights and wrongs of a given action and decision-makers may of course act according to the results of the legal analysis. In fact, they do so on many occasions. Yet, by including political and moral considerations, decision-makers may also reach the conclusion that the act is politically and morally justified even if not legal.

2.4. The interface between politics and future law (de lege ferenda)

Such contradictions highlight important questions about legal-political strategies and how to deal with the interface between political and legal arguments. One strategy that leans on the general perspective is to widen the field of law by arguing on political and moral grounds (already in the courtroom, so to speak) and alleging that political and moral justifications may have consequences for the existing or an emerging new law. In European legal tradition such attempts are, generally, not recognised. This strategy is applied, in particular, in the United States where legal tradition implies more political and even law-making functions than in Europe. In addition, the United States generally – like other great powers in history – has a more pragmatic attitude to international law.

The European tradition is rather to accept that law is only part of the world and keep up the relatively clear distinctions between politics and law. By the way, an approach that is predominant within the profession of international lawyers. The consequence of this strategy is to create a space outside the law for transparent political, moral and legal-political considerations. Since the latter tradition avoids the risks of reintroducing the unpredictabilities of the general perspective into existing law (lex lata) and of blurring the distinctions between politics and law, and between current law and future law, the present report will be based on this tradition. From the outset, political and legal questions will therefore be dealt with in relative isolation. Only later on, in

Chapters VI and VII, will political, moral and legal-political perspectives be brought together for a comprehensive assessment.

In the European tradition, the function of legal analysis is to interpret the law on its own premises by considering only purely legal arguments, i.e. to establish at any given time what is the legal status regarding a specific question. This in contrast to the more expansive interpretation of international law which will try to reach a legal judgement on the issue which includes moral and political arguments (e.g. in the form of natural law). Under this more expansive approach to law it beholds the legal expert to pass the more general judgement on how to merge legal, political and moral arguments. Following these approaches there exist legal analyses of humanitarian intervention that arrive at different conclusions. We prefer the former method and thus to end the legal analysis when we have exhausted the question of what is valid law today, and then pass on the task of balancing legal and extra-legal consideration to decision makers and the general public and professional discussion.

The advantage of this approach is that it makes it possible to spell out the legal arguments on their own terms, while at the same time providing an opportunity to stress that a political-moral judgement always has to be made about what to do, given the *legal* advice. Whether to follow it or not. This is first of all a *political* question in a concrete situation, whereas it is a *legal-political* issue whether to aim at changing the law or accepting it as it is. These distinctions seem useful as a method of establishing the basic premises for a discussion of legal-political alternatives and strategies towards the end of the report.

2.5. Legality and legitimacy of intervention

At the root of considerations concerning humanitarian intervention is the question of how to reconcile in the most constructive way the strained relationship between the 1) the non-intervention norm and notably the non-use of force and 2) the international prevention of gross and systematic human rights violations. As a background to the discussion of this question it may prove useful to discuss briefly the dynamics of international law and especially the relations between political, moral and legal considerations and justifications.

The question of the *legality* of humanitarian intervention on the part of states or international organisations is determined by the norms of international law – treaty law as well as customary law. From a purely legal perspective any specific conduct or action will at any given time in principle be either legal or

illegal though, admittedly, legal experts disagree among themselves on the limits of the law. The notion of legality – is the intervention lawful? – is a purely legal concept. A distinction can be made between the legality and the legitimacy respectively of humanitarian intervention.

The *legitimacy* of a given action may be determined mainly on political or moral grounds, but legal considerations could also be involved. The notion of legitimacy – is the intervention justifiable? – is a multidisciplinary concept referring to moral-philosophical, political as well as general legal principles.[4] Among the criteria applied would be for instance evaluations of the overall respectability and legitimacy of the countries involved in a given action, the procedures and the modalities of the action, whether the action enjoys the explicit or implicit support of a considerable number of countries and international organisations, whether the action is deemed necessary and proportionate etc. In other words, while legality is determined by the norms of international law, legitimacy is an issue of debate in legal doctrine (that is in the professional discussion among legal scholars) and in the general public discourse. Whether or not an action is considered legitimate can have profound political consequences. However, legitimacy cannot answer the question of the legality of an action. On the other hand, it may give some idea about the desirability and possibility of future changes of international law (*de lege ferenda*).

The concept of legitimacy is less precise than legality. It will often be contested, and critics will claim that a statement about the legitimacy of an act is ultimately nothing but an individual moral and political preference. However, a statement about legitimacy is a judgement about the general evaluation of an act and therefore not private. On the other hand, it is not a formal concept because there is no undisputed authority mandated to evaluate legitimacy and no agreed procedure for doing this. It remains a political evaluation about others' political evaluation. Therefore, it is never possible to say definitively that an act *is* legitimate, only that e.g. "it is widely considered legitimate". Legitimacy is always a matter of degree and assessment, in contrast to legality which is either/or and often according to designated competencies regarding interpretation. Still, the softer concept of legitimacy is unavoidable when it comes to legal-political considerations and reflections about how to mediate political and legal concerns.

As noted above, the general perspective may occasionally try to widen the legal sphere so as to encompass moral-philosophical and political principles. Since it goes beyond purely legal justifications, this can be characterised as a legal-political endeavour. If successful, such an attempt will change the

boundaries between legality and legitimacy. Such attempts could either be accepted or rejected by the states (the international community) and ultimately by the International Court of Justice. If they are accepted new legal norms have been created. This is how customary international law evolves.

However, legal theory and practice knows of two other ways out of such situations. It must be stressed that these exits are heavily guarded, so that passage is dependent on strong arguments. Both methods makes it possible to preserve the hard core of the law, while still making concessions to "the real world" of the general perspective.

The first method consists of using the concept of "extenuating circumstances". This concept may provide some political legitimacy but is not a legal defence for acts not in conformity with international law (e.g. Corfu Channel case, 1949). The breach of international law is in other words considered legally wrongful, but to some degree understandable or excusable.

The second method can be associated with the logic of different kinds of *jus necessitatis* dealing with issues such as state necessity, distress, *force majeur*, etc. These are legal concepts which preclude the wrongfulness of an act although it does not conform with the general norms of international law. The concrete act is in other words not a breach of international law. These concepts are only applicable in concrete cases and do not challenge the general norm.

Thus, though the distinction between legal and illegal is clear in principle, there is still some room for nuances and exceptions in international law. Legitimacy is in other words a concept with several meanings. It can be a purely moral-political concept, a legal-political concept and even a legal concept, although applied sparingly in the latter context in order not to dilute the rules of law. How these labels apply to the use of force and thus to humanitarian intervention without authorisation from the UN Security Council will be discussed in Chapters V, VI and VII.

2.6. Rules and state practice – the dynamics of international law

International law is a rather conservative, but not static body of norms. It develops through the adoption of new conventions or amendment of existing conventions as well as through the practice of states. The first method is dominant today, whereas state practice was the most important source of development in the past.

Obviously the most direct and reliable way to develop international law is by formal adoption of new norms, e.g. international conventions, or by amending the UN Charter. Since this is not an easy road as regards humanitarian intervention, the dynamics of state practice comes into focus.

State practice may lead to the development of new international law amending or derogating from existing norms, provided this practice is supported by a vast majority of states, is fairly consistent and evidences an opinion of states that they were legally entitled or obliged to pursue this practice (*opinio juris sive necessitatis*).

Whether such a development through state practice takes place, depends on the practice of states when justifying their acts. A claim to legitimacy may here take on either a legal or a purely political-moral form. A legal justification asserting a new (emerging) right of intervention may, if supported by a vast majority of other states, lead to the creation of corresponding new legal norms, whereas a purely political-moral justification, as a point of departure, leaves the existing norms unchallenged.

International case law provides an important comment to the problem of justification. The International Court of Justice in the Nicaragua Case (Nicaragua vs. The United States, 1986) made a clear distinction between legal and political justifications of intervention.

"The significance for the Court of cases of State conduct *prima facie* inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law."

On the contrary, referring to the justifications of the United States, the Court noted that these were statements of international policy and not an assertion of rules of existing international law or of a new right of intervention.[5]

Paradoxically as it may sound, breach of existing legal norms may in other words serve as confirmation of these very norms, especially if the intervening states abstain from the use of legal justifications for their intervention and argue their case only on political and moral grounds. States have a choice as to the justifications they use and can thereby influence the dynamics of international law. The mechanism mentioned here can thus serve as a basis for fundamentally opposed legal-political strategies: either to preserve the law as it is or to challenge it and possibly develop it in new directions.

2.7. New rules or acting ad hoc?

Whereas a strong case for the *legitimacy* of humanitarian intervention without Security Council authorisation in extreme cases of human rights violations can be made, the current *legality* of such humanitarian intervention is highly disputed. In the ongoing discussion about humanitarian intervention some authors have proposed to create new rules or to structure existing rules in a

more coherent way. Others are reluctant to touch the existing rules and would prefer to preserve them as they are.

As already noted, existing norms of the UN Charter etc. may be formally amended; and even in the absence of formal amendment, state practice may lead to the creation of a right of intervention, depending on whether declarations on and acts of humanitarian intervention are justified on legal grounds or on political and moral grounds only.

On the basis of these considerations and by observing the current global discourse and state practice four legal-political strategies concerning the position of humanitarian intervention in international law can be identified. The strategies are presented in ascending order according to the extent to which they deviate from existing legal norms and will be analysed in detail later on:

1. The status quo strategy: exclusive reliance on the Security Council. The status quo legal-political strategy rules out an option for humanitarian intervention without authorisation from the Security Council.

2. The ad hoc strategy: humanitarian intervention as an "emergency exit" from international law. This strategy keeps open the option of humanitarian intervention in extreme cases if the Security Council is blocked. The ad hoc legal-political strategy does not, however, seek to challenge the norms of international law or the authority of the UN Security Council.

3. The exception strategy: establishing a subsidiary right of humanitarian intervention. This legal-political strategy seeks to establish through treaty amendment or state practice a subsidiary right of humanitarian intervention outside the auspices of the Security Council. It challenges the role of the Security Council as the sole centre for authoritative decision-making on humanitarian intervention.

4. The general right strategy: establishing a general right of humanitarian intervention: The most far-reaching legal-political strategy aims at establishing a general right of humanitarian intervention. To an even higher degree than strategy 3, it would challenge the role of the Security Council as the sole centre for authoritative decision-making on humanitarian intervention.

The characteristics, advantages, disadvantages, feasibility and dynamics of these legal-political strategies will be dealt with especially in Chapters VI and VII. These issues will be addressed from the perspective of the choices faced in difficult political situations.

As discussed above, the method applied in this report permits a relatively clear distinction between political and legal arguments. The analysis has four steps.

1st step, Chapter II: A discussion of the broad *political* background taking as its point of departure the order/justice dimension. This includes a discussion of the character of the new states and the new intrastate type of warfare. In addition the political, moral and instrumental barriers to humanitarian intervention before and after the end of the Cold War are dealt with.

2nd step, Chapters III-V: A discussion of the *legal* status of humanitarian intervention. First an overview of the issue of intervention not involving the use of force is presented (Chapter III). Subsequently humanitarian intervention *with* authorisation from the UN Security Council is dealt with (Chapter IV). Finally, questions pertaining to humanitarian intervention *without* authorisation from the UN Security Council are analysed (Chapter V).

3rd step, Chapter VI: In this chapter the political, moral and legal considerations of the preceding chapters are brought together. The pros and cons of humanitarian intervention are discussed. This serves as a starting point for the *legal-political* discussion. The first part of this discussion concerns the issue of criteria for legitimate humanitarian intervention. What is their function? What is their content? What are the prospects for international formalisation of criteria? The second part of the discussion deals with the four legal-political strategies that have just been outlined.

4th step, Chapter VII: The concluding chapter is reserved exclusively for a final assessment of the issue of legal-political strategies.

Chapter II
The political and moral aspects of humanitarian intervention

The aim of this chapter is to shed light on some of the political and moral aspects and dilemmas related to humanitarian intervention. This will be done in three steps.

First, the nature of the 'demand' for humanitarian intervention, that is, the type of states and the sort of warfare which have often has resulted in genocide and massive human rights violations, will be explored. It will be argued that the dilemmas pertaining to humanitarian intervention cannot be grasped without taking the character of the new states and the new type of warfare into consideration. It should be noted, though, that the demand for humanitarian intervention has arisen in other circumstances as well.

Second, factors affecting the response of the international community to humanitarian crises will be analysed. Attention will be directed at the political, moral, and instrumental motivations for and barriers to humanitarian intervention before and after the end of the Cold War. It will be argued that the nature of these motivations and barriers has changed significantly after 1989.

Third, taking the post-Cold War context into consideration, the political and moral dilemmas involved when deciding whether to conduct a humanitarian intervention will be explored. It will be argued that these dilemmas arise from the complicated balance between order and justice on the domestic level within most new states and between states on the international level.

1. THE CHALLENGE – WEAK STATES AND WARS OF THE THIRD KIND

During the last 50 years two major developments with significant consequences for the political, moral, and instrumental aspects of humanitarian intervention have taken place. The process of decolonisation in the 1950s and 1960s and the dissolution of Yugoslavia and the Soviet Union in the early 1990s have resulted in a succession of new states born in an international context significantly different from that of previous periods. Many of these new states are weak – not in the military sense – but in terms of internal legitimacy,

efficacy, and stability. In parallel with this development we have witnessed a new sort of warfare. The traditional Clausewitzian conception of war as organised combat between military forces of two or more sovereign states has become increasingly divorced from the characteristics of most armed conflicts since 1945, of which more than 75 percent were intra-state rather than inter-state wars.[1]

To a large degree, the creation of new and weak states and the change in the overall pattern of warfare are interrelated phenomena, if only because the bulk of the armed conflicts has taken place in these states. More often than not, the immediate source of the intra-state conflict has been the issue of statehood and the relation of the new states to their constituent nations, ethnic groups, and religious communities. Two factors help explain this pattern.

First, when the international community granted recognition to former colonial units the, traditional requirement of effective government on the territory played only a minor role. In several cases, the governments of the new states did not even have physical control over their territory. In earlier periods, the procedure was to recognise new states on the basis of de facto control over a territory. For that reason, secessionists were eventually recognised if they had permanent control over a given territory. In the 19th and early 20th Century, non-European states were in addition confronted with the so-called 'standard of civilisation' criteria which meant that states, in order to be recognised, had to display effective European style governance. After 1945, this procedure became morally and politically impossible, and as soon as a colony broke away from its colonial power, the new governing elite would be recognised within the colonial borders irrespective of its degree of control of this territory not to speak of its likelihood of maintaining this control. Moreover, the desire of the international community not to change the borders of the colonial territories when offering international recognition has resulted in the creation of new sovereign states containing disparate nations, ethnic groups, and religious communities which do not necessarily accept the legitimacy of the territorial status quo and the authority of the regime. In spite of different international circumstances this pattern has – to some degree – also characterised the international community's recognition of the national republics of the former Yugoslavia and the Soviet Union after the Cold War.

Second, especially after the Cold War, the scope of sovereignty has gradually been reduced due to international norms and requirements of democracy, human rights, and minority rights. Thereby the freedom of governments to do what they want behind their shield of sovereignty has been called into question. Particularly in Europe, this has reduced the degree to which rulers can

use coercion to consolidate political order on their territory without some form of international reaction. At the same time, failed states in which political and social order has collapsed are only in few cases 'allowed' to disappear as judicial entities because of the international community's reluctance to accept territorial conquest and formal hierarchies such as trusteeships and protectorates.

Even though many of the states created after 1945 have managed to thrive and develop political structures that could be described as democratic, these states have, in a number of cases, been characterised by low levels of socio-political cohesion and legitimacy and weak government structures. For some states, weakness is a product of nothing more than exploitation, large-scale corruption, and kleptocratic governance by predatory rulers with little or no interest in the plights of the population on their territory. In other cases, weakness derives from a situation in which substantial segments of the population do not accord the government loyalty and do not accept the legitimacy of the political centre and of the territorial status quo. This may derive from a variety of sources, among which are extended dominance of one national, ethnic, or religious group over others, inequitable allocation of resources, and forced assimilation. Such practices often emanate from the efforts of the post-colonial and post-communist political elites to bolster their power by playing the nationalist or religious cards.

In this context, attempts by even well-intentioned governments to enhance socio-political cohesion and domestic legitimacy through democracy, human rights, and political autonomy for minority groups have been confronted with profound difficulties. If large parts of the population are openly in support of political or military activities aimed at undermining the regime or the territorial integrity of the state, not only authoritarian rulers but also more benevolent weak state regimes are often reluctant to introduce free and fair elections and political rights. Consequently, while political legitimacy may be a precondition for the long-term socio-political cohesion of weak states, it is often difficult to grant political rights in the short term in the absence of political order understood as a general acceptance of the authority of the political centre and of the borders of the state.

In a number of cases it has not been possible to handle this complicated balancing act and the result has been armed conflict between the government and local power centres, and – in the worst cases – a complete breakdown of political and social order. Such intra-state conflicts rooted in identity politics – or 'wars of the third kind' as they have been termed – typically display the following characteristics:

- Armed combat is fought against the authorities of the state or by the government authorities against ethnic or religious groups residing on the territory of that state. The immediate aims of the warring parties are to promote a particular definition of political community or to change the borders of the state.
- Military campaigns are fought between loosely knit groups of regulars, irregulars, and locally based warlords under little or no central authority rather than between highly organised armed forces based on a strict command hierarchy. In most cases, there are few decisive battles and no clear-cut outcomes. Due to the lack of any substantial settlements the armed conflicts often last for decades.
- The clear distinction between the state, the armed forces, and the civilian population dissolves because the main strength of the warring parties lies in support from the civilian population. Thereby, civilians become targets of eviction, massacres, and ethnic cleansing because everyone is labelled a combatant or collaborator merely by virtue of their religious or ethnic identity.
- Since the distinction between combatant and civilian is blurred or indistinct, the brunt of suffering is borne by civilians. Total casualty figures of internal wars since 1945 show that approximately 90 percent of the casualties were civilians. Especially in sub-Saharan Africa the civilian casualties have been appalling. The five intra-state wars in Angola, Ethiopia, Mozambique, Sierra Leone, and the Sudan have so far resulted in between 100.000 deaths in Angola and reportedly more than one million deaths in the Sudan.

Hence, in contrast to the limited and institutionalised wars between sovereign states that characterised Europe after the Peace of Westphalia in 1648 and the total wars between national mass armies after the French Revolution in 1792, warfare after 1945 has been a phenomenon taking place within states and civilian populations have borne the brunt of the suffering.[2]

The combined effect of the proliferation of weak states sustained by international norms upholding their judicial sovereignty even when they do not perform the tasks of statehood and the parallel change in the nature of warfare has presented the international community with difficult challenges.

First, the complex balancing act involved in weak state regimes' attempts to consolidate political order by persuasion or coercion makes progression toward stronger states difficult to achieve. Yet the reluctance of the international community to create more turbulence and disorder by accepting secessionism and outside military conquest implies that even failed states will continue to

persist as judicial entities. Wars of the third kind and the concomitant humanitarian disasters are therefore likely to remain a recurrent phenomenon.

Second, the relationship between order and justice in weak states, let alone in collapsing states, is immensely complicated. Especially in conflicts related to secessionism, it is often impossible to find the hypothetical point of compromise between those intent on maintaining the territorial integrity of the state and those bent on secession. How can communities within states which have experienced exclusion, systematic terror, and genocide be persuaded suddenly to stop fearing those who have excluded or murdered them? How can governments struggling with secessionist movements be persuaded to put down the arms and grant substantial political autonomy to the recalcitrant communities? These dilemmas make negotiated 'settlements' hard to achieve and explain why outside diplomatic intervention and brokering more often than not proves to be futile.

Third, economic sanctions have limited value as a means of coercing governments and non-state actors to abstain from genocide or gross human rights violations. In authoritarian or predatory states, the conventional 'civilian pain leads to political gain' assumption has little applicability because the civilian populations who bear the brunt of the sanctions have limited or no power to influence the policy of the government. Particularly comprehensive sanctions, therefore, impose extensive suffering on ordinary people, while leaving the regimes they target relatively unscathed. As far as failed states that have disintegrated into civil war are concerned, political and military power is often distributed between rival warlords and warring parties. In such cases, comprehensive or smart sanctions are difficult to impose and often do not make sense because there is no government worth its name to target.

Fourth, the lack of efficiency of diplomatic mediation and economic sanctions in wars of the third kind often makes military intervention necessary if the concomitant humanitarian disasters are to be addressed. Yet lack of clear distinction between combatants and civilians and armed combat conducted by irregulars without strict command hierarchies makes military intervention for even strictly humanitarian purposes dangerous and difficult to facilitate. Furthermore, military intervention designed so as to minimise risk to the military personnel of intervening powers can be hard to conduct effectively without inflicting damage on civilians.

2. HUMANITARIAN INTERVENTION DURING THE COLD WAR

With the establishment of the UN Charter, the responsibility for the maintenance of international peace and security was vested in the Security Council. Moreover, the great powers equipped themselves with a right of veto, an act which reflected the realisation that use of force to secure international peace against the will of one of the permanent members of the Security Council would be destabilising and might undermine the international order. At the same time the UN Charter and subsequent conventions set out as a fundamental purpose the promotion of universal observance of human rights, prevention of genocide, and protection of civilian victims of war. The UN Charter reflects the idea that maintenance of order and pursuit of justice can be reconciled on the domestic level within states as well as on the global level.

However, if the armed combat is fought between government forces and loosely organised irregulars and takes place within the borders of a state, how does one define the "threat to peace", "breach of the peace", or "act of aggression" that must exist before the Security Council can take action? How can principles of protection of human rights and civilian victims of warfare be reconciled with principles prohibiting intervention in the domestic jurisdiction of a sovereign state? What should the international community do if the Security Council can not agree to take action in the face of genocide and gross and systematic violations of human rights? These moral and political dilemmas arising from the new sort of intra-state warfare were not anticipated by the creators of the UN Charter and the UN security system and represent a profound moral and political challenge.

Shortly after the UN Charter had been signed, however, the ideological competition and global confrontation between the two superpowers eroded any possibility of a reconciliation of order and justice as envisioned in the UN security system. Similarly, the Cold War stalemate made reflections about the appropriateness of the UN Charter in the face of wars of the third kind redundant for all practical intents and purposes. The paralysis of the Security Council from the end of the 1940s lameducked the UN security system and left little room for humanitarian intervention mandated by the Security Council. Moreover, none of the superpowers were willing to upset the global political order by intervening militarily in the sphere of influence of the other part without UN authorisation for the sake of human rights protection and genocide prevention. Considerations of order prevailed over the pursuit of justice because the perceived stakes were too high: the fear of nuclear Armageddon had sobering effects.

Furthermore, universal conventions on human rights and genocide prevention notwithstanding, the concept of justice was in itself subject to a contest that contributed to the absence of humanitarian intervention. The contest took place not only between East and West but also between North and South. The latter was closely related to decolonisation and the state formation process in the Third World. The new post-colonial states – often 'possessed' by rulers engaged in various mixtures of state-building by persuasion and coercion – proved to be strong supporters of Westphalian norms of sovereignty and the concomitant principle of non-intervention. For that reason, the prevailing attitude in the General Assembly – where the post-colonial states obtained the voting majority in the 1960s – was decidedly against interventions in internal conflicts. Civil wars and internal troubles were to be regarded as domestic matters of no relevance to the UN, and the General Assembly took the position that what constituted a "threat to the peace" should be interpreted restrictively. For most third world governments the idea of outside intervention in domestic affairs without the consent of the government in question was regarded as an expression of neo-colonial thinking. This strong rethoric of anti-colonialism in the General Assembly helps explain why it was not politically possibly to designate human rights violations and genocide in black sub-Saharan Africa as a threat to international peace. And it explains why racist practices in Southern Rhodesia and South Africa could be defined as a threat to international peace against the will of several Western great powers.

As a consequence of the high priority given to global order maintenance and the contested nature of justice, the world witnessed – with depressing regularity – massive violations of human rights and genocide without any substantial reaction from the international community taking place. To mention only the most conspicuous examples: Tibet (1950's), East Pakistan (1971), Biafra (1967-70), Sudan (1956-72 and again from 1983), East Timor (1965 and again from 1975), Uganda (1971-79), Cambodia (1975-79), and Iraq (1980's).

The almost complete absence of humanitarian interventions during the Cold War was therefore not due to any lack of human suffering in civil wars around the world at that time. It was rather that political and – to some degree – moral considerations precluded humanitarian intervention as a course of action for the international community and the UN Security Council to contemplate or pursue. As a result, the discrepancy between individual rights regimes and international enforcement of these regimes in the case of massive human rights violations in civil wars and authoritarian states was striking.

3. THE PROBLEM OF HUMANITARIAN INTERVENTION AFTER THE COLD WAR

Humanitarian intervention by the international community became more politically feasible after 1989. The ending of the Cold War changed the prevalent relationship between the US and the Soviet Union/Russia into one of co-operation or at least non-competition on many issues where previously such action had been precluded by political, moral, and military rivalry. China proved more co-operative as well.

The more friendly relationship between the great powers also spelled an end to the proxy wars and competitive support for third world regimes that in some cases might have intensified civil wars but in general had worked to prop up and insulate authoritarian regimes in weak states against internal discontent. The ending of the Cold War, therefore, meant that weak state regimes became more vulnerable to internal strife and centrifugal forces. In some cases the result has been that weak states have disintegrated into failed states torn by armed combat between government forces and local power centres.

At the same time, norms pertaining to democratisation and protection of individual rights have increasingly achieved the status of universal principles that governments must observe if they wish to be eligible for development aid and support from international financial institutions. Moreover, the reach of global news networks has expanded considerably during the last decade and made it more difficult to commit flagrant violations of individual rights without triggering some form of worldwide media reaction.

For these reasons, a distinct feature of world politics after 1989 has been a considerable increase in international engagement in armed conflicts and humanitarian crises. Among other indications, that was evident from the considerable growth of Security Council Resolutions and deployments of UN peacekeepers around the world immediately after the end of the Cold War. In 1992 alone, there was an almost five-fold increase in the deployment of UN-peacekeepers from 11,000 at the start of the year to 52,000 at the end. Blue helmets were dispatched to Iraq and Kuwait, El Salvador, Haiti, Western Sahara, Angola, Somalia, Rwanda, Mozambique, Cambodia, Croatia, Macedonia, and Bosnia.

In spite of more permissive global circumstances the effectiveness of the UN security system in the face of gross and systematic violations of individual rights in wars of the third kind has been limited on several occasions. Disagreements among the permanent members of the Security Council on the Kosovo question precluded a UN mandate for NATO's humanitarian intervention.

Differences within the Council reflected the lack of consensus in the wider international community over how to achieve a proper balance between sovereignty and human rights. Failure to intervene in the face of humanitarian disasters, however, has also been driven by a general disinclination of Security Council members to embark upon ventures that appear unclear and risk becoming so lengthy and costly in terms of human life and money that they are unlikely to find domestic political support. Such considerations appeared to prevail when the Security Council initially hesitated to act in the face of an unfolding genocide in Rwanda.

Consequently, recent failures of the UN system to handle the humanitarian disasters involved in wars of the third kind have different explanations that are rooted in more than disagreement among the permanent members of the Security Council. In the following some of these explanations are put forward.

3.1. The dynamic of escalation

As interventions in Somalia, Rwanda, Bosnia, Kosovo, and East Timor have illustrated, the protracted nature of wars of the third kind tends to produce situations in which employment of instruments like diplomatic mediation and peacekeeping escalates into peace enforcement operations. More often than not, it is difficult to preserve the credibility of the international community's engagement in addressing humanitarian disasters without resorting to military enforcement activities because half-hearted and timorous intervention achieves little. Due to this escalation logic, the basic choice in many cases is one between either strict non-involvement or comprehensive military intervention. Yet a foreign policy course of hard-headed inaction is difficult to maintain in democracies when a humanitarian crisis has reached the political agenda and triggered demands for 'doing something'.

3.2. The lack of willingness to take casualties

Demands for military enforcement action in humanitarian emergencies have on several occasions been at odds with the general unwillingness of intervening powers to accept risk to the lives of their soldiers. This unwillingness to take casualties is rooted in the problem of achieving public acceptance for a national deployment in military operations not directly related to traditional notions of national security. It has therefore been an implicit requirement that casualties to the deployed own troops must be minimal or, preferably, zero. That trend became particularly evident when the US withdrew its soldiers from the UN mandated operation in Somalia when the circumstances changed and the military risks increased. The reluctance to take

risks for humanitarian values also contributed to the initial unwillingness of several leading NATO powers to intervene in Kosovo with ground troops. In short, countries that champion humanitarian values are at the same time, and for understandable reasons, reluctant to risk the lives of their soldiers to defend human rights, even when the humanitarian disaster takes place in geographic proximity.

3.3. Weak regional capabilities and security organisations

For the reasons stated above the Western powers have been reluctant to conduct humanitarian interventions in complex civil wars. This reluctance tends to increase if the crises take place in geographic areas with little strategic value and are unable to attract persistent media attention. While concerns about destabilisation wane with distance, geographical proximity to intra-state wars increases vulnerability to regional spill-over effects. For this reason, it is often easier for governments geographically close to a conflict to commit the political capital, personnel, and money necessary for military interventions. The current Australian-led coalition of the willing in East Timor is a case in point.

But most regions do not have sufficient capabilities and security organisations with the capacity to carry out major peacekeeping or peace enforcement operations. The ability of OAU to alleviate crisis in Somalia and Rwanda was limited as was the role of ASEAN and APEC in the East Timor crisis. Even in Europe the regional security organisations and political and military capabilities have been unable to handle the Balkan crises without active US involvement on the ground. Currently, only NATO can call on any significant political and military resources.

Moreover, regions are very uneven when it comes to the maturity of interstate relations. In regions characterised by weak states, wars of the third kind, and lack of shared norms and values, high levels of mutual suspicion and uncertainty limit the credibility of regional organisations. Co-operation between the UN and the Russian dominated CIS is a case in point. While CIS forces in Georgia and elsewhere have cast their role as peacekeeping, they were seen as anything but impartial by the Georgian government and by many at the UN. Similar problems have characterised peacekeeping missions conducted by ECOWAS, and other sub-regional and regional organisations. Thus, while states closest to a conflict might be most motivated to intervene, they are also often too involved to be expected to perform the task in an acceptable way. These factors have inhibited the ability of the international community to respond to genocide and humanitarian disasters with credible diplomatic instruments and efficient and sustainable military force.

3.4. Lack of consensus on military intervention and the scope of sovereignty

The effectiveness of the international community has also been constrained by the absence of substantial agreement within the Security Council and among the broader UN membership about what constitutes a threat to international peace and security and to what degree the principle of non-intervention in the domestic jurisdiction of a sovereign state can be overruled in the case of gross human rights violations and genocide.

Western governments have, with increasing firmness, taken the position that traditional notions of national sovereignty should be set aside in cases of massive violations of human rights and genocide. Rights of individuals and groups can override the principle of sovereignty. Even though none of the western powers are keen to promote a complete abandonment of the principle of non-intervention, they maintain that acts of genocide and flagrant violations of individual rights can never be purely an internal matter. This judgement is underlined by the fact that government oppression and civil war often produce international problems due to massive flows of refugees. For these reasons, Western governments have been strong supporters of a broad interpretation of what constitutes a threat to international peace.

China and Russia have been sensitive about such issues due to their concerns about secessionist groups within their borders and – at least as far as China is concerned – a general disinclination to accept demands for human rights. For these reasons, they appear to be reluctant to accept measures that override the principle of non-intervention in the internal affairs of a sovereign state.

As far as the Third World governments are concerned, there exists a widespread fear that humanitarian intervention could be used as a pretext for military intervention of strong powers in the affairs of weak states. This fear is linked with memories of colonialism but also reflects the sensitive internal balance in many Third World countries with large ethnic or religious minorities who often harbour dissatisfaction towards the central government. Furthermore, the selective nature of humanitarian interventions, even among the many cases in the Third World that could qualify for them, has raised doubts about the real motives for such interventions. For these reasons, traditional notions of sovereignty are regarded as a defence against the dynamics of an unequal world.

In sum, after the Cold War, more permissive global circumstances have allowed a closer correspondence between universal humanitarian regimes and the enforcement of such regimes in cases of genocide and massive breaches of humanitarian law. The discrepancy between words and deed has been reduced. At the same time, because of the combination of escalation dynamics,

unwillingness to take casualties, weak regional security capabilities, and disagreements among the permanent Security Council members and the wider UN membership, the result has often been belated or insufficient enforcement of declared principles as well as enforcement actions without clear UN mandates. Taking the identified constraints into consideration, what are the political and moral dilemmas of humanitarian intervention?

4. COPING WITH THE CONSTRAINTS PERTAINING TO HUMANITARIAN INTERVENTION

Humanitarian intervention inescapably involves moral and political questions as well as instrumental questions. Unfortunately, it is not possible to put forward any principled and general blueprint for how to cope with the moral and political dilemmas of humanitarian intervention and the underlying balancing act between order and justice. One way forward, however, is to pinpoint the discussions on the political and moral aspects of humanitarian intervention that have unfolded among scholars, commentators, and practitioners within the field. While most critics of humanitarian intervention implicitly or explicitly base their argument on the assumption that justice for the greatest number requires order, proponents of humanitarian intervention tend to argue that order requires justice. Critics and proponents of humanitarian intervention therefore base their arguments on conflicting assumptions about the relationship between order and justice. In the following some of these competing discourses on key dimensions of humanitarian intervention are put forward.

4.1. The status of the UN Security Council

Critics of humanitarian intervention without Security Council authorisation maintain that it is a mistake to violate the principle of non-intervention without first securing a mandate from the Security Council. To bypass the Security Council in order to avoid a veto would be to violate the constitution of international society at its most important point. According to this discourse, the great power veto is a legal recognition that armed intervention by the international community must rest on a great power consensus. Otherwise, humanitarian interventions undermine international order. Endangering the principle that rules out use of force for purposes other than self-defence might produce more unpredictability and a higher level of tension in international affairs.

Proponents of humanitarian intervention conducted without Security Council mandates in extreme cases maintain that the UN security system is of little value if it precludes action in the face of massive violations of human rights and genocide. The existence of an automatic and absolute coupling of humanitarian intervention to authorisation by the Security Council could be misused, both by calculating lawbreakers and by members of the Security Council and lead to paralysis of the UN security system. If a lawbreaker had allies on the Security Council, he could safely expect the Council to be unable to reach agreement on vigorous and timely intervention against his norm violation. Proponents of this line of thinking emphasise that some of those who maintain that the UN has primary responsibility for the maintenance of international peace and security and oppose any use of force not authorised by the Security Council do so precisely in order to preclude enforcement of individual rights at the expense of sovereignty. The implications of insisting on UN mandates could therefore very well be a significant reduction of the international community's ability to enforce individual rights regimes and thereby of the general deterrence effect of the UN security system.

4.2. The relationship between the great powers

Critics of humanitarian intervention without consent of all the great powers have invoked the closely related language of prudence and international order. Proponents of this line of thinking have argued that conducting a humanitarian intervention against the will of one or more great powers would be to gamble with international order. Putting the relationship between the great powers at risk could produce consequences for the whole international system far worse than a humanitarian disaster in a single state. The assumption behind this line of reasoning is that dividing the great powers, or even risking that division, is the most dangerous policy imaginable. When the great powers were divided in the Cold War period, the greatest degree of international insecurity and human suffering occurred. The premise of this argument is an ethic of responsibility not to split the great powers into antagonistic camps if it can be avoided.

Proponents hold that appeasing some of the great powers' concern about the decreasing scope of sovereignty would preclude the progressive development of human rights, minority rights, and humanitarian law and would, in effect, preserve the principle of sovereignty as a shield behind which rulers can do as they please. While military enforcement of these norms might not be possible within the jurisdiction of these great powers, this should not preclude humanitarian interventions where it is politically feasible taking instrumental

constraints into consideration. Inaction in the face of genocide and gross human rights violations would not only result in more human suffering and injustice, but would also – in the longer run – erode regional and global order because oppressed ethnic and religious groups might take action against authoritarian regimes and because civil wars tend to spill over into international conflict. The basic premise of this argument is that an international order that allows for genocide and other flagrant violations of human rights is morally flawed and inherently unstable.

One of the differences between the conflicting discourses pertaining to the status of the Security Council and the relationship between the great powers is rooted in different evaluations of the record of the Security Council during recent years. Arguments in favour of intervention in the absence of great power consensus and UN mandates are often based on a view of the Security Council as 'blocked' due to vetoes and increasingly anti-Western positions by Russia and China. Opponents argue that the Security Council has experienced its best period ever since the end of the Cold War. Much has been achieved, and there are real prospects of gradually improving the operation of the Security Council through informal limitations on the use of the veto.

4.3. The effects of humanitarian intervention on weak multiethnic states

Critics of humanitarian intervention have argued that military intervention in civil wars between oppressed minorities and central governments as well as sharp rhetoric about the universal protection of minorities involves a risk of changing the calculations of leaders of minority groups and encouraging armed resistance against government coercion. According to this discourse, this could make weak states with alienated national or religious minorities more vulnerable to militant secessionist movements. If the outcome is the disintegration of fragile political orders in weak states, justice for the greatest number is unlikely to result, if only because of the immense human suffering involved in armed conflicts between governments and minorities. Even if humanitarian interventions take place when things go wrong they are unlikely to transform landscapes of moral and political complexity into politically viable, let alone 'just' settlements.

The pro-intervention discourse maintains that inaction in the face of genocide is not only unjust but is also likely to encourage coercive methods of weak state regimes in their dealing with separatist groups and alienated ethnic and religious communities. If the outcome is more oppression and coercion against minorities elsewhere, neither justice for the greatest number nor long-term domestic and global order will be achieved. On the other hand, by

sharpening the rhetoric about universal protection of rights of individuals and groups and by conducting humanitarian interventions, the incentives of weak state regimes to observe human rights and seek conciliation with aggrieved sections of their populations will increase. Following this discourse, the main problem is that the combination of inadequate regional capabilities and insufficient political will among western governments to deploy forces in remote strategic ghettos has resulted in too few humanitarian interventions in cases of government coercion and flagrant violations of human rights, especially when they occur in the Third World. Even though the moral supremacy and 'guilt power' of post-colonial states has ended and demands are increasingly raised from the North that unless certain criteria (good governance) are fulfilled a state cannot claim the rights and the protection of sovereignty the overall picture, according to this discourse, is one of insufficient enforcement of these principles.

4.4. Regional enforcement of universal principles

Critics of humanitarian intervention have argued that while low regional thresholds in the face of flagrant violations of individual rights may be a valuable goal, unauthorised military enforcement of universal principles could be dangerous. According to this line of reasoning, there is a danger of such interventions undermining the imperfect, yet resilient, security system created after World War II, and of setting dangerous precedents for future interventions without clear criteria to decide who might invoke these precedents and in what circumstances. Use of military force by regional security organisations without UN mandates might signal a new era in which strong powers can set conditions for domestic conduct that must be met if governments within their region want to avoid outside interference. This might, in effect, resurrect the earlier doctrine of the right of military intervention of powerful states in their own neighbourhood when diplomatic and economic sticks and carrots prove unsuccessful.

The pro-intervention discourse holds that if a group of democratic states in a region can agree to enforce the universal principle that sovereignty should be conditional on democracy and human rights such enforcement should not necessarily be conditional on UN mandates. Otherwise, the progressive development of universal principles of democracy and protection of groups and individuals on regional levels would in effect be blocked by the lowest possible common denominator on the global level. This discourse holds that, even if instrumental limitations and problems related to risking the lives of military personnel in remote areas of the world might result in uneven global

enforcement of universal values and accusations of 'double standards', it would be morally and politically wrong to abstain from humanitarian intervention in a region where military action is possible. This is so, not least because lack of regional action in the face of flagrant violations of individual rights could undermine the credibility of security organisations in the region.

4.5. Summing up

As can be seen, the competing discourses for and against humanitarian intervention reflect different assumptions about the relationship between order and justice. Proponents of humanitarian intervention emphasise that justice is a prerequisite for long-term order on the state level as well as on the international level. Critics of humanitarian intervention maintain that order is a precondition for justice and that humanitarian intervention – especially in the absence of consensus among the great powers – might endanger order and thereby undermine the precondition for justice on both the international level and within weak states.

In sum, the different approaches to the relationship between order and justice produce indeterminate conclusions about the political and moral dilemmas involved in humanitarian intervention. The relationship between order and justice is immensely complicated and precludes any possibility of an absolute and principled 'ethic of intervention' (or of non-intervention, for that matter) which stands on solid ground. This indeterminacy is likely to act as a constraint on governments contemplating humanitarian intervention.

What the most 'responsible' choice would be in any particular situation will depend on the concrete circumstances of the case, on instrumental considerations, and on a complex balancing act between considerations of order and considerations of justice on different levels and over various time lines. In the last instance, it depends on definitions of national interest. Moreover, a significant part of the evaluation of a specific case relates to the questions whether an action would be lawful or not and what would be the long-term effects of an act on the development of international law and its standing. Therefore, Chapters III-V focus on the legal aspects in relation to humanitarian intervention.

Chapter III
Intervention not involving the use of force – the diminishing scope of sovereignty in the field of human rights

Since the adoption of the UN charter in 1945 the protection of the individual has become an important issue of international law and international concern. States can no longer invoke the principle of non-intervention in domestic jurisdiction against international interference and non-military intervention in case of serious violations of human rights or international humanitarian law on its territory. Such violations are a legitimate concern of the international community.

Furthermore, persons responsible for genocide, crimes against humanity or war crimes bear individual criminal responsibility under international law. States have an obligation to prosecute these criminals; if states do not the persons are subject to international prosecution with the coming into force of the International Criminal Court.

The protection of human rights has become a "shared responsibility" of the state and the international community. Under international law the state remains the prime responsible for the protection of individuals on its territory, but under international supervision. The responsibility of the international community to prevent and punish serious violations of human rights comes into play if the state is either unwilling to meet its international obligations or, in the case of "weak" or "failed" states, unable to prevent serious violations from being committed on its territory by private parties.

Thus, the following survey of international non-military intervention in cases of serious human rights violations also evidences a dynamic development which has diminished the scope of state sovereignty as regards the protection of human rights.

1. THE PRINCIPLE OF NON-INTERVENTION IN DOMESTIC JURISDICTION

The principle of non-intervention in the domestic jurisdiction (or "internal

affairs") of a state is a longstanding and fundamental principle of customary international law. It is the corollary of the right of every state to sovereignty, territorial integrity and political independence, which itself is a fundamental principle of international law.

The principle of non-intervention has on numerous occasions been reaffirmed by the UN General Assembly, notably in the Declaration on the Inadmissibility of Intervention (1965) and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (1970).[1] The International Court of Justice has confirmed that the principle is part of customary international law.[2]

The customary principle of non-intervention pertains to interstate relations. As regards intervention by UN organs, a somewhat similar principle is set out in Article 2(7) of the UN Charter as a fundamental principle of the organisation: *"Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state (…)".*

The prohibition on intervention contains two elements. First, the intensity of the intercession must amount to "intervention". Second, the intervention must be bearing on matters belonging to "the domestic jurisdiction" of the state.

1.1. What is "intervention"?

Intervention by states and the UN should be dealt with separately, since the notion of "intervention" is narrower under customary law applicable to acts of states than with regard to Article 2(7) of the UN Charter applicable to acts of the UN.

1.1.1. INTERVENTION BY INDIVIDUAL STATES

"Intervention" according to the customary principle of non-intervention means forcible, dictatorial or otherwise coercive interference, in effect depriving the state intervened against of control over the matter.[3] Other forms of interference in the affairs of another state do not constitute intervention in the legal sense.

The threat or use of force is the classical form of intervention – whether in the direct form of military action or in the indirect form of support for subversive or terrorist armed activities in another state.[4] But even economic sanctions or political measures may in some cases amount to intervention, provided they have coercive effect.[5]

In the Nicaragua Case, the International Court of Justice held that the supply of funds by the United States to violent opposition forces in Nicaragua, while not a threat or use of force, constituted intervention in the internal affairs of Nicaragua.[6] In the Helsinki Final Act from the Conference on Security and Co-operation in Europe (CSCE) from 1975 the participating states vowed to *"refrain from any other act of military, or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind."*

The General Assembly in 1970 adopted the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. Although, formally, the declaration has only the status of a recommendation, it is generally recognised that it reflects to a large extent the content of the principle of non-intervention in contemporary customary international law.[7] The declaration states:

"No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also no state shall organise, assist, foment, finance, incite or tolerate subversive, terrorists or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State."

However, many forms of interference by one state in the affairs of another state do not amount to intervention and are therefore in any case lawful, whether or not they bear on matters of domestic jurisdiction. Criticism directed against another state is not intervention, although the state criticised may often claim that it is. Even diplomatic and economic sanctions (normally) are not intervention proper; such sanctions may well be undertaken to bring pressure to bear on the target state, but such measures are not intervention, since, normally, they do not have coercive effect.

In the Nicaragua Case, the International Court of Justice refused the assertion by Nicaragua that the United States boycott on trade with and freeze of economic aid to Nicaragua constituted intervention.[9] In recent years, the EU has adopted embargos on the sale of weapons to Burma, Nigeria and Sudan. Similarly, African states in 1996 adopted sanctions against Burundi and Liberia.

Significantly, states may also provide humanitarian emergency assistance (food, clothes, medical care etc.) to civilians within another state without the

consent of its government. According to the International Court of Justice, such assistance does not violate the prohibition on intervention, provided it is limited to the purposes hallowed by the International Red Cross and is offered to all in need without discrimination.[10]

Humanitarian emergency assistance provided by non-governmental organisations is, by definition, not intervention, since only acts attributable to states or governmental organisations may violate the customary principle of non-intervention.

1.1.2. INTERVENTION BY THE UN

On its face, Article 2(7) of the UN Charter which applies to acts of the UN organs is similar to the customary principle of non-intervention. However, "intervention" must be understood in a broader sense as regards Article 2(7).

The dominant view in legal doctrine is that organs of the UN may always discuss issues of a general character and make general recommendations, whereas any UN resolution or recommendation addressed to a particular state calling upon this state to act in a particular way constitutes "intervention" within the meaning of Article 2(7).[11]

The practice of the organs of the UN is not clear as regards the scope of the notion of intervention. When the UN rejects an invocation of Article 2(7) by a state, it is most often left open, whether this is based on the opinion that the interference is not intervention or that the intervention is bearing on matters which are not considered "essentially within the jurisdiction of the state". But in cases where Article 2(7) has been invoked, states concerned argued that "intervention" includes all actions of interference, including discussions and resolutions on the situation in a state.[12]

Presumably, humanitarian emergency assistance offered by organs of the UN is not intervention, provided it meets the same standards as are applicable to humanitarian assistance offered by states; that is, the assistance must serve the purposes hallowed by the International Red Cross and be offered to all in need without discrimination.

1.2. What is "the domestic jurisdiction" of a state?

The delimitation of the "domestic jurisdiction" of a state is particularly relevant to the competence of the UN. As noted above, regardless of whether or not a matter is within the "domestic jurisdiction" of a state, other states may interfere in many ways which do not amount to intervention. In fact, most non-military sanctions undertaken by states are not intervention. As regards the UN organs, if a matter is "essentially within the domestic jurisdiction" of a state the UN has

no right to interfere (unless the situation constitutes a "threat to the peace" etc. under Chapter VII of the UN Charter, cf. Article 2(7) in fine: "*but this principle shall not prejudice the application of enforcement measures under Chapter VII.*")

Areas traditionally reserved for domestic jurisdiction (*domaine réservé*) include the constitutional order and the political, economic, social and cultural system.

The General Assembly in its Declaration on Friendly Relations from 1970 stated that, "*Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.*" The International Court of Justice has confirmed this view, stating that, "*A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely [including notably] the choice of a political, economic, social and cultural system, and the formulation of foreign policy.*"

However, the notion of "domestic jurisdiction" is not absolute but essentially relative, as it depends on the development of international law. States may by way of treaty undertake international obligations on any subject. Therefore, no area is by definition reserved for the exclusive domestic jurisdiction of the state.

The Permanent Court of International Justice (the predecessor of the International Court of Justice) in 1923 stated with regard to the concept of "the domestic jurisdiction of a state" in Article 15(8) of the Covenant of the League of Nations (parallel to Article 2(7)) that the notion is: "*essentially relative (..) and depends upon the development of international relations*". This understanding was brought along to Article 2(7). During the negotiations in San Francisco in 1945 prior to the adoption of the UN Charter, John Foster Dulles (United States) stressed that non-intervention was to be a basic principle of the UN, but also one subject to evolution along with the development of international law.[15]

Thus, even areas traditionally considered the "domestic jurisdiction" of the state may become matters of legitimate international concern through the development of international law. Since 1945, such a development has especially taken place as regards the protection of human rights.

Traditionally, the decisive condition placing an area outside the exclusive domestic jurisdiction of a state has been the existence of an international legal obligation. An area not subject to any rules of international law lies exclusively within the domestic jurisdiction of the state, whereas an area which is governed by rules of international treaties to which the state is a party at least no longer falls within the exclusive jurisdiction of that state.[16] But even if a state is not a party to the relevant treaty, the matter still does not belong to its exclusive domestic jurisdiction if that treaty codifies or has subsequently developed into norms of customary international law.

Moreover, Article 2(7) does not refer to international law, and thus gives room for a more broad and political assessment of what is "essentially within the domestic jurisdiction". Consequently, some argue that even if a situation within a state due to the lack of a legal obligation would in legal terms be "essentially within the domestic jurisdiction" according to Article 2(7), there may still be a legitimate international concern which itself takes the matter outside the exclusive sphere of the state.[17] From this perspective, any affair may thus assume international character.

As regards action by the UN, when a dispute arises as to the "domestic" or "international" character of a situation within a state the problem is, however, that the compliance with Article 2(7) is only to a limited extent subject to judicial control. The authority to interpret Article 2(7) rests, in the first place, with the acting UN organ itself. The International Court of Justice has no general powers of interpretation regarding the UN Charter. However, according to Article 96 of the UN Charter the General Assembly or the Security Council may request an advisory opinion from the Court on any legal question. The Court may also interpret Article 2(7) in ordinary cases brought before it. On the few occasions given, the Court so far has never held that Article 2(7) precluded the organs of the UN from acting.

2. PROTECTION OF HUMAN RIGHTS AS A LEGITIMATE INTERNATIONAL CONCERN

Before 1945, the protection of human rights was predominantly a matter of domestic jurisdiction. Customary international law contained no limitations upon the freedom of the state to treat its own citizens at its own discretion. Treaty obligations in the field of human rights were scarce and limited in scope (slavery, minorities etc.)

However, the UN Charter in Article 1(3) sets out as a purpose of the UN to achieve international co-operation "in promoting and encouraging respect for human rights and fundamental freedoms..". Article 55, litra c provides that the UN shall promote "universal respect for, and observance of, human rights and fundamental freedoms", and according to Article 56 all members of the UN pledge themselves to take joint and separate action for the achievement of the protection of human rights.

In the view of some legal scholars these provisions in themselves establish a legal obligation for states to observe human rights and, consequently, human rights issues are a matter of international concern outside the scope of Article

2(7). Other legal scholars consider this view as too far-reaching in light of the broad wording of the Charter provisions on human rights and the fundamental character of Article 2(7). However, it is probably generally recognised that states have in any case a legal responsibility under the Charter for gross and systematic violations of human rights.

This view finds support in the practice of the International Court of Juctice. In 1971 the Court held that the South African policies of apartheid in the territory of Namibia constituted *"a denial of fundamental human rights [and] a flagrant violation of the purposes and principles of the Charter."*[18]

Developments after 1945 have in any event reduced the relevance of Article 2(7) with regard to the protection of fundamental human rights. In pursuance of the objectives of the Charter numerous declarations and conventions on fundamental human rights and international humanitarian law have been adopted. Most of the basic conventions – as shown below – have been ratified by a vast majority of states in the world. Landmark UN documents on human rights and fundamental freedoms include notably

– the *Universal Declaration of Human Rights* from 1948 (adopted by 48 votes, with 7 abstentions);
– the *Convention for the Prevention and Punishment of the Crime of Genocide* from 1948 (in force since 1951; as of 1 October 1999 ratified by 129 states);
– the *Convention on the Elimination of all Forms of Racial Discrimination* from 1965 (in force since 1969; as of 1 October 1999 ratified by 155 states);
– the *International Covenant on Civil and Political Rights* from 1966 (in force since 1976; as of 1 October 1999 ratified by 144 states);
– the *International Covenant on Economic, Social and Cultural Rights* from 1966 (in force since 1976; as of 1 October 1999 ratified by 142 states);
– *Convention on the Elimination of All Forms of Discrimination against Women* from 1979 (in force since 1981; as of 1 October 1999 ratified by 163 states);
– the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* from 1984 (in force since 1987; as of 1 October 1999 ratified by 118 states);
– *Convention on the Rights of the Child* from 1989 (in force since 1990; as of 1 October 1999 ratified by 191 states).

The fundamental documents on international humanitarian law are

– the *four Geneva Conventions* from 1949, with *Additional Protocols I and II* from 1977 (the four Geneva Conventions are in force since 1950, the Additional Protocols I and II since 1979 and 1978 respectively; as of 1 October 1999 the four Conventions were ratified by 188 states, Protocol I by 155 states and Protocol II by 148 states).

The primary objective of international humanitarian law is similar to that of international human rights law: To protect the life and integrity of the individual. But whereas human rights law has general applicability, the rules of international humanitarian law apply only to armed – international or internal – conflicts. A paramount purpose of international humanitarian law is to protect civilians in case of an armed conflict.

Issues of human rights or international humanitarian law governed by an international treaty to which the state is a party no longer belong to its exclusive jurisdiction.

The International Court of Justice confirmed this in its advisory opinion in the Case of Bulgaria, Hungary and Romania. The case was brought before the Court by the General Assembly on allegations by some Western states that the three states had violated the human rights of a number of Christian priests in violation of a peace treaty. The Court held that it had competence to deal with the matter and rejected the invocation of Article 2(7).[19]

Even if the state is not a party to the relevant conventions on human rights or international humanitarian law the principle of non-intervention may still be inapplicable because the treaty provisions codify or have subsequently developed into norms of customary international law, which are binding upon all states. Indeed, the most fundamental norms of human rights law and international humanitarian law are now considered legally binding upon all states as part of customary international law. These norms are obligations of all states towards the international community as a whole.

The International Court of Justice in 1970 held that the obligations of states towards the international community as a whole include the protection of the individual against the crime of "*genocide*" as well as the protection of "*the principles and rules concerning the basic rights of the human person*", some of which have entered into the body of general international law, others are conferred by international instruments of a universal or quasi-universal character. The protection of these basic rights are the concern of all states: "*In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations* ***erga omnes***.."[20] In 1986, the International Court of Justice confirmed that the basic provisions of the Geneva Conventions on international humanitarian law on the protection of people *hors de combat* are norms of customary international law, binding upon all states. According to the Court, these basic principles of international humanitarian law belong to the "*elementary considerations of humanity*".[21]

Furthermore, the practice of the UN organs and of states shows that, increasingly, the protection of fundamental human rights in general is considered a legitimate concern of the international community, regardless of specific legal obligation.

The UN organs have on numerous occasions condemned gross and systematic violations of fundamental human rights within a state.

Important examples are: The policy of apartheid in South Africa and Southern Rhodesia (condemned by the General Assembly since 1946 and by the Security Council since 1960); the suppression by China of the Tibetan people (condemned by the General Assembly in 1959); the suppression by Portugal of the people in its colonies in Angola, Mozambique and Guinea (condemned by the Security Council since 1961); the serious violations of human rights by the regime in the Dominican Republic (condemned by the Security Council in 1965); the serious human rights violations in Chile under Pinochet (condemned by the General Assembly from 1976); the repression by Iraq of the Kurds (condemned by the Security Council in 1991); the ethnic cleansing and forcible removal of minorities within the former Yugoslavia (condemned by the Security Council since 1992).

So far, no state has succeeded in invoking Article 2(7) against UN involvement in issues of human rights on the basis that the matter essentially belonged to the "domestic jurisdiction" of the state. In cases of gross and systematic violations of human rights the UN organs have considered the Charter provisions on human rights as a sufficient legal basis for intervention regardless of the existence of any more specific legal obligations upon the state to respect the human rights in question.[22]

The International Court of Justice seems to support this practice. In the Namibia Case, the Court held that South Africa's laws on and practice of apartheid violated the principles and purposes of the UN Charter. Thus, it was not decisive whether or not South Africa had violated other more specific legal obligations to observe fundamental human rights.[23] In the Nicaragua Case, the United States argued that its operations in Nicaragua were justified as a response to Nicaraguas violations of its human rights obligations under a bilateral treaty. Nicaragua denied any breach of the treaty. But the Court held that, *"This particular point requires to be studied independently of the question of a "legal commitment". The absence of such a commitment would not mean that Nicaragua could with impunity violate human rights".*[24]

Similarly, as regards state practice numerous declarations testify to the view that the protection of human rights is a matter of international concern in general.

The General Assembly in 1970 expressed the general position of the international community this way: *"The international conventions and declarations concluded under [the UN] auspices give expression to the moral conscience of mankind and represent humanitarian standards for all members of the international community."*[25]

The strongest universal testimony to the international development in the field of human rights was adopted by the World Conference on Human Rights in Vienna on 25 June 1993. In the concluding document – The Vienna Declaration and Programme of Action – which was unanimously adopted by all the members of the UN, it is unequivocally stated in paragraph four that, *"the*

promotion and protection of all human rights is a legitimate concern of the international community."

In a regional context, this view has been reaffirmed through declarations made within the framework of the CSCE/OSCE expressing the legal opinion of these states. The 1975 Helsinki Final Act from the Conference on Security and Co-operation in Europe in Chapter VII on "Respect for human rights and fundamental freedoms" states that "*The participating States recognise the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and co-operation among themselves as among all States.*" Similarly, the 1991 Document from the Moscow meeting of the Conference on the Human Dimension of the CSCE emphasised "*that issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order*" and the participating states "*categorically and irrevocably*" declared "*that the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating states and do not belong exclusively to the internal affairs of the state concerned.*"

On the other hand, quite a few developing countries are still in reality opposed to the view that protection of human rights is a matter of legitimate international concern. Attaching, also for historical reasons, high value to the principle of state sovereignty, these countries maintain that the protection of the individual is a matter essentially within the domestic jurisdiction of the state. This position is backed by China.

This was aptly illustrated on the historical summit of the Security Council on 31 January 1992. On this occasion China stated: "*The core of these principles [of the new international order] is non-interference in each other's internal affairs (...) In essence, the issue of human rights falls within the sovereignty of each country (...) China values human rights (...) However, it is opposed to interference in the internal affairs of other countries using the human rights issue as an excuse.*"

3. INDIVIDUAL CRIMINAL RESPONSIBILITY UNDER INTERNATIONAL LAW FOR CRIMES OF GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES

The protection of the individual in international law is not restricted to obligations of states to observe and protect human rights. As regards atrocities against humanity there is individual criminal responsibility under international law. With the coming into function of the International Criminal Court, there will also be international jurisdiction to prosecute.

Crucial for this development was the establishment after the Second World War of the international military tribunals in Nuremberg and Tokyo for the prosecution of war criminals of the European Axis and Japan. These trials were special, since imposed by the victorious Alliance. But the principles they

applied have since come to represent general international law. The tribunals were given jurisdiction to prosecute persons responsible for "crimes against peace", "war crimes" and "crimes against humanity".

In its judgment from 1946 the Nuremberg Tribunal rejected objections that the trial meant retrospective punishment of acts which had been lawful under domestic law, that international law could provide no punishment for individuals and that the acts in question were acts of the state and therefore protected by its sovereignty. The Tribunal stated that: *"international law imposes duties and liabilities upon individuals as upon states (..) the very essence of the Charter [of the Tribunal] is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State."*

In 1946, the General Assembly unanimously affirmed "the principles of international law" applied in the Nuremberg trial.[28] In 1948, the UN Convention on the Prevention and Punishment of the Crime of Genocide was adopted, confirming that genocide is an international crime for which there is individual criminal responsibility. Equally, the Geneva Conventions from 1949 in substance provide for individual criminal responsibility for grave breaches of the norms of international humanitarian law.

A major weakness of these conventions, however, is the lack of guarantees for effective enforcement. The prosecution of individuals – whether acting in a public or private capacity – is left to the state. Thus, the prospects for prosecution are bad since, in practice, perpetrators of genocide etc. will often be rulers or officials of the state.

It was therefore a landmark as regards the prosecution of the most serious atrocities against humanity when in 1993 and 1994 the UN Security Council established ad hoc international criminal tribunals for the prosecution of persons responsible for genocide, crimes against humanity and serious violations of international humanitarian law committed in the former Yugoslavia[29] and Rwanda.[30]

The agreement on the 1998 UN Conference in Rome to establish a permanent International Criminal Court under the auspices of the UN signifies the culmination so far of the development described.[31] The jurisdiction of the International Criminal Court is limited to "the most serious crimes of concern to the international community as a whole", that is the crime of genocide, crimes against humanity and war crimes (Article 5 of the Statute). Persons responsible for such crimes are subject to the jurisdiction of the Court whether they acted in a private or an official capacity (Article 25 and 27 of the Statute). The jurisdiction of the Court is complementary to that of the state and thus only exists in so far as the state is unwilling or unable to prosecute (Article 17 of the Statute).

4. CONCLUSION

The principle of non-intervention in the domestic jurisdiction of a state does not preclude other states from expressing criticism, imposing diplomatic or economic sanctions or supplying humanitarian emergency assistance. As regards acts of the UN, the principle of non-intervention in Article 2(7) of the UN Charter prohibits any interference in matters essentially belonging to the domestic jurisdiction of a state, except in accordance with Chapter VII of the UN Charter in case of a threat to the peace, a breach of the peace or an act of aggression.

However, the protection of human rights has become an issue of legitimate international concern, and therefore no longer falls within the exclusive domestic jurisdiction of the state. This especially holds true as regards gross and massive violations of human rights or international humanitarian law. The basic norms for the protection of the individual are binding upon all states whether by explicit treaty obligation or because they are part of international customary law as "universal standards of humanity" in accordance with the principles of the UN Charter. This has been confirmed by the International Court of Justice. The practice of the UN and of states even supports the view that, in general, the protection of human rights is a matter of legitimate international concern, and, therefore not protected by the prohibition on intervention in the domestic jurisdiction of a state.

The legitimate international concern for the most serious and systematic human rights violations exists whether the violations are committed by state authorities or by guerrillas, militias or other private bodies or individuals acting within the territory of the state. This is reflected in the recognition of individual criminal responsibility under international law for the most serious crimes against humanity. With the Nuremberg and Tokyo trials as a starting point, this development has reached its climax so far with the decision to establish a permanent International Criminal Court.

In conclusion, the protection of the basic rights of individuals has become a "shared responsibility" of the state and the international community. The primary responsibility under international law to observe, protect and punish crimes against the basic rights of the individual still rests with the state. The international responsibility is complementary and comes into play in cases where the state is unwilling or unable to fulfil these obligations.

Chapter IV
Humanitarian intervention with authorisation from the UN Security Council

If the humanitarian situation in a state poses a threat to international peace, the Security Council is competent under Chapter VII of the UN Charter to decide upon the measures necessary to maintain international peace, including the use of force.

Only action under Chapter VII will be dealt with here. Action under Chapter VII should be distinguished from proposals and recommendations under Chapter VI on Pacific Settlement of Disputes in case of "*any dispute, the continuance of which is likely to endanger the maintenance of international peace and security*"(Article 33). The UN organs, notably the Security Council, have on numerous occasions established peace-keeping forces and observer groups for the maintenance of international peace in the case of a Chapter VI situation. Arguably, the legal basis for peace-keeping is inherent in Chapter VI, although the peace-keeping instrument is not expressly provided for in the UN Charter. Peace-keeping is sometimes referred to as "Chapter VI 1/2" action. The fundamental difference between peace-keeping operations and enforcement action under Chapter VII is that peace-keeping is based on the consensus and co-operation of the state(s) or parties concerned.

In the following, the framework for enforcement action under Chapter VII will be described, including the competence of the Security Council to authorise the use of force by Member States. Then the notion of a "threat to the peace" – which opens the door to enforcement action under Chapter VII – is analysed with emphasis on the practice of the Security Council concerning internal conflicts with humanitarian consequences.

1. ENFORCEMENT ACTION UNDER CHAPTER VII OF THE UN CHARTER

The UN Charter is based on a system of collective security. The Charter confers upon the Security Council primary responsibility for the maintenance of

international peace and security, and the Security Council in carrying out its duties acts on behalf of the Member States (Article 24(1)). Subsidiary responsibility for international peace and security rests with the other UN organs, notably the General Assembly.

Decisions taken by the Security Council in discharging its responsibilities are binding upon the Member States (Article 25). Decision by the Security Council requires an affirmative vote of nine of its fifteen Members including the "concurring votes" of the Permanent Members – United States, the United Kingdom, France, China and Russia (Article 27(3)). According to established practice, abstention by one or more Permanent Members does not prevent a decision.

Chapter VII provides the legal basis for action by the Security Council to maintain or restore international peace and security. Action under Chapter VII has the one purpose of maintaining or restoring international peace and security and thus is not, in principle, a basis for sanctioning states acting in violation of international law. In practice, however, the distinction is not so clear-cut. Acting under Chapter VII the Security Council has, on numerous occasions, condemned serious violations of human rights and international humanitarian law and, on two occasions, has even established international criminal tribunals to prosecute the persons responsible (see below).

1.1. Security Council enforcement action

According to Article 39 of the UN Charter the Security Council shall determine the existence of a "threat to the peace", a "breach of the peace" or "act of aggression" and make recommendations or decide upon the measures necessary to maintain or restore international peace and security.

Measures decided upon by the Security Council may include non-military measures like economic sanctions or the severance of diplomatic relations (Article 41).

Only if such measures "would be inadequate or have proved to be inadequate" may the Security Council take action involving the use of military force (Article 42). To assist and advise the Security Council on such enforcement action a Military Staff Committee is established consisting of the Chiefs of Staff of the Permanent Members (Article 47). The forces necessary to carry out a military enforcement action are to be made available to the Council in accordance with special agreement (Article 43).

However, a major defect of the collective security system is that the Security Council does not dispose of any armed forces itself, because the agreements between the Council and the Member States envisaged in Article 43 have never

been concluded.[1] The absence of such agreements rules out a binding decision by the Security Council on enforcement action in accordance with Article 42. This means that no Member State is obligated to make troops available to the Security Council on request.

1.2. Security Council authorisation for enforcement action

The absence of Article 43 agreements has not been regarded as leaving the Security Council without competence under Chapter VII to mandate the use of force if it determines the existence of a "threat to the peace" etc. (Article 39) and considers the use of force necessary. It is generally recognised that the Security Council is competent under Chapter VII to authorise an enforcement action including the use of force, to be carried out on a voluntary basis by Member States.[2]

This was implied by the International Court of Justice already in 1962 when it rejected the view that Article 43 agreements are a condition of any Security Council enforcement action under Chapter VII: *"The Court cannot accept so limited a view of the powers of the Security Council under the Charter. It cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded."*[3] Similarly, in 1971, the Court held that Article 24(2), which refers to the specific powers granted to the Security Council for the discharge of its primary responsibility for international peace and security under Article 24(1), *"does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1."*[4]

A Security Council authorisation may be addressed to the Member States in general, to particular Member States or to a regional organisation or agency.

Chapter VIII of the UN Charter on Regional Arrangements foresees a pivotal role for regional organisations and agencies in the maintenance of international peace and security, but confers no independent competence of enforcement action upon these regional organs. Article 53 provides that the Security Council, where appropriate, shall utilise such regional organisations or agencies for enforcement action *"under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council..."*.

The use of force by states in accordance with prior Security Council authorisation under Chapter VII is lawful under international law, provided the action is carried out in accordance with the rules of international humanitarian law concerning international armed conflict. Such enforcement action is carried out on behalf of the UN and, in principle, takes place under the responsibility and control of the Security Council. Although the intervention is actually carried out by states, the UN Secretary General is involved, and the

Security Council is kept duly informed. In principle, the Security Council may at any time withdraw its authorisation or limit its scope.

The authorised states or regional organisations are not bound to carry out the Security Council authorisation. But when they do, any conditions set out in the authorisation as to the objectives of the action, limits upon scale and duration etc. are binding upon them. Any use of force which exceeds the authorisation by the Security Council is in breach of international law (unless an alternative legal basis can be established).

Security Council authorisation has become the relevant form of military enforcement action under Chapter VII of the UN Charter.

In 1990 the Security Council for the first time ever in Resolution 678 (1990) authorised "under Chapter VII" the use of force by Member States to force Iraq out of Kuwait. From a legal point of view, the allied invasion in Kuwait needed no Security Council authorisation; since Kuwait had already asked for assistance the right of collective self-defense against an armed attack could have served as a sufficient legal basis. The Security Council involvement must be seen as a wish from the allied states to get a "blueprint" on the operation when carried out on behalf of the UN. In 1950, after the aggression by North Korea against South Korea the Security Council in Resolutions 83 and 84 (1950) "recommended" that the Members assist South Korea in repelling the attack from North Korea in order to restore international peace and "authorised" the international force to use the UN flag during operations. This operation too was justified as an exercise of the right of collective self-defense. In 1966, the Security Council in Resolution 221 "called upon" the UK to use force to prevent oil from arriving in Southern Rhodesia. This was a special case, since Southern Rhodesia was at the time a colony of the UK.

During the 1990s, the Security Council has, on several occasions, authorised under Chapter VII the use of force in response to threats to international peace arising out of internal conflicts within a state with serious humanitarian consequences. In most of these cases, the use of force by states would have been prima facie unlawful without authorisation from the Security Council (see cases below).

1.3. Subsidiary responsibility of the General Assembly

In 1950, the General Assembly adopted the Uniting for Peace Resolution in which it claimed subsidiary responsibility for international peace and security and competence to make recommendations regarding measures necessary to maintain or restore the peace.[5] In the central passage of the resolution the General Assembly resolved 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 ther

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 Member States for collective measures, including in the case of a breach to the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security."

During the 1950s, with the deadlock in the Security Council, the General Assembly on the basis of the Uniting for Peace Resolution, assumed the task of peace-keeping by summoning special sessions, calling for withdrawal of troops etc. However, there were never any recommendations on the basis of the Resolution to take collective military measures. Today, the Resolution has lost much of its importance.[6]

The Uniting for Peace Resolution is no legal basis for the authorisation of humanitarian intervention. According to Security Council practice, a humanitarian emergency may constitute a "threat to the peace". But the Resolution only assumes competence for the General Assembly to recommend military action in case of a breach of the peace or an act of aggression. In case of a threat to the peace, the General Assembly may recommend non-military measures only. Thus, according to the dominant view, the General Assembly under the Resolution may only recommend military measures that states are in any event entitled to take in the exercise of collective self-defence. A recommendation from the General Assembly under the Resolution gives no legal basis for an otherwise unlawful use of force.[7]

It is also generally agreed that, among the UN organs, the Security Council has exclusive competence with regard to taking or authorising action involving the use of force which would otherwise be unlawful under international law.[8]

2. INTERNAL CONFLICTS INVOLVING SERIOUS VIOLATIONS OF HUMAN RIGHTS OR INTERNATIONAL HUMANITARIAN LAW AS A THREAT TO INTERNATIONAL PEACE?

2.1. The notion of a "threat to the peace" in Article 39

The determination of a "threat to the peace" under Article 39 is the minimum requirement which opens the door to enforcement action under Chapter VII. The notion of a "threat to the peace", according to Security Council practice, is the relevant notion with regard to humanitarian emergencies arising from situations within a state. The notions of a "breach of the peace" or "act of aggression" are not relevant.

So the crucial question is whether and under what circumstances a situation of humanitarian emergency within a state caused by civil war (grave violations of international humanitarian law) or repression of the civilian population (gross and massive violations of human rights) may be regarded as a "threat to the peace" within the meaning of Article 39.

The notion of a "threat to the peace" clearly refers to international peace.[9]

International peace, according to the original conception of the UN Charter, means the absence of military conflict between states. The traditional notion of a "threat to international peace" thus presupposes the objective existence of a threat of aggresion by one state against another or a real risk of international armed conclict in some other form.[10] The UN Charter is based on an international community of sovereign states, and the foremost purpose of the Charter was to maintain the status quo (except for colonial territories), by outlawing any use of force between states. The system of collective security was set up to respond to threats to and breaches of this status quo, thereby policing the sovereignty of states.

It was hardly the intention of the framers of the Charter that internal conflicts and human rights violations should be regarded as a threat to international peace. There is no evidence that they might have envisaged a competence for the Security Council under Chapter VII to take action to cope with situations of humanitarian emergency within a state resulting from civil war or systematic repression.[11]

However, the framers did not rule out a dynamic development of the notion of a "threat to the peace" either. The notion is inherently vague, and it was basically left to the discretion of the Security Council to determine the existence of a threat to the peace. As early as 1951, a recognised international legal scholar observed that: "*A civil war, as any other situation within a state, may be interpreted by the competent organ of the United Nations as a threat to international peace (..) hence, it is doubtful whether the restriction implied in the term "international" peace is of any importance.*"

2.2. Practice of the Security Council

Through the practice of the Security Council, the original understanding of what constitutes a "threat to the peace" has been considerably widened.

The 1969 Vienna Convention on the Law of Treaties, which codifies general norms of interpretation of treaties (and which according to Article 5 is also applicable to treaties which – like the UN Charter – are the constituent instrument of an international organisation) in Article 31(3), litra b recognises that subsequent practice in the application of a treaty is relevant to its interpretation.

In effect, the Security Council has, in several cases, regarded internal situations – like civil war, civil strife or gross and massive violations of human rights – as a threat to international peace. Certainly, such inherently internal conflicts have almost invariably also had international repercussions (cross-frontier refugee flows, destabilisation in the region etc.) to which the Security Council has often referred when determining the existence of a threat to the peace. But, first of all, even such repercussions would not qualify as a "threat to the peace" in the original sense. Second, in recent practice the Security Council, when dealing with internal conflicts under Chapter VII, increasingly does not refer to international repercussions at all.

2.2.1. PRACTICE DURING THE COLD WAR (1945-1989)

It is often assumed that this broad interpretation of a "threat to the peace" is a new trend in Security Council practice since the end of the Cold War. This is not quite correct. Already in the 1960s and 1970s the Security Council determined that inherently internal situations in Southern Rhodesia and South Africa constituted a threat to international peace and security. Despite the circumstances surrounding these African cases – the de-colonisation and the struggle for independence of the African people – they show that the practice of the Security Council since 1991 was not entirely without precedent. It is noteworthy that in the 1960s it was the developing countries in Asia and Africa, backed by the Soviet Union, which brought pressure upon the Security Council to apply Chapter VII to various situations in Southern Africa, whereas the Western states, although deploring the policies of racial discrimination and repression by colonial powers and white minority governments, were initially unwilling to consider these policies a "threat to the peace".[13]

In the case of **Southern Rhodesia** (1966), the Security Council for the first time in effect considered violations of basic human rights a threat to international peace.

In 1965, the white regime in Southern Rhodesia proclaimed independence for the territory in violation of the right of the black majority to self-determination. The Security Council, in Resolution 217 (1965), determined that the continuance of this situation was a threat to international peace and security and called upon states to break off economic relations with the regime. In Resolution 221 (1966), it determined that the situation was a threat to international peace and security and called upon the UK to prevent, by use of force if necessary, the arrival of vessels at the port of Beira carrying oil destined for Southern Rhodesia.

In the case of **South Africa** (1977), the Security Council in effect regarded the policy of apartheid a threat to international peace and imposed an arms embargo.

During the 1970s, the Security Council had repeatedly condemned South Africa for its policy of apartheid and aggressions against neighbouring states, hosting groups of the ANC. In Resolution 418 (1977), the Security Council considered the policy of apartheid and repression as well as the attacks by South Africa against neighbouring states to be *"fraught with danger to international peace and security"* and under Chapter VII decided upon an arms embargo against South Africa. Despite the ambiguity in the Resolution as to what constituted the threat to international peace, it was clearly motivated by demands from African states to take effective measures against the apartheid regime.

2.2.2. PRACTICE AFTER THE COLD WAR (1990-1999)

The practice of the Security Council since 1991 shows an increasing tendency towards considering inherently internal conflicts threats to international peace and security, notably due to the human suffering involved. The Security Council, under Chapter VII, has dealt with civil war and humanitarian emergencies notably in the cases of Iraq, the former Yugoslavia, Liberia, Somalia, Haiti, Angola, Rwanda, Burundi, Zaire, Albania, the Central African Republic, Kosovo and East Timor.

The fact that the number of cases has grown dramatically since the beginning of the 1990s is, above all, due to the changed political environment since the end of the Cold War. In the 1990s, China and Russia have often pursued a policy of abstaining instead of vetoing decisions in the Security Council – especially in the first half of the 1990s.

But the practice of the Security Council in the 1990s also evidences a tendency towards further widening the notion of a "threat to the peace". The Security Council now considers that internal conflicts with humanitarian consequences may be regarded as threats to international peace in their own right, regardless of their international repercussions. The Security Council has considered that serious violations of human rights, international humanitarian law and even democracy may in themselves constitute a threat to international peace. Finally, Security Council authorisation for humanitarian intervention is an innovation of the 1990s as well.

The following survey only deals with landmark cases and cases of actuality:

In the case of **Iraq** (1991), the Security Council determined that the Iraqi repression against the Kurds and the ensuing cross-border repercussions were a threat to international peace and insisted upon free access by humanitarian organisations.

In the aftermath of the Gulf War, Iraq initiated a campaign of repression against the Kurds in the northern part of Iraq, resulting in serious humanitarian suffering and substantial refugee flows into Turkey and Iran as well as cross-border incursions. The Security Council, in Resolution 688 (1991), condemned the Iraqi repression, "*the consequences of which threaten international peace and security in the region*". Although the Council referred also to cross-border consequences, the Resolution was clearly motivated by the magnitude of the human suffering.[14] The Council "*insisted*" that Iraq allow immediate access by international humanitarian organisations. Resolution 688 may be regarded as a forerunner to authorisations for humanitarian intervention in subsequent cases. Immediately after the adoption of Resolution 688 a number of states undertook humanitarian relief operations in Northern Iraq backed by force. Many states participating referred to Resolution 688 – read in conjunction with Resolution 678 authorising the use of force against Iraq following the Iraqi intervention in Kuwait – as the legal basis for the operation. According to the dominant view in international legal doctrine, the use of force for humanitarian purposes in Iraq since 1991 is an example of humanitarian intervention without authorisation from the Security Council, although the operations in Iraq were deeply embedded in and arguably politically legitimised by the overall involvement of the Security Council (see further on the humanitarian interventions in Iraq since 1991 Chapter V below).

In the case of **the former Yugoslavia** (1991-93) the Security Council considered civil war and serious violations of international humanitarian law a threat to international peace and, for the first time ever, authorised a humanitarian intervention. It also established an international tribunal for the prosecution of war criminals.

The Security Council, in Resolution 757 (1992), determined that the situation, notably in Bosnia, constituted a threat to international peace and security and under Chapter VII imposed comprehensive economic sanctions against Serbia and Montenegro. In Resolution 770 (1992), the Security Council called upon "*States to take nationally or through regional agencies all measures necessary*" to facilitate the delivery of humanitarian assistance to Bosnia-Herzegovina. This was, in reality, an authorisation to NATO, which did not however intervene in a substantial way until more than two years later, when NATO attacked the Bosnian Serbs and forced them to surrender. By Resolution 827 (1993) the Security Council, under Chapter VII, established an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia. Thereby, it had stated for the first time that grave breaches of international humanitarian law constitute, in themselves, a threat to international peace and security.

In the case of **Somalia** (1992), the Security Council considered the humanitarian tragedy resulting from civil war and anarchy a threat to international peace and security and ultimately authorised a military intervention for humanitarian purposes.

In Resolution 733 (1992), the Security Council expressed alarm at the deteriorating civil war in Somalia resulting in "heavy loss of human life". Concerned that the continuation of this situation was a threat to international peace and security, it imposed, under Chapter VII, an arms embargo against Somalia.[15] In landmark Resolution 794 (1992), the Security Council took its boldest stand so far when determining without reference to cross-frontier implications that the humanitarian disaster in Somalia brought about by civil war, disorder and widespread violations of international humanitarian law in itself constituted a threat to international peace.Acting under Chapter VII, the Security Council authorised the Member States and the Secretary-General to use "*all necessary means to establish as soon as possible a secur environment for humanitarian relief operations in Somalia*" in accordance with the US offer to head such an operation.[16] The ambition was to "restore peace, stability and law and order" in Somalia. In this respect, the humanitarian intervention did not succeed, and the efforts were interrupted in 1995.

The case of **Haiti** (1993-94) is arguably the most controversial in the practice of the Security Council under Chapter VII. The Security Council in effect considered a violation of democracy – a military coup against the democratically elected government – a threat to international peace and security and authorised a military intervention for the purpose, above all, of restoring democracy in Haiti.

After Haiti's first democratic elections in 1990 – in which the UN had been heavily involved – Aristide was elected president. But by a military coup in September 1991 he was forced into exile. After economic sanctions under Chapter VII had proved unsuccessful in forcing the military regime to step down, the Security Council, in Resolution 940 (1994), determined the continued existence of a threat to the peace, pointing to the refusal of the regime to step down, the deteriorating humanitarian situation and the systematic violations of human rights and under Chapter VII authorised "*Member States to form a multinational force under unified command and control*" in order to "*use all necessary means to facilitate the departure from Haiti of the military leadership [and] the prompt return of the legitimately elected president*". The intervention was to be carried out predominantly by US forces. In the end, the regime in Haiti yielded to the threats, and Aristide was reinstated.

In the case of **Rwanda** (1994), the Security Council considered the humanitarian tragedy resulting from civil war, genocide and flagrant violations of international humanitarian law and human rights a threat to international peace and security and authorised a humanitarian intervention. Like in the former Yugoslavia, the Council also established an international tribunal for the prosecution of war criminals.

In the spring of 1994, a civil war developed in Rwanda between ethnic groups. Genocide was being committed resulting in a humanitarian disaster of appalling proportions. Initially, the international community showed hesitance to intervene. In Resolution 918 (1994), the Security Council condemned the violence and massacre against civilians and expressed its

alarm at the systematic, widespread and flagrant violations of international humanitarian law and human rights. Disturbed by the "*magnitude of the human suffering caused by the conflict*" it determined that the situation in Rwanda constituted a threat to international peace and security in the region and, under Chapter VII, imposed an arms embargo on Rwanda. Since the situation only got worse, the Security Council, in Resolution 929 (1994), acting under Chapter VII, authorised the Member States to carry out a military operation, "*aimed at contributing, in an impartial way, to the security and protection of displaced persons, refugees and civilians at risk in Rwanda*" and to "*use all necessary means*" to achieve this objective, stressing the "*strictly humanitarian character*" of the operation. The military intervention was subsequently carried out under French command. By Resolution 955 (1994), the Security Council established an International Criminal Tribunal for Rwanda to prosecute persons responsible for genocide, crimes against humanity and other serious violations of international humanitarian law. Thereby the Council confirmed that such acts constitute, in themselves, a threat to international peace and security.

In the case of **Kosovo** (1998), in the Federal Republic of Yugoslavia, the Security Council considered a pending humanitarian catastrophe brought about by civil strife and repression against civilians a threat to international peace and security. When it became clear that both Russia and China would block by veto a Security Council authorisation for military intervention, NATO carried out a humanitarian intervention without authorisation from the Security Council (see Chapter V below). Subsequently, the Security Council endorsed the political outcome of the NATO operation.

In 1998, a violent internal conflict was developing in the province of Kosovo in the Federal Republic of Yugoslavia between Serbian government military and police forces and the Kosovo Liberation Army (the UCK). The Security Council, in Resolution 1160 (1998), condemned the Serbian police forces for excessive use of force against civilians and the UCK for its acts of terrorism. Acting under Chapter VII, it imposed an arms embargo on Yugoslavia. The Security Council also expressed its support for, "*an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration*". In Resolution 1199 (1998), after the situation in Kosovo had deteriorated, the Security Council stated that it was, "*deeply concerned by the rapid deterioration in the humanitarian situation throughout Kosovo, alarmed at the impending humanitarian catastrophe (..) and emphasising the need to prevent this from happening.*" The Council determined that the situation was a threat to peace and security in the region and, under Chapter VII, demanded among others that the Yugoslav authorities cease all repression against the civilian population in Kosovo, enable effective and continuous international monitoring in Kosovo and facilitate the safe return of refugees and displaced persons and that the Kosovo Albanian leadership condemn all acts of terrorism. Finally, it decided that "*should the concrete measures demanded in this resolution and resolution 1160 not be taken, to consider further action and additional measures to maintain or restore peace and stability in the region.*"[17] Due to the intention of Russia and China to veto an authorisation for the use of force, additional measures were never decided upon. In March 1999, NATO initiated a military operation to put an end to the atrocities in Kosovo (see Chapter V below). After the NATO military operation, when, as a consequence, the Federal Republic of Yugoslavia had agreed on the terms for agreement on Kosovo, the Security Council became involved again. In Resolution 1244 (1999) it welcomed the agreement between the Federal

Republic of Yugoslavia and the G8 and, in accordance with the agreement, authorised, under Chapter VII, a security presence in Kosovo to enforce it.

In the case of **East Timor** (1999), the Security Council considered the acts of terror against the civilian pro-independence population of East Timor a threat to international peace and security. Under Chapter VII, it authorised an international military operation to restore peace, an operation which had been requested by the Indonesian government.

On 30 August 1999, a referendum was held in East Timor on independence from Indonesia. The majority voted for independence. Following the results, pro-Indonesian militias, apparently supported by Indonesia, issued a campaign of terror against the pro-independence population, resulting in massive losses of human life, substantial refugee flows and internal displacement. After international pressure, the Indonesian government accepted demands for an international military presence to restore peace in East Timor. In Resolution 1264 (1999), the Security Council expressed concern at the systematic, widespread and flagrant violations of international humanitarian law and human rights against East Timorese civilians and stressed the individual responsibility for these crimes. Determining that the situation was a threat to peace and security, it authorised, under Chapter VII, a multinational operation, pursuant to the Indonesian request, to restore peace and security and facilitate humanitarian assistance in East Timor by all necessary measures. The operation was carried out under Australian leadership.

2.3. Assessment of the practice of the Security Council

2.3.1. WHEN DOES AN INTERNAL CONFLICT BECOME A THREAT TO INTERNATIONAL PEACE?

Common to internal violent conflicts – civil war, civil strife and other forms of violent civil unrest, typically occurring within disintegrating states – and gross and massive violations of human rights committed by the government of the state – genocide, ethnic cleansing and other atrocities – is the large scale human suffering involved. Furthermore, violent internal conflicts as well as gross and massive human rights violations by the government will almost invariably have international consequences like cross-frontier refugee flows and political or military destabilisation in the region.

2.3.1.1. What constitutes the threat to international peace?

The Security Council, in determining the existence of a threat to international peace and security, seems, increasingly, to consider large-scale human suffering in itself a sufficient basis, whereas the international repercussions are no longer crucial.

International repercussions of internal conflicts as a threat to the peace. According to the traditional notion of a threat to international peace, a risk of international military conflict should exist. However, the notion of a threat to international peace may be interpreted to include other cross-frontier repercussions as well, like substantial refugee flows across borders or risk of destabilisation in the region. The Security Council has often referred to international repercussions of internal conflicts as constituting a threat to the peace (in cases like South Africa, Iraq, Haiti and Kosovo).

Civil war and large-scale human suffering as a threat to the peace. The Security Council, increasingly, seems to regard a civil war with large-scale human suffering as a threat to international peace in its own right, regardless of its international consequences. In Resolution 794 on Somalia, the Security Council for the first time stated that *"the magnitude of the human tragedy"* constituted in itself a threat to international peace and security. This precedent was followed in Rwanda and Zaire.

Gross and massive violations of human rights and international humanitarian law as a threat to the peace. In the same vein, the Security Council has made it clear that gross and massive violations of human rights (Southern Rhodesia, South Africa, Iraq and Kosovo) or international humanitarian law (the former Yugoslavia and Rwanda) may in themselves constitute a threat to international peace.

Violation of democracy as a threat to the peace. The Security Council has gone even further by, on one occasion, in effect considering the violent overthrow of a democratically elected government a threat to the peace (Haiti).

The case of Haiti was the first – and so far only – time the Security Council has regarded clear illegitimacy of government as a threat to international peace. Haiti remains a very controversial application of Chapter VII. The choice of political system has traditionally been regarded as belonging to the core of state sovereignty. The Haiti case implies that the restoration of democracy in a state in which the elected government has been violently overthrown may be a matter of legitimate international enforcement. But it is no precedent for a general right of international intervention to create democracy.

2.3.1.2. From a negative to a positive concept of international peace

Instead of a traditional and negative concept of peace – the absence of international military conflict – the Security Council seems increasingly to apply a broader and positive concept of peace – the absence of factors of international

destabilisation and disorder, including flagrant disregard of international norms for the protection of the individual.

2.3.1.3. Action on purely humanitarian grounds

Alternatively, and perhaps more realistically, the practice of the Security Council may be seen as evidence of the conviction that within the framework of the UN the international community must be able to act on humanitarian grounds, when gross and systematic violations of human rights or international humanitarian law threaten the lives and dignity of a large proportion of the civilian population within a state.

In 1991, UN Secretary General Javier Perez de Cuellar in his report to the General Assembly, referring to UN enforcement action for the protection of human rights, stated that *"It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protected barrier behind which human rights could be massively or systematically violated with impunity. The fact that in diverse situations, the United Nations has not been able to prevent atrocities cannot be cited as an argument, legal or moral, against the necessity for action, especially where peace is threatened (...) The case for not impinging on the sovereignty, territorial integrity and political independence of States is by itself indubitably strong. But it would only be weakened if it were to cover the implication that sovereignty, even in this day and age, includes the right of mass slaughter or of launching systematic campaigns of decimation or forced exodus of civilian populations in the name of controlling civil strife or insurrection."*[18]

2.3.2. MEASURES TAKEN TO REDRESS HUMANITARIAN EMERGENCIES

In the cases referred to, the Security Council has taken measures under Chapter VII to maintain or restore international peace and security.

Non-military enforcement measures. In accordance with the principles of Chapter VII, the Security Council has normally started out with imposing an arms embargo, sometimes expanded into more comprehensive economic sanctions, before turning to the authorisation of military enforcement. During the Cold War, the Security Council never went further than to impose non-military measures.[19]

Military enforcement measures. During the 1990s, the Security Council has mandated the use of military force in response to internal conflicts with serious humanitarian consequences in the cases of the former Yugoslavia (Bosnia), Somalia, Rwanda, Haiti, Zaire, Albania and East Timor.

Only in Somalia, Rwanda, Haiti, Zaire and East Timor did the Security Council "authorise" the use of force "under Chapter VII". In Bosnia and Albania the use of force required no

Security Council authorisation under Chapter VII, since the legitimate governments had requested assistance from the international community. In the case of East Timor, there was no legal necessity for an authorisation under Chapter VII either since Indonesia formally requested assistance, but the authorisation provides for effective international enforcement unrestricted by Indonesian attitudes.

Military intervention as unique and exceptional cases? Somalia was the first time that the Security Council authorised under Chapter VII a military intervention to cope with an internal conflict. This precedent was later followed in Rwanda, Haiti and Zaire. Especially in Somalia, Haiti and Rwanda the Security Council, when authorising the use of military force, has stressed the unique and exceptional character of the situation.

In Resolution 794 on Somalia, the Security Council recognised, "*the unique character of the present situation in Somalia and mindful of its deteriorating, complex and extraordinary nature, requiring an immediate and exceptional response*". In Resolution 940 on Haiti, it recognised "*the unique character*" of the situation and "*its deteriorating, complex and extraordinary nature, requiring an exceptional response*". In Resolution 929 on Rwanda, it recognised that, "*the current situation in Rwanda constitutes a unique case which demands an urgent response by the international community.*"

This approach reveals unwillingness on the part of the Security Council to set precedents for humanitarian intervention in internal conflicts. Presumably, it wants to retain the option for a case by case assessment. However, the more often the Security Council authorises the use of military force to cope with internal conflicts, the less convincing becomes the *sui generis* rhetoric on the part of the Security Council.

The Security Council, when in Resolution 1080 (1996) it authorised the use of force in Zaire, omitted the "unique and exceptional situation"-formula and simply recognised that the situation, "*demands an urgent response by the international community*".

Thus, despite the arguable special characteristics of most authorisations under Chapter VII, the practice of the Security Council has set a precedent for authorising humanitarian intervention when the situation within a state is one of imminent humanitarian catastrophe. Haiti, however, must so far be considered a unique and exceptional authorisation of military intervention to restore democracy.

Humanitarian purpose of military enforcement. Generally, the Security Council has authorised use of military force for strictly humanitarian purposes

– to ensure the provision of humanitarian assistance and the protection of civilians. This was so in Bosnia, Somalia, Rwanda, Zaire, Albania and East Timor.

Humanitarian intervention is fundamentally different from enforcement action to maintain international peace in the traditional sense. Maintenance of international peace in the traditional sense means addressing international tensions, not protecting civilians within the state. When the purpose is humanitarian, intervention might, arguably, in the short term result in less international peace in the traditional sense than would no action, without thereby being disproportionate. Protecting individuals, presumably, provides better conditions for international peace and security in the long term.

Haiti is the one deviation so far from this general picture. In Haiti, the Security Council authorised military intervention for the purpose, above all, of restoring democracy.

2.4. Limits upon the competence of the Security Council?

The Security Council is a political organ. It consists of representatives of states with differing interests, and – above all – its rules of decision laid down in Article 27(3) reflect the powers of the world, allowing for the Permanent Members to veto any decision. Furthermore, the Security Council has only the powers and capacities that the Member States choose to provide it with. Consequently, it may be unable to take action when, according to the UN Charter, it could and should. Examples of inaction are numerous. This lack of consistency is a problem of legitimacy, but not of legality.

If, on the other hand, the Security Council takes action, though according to the UN Charter it arguably had no legal competence to do so, the question is whether there are any effective judicial guarantees against *ultra vires* action – that is action exceeding the limits of its competence under the UN Charter – by the Security Council.

The Security Council, in discharging its duties, is bound to act in accordance with the purposes and principles of the UN Charter (Article 24(2)). But when the Security Council acts, there is a presumption that it has competence to do so, although the possibility of actions *ultra vires* can not be ruled out in principle.

The International Court of Justice in 1962 on the purposes and powers of the UN stated that:
"These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. (..) But when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization."[29]

The limits upon the competence of the Security Council are not, however, guarded by effective judicial guarantees. The Charter has not conferred upon the International Court of Justice general powers to review decisions taken by the other UN organs.[21] However, the other UN organs may themselves ask the Court for an advisory opinion on the legality of any UN action (Article 96 of the Charter)[22], or the Court may consider the legality of such decisions in the context of an ordinary case brought before it.

The latter happened with Resolution 748 (1992) demanding of Libya to hand over two persons suspected in the Lockerbie bombings for international prosecution. The resolution was indirectly brought before the Court in the context of a case filed by Libya. According to Libya, the Montreal Convention on Airplane Terrorism did not demand that Libya hand over the suspects, whereas such an obligation was conferred upon it by Resolution 748, since UN Charter obligations prevail over other treaty obligations (Article 103). Acording to Libya, Resolution 748 is *ultra vires* in holding that the Libyan refusal to hand over the suspects is a "threat to international peace" under Chapter VII. In its order of 14 April 1992 (para. 39-40), the Court held that Resolution 748 was "*prima facie*" valid and binding but refused to give a final ruling on "*the legal effects*" of the resolution until the judgment, still pending.

3. CONCLUSION

Under the UN Charter, armed enforcement for humanitarian purposes may be undertaken only if the Security Council determines the existence of a threat to international peace, a breach of the peace or an act of aggression under Chapter VII and decides upon or authorises such an intervention. Currently, intervention by Member States with Security Council authorisation is the only option available, since enforcement action undertaken directly by the Security Council is conditioned upon the existence of a standing UN force which has not been established. The General Assembly has no subsidiary competence to authorise humanitarian intervention.

The notion of a "threat to the peace" is inherently vague. The UN Charter has, basically, left it to the discretion of the Security Council to determine when a "threat to the peace" is at hand. There is no general option for review by the International Court of Justice. Review by the Court may take place only incidentally or on the request of the other UN organs. The Court has held that there is a presumption in favour of the legality of Security Council action.

The Security Council has interpreted the notion of a "threat to the peace" broadly to include also internal conflicts with serious humanitarian consequences.

Notably in its practice of the 1990s, the Security Council has demonstrated

a tendency to widen considerably the traditional notion of a threat to the peace under Chapter VII in order to cope under Chapter VII with humanitarian emergencies resulting from violent internal conflicts or governmental repression of civilians. In several cases, the Security Council has regarded a humanitarian emergency arising from civil war, civil strife etc. with grave breaches of international humanitarian law or from gross and massive violations of human rights by the government of a state as a threat to international peace and security. The Security Council, in the cases of the former Yugoslavia and Rwanda, even established international criminal tribunals to prosecute persons responsible for serious crimes against civilians. In the case of Haiti, so far a "lonely bird", the Security Council even considered a violent overthrow of the democratically elected government a threat to international peace.

This practice may be seen as reflecting a dynamic change in the conception of the notion of "international peace" from a traditional notion of peace (absence of international military conflict) to a wider notion of peace (stability and order) for which conditions within a state are also relevant.

Or, it may be seen as reflecting a *de facto*derogation from the notion of a "threat to the peace" in the Charter enabling the Security Council to act on purely humanitarian grounds. It may be argued that the Security Council has treated the notion of a "threat to the peace" as a political concept rather than a legal one: If the Security Council can agree upon a response by the international community to a humanitarian emergency within a state, it determines the existence of a threat to the peace and takes action.

The practice of the Security Council, although not consistent, does show an increasing readiness on the part of the international community to intervene when human suffering within a state reaches the proportions of an impending humanitarian disaster. Thus, the Security Council, although when authorising a humanitarian intervention it has taken great pains to stress the "unique and exceptional character" of the crisis at hand, has provided a precedent for humanitarian interventions within the framework of the UN in case of humanitarian emergencies resulting from civil war and repression of civilians within a state.

This is a crucial development as far as the protection of individuals is concerned. But the limitations of the UN Security Council should also be borne in mind.

First, the Security Council has only the capacity for decision when no Permanent Members use the veto. The Security Council is a law-making organ, interpreting the UN Charter. At the same time, however, it is essentially

composed as a political organ. Yet, this weakness of the Security Council is also its strength. The legitimacy of Security Council action rests not so much with its obligation to respect the principles and purposes of the UN Charter as with its procedure of decision which – by requiring a qualified majority and no veto from Permanent Members – rule out the abuse of humanitarian intervention by a few states for purposes of national interest.

Second, the Security Council has only the measures for enforcement that Member States confer upon it. Humanitarian intervention simply will not take place unless one or more states are willing to do the job. That is why Security Council action on humanitarian grounds has often been characterised by too little being done too late. In Rwanda, the international community hesitated to intervene, so Security Council authorisation for humanitarian intervention came too late, when genocide was already a full-blown fact. In Somalia, the humanitarian intervention authorised by the Security Council was half-hearted and was called off after casualties had occurred.

Chapter V
Humanitarian intervention without authorisation from the UN Security Council

This chapter deals with humanitarian intervention by individual states – acting unilaterally or multilaterally – without prior authorisation from the Security Council.

The legality and legitimacy of such humanitarian intervention is a long-standing controversy among states and legal scholars. Before addressing this question from the point of view of international law, a few remarks should be made on the dilemma of the international community which provokes the continued relevance of the question.

On one hand, the development of international relations and international law in the 20th century has been dominated by the common experience of two world wars which have convinced the international community that the use of force to solve international disputes is not only a violation of state sovereignty but, in the long run, is also detrimental to the international community at large. The UN Charter has therefore generally outlawed all use of force between states, allowing only for the use of force in self-defence against an armed attack and the use of force authorised by the Security Council for the maintenance of international peace and security.

On the other hand, international law is increasingly concerned with the protection of individuals, thereby limiting the sovereignty of the state to treat its own citizens at its discretion. Numerous instruments have been adopted for the protection of basic human rights and rules of international humanitarian law. These norms are now obligations of the international community as a whole. The Security Council, in recent years, has used its powers under Chapter VII expansively to mandate international action to cope with humanitarian emergencies within a state notably resulting from gross and massive violations of human rights or international humanitarian law.

The dilemma of the international community arises when the Security Council, due to a veto by one or more Permanent Members, fails to authorise the action necessary to prevent an imminent humanitarian disaster in a state.

In this situation, do states have a right under international law to conduct humanitarian intervention on their own initiative, or does the prohibition on the use of force take precedence?

The following analysis looks first to the development and status of the doctrine of humanitarian intervention in international law prior to the UN Charter. Turning then to the crucial question of the continued legality under international law of humanitarian intervention without Security Council authorisation, Article 2(4) of the UN Charter forms the starting point of assessing whether it is conceivable that a pre-1945 doctrine of humanitarian intervention has survived the adoption of the UN Charter. Subsequently, it is discussed whether, even assuming that no such general right of humanitarian intervention exists, specific legal defences like reprisals or a state of necessity may justify humanitarian intervention in extreme cases. Finally, it is assessed whether, despite Article 2(4), state practice after 1945 has established a rule of customary international law allowing for humanitarian intervention without authorisation from the Security Council.

1. DEVELOPMENT AND STATUS OF THE DOCTRINE OF HUMANITARIAN INTERVENTION PRIOR TO THE UN CHARTER

The historical roots of the doctrine of humanitarian intervention date back to the 16th and 17th century classical writers on international law. They held the view, founded in natural law philosophy, that a war to punish injustice and those guilty of crimes was a just war (*bellum justum*).[1]

The modern doctrine of humanitarian intervention is usually traced back to 19th century state practice and international legal theory.[2] By that time, war and other forms of use of force was not generally prohibited as a means of international politics, but there was a sense of necessity to justify the use of force on moral and political grounds in accordance, notably, with the tradition of just war.

In legal theory, a doctrine of intervention for humanity emerged, according to which states had the right to intervene by the use of force "in cases in which a State maltreats its subjects in a manner which shocks the conscience of mankind."[3] This doctrine was related to the philosophy of political liberalism and the concept of human rights, which during the late 18th century and 19th century led to the establishment of constitutional democracy in the United States and Western European states.

States in the 19th century increasingly invoked humanitarian reasons to justify intervention. The invocation of the doctrine of humanitarian

intervention, however, was sometimes a pretext for intervention for strategic, political or economic purposes.[4] Humanitarian interventions before 1945 include notably the following cases, which all had a collective character and were all directed against Turkey:

– the collective intervention by Great Britain, France and Russia in Greece 1827-30 to stop the Turkish massacres and suppression of the revolutionary Greek population;
– the French intervention in the Lebanon 1860-61 authorised and supervised by the five European great powers to stop the massacres of the Christian Maronites committed by the Druses under Turkish supremacy;
– the dictatorial interference by Austria, France, Italy, Prussia and Russia in 1866-68 in the Turkish administration of Crete to protect the oppressed Christian population;
– the collective European great power interference and Russian intervention in the Balkans 1875-78 in favour of the insurrectionist Christians in Bosnia, Herzegovina and Bulgaria, who had been subjected to massacres under Turkish misrule;
– the dictatorial interference by the European great powers 1903-08 in the internal affairs of Turkey in favour of the oppressed Christian Macedonian population.

During the first half of the 20th century, the doctrine of humanitarian intervention was recognised by a vast majority of legal scholars as part of customary international law, although there was also a considerable minority of legal scholars who were opposed to the doctrine.[5]

In state practice, however, the frequency of alleged humanitarian interventions declined during the first half of the 20th century.[6] This decline coincides with, and might in part relate to, the first initiatives by the international community to outlaw the use of force in international relations by restricting and ultimately prohibiting (the Kellogg-Briand Pact from 1928) war as an instrument in international relations.

In conclusion, it is debatable how firmly the doctrine of humanitarian intervention had established itself in customary international law prior to the UN Charter. The evaluations by legal scholars differ on this point.[7] On the one hand, the doctrine had become increasingly recognised in legal theory as part of customary international law, although the precise content and extent of the doctrine was not clear. Furthermore, the doctrine was often invoked in state practice during the 19th century to justify intervention. On the other hand, state practice was often questionable as to the genuinely humanitarian character of intervention, and, in the course of the 20th century, the frequency of interventions for (alleged) humanitarian purposes declined.

2. HUMANITARIAN INTERVENTION UNDER EXISTING INTERNATIONAL LAW

Humanitarian intervention without Security Council authorisation continues to be a controversial issue of international law. There is no consensus in legal doctrine on this issue; especially American legal scholars have advanced the case for the legality of humanitarian intervention. The position of states differ as well; notably France and the UK have asserted a right of humanitarian intervention.

The starting point of the assessment must be Article 2(4) of the UN Charter which lays down the general prohibition on the use of force in international relations.

2.1. Article 2(4) of the UN Charter

As noted above, there was before 1945 no general prohibition on the use of force in international law, although the waging of war had been progressively outlawed since the beginning of the 20th century. This changed with the adoption of the UN Charter. The provisions of the Charter on the use of force have since been regarded as an authoritative declaration of customary international law. Article 2(4) of the Charter states that:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

The Charter provides two explicit exceptions to this rule, which are not, however, relevant to humanitarian intervention without authorisation from the Security Council. First, the right of individual or collective self-defence against an armed attack against the state (Article 51). Second, military enforcement action mandated by the Security Council (Chapter VII, Article 42).

Furthermore, armed assistance may be provided on the request of the lawful government of the state. Such a request may be relevant when a humanitarian emergency arises from natural causes (drought, flood, starvation etc.) or when gross and massive violations of human rights or international humanitarian law are committed by entities opposed to the government (mercenaries, guerrillas etc.). Traditionally such a request has not been relevant in the classical case of humanitarian intervention when a humanitarian disaster is caused by human rights violations committed by the government itself. Moreover, a request is not likely, if, in case of violent internal conflicts, government has broken down.

In state practice military action has also on many occasions been taken by one state into the territory of another state in order to protect or rescue its own citizens from harm due to

violent internal conflicts, rebellion, flood etc.[8] Such action is sometimes considered justified, provided it is not abused for political purposes. However, the legality of such action is disputed on the grounds that it is incompatible with Article 2(4) of the UN Charter.[9] Some states and legal scholars take the view that such action falls within the right of self-defence in Article 51 of the UN Charter. This position is not sound since the right of self-defence presupposes an armed attack against the state itself. In any case, this doctrine does not cover humanitarian intervention to protect nationals of the target state.

The crucial question, therefore, is whether Article 2(4) should be interpreted as prohibiting all use of force against another state which is not covered by the two exceptions explicitly provided for in the UN Charter, or as allowing implicitly for certain exceptions, notably humanitarian intervention without authorisation from the Security Council.

2.1.1. HUMANITARIAN INTERVENTION ON ITS FACE INCOMPATIBLE WITH ARTICLE 2(4)

On its face, Article 2(4) must be interpreted as a general prohibition on the use of force between states without any exceptions other than those explicitly provided for by the UN Charter itself, thus prohibiting also humanitarian intervention without authorisation from the Security Council.[10]

Consequently, although the drafters of the Charter did not explicitly take a stand on the issue of humanitarian intervention,[11] it must also be presumed that, even assuming that a right of humanitarian intervention was established in customary international law prior to the Charter, this right did not survive the adoption of the UN Charter.[12] Article 2(4) drew a "line in the sand" as regards the use of force between states.

That Article 2(4) was intended to have general applicability is apparent, above all, from the wording of Article 2(4), which prohibits not only the classical waging of war that violates the core of sovereignty of another state and aims at its subordination – *"the threat or use of force against the territorial integrity or political independence of any state"* – but also the use of force, *"in any other manner inconsistent with the Purposes of the United Nations."*

The presumption against any other exceptions than those explicitly provided for in the UN Charter itself, is supported by the *travaux préparatoires*[13] to Article 2(4) and the preamble to the Charter, the seventh preambular paragraph of which states that a primary goal of the Charter is, *"to ensure (..) that armed force shall not be used, save in the common interest."* Indeed, the spirit of the entire Charter, when read in conjunction and in light of its historical background, supports this conclusion.

2.1.2. POSSIBLE LEGAL BASIS FOR HUMANITARIAN INTERVENTION UNDER THE UN CHARTER

Still, the question whether a right of humanitarian intervention without Security Council authorisation is compatible with Article 2(4) continues to be debated in international legal doctrine.

A number of international legal scholars – in particular, but far from only, from the United States – advance a case for the continued legality under the UN Charter of humanitarian intervention without authorisation from the Security Council.

One argument is that humanitarian intervention is not incompatible with Article 2(4), since humanitarian intervention is not directed against the "territorial integrity" or "political independence" of the state and, above all, is not "inconsistent with the Purposes and Principles of the Charter" either, but rather in conformity with one of the fundamental purposes of the UN, the promotion of respect for human rights, Article 1(3).[14]

However, Article 1(3) also provides that the solution of international economic, social and cultural problems are purposes of the UN. Thus, it may be argued, intervention on economic, social or cultural grounds might be exempted from the prohibition as well. Such balancing between general purposes of the Charter and the prohibition on the use of force is not compatible with the fundamental character of the latter.

Another, more subtle, argument is that humanitarian intervention is not incompatible with Article 2(4), in so far as it is based on a subsidiary responsibility of the Member States for the maintenance of international peace and security which applies when the Security Council is unable to fulfil its responsibilities under Article 24 and Chapter VII. This line of reasoning is generally referred to as the "link theory".[15]

However, first of all, this view has no basis in the provisions of the Charter. When Article 24 confers only "primary" responsibility upon the Security Council for the Maintenance of international peace and security, it clearly refers to a subsidiary responsibility of other organs of the UN, notably the General Assembly, but not of the Member States.[16] Second, arguing that the conditions on which the Charter was adopted have fundamentally changed, due to the failure by the Security Council to fulfil its responsibilities, and that, consequently, the Charter must be regarded as partly suspended[17], is not legally sound and has in any case lost much of its strength with the revitalisation of the Security Council since 1991. Third, the prohibition on the use of force between states has an existence under customary international law, which is independent of the UN Charter and therefore can hardly be conditioned upon the effectiveness of collective security under Chapter VII.

2.1.3. THE POSITION OF THE INTERNATIONAL COURT OF JUSTICE

The practice of the International Court of Justice also supports a broad interpretation of the prohibition in Article 2(4). The arguments invoked in favour of the legality under the UN Charter of humanitarian intervention without authorisation from the Security Council, are not consistent with the position taken by the Court.

Already in the Corfu Channel Case from 1949, the Court interpreted the prohibition on the use of force broadly, leaving the impression that under the UN Charter no implicit exceptions to Article 2(4) are accepted. In particular, the Court held that defects in international organisation can not justify non-compliance with the prohibition on the use of force.

After two British ships were sunk by mines laid out by Albania in its Corfu Channel, the UK intervened into the strait with warships to sweep the mines, alleging a right of intervention to secure evidence for a claim for damages. The Court rejected the UK allegation: *"The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defect in international organization, find a place in international law."*[27] The Court also rejected the invocation of a right of forcible "self-help", stating that, *"Between independent States, respect for territorial integrity is an essential foundation of international relations."*[28]

In the Nicaragua Case from 1986, the Court reaffirmed the general character of the prohibition on the use of force, a rule which it held to be part of customary international law and thus independent of the functioning of the collective security system under Chapter VII of the UN Charter.

The Court stated that, *"the principle of non-use of force (..) may thus be regarded as a principle of customary international law, not as such conditioned by provisions related to collective security, or to the facilities of armed contingents to be provided under Article 43 of the Charter.* [The principle of non-use of force should therefore] *..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."*[29]

Even more importantly, the Court in the Nicaragua Case seems to have implicitly rejected the doctrine of humanitarian intervention as incompatible with the prohibition on the use of force between states. The Court held that international law does not permit the use of armed force to redress violations of human rights in another state.

Considering the claim by the United States that its intervention in Nicaragua was justified to protect human rights, the Court stated that, *"In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect."*[30]

In the 1996 Nuclear Weapons Case, the Court seems to confirm that it regards self-defence against an armed attack (Article 51) and Security Council military enforcement action (Chapter VII) as the only exceptions under existing international law to the prohibition on the use of force in international relations.[21]

In conclusion, humanitarian intervention without Security Council authorisation is not compatible with Article 2(4). In accordance with the position of the International Court of Justice and the predominant position in international legal doctrine, Article 2(4) must be interpreted as prohibiting all use of force between states not explicitly exempted by the UN Charter. Arguments advanced for the legality of humanitarian intervention without Security Council authorisation do not suffice to provide a legal basis under the UN Charter.

2.2. Could humanitarian intervention be legally justified in extreme cases as "reprisals" or by reference to "a state of necessity"?

Although humanitarian intervention without Security Council authorisation is generally not compatible with Article 2(4) of the UN Charter, there may still under international law exist a right of humanitarian intervention in exceptional cases. International law recognises that special circumstances may preclude the wrongfulness of acts which, generally, are not compatible with international law.

Since 1955, the International Law Commission (ILC) has been working to codify international law on state responsibility, including circumstances which preclude such responsibility. The work is still not finished, but it is generally recognised that the preliminary ILC draft broadly reflects existing rules of customary international law.

According to the ILC draft, Articles 29-34, there are six circumstances which may preclude the wrongfulness of acts not in conformity with international law: Apart from situations where the state has given its *consent* such a legal defence may be valid for acts undertaken in situations of *force majeure*, *distress*, *a state of necessity* or in *self-defence* against an armed attack or as *reprisals* to sanction breaches of international law by another state.

As regards humanitarian intervention without Security Council authorisation and without the consent of the government of the target state, the doctrines of reprisals and state of necessity merit consideration (the irrelevance of self-defence was argued above: distress pertains to acts of persons representing the state, and force majeure only applies where the state has no choice but to act in breach of international law).

2.2.1. COULD HUMANITARIAN INTERVENTION BE JUSTIFIED AS REPRISALS?

As noted earlier, gross and massive violations of human rights by a government against its own citizens may be regarded as a violation against the international community as a whole. The question therefore arises whether such breaches of obligations towards the international community may be met by counter-measures in the form of humanitarian intervention, legally justified as reprisals. In the past, the use of force in international relations has often taken the form of reprisals. As for humanitarian intervention, justifying it as reprisals would surely run counter to the strictly humanitarian nature of the action. More importantly, however, under existing international law, it is recognised that reprisals may never involve the use of force.

The ILC draft in Article 50 prohibits countermeasures in respect of an internationally wrongful act by the use of force as prohibited by the Charter of the United Nations. Similarly, in the 1970 General Assembly Declaration on Friendly Relations, it was unambiguously stated that, *"States have a duty to refrain from acts of reprisals involving the use of force."*

2.2.2. COULD HUMANITARIAN INTERVENTION BE JUSTIFIED BY REFERENCE TO A "STATE OF NECESSITY"?

The doctrine of "a state of necessity" provides the most plausible option for justifying humanitarian intervention without Security Council authorisation in extreme cases.

The scope of this doctrine, however, is strictly limited. The doctrine of "a state of necessity" has been recognised by the International Court of Justice as valid only "on an exceptional basis". Apparently, the Court regards the strict conditions set up in the ILC Draft (see below) as reflective of customary international law.[22]

According to the ILC draft, Article 33, section 1, the reference to a "state of necessity" may only be applied as a legal defence if the act not in conformity with international law was the "only means of safeguarding an essential interest of the State against a grave and imminent peril" and at the same time "did not seriously impair an essential interest of the State towards which the obligation existed."

It is not reasonable to argue that humanitarian intervention could meet these conditions. First, although brought about by a legitimate and sincere international concern for individuals of another state, in the case of humanitarian intervention the essential interests of the intervening states, notably interest of survival or of the security of its own territory, are not really at stake. Second, even if a decent argument could be made in this respect, by

referring to the common conscience of humankind etc., humanitarian intervention still would not be justifiable as an act in a state of necessity, because, surely, such intervention seriously impairs the essential interest of the target state concerning respect for its territorial integrity.

These considerations suffice in themselves to rule out a legal defence for humanitarian intervention without Security Council authorisation based on "state of necessity".

Furthermore, according to the ILC draft, Article 33, section 2, the doctrine of "a state of necessity" cannot in any case be invoked 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 "is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation."

Many legal scholars consider Article 2(4) a peremptory norm of general international law from which no derogation is possible (*jus cogens*).[23] Furthermore, a good case could be made supporting the view that the UN Charter is exactly the kind of treaty which excludes the invocation of doctrines like "state of necessity" to justify the use of force in contravention of Article 2(4). In commenting upon this question, the ILC refers to Article 2(4), but, in the end, leaves the assessment to other UN organs.

If, indeed, the door was opened for the use of force in special circumstances as acts of "necessity" or the like, international law might be set on a track going back in time to the conditions prevailing before the UN Charter, when such doctrines and regimes flourished as justifications for the use of force in international relations, with all their potentials for abuse by powerful states. As noted above, this was exactly the state of affairs that Article 2(4) of the UN Charter was intended to bring to an end.

This view is supported by the position taken by the International Court of Justice in the above mentioned 1949 Corfu Channel Case (a position which the Court referred to again in 1986 in the Nicaragua Case) when it rejected the UK defence that the sweeping of mines in Albanian territorial waters was an act of "necessity", because it was necessary to secure evidence for subsequent proceedings against Albania. As earlier noted, the Court stated that it could: *".. only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defect in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take, here; for from the nature of things, it would be reserved for the most powerful states, and might easily lead to perverting the administration of international justice itself."*[24]

It should be added that in state practice after 1945, states intervening for alleged humanitarian purposes have not justified the intervention by reference to "a state of necessity" but have relied on other justifications such as self-defence.[25]

In conclusion, even if the occurrence of human rights atrocities within a state, combined with the inability of the Security Council to act, arguably puts the international community in a moral state of necessity, under existing international law the "state of necessity" doctrine cannot provide a legal justification for humanitarian intervention in violation of the general prohibition on the use of force.[26]

2.3. Humanitarian intervention in state practice after 1945

In the light of Article 2(4), the only possible legal justification for humanitarian intervention without a Security Council mandate is the assumption that the practice of states after 1945 has established a right of humanitarian intervention as part of customary international law. For state practice after 1945 to establish an exception under international law to Article 2(4) – considered by many as the basic rule of international law – would require considerable consistency as well as general acceptance from a vast majority of states within the international community.

International law regarding non-intervention, including the prohibition on the use of force, may undergo dynamic changes through the actual practice of states. Whether a new right of intervention develops through state practice, depends predominantly upon the attitude of states when intervening in breach of existing norms. According to the International Court of Justice, interventions justified on legal grounds, alleging a right of intervention, may, if supported by other states, in time, lead to corresponding new norms of international law (see above Chapter I). On the other hand, interventions which are justified on moral or political grounds only, or which are met with criticism by the international community, serve to confirm the general prohibition on the use of force in international law, rather than to erode it.

In assessing whether state practice after 1945 might have established a right of humanitarian intervention without authorisation from the Security Council as a norm of customary law, the following evidence should be investigated:

– Interventions after 1945 by which a right of humanitarian intervention has been invoked and, above all, the response to such actions by the international community.
– Official declarations etc. adopted after 1945 expressing the legal opinion of the international community with regard to humanitarian intervention.

It seems reasonable to initially make a distinction between practice during the Cold War (until 1990) and post Cold War practice (from 1990), since a change in state practice and international attitude seems to be emerging in recent years.

2.3.1. STATE PRACTICE DURING THE COLD WAR (1945-1989)

State practice during the Cold War does not support the view that a right of humanitarian intervention without Security Council authorisation has been established under customary international law.

2.3.1.1. Humanitarian interventions after 1945 and the international reaction

After 1945, numerous cases exist in which a state has intervened by the use of force in another state. Most of these interventions, however, could not reasonably be said to be genuinely humanitarian. The political interest of the intervening state or its interest to protect its own nationals abroad in most cases seems to have been the basis for intervention. More importantly, even in cases where the doctrine of humanitarian intervention might have been invoked, states most often have not. States intervening have most often relied on self-defence as their legal justification.[27] Many of these cases concerned intervention by a state to protect its own nationals abroad. In other cases, states have relied upon an (alleged) invitation by the government.

Arguable humanitarian interventions include the following cases:

India's intervention in East Pakistan, 1971. In November 1971, India intervened in East Pakistan where Pakistani forces had committed large-scale human rights violations and had forced some 10 million people to flee to India. India defeated the Pakistani troops and contributed actively to the establishment of the independent state of Bangladesh. The Security Council was paralysed, whereas the General Assembly criticised the intervention. India's intervention seems to have been motivated by humanitarian concerns as well as concerns for the regional balance of power vis-à-vis Pakistan. But India itself did not invoke the doctrine of humanitarian intervention as justification.

Vietnam's intervention in Cambodia, 1978-79. In December 1978, Vietnam invaded Cambodia and expelled the Khmer Rouge regime, which had on several occasions violated the Vietnamese boarder. Vietnam installed a new government. Although Vietnam also invoked humanitarian considerations as justification, the border intrusions seem to have motivated the Vietnamese invasion rather than the genocide committed by the Khmer Rouge from 1975-

79, by which close to two million people were killed. Whereas the adoption of a Security Council resolution, demanding Vietnamese withdrawal, was blocked by a Soviet veto, the United States and most other Western states criticised the invasion and rejected Vietnam's justifications.

The intervention by France in Central Africa, 1979. In 1979, France intervened in Central Africa to put an end to the atrocities committed by President Bokassa, notably a veritable massacre on students. While Bokassa was abroad, France intervened – without meeting any resistance – and reinstated the ousted President Dacko. Only a few states criticised the French intervention.

Tanzania's intervention in Uganda, 1979. In 1979, Tanzania intervened in Uganda and conquered the Ugandan capital Kampala forcing Idi Amin to escape. Tanzania installed a new government. The background to the intervention was partly a conflict concerning Kagera – a region of Tanzania annexed by Amin, partly the reign of terror conducted by Amin – resulting in the loss of estimated 300.000 lives. Only a few states criticised the intervention. Tanzania did not invoke the doctrine of humanitarian intervention.

As can be seen, even with regard to arguably humanitarian interventions there has not been universal approval by the international community. Neither of the four interventions mentioned were condemned in the Security Council, but they were discussed in the UN, and the Indian and Vietnamese interventions were criticised by many states, whereas the French and Tanzanian interventions only by a few. Significantly, the states intervening were themselves notably hesitant to formally invoke the doctrine of humanitarian intervention as a legal justification.

2.3.1.2. International declarations on the non-use of force in international relations

International declarations on non-intervention unambiguously speak against the assumption that a right of humanitarian intervention without Security Council authorisation has developed after 1945.

From the Declaration on Friendly Relations from 1970 it seems clear that any use of force between states not explicitly allowed for in the UN Charter is taken to be incompatible with Article 2(4) and with international law. Only the two exceptions provided by the UN Charter are mentioned. There is no hint at all of a right of humanitarian intervention. On the prohibition on intervention in the domestic jurisdiction of a state, it is stated that intervention, "for any reason whatever" and in particular "armed intervention", is prohibited under

international law. In the 1986 Nicaragua Case, the International Court of Justice held that the Declaration reflects the prohibition on the use of force under customary international law.[28]

In the 1975 Helsinki Final Act from the Conference on Security and Co-operation in Europe (CSCE), the 35 participating states – including the Soviet Union and the United States – adopted a Declaration on Principles. On the principle of Refraining from the threat or use of force, they resolved to refrain in their mutual relations as well as in their international relations in general, from the threat or use of force in accordance with Article 2(4) of the UN Charter, adding that, *"No consideration may be invoked to serve to warrant resort to the threat or use of force in contravention of this principle."* On the principle of Non-intervention in internal affairs, the states resolved to respect this principle, adding that, *"They will accordingly refrain from any form of armed intervention or threat of such intervention against another participating state."*

2.3.2. STATE PRACTICE AFTER THE COLD WAR (1990-1999)

The question is then whether a right of humanitarian intervention without Security Council authorisation may be emerging from developments in state practice during the 1990s. The humanitarian interventions authorised by the Security Council in Bosnia, Somalia and Rwanda are, of course, not relevant in legal terms, but they show that the international community is increasingly recognising that humanitarian intervention may sometimes be necessary. Yet, the fact that states increasingly turn to the Security Council, may also speak against the assumption that a right of humanitarian intervention without Security Council authorisation is emerging from recent state practice.

2.3.2.1. Humanitarian interventions and international reactions

In state practice since 1990, there are notably three cases of arguably genuine humanitarian intervention without prior authorisation from the Security Council.

The intervention by ECOWAS in Liberia, 1990. In 1990, the Economic Organisation of West African States (ECOWAS) intervened in Liberia to put an end to the bloody civil war there and restore order in the country, in which at this time there was a complete breakdown of government. The intervention was subsequently endorsed by the Security Council in Resolution 788 (1992), in which it welcomed the efforts of the ECOWAS to restore peace in Liberia.

The interventions lead by the United States, UK and France in Iraq since 1991. In 1991 – after the Iraqi invasion of Kuwait in 1990 had been countered by the

international community on the basis of the authorisation by the Security Council (SC Res. 678, 1990) and Iraq had agreed upon conditions for a cease-fire, sanctioned by the Security Council (SC Res. 687, 1991) – the Iraqi government initiated a campaign of violent oppression against minorities in Iraq, notably the Kurds in Northern Iraq.

The Security Council, in Resolution 688 (1991) condemned the repression of civilians in Iraq, and, considering the repression and its international consequences a threat to international peace and security, insisted that Iraq allow immediate access by humanitarian organisations in all parts of Iraq (see above Chapter IV).

In April 1991, immediately after the adoption of Resolution 688 and in order to enforce its demands for humanitarian relief in Northern Iraq, the United States declared and started to enforce a no-fly zone in Northern Iraq to secure the safety of humanitarian relief operations. Under this shield, a large humanitarian relief operation, backed by thousands of troops from 13 countries, was initiated in Northern Iraq. In May 1991, the international force was replaced by 500 lightly armed UN guards in accordance with an agreement between the UN and the Iraqi government. The no-fly zone in Northern Iraq continues to be enforced by US, UK and French forces.

The intervention in Northern Iraq was discussed in the UN General Assembly. Some states spoke out against it as a violation of Iraq's sovereignty, whereas several states spoke out in its favour. In the end, no resolution of condemnation was adopted.[29]

In the declaration of 16 July 1991 from the G7 summit in London, the operations in Iraq were commented upon in this way: *"We note that the urgent and overwhelming nature of the humanitarian problem in Iraq caused by violent oppression by the Government required exceptional action by the international community, following UN Security Council Resolution 688. We urge the UN and its affiliated agencies to be ready to consider similar action in the future if the circumstances require it. The international community cannot stand idly by in cases where widespread suffering from famine, war, oppression, refugee flows, disease or flood reaches urgent and overwhelming proportions."*

In August 1992, the Iraqi government initiated another campaign of violent oppression, this time in Southern Iraq against the Shiites. As a response, the United States, UK and France declared a no-fly zone in the Southern Iraq, which continues to be enforced by forces from the three states, including operations against Iraqi military planes violating the no-fly zone and against Iraqi anti-aircraft batteries, which engage Western military planes.

From the various statements made by governments and others during that period, it is clear that, generally, although some states were very ambiguous

and others expressed serious reservations, the military interventions in Northern and Southern Iraq following Resolution 688, were regarded by the world community as somehow emanating from the authority of the Security Council. Notably the intervening states took the position that the interventions were based on the authority of the Security Council. In international legal doctrine, it has been much debated whether the interventions in Iraq had a legal basis in prior Security Council resolutions, although there seems to be general agreement that the Security Council did not expressly authorise the interventions – neither in Resolution 688 taken alone, which makes no explicit reference to Chapter VII and does not contain any language authorising the use of force; nor if Resolution 688 is read on the background of Resolution 678, authorising the use of force to force Iraq out of Kuwait, since this authorisation concerned Iraq's invasion of Kuwait and terminated with the cease-fire agreement in Resolution 687.[30]

NATO's intervention in the Federal Republic of Yugoslavia, 1999. In 1998, the Federal Republic of Yugoslavia had issued a campaign of violent prosecution against civilians in the province of Kosovo. The Security Council in Resolutions 1160 and 1199 (1998) determined that the humanitarian situation in Kosovo constituted a threat to international peace and stressed the need to prevent a humanitarian catastrophe. But a Security Council authorisation for military intervention was not given due to the stated intentions of Russia and China to block such a decision by veto (see above Chapter IV).

In November 1998, NATO threatened to intervene with force. In March 1999, after negotiations with Belgrade proved unsuccessful, NATO initiated a military operation to put an end to the oppression against the ethnic Albanians in Kosovo. The operation was concluded in June 1999 when Belgrade essentially agreed to sign the agreement with the G8 on the autonomy of Kosovo and on international military presence in Kosovo, which it had earlier refused to sign. The agreement was welcomed by the Security Council in Resolution 1244 (1999), in which it authorised, under Chapter VII, an international security presence in Kosovo.

During the NATO operation, heavy criticism was expressed notably by Russia and China. But there were also many statements of support or, at least, implicit acceptance from the international community.

The Security Council on 14 April 1999, rejected by twelve votes to three (Russia, China and Namibia) a draft resolution, sponsored by Russia, which would have condemned the NATO operation as a violation of Article 2(4) of the UN Charter and demanded the cessation of use of force by NATO in Yugoslavia.[31]

UN Secretary General Kofi Annan issued a statement immediately after the NATO operation had commenced in which he regretted the failure of the Yugoslav authorities to reach a political settlement in Kosovo, and continued:

"It is indeed tragic that diplomacy has failed, but there are times when the use of force may be legitimate in the pursuit of peace. But (...) under the Charter , the Security Council has primary responsibility for maintaining international peace and security (...). Either, the Council should be involved in any decision to resort to the use of force."[32]

Shortly after, Annan in an address to the UN Commission on Human Rights – referring also to the "campaign of ethnic cleansing conducted by Serbian authorities in Kosovo" – stated that:

"We should leave no one in doubt that for the "mass murderers", the "ethnic cleansers", those guilty of gross and shocking violations of human rights, impunity is not acceptable. The United Nations will never be their refuge, its Charter never the source of comfort or justification. (...) Emerging slowly, but I believe surely is an international norm against the violent repression of minorities that will and must take precedence over concerns of State sovereignty."[33]

The Federal Republic of Yugoslavia has brought the case before the International Court of Justice alleging, notably, a violation of the prohibition on the use of force. In its preliminary order of 2 June 1999, the Court rejected the request by Yugoslavia for provisional measures but at the same time indicated concern for the legality of the use of force by NATO. The Court's judgement on the merits is pending.

In its order, the Court, on the one hand, remarked that it was, *"deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background of the present dispute"*,whereas on the other hand *"profoundly concerned with the use of force in Yugoslavia (..) under the present circumstances such use raises very serious issues of international law."*[34]

In conclusion, state practice after the end of the Cold War (1990-99) concerning humanitarian intervention is neither sufficiently substantial nor has there been sufficient acceptance in the international community to support the view that a right of humanitarian intervention without Security Council authorisation has become part of customary international law. However, the amount of criticism from states seems less, and there has been implicit support from the UN after the fact when the intervention could be said to be truly humanitarian. State practice since 1990 may be seen as evidence of a greater acceptance that humanitarian intervention may be morally justifiable in extreme cases.

3. CONCLUSION

Under current international law there is no right for states to undertake humanitarian intervention in another state without prior authorisation from the Security Council.

Regardless of the status of the doctrine of humanitarian intervention prior to the UN Charter, such intervention is now incompatible with Article 2(4) of the UN Charter, which generally prohibits the use of force between states, excepting only use of force in self-defence against an armed attack and use of force mandated by the Security Council under Chapter VII of the UN Charter. To invoke against Article 2(4) the continued validity of a doctrine of humanitarian intervention allegedly established prior to the UN Charter is not sound. Article 2(4), to a large extent, created an entirely new legal order as regards the use of force between states with which this doctrine is not compatible. This is also the position of the International Court of Justice which has strongly emphasised the prohibition on the use of force for whatever reasons, and, arguably, has implicitly rejected the doctrine of humanitarian intervention. There is therefore no general right of humanitarian intervention without Security Council authorisation under existing international law.

The exceptional circumstances, which according to customary international law may preclude the wrongfulness of acts not in conformity with international law, do not provide a legal basis either for humanitarian intervention in extreme cases without Security Council authorisation. The doctrine of reprisals is not a valid basis, since such countermeasures in response to a breach of international obligations by another state may never include the use of force. Neither can the doctrine a "a state of necessity" provide a right of humanitarian intervention in extreme cases without Security Council authorisation. First, the doctrine of "necessity" is extremely narrow in scope, requiring an essential state interest at stake for the acting state with no comparable interest thereby violated in the target state. Second, it is highly controversial whether the doctrine of "necessity" can in any case, apart from self-defence against an armed attack, justify the use of armed force against another state.

The development through state practice of a new rule of customary international, allowing states to conduct humanitarian intervention without Security Council authorisation, in contravention of the fundamental prohibition on the use of force in international relations laid down in Article 2(4) of the UN Charter, would require a strong and consistent consensus among a vast majority of states in the world. Exceptional violations for humanitarian purposes of the prohibition on the use of force which are not justified by

reference to a legal right of intervention but on moral and political grounds only, serve to confirm the existing rule of international law rather than to erode it.

State practice during the Cold War (1945-89) does not support the view that a right of humanitarian intervention without authorisation from the Security Council has become part of customary international law. Only a few interventions from this period could arguably be said to be humanitarian, and even in these cases, the intervening states were notably hesitant to rely on the doctrine of humanitarian intervention. Furthermore, there has in some of the cases been strong criticism from the international community. Indeed, state practice in this period as well as international declarations on non-use of force between states have reaffirmed the general character of the prohibition laid down in Article 2(4). Thus, state practice during the Cold War rather speaks against than in favour of a right of humanitarian intervention without Security Council authorisation in customary international law.

Nor is state practice after the end of the Cold War (1990-99) concerning humanitarian intervention sufficiently substantial or generally accepted to support the view that a right of humanitarian intervention without authorisation from the Security Council has become part of customary international law. However, the amount of criticism from states seems less and there has been implicit support from the UN after the fact when the intervention was truly humanitarian. State practice since 1990 can be seen as evidence of a greater acceptance that humanitarian intervention without Security Council authorisation may be morally justifiable in extreme cases. But these events do not amount to the conclusion that a legal right of humanitarian intervention without Security Council authorisation has been established under current international law. It is still premature to assess whether such a right may be emerging under international law.

Chapter VI
Bringing political and legal aspects together

1. INTRODUCTION

Obviously there is no easy solution to the problems and dilemmas of humanitarian intervention without authorisation from the Security Council.

International law, according to the interpretation set forth above which corresponds with the predominant position among international legal scholars, offers one answer to this problem: that there is no right of humanitarian intervention without Security Council authorisation under existing international law. But this is not the whole story. From a political or moral perspective on international relations the answer may be different.

In the end, international law is essentially a body of norms which states in their mutual relations have agreed upon – whether by treaty or custom – because, on balance, these norms are generally regarded as a viable and necessary framework for international co-operation and peaceful co-existence, objectives which in the long term serve the interest of all states. In addition, international law works through its enforcement mechanisms and through the inherent pressure for justification to which states are exposed. International law aims at creating a legal order in international relations where there would otherwise be anarchy with state conduct dictated only by naked state interest and balances of power. At the same time, international law is a distinct institution of norms with a dynamic of its own, which reaches beyond the logic of interstate relations. This is certainly the case as far as the international protection of the individual is concerned. Norms of international law in this area tend to progressively affect the policy choices of states.

However, the current international legal order is a far cry from being a perfect legal system, lacking in particular means of effective enforcement. There is an asymmetry between the means of enforcement and the potential for violations of international legal norms. Violators of for instance human rights norms are protected by the high standards of international law concerning state sovereignty and the non-use of force, whereas they need not accept compulsory jurisdiction of the International Court of Justice and

enforcement action against them is dependent on political organs that are vulnerable to the conditions and vagaries of international politics.

Therefore, the political interests and normative concerns of states continue to play a crucial role in the actual compliance with and development of international law. Existing norms of international law can only survive if, generally, states accept them and actually comply with them. At times, vital political interests of states or shared moral convictions of a group of states may, however, outweigh the dictates of law and lead to acts which are not compatible with the existing general international norms – e.g. humanitarian intervention without Security Council authorisation.

International law tries to take this reality into account by allowing legal defences for acts undertaken by states in self-defence, in a state of necessity, distress etc. However, as has been shown above, these defences do not provide a legal basis for humanitarian intervention under existing international law.

At present, therefore, the dilemma of humanitarian intervention without Security Council authorisation is inescapable. There is no clear-cut solution which may reconcile the tension between the peremptory rule of international law that the use of force in international relations is prohibited and the political and moral desire and aspiration of many states to act in the face of atrocities causing large-scale human suffering within another state. Faced with this dilemma, the paramount question is how to balance the wish to uphold and strengthen the existing international legal order against the refusal to accept gross and massive human rights violations without international reaction. To this question there is no single answer, since, as will be pointed out below, there are conflicting political and legal-political considerations. No magic formula is at hand and a hard political choice, therefore, has to be made. Either choice carries with it consequences for the future of international law and international relations.

The challenge, it seems, must be to leave open the option for humanitarian intervention in extreme cases of human suffering, where the reasons for action seem morally imperative and politically sound but the Security Council is unable to act, while at the same time to avoid jeopardising in a fundamental way the existing, hard-earned, international legal order, including the central role of the Security Council.

2. POLITICAL AND LEGAL-POLITICAL CONSIDERATIONS ON HUMANITARIAN INTERVENTION

The following considerations mainly deal with the principal moral, political

and legal-political arguments for and against humanitarian intervention without Security Council authorisation and basically reflect the tension in international relations between the principles of justice and order which were outlined above in Chapters I and II. The many other interests and motives that may be involved in a decision concerning humanitarian intervention will not be discussed. These could relate, for instance, to issues of self-interest as concerns practicality, political influence in a target region and concern for the position of the intervening powers in the international political and legal order.

2.1. The legitimacy of humanitarian intervention

There are strong moral and legal-political arguments for the legitimacy of humanitarian intervention even without Security Council authorisation:

1. "Just warfare" – moral necessity. Sometimes the old natural law doctrine of a just war (*bellum justum*) for the sake of humanity is invoked to justify humanitarian intervention on moral grounds. The following two statements are illustrative:

"The rights of states recognised by international law are derived from human rights, and as a consequence war on behalf of human rights (humanitarian intervention) is morally justified in appropriate cases".[1] *"The validity of humanitarian intervention is not based upon the nation-state oriented theories of international law (..) It is based upon an antinomic but equally vigorous principle (..):the kinship and minimum reciprocal responsibilities of all humanity, the inabilities of geographical borders to stem categorical imperatives, and ultimately, the confirmation of the sanctity of human life.."*[2]

2. Intervention is necessary in extreme cases to preserve the practical and moral legitimacy of international law. Arguably, in cases of extreme human suffering it is necessary to undertake humanitarian intervention even without Security Council authorisation in order to preserve the legitimacy of international legal order. This argument has been aptly stated this way:

"If international law, at the present stage of its development and taking account the present level of functional capabilities of the UN system, were to provide no room for genuinely selfless, morally-dictated last-resort humanitarian intervention in extreme cases where the Security Council is unable to act timely and effectively, it might lose control over, or even become irrelevant to the solution of, some of the greatest human dramas in the world. In such cases, prohibiting intervention by individual states (...) might become so utterly immoral as to undermine the basic fundamentals, if not the very idea of law."[3]

3. Doing wrong to correct greater wrongs – emergency rule. Connected with the first argument is the argument that humanitarian intervention in extreme cases may be regarded as a legitimate breach of international law in order to

prevent or bring to an end even more serious breaches of international law. This argument of necessity is supported by the increasing concern for the protection of the life and dignity of the individual in international law and international relations, although, as has been shown, it does not provide a legal defence under existing international law.

4. Humanitarian intervention does not violate the core of state sovereignty. The core of sovereignty is the territorial integrity and political independence of the state. Humanitarian intervention has a limited, strictly humanitarian purpose, and thus, although clearly encroaching upon, does not strike at the heart of state sovereignty.

A similar argument is sometimes invoked to justify the use of force by a state to protect its own nationals abroad. It may be asked, whether such a doctrine – in light of the development of human rights after 1945 – is fundamentally different from humanitarian intervention to protect foreign nationals in their own state. From the point of view of sovereignty there is a marked difference. First, in the case of intervention to protect nationals abroad there exists a legitimate bond between the intervening state and the individuals in jeopardy. Second, such operations are normally small-scale and, provided the intervention sticks to its stated purpose, the interests of the target state are not really at stake. Neither of these observations hold true for humanitarian intervention.

5. Humanitarian intervention might increase observance of human rights in weak states. Absence of humanitarian intervention in the face of genocide and other gross and systematic violations of human rights is not only unjust but is also likely to encourage coercive methods of weak state regimes in their dealing with separatist groups and alienated ethnic and religious communities. By conducting humanitarian interventions where possible, the incentives to weak state regimes to observe human rights and seek peaceful solutions to internal problems will increase. Observance of human rights is a likely precondition for internal stability in weak states and for long-term global political order.

6. The need for international law enforcement in spite of Security Council paralysis. The existence of an automatic and absolute coupling of humanitarian intervention to authorisation by the Security Council might be misused by calculating lawbreakers and by members of the Security Council leading to paralysis of the UN security system. For that reason, there might be situations where the only way to deter authoritarian rulers or to address an emerging genocide is to act without authorisation from the Security Council in order to restore justice and avoid a significant reduction of the international community's ability to enforce international law.

7. Humanitarian intervention without authorisation from the Security Council in order to enforce high regional standards. If a group of democratic states can agree to set standards for the conduct of governments within their region higher than those set by global regimes, military enforcement of these standards should not be conditional on authorisation from the Security Council. In that case progressive development of democracy and protection of groups and individuals on regional levels would in effect be hindered by the lowest possible common denominator on the global level.

2.2. The dangers of humanitarian intervention

On the other hand, there are also strong political and legal-political arguments against humanitarian intervention in general and intervention without Security Council authorisation in particular, especially concerning the consequences for the international legal and political order and the risk of abuse.

1. Jeopardising the international legal order. Humanitarian intervention may blur the contours of the hard-earned but now generally recognised international prohibition on the use of force, put the fragile collective security system at risk and undermine basic tenets of the present international legal order.

2. Making a loop-hole in the prohibition on the use of force. The prohibition on the use of force under existing international law is a general rule with relatively well-defined exceptions. Admitting humanitarian intervention in derogation of Article 2(4) may in time lead to a demand for other exceptions as well, thus leaving the prohibition much more blurred and modified than at present, thereby weakening its normative strength and, possibly, also its general recognition in the international community.

3. The perils of dividing the permanent members of the Security Council. The right of veto of the permanent members of the Security Council is a legal recognition that use of force for purposes other than self-defence must rest on a great power consensus. The assumption behind the veto is that dividing the great powers (or even risking that division) might upset the global political order and undermine the possibility of a global legal order. While it might be tempting to contemplate ways of protecting regional or global enforcement of human rights from the vagaries of the great powers, it should be taken into consideration that the continued status of the Security Council as the sole centre for authoritative decision-making on the use of force for humanitarian

purposes might be a precondition for global political and legal order. Side-stepping the Security Council and endangering the relationship between the great powers for the sake of human rights enforcement might produce consequences for the whole world far worse than inaction in the face of humanitarian disaster. The intervening powers could end up "sacrificing too much for too little".

4. Undermining the authority of the Security Council. If the policy of states in general were that the authorisation of Security Council is a preferable, but not necessary, basis for humanitarian intervention, this would in time undermine the role of the Security Council as the sole centre in the world for authoritative decision-making on the use of force for humanitarian purposes.

5. Humanitarian intervention might undermine political order in weak states. By increasing the frequency of humanitarian intervention and sharpening the rhetoric about absolute rights for individuals and groups that overrule traditional notions of sovereignty there is a risk of altering the calculations of and encouraging rebellion among minorities and other groups who are targets of government oppression. As the willingness and ability to intervene in trouble spots with no strategic importance and no media attention is limited this might produce a discrepancy between the expectations among these groups and the capabilities of the international community to intervene if things go wrong. If the result is disintegration of fragile, weak states and humanitarian disasters which do not trigger humanitarian intervention, justice for the greatest number is unlikely to result. Hence, by creating inflated expectations, the international community might inflict more suffering than would otherwise have been the case.

6. The dangers of enforcing high regional standards through military intervention. While the pursuit of universal norms pertaining to democracy, human rights, and minority protection and the concomitant decrease in the scope of sovereignty in a region is a valuable goal, military enforcement without UN mandates of such norms on intransigent governments is not without problems. It might signal a return to an era of geographical morality in which certain regions of the world define their own threshold for the use of armed force in their region without UN authorisation. Such regionally defined 'standards of civilisations' could also resurrect earlier doctrines of the right of intervention of powerful states in their own neighbourhoods when diplomatic instruments prove unsuccessful.

7. The inherent risk of abuse. Judging from the experience of more than 150 years of state practice, in which humanitarian considerations have been invoked to justify intervention, it is obvious that the doctrine gives room for abuse. This raises questions of the justifiability of the doctrine as applied in real life.[4]

8. Inequality and abuse – intervention by powerful against weak states. Most likely, humanitarian intervention will be applied in the future, as in the past, by powerful states against weak states, notably third world states. Thus, humanitarian intervention may be seen as adding to the already existing inequality in the international community, thereby further undermining the principle of equality of states on which the UN Charter is formally based, cf. Article 2(1). This poses a problem of (political) legitimacy of humanitarian intervention in international relations.[5] Allowing for intervention without Security Council authorisation increases the inherent risk of abuse for political purposes, which then means powerful states intervening in an illegitimate way in weak states.

From this it is clear that any *general doctrine of humanitarian intervention* without Security Council authorisation would be problematic. Humanitarian intervention remains a hard choice which can only prudently be made in concrete circumstances. This does not, however, exclude the relevance of discussing certain basic minimum conditions (criteria) for undertaking legitimately humanitarian intervention.

3. CRITERIA FOR LEGITIMATE HUMANITARIAN INTERVENTION?

Despite the lack of a legal basis for humanitarian intervention without Security Council authorisation in existing international law, it is hardly realistic in the foreseeable future that states should altogether refrain from such intervention if it is deemed imperative on moral and political grounds.

Recognising this, the crucial questions are: Under what conditions (criteria) should humanitarian intervention be considered legitimate? What kind of justification could and should these criteria provide? Is it desirable and realistic to formalise such criteria? Among legal scholars and political scientists these questions have been discussed for decades, if not for centuries.

The purpose of establishing criteria is to prevent the abuse of humanitarian intervention by defining conditions for its legitimate use. There is probably, at

least among western legal scholars, a general consensus on a set of broad criteria for legitimate humanitarian intervention, although not full agreement as to their specific application. More controversial is what function these criteria serve in the justification of a humanitarian intervention – either as moral-political reasons or as grounds for making new law. It is also controversial whether or not these criteria should be formalised, for instance by way of an international or regional declaration. If formalised in one of these ways, the criteria would tend to become a doctrine for humanitarian intervention. As will be mentioned below, attempts at formalisation in the 1970s by the International Law Association have failed. The criteria discussed by the International Law Association were very much the same as today. Thus, although in principle criteria are subject to change, they have shown considerable consistency over time.

3.1. What is the function of criteria for humanitarian intervention?

If one takes the view that under certain circumstances there is a right of humanitarian intervention without Security Council authorisation under existing international law, the criteria define these circumstances. If one takes the view, as does this report, that there is no such right under existing international law, such criteria may serve either 1) to justify ad hoc (case by case) intervention in extreme cases on moral-political grounds only (thus recognising in principle the existing rules concerning non-intervention and non-use of force) or 2) to justify intervention by asserting a new right of intervention (thereby contributing to the possible development of such a right in international law, in fact, a doctrine for humanitarian intervention).

If formalised, such criteria tend towards establishing a doctrine of humanitarian intervention. Quite a few international legal scholars consider the formalisation of criteria undesirable. Criteria, it is argued, will inevitably be more or less vague and thus the risk of abuse is unavoidable. They prefer, therefore, to regard humanitarian intervention as a violation of international law, which the international community should not accept in general, but which it may choose on a case by case basis not to condemn if the intervention is truly humanitarian and morally justifiable.[6]

In any event, regardless of one's legal or legal-political position on humanitarian intervention, the claim to the legitimacy, and possible legality, of humanitarian intervention is only plausible under certain conditions. To approach some kind of consensus on these conditions in the wider international community is the essential purpose of discussing criteria for humanitarian intervention.

3.2. Prospects for international formalisation of criteria

Even if one were to prefer a formalisation of criteria for humanitarian intervention, the prospects for international consensus on a set of criteria for the conduct of humanitarian intervention are not too positive. Not only are there differences among legal scholars as to the exact content of the criteria, but above all, *"there is too much resistance to the legality of unilateral humanitarian intervention and too much variance in the conditions under which such interventions occur."*[7] It is highly unlikely that the developing countries, which also for historical reasons attach high value to the principle of state sovereignty, would be inclined to adopt such a set of criteria.[8] The same holds true for China and probably also for Russia. Thus, it is not reasonable to expect in the foreseeable future the adoption, for instance, of a declaration within the framework of the UN on such criteria.

The International Law Association in 1965 established a Committee on Human Rights, which in 1969 established a Sub-Committee to study the international protection of human rights by general international law, including the status of the doctrine of humanitarian intervention. Between 1970 and 1976 the Sub-Committee delivered four reports on the issue of humanitarian intervention (chaired by the American professor Lillich). In the course of its work, the Sub-Committee discussed the feasibility of drafting a protocol for Humanitarian Intervention for the Protection of Human Rights including criteria for legitimate humanitarian intervention. Drawing on legal scholars, the Sub-Committee managed to produce a preliminary list of criteria (International Law Association, 1974, p. 219). However, the issue of humanitarian intervention proved too controversial among the members of the Sub-Committee. In the end, the idea of a draft protocol was given up due to the negative prospects for achieving consensus among states.[9]

Yet it is not impossible that some states may, in time, agree on a set of fundamental criteria such as the ones discussed below. If so, they might consider to confirm this consensus in a declaration, possibly within the framework of a regional organisation or agency. The legal status of such a declaration, however, would be dubious since it would probably not be supported by a vast majority of states within the international community. Furthermore, from a political point of view, such a declaration on a doctrine of humanitarian intervention might provoke international tension and challenge the existing international legal order.

A somewhat less formal way to proceed would be to apply, on a case-by-case basis, a standard list of justifications. Such a list could be used to justify one's own interventions and to criticise those of others. Thus, the criteria could gradually be established through practice with no attempt to force others to relate to this list as a matter for decision.

The effects of these two different approaches would depend on the context and their concrete application. Again, it would be of importance whether they were used for justification on legal grounds or on moral and political grounds only.

3.3. Possible criteria for humanitarian intervention

The essential discussion on criteria for legitimate humanitarian intervention may be structured under five headings:

3.3.1. SERIOUS VIOLATIONS OF HUMAN RIGHTS OR INTERNATIONAL HUMANITARIAN LAW

Humanitarian intervention is legitimate only if a state is unwilling or unable to prevent or bring to an end serious human suffering within that state resulting from gross and massive violations of human rights or international humanitarian law.

This will be the case if the state itself or groups supported by the state are committing atrocities against the civilian population, or – in the case of weak or failed states – such atrocities take place in the context of civil war or general anarchy and disorder.

It is generally agreed that intervention should be undertaken only in extreme cases of gross and massive violations of human rights or international humanitarian law.

"Cruelties against and persecution of nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind." (Lauterpacht); substantial deprivation of human rights (Lillich); particularly widespread loss of human life (Moore); severe human rights violations (Scheffer); "widespread deprivations of internationally recognised human rights" (Murphy); "gross human rights violation" (International Law Association); "Genocide or comparable tragedy in which fundamental human rights, including and in particular the right to life are violated on a gross and massive scale" (Verwey).

This definition needs precision and limitation. The definition of violations which may justify humanitarian intervention should be narrow in order to avoid abuse and to establish clearly its moral and political legitimacy. Although a rather broad definition may be suggested by Security Council practice under Chapter VII (cf. Haiti), there is no direct parallel. Humanitarian intervention without Security Council authorisation lacks the clear legal basis of Security Council action under the Charter as well as the institutional guarantees against abuse inherent in the Security Council procedure.

An obvious solution would be to take up the definition of "the most serious crimes of concern to the international community as a whole" for which there is individual criminal responsibility under international law. Article 5 in the 1998 statute of the International Criminal Court refers to "genocide", "crimes against humanity" and "war crimes" (grave breaches of international humanitarian law). According to the statute, these crimes are defined basically in this way:

– *Genocide* means acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such by killing; causing serious bodily or mental harm; deliberately inflicting conditions of life calculated to bring about its physical destruction; conducting birth control or forcibly transferring children etc.
– *Crimes against humanity* include – when committed as part of a widespread or systematic attack against any civilian population – murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, ethnic and racial grounds and other inhumane acts.
– *Serious violations of international humanitarian law* include – particularly when committed as part of a plan or policy or on a large scale – notably violence to the life, health and physical or mental well-being of persons, in particular murder and cruel treatment such as torture, mutilation or any form of corporal punishment; the taking of hostages; acts of terrorism; outrages upon personal dignity, in particular humiliating and degrading treatment, rape, forced prostitution, indecent assault; pillage.

This definition seems suited to determine when humanitarian intervention may be justified. It includes only the most serious human rights atrocities; and it covers both atrocities committed in the course of internal armed conflict and systematic repression by the government against groups of the civilian population.

A further problem is who should make the assessment that violations of this magnitude are in fact unfolding. If necessary, the state(s) intervening must initially make the assessment. Prior statements by UN organs or agencies would certainly enhance the legitimacy of the intervention as would reports from other international organisations and independent human rights NGOs. Subsequent recourse to the UN, possibly the International Court of Justice, for confirmation of the assessment made could be envisaged.

3.3.2. THE SECURITY COUNCIL FAILS TO ACT

Inaction on the part of the Security Council is generally accepted as an indispensable condition for the legitimacy of humanitarian intervention without Security Council authorisation. According to the UN Charter only the Security Council is competent to authorise the use of force in another state for the maintenance of international peace and security. Therefore, Security Council authorisation is always to be preferred to action on the initiative of individual states or regional organisations or agencies. Humanitarian intervention should only be considered if the Security Council fails to act due to a veto – anticipated or actual – by one or more of its permanent members.

Only if the Security Council fails to act (Scheffer, International Law Association); only if action by the United Nations has proved to be ineffective or cannot be awaited (Verwey).

For this reason it is also a natural requirement that states who decide to undertake a humanitarian intervention without Security Council authorisation should at least report to the Security Council on their plans of intervention and its progress.

Need for prior report to the Security Council on the intention of conducting humanitarian intervention (International Law Association). Need for subsequent reporting to the Security Council (Moore).

3.3.3. UNILATERAL, MULTILATERAL OR REGIONAL INTERVENTION?

It is often discussed whether humanitarian intervention is more – or only – legitimate if undertaken multilaterally by several states. In the same vein it is often discussed whether action within the framework of a regional organisation or agency adds to the legitimacy of a humanitarian intervention. For a state – especially a small one – this consideration is of course important. Yet in principle it does not rule out that unilateral intervention may be legitimate if the humanitarian emergency is apparent, but no other states than the neighbouring states want to make the effort.

In any event, it must be maintained that *"intervention does not gain in legality under customary international law by being collective rather than individual."*[1] This applies for regional organisations as well. But it is equally true that, generally speaking, *"the fact that more than one state has participated in a decision to intervene for humanitarian reasons does lessen the chance that the doctrine will be invoked exclusively for reasons of self-interest."*[2]

Intervention by a regional organisation is preferred to one by a group of states or an individual state (International Law Association). Effort should be made for a multilateral force (Scheffer). Multilateral intervention may be preferable for political reasons to reduce the danger of abuse (Malanczuk).

3.3.4. ONLY NECESSARY AND PROPORTIONATE USE OF FORCE

In accordance with the principle of necessity and proportionality permeating Chapter VII of the UN Charter, it is generally agreed that humanitarian intervention should only be undertaken where strictly necessary and only by the minimum use of force necessary to bring human suffering to an end. However, the concrete application of this principle is complex and controversial.

Exhaustion of diplomatic efforts and non-military measures of coercion

In principle this is a general requirement. Thus, diplomatic efforts should first be made to bring pressure to bear on the government violating human rights. It will inevitably be a matter of discretion to assess when the diplomatic efforts have been exhausted. If diplomatic efforts fail altogether, or along with it, the feasibility of imposing economic sanctions should be considered before resorting to armed intervention.

"All non-intervention remedies must be exhausted before a humanitarian intervention can be commenced (International Law Association). Only a last-resort armed intervention can save the (potential) victims, after all peaceful efforts have failed (Verwey).

If from the outset it is clear that such measures are not suitable to prevent the human rights violations, intervention, arguably, may be considered right away.[12] Indeed, non-military measures may often have little effect upon, or may even be detrimental to, the human rights situation in a state.[13]

Before intervention is commenced, a clear ultimatum should be given to the government of the state – unless government has broken down – insisting on the termination of gross and massive human rights violations.

Scale, duration and purpose of intervention – only the minimum necessary

In principle, when military intervention is considered necessary it should be used only on the minimum scale needed to redress the human rights situation and should be discontinued as soon as this limited objective has been fulfilled.

Use of force must be proportionate to the human rights at stake (Moore); intervention should have a convincingly positive effect on human rights in the state – more good than harm from

the intervention, (Scheffer); the magnitude of military involvement should be proportionate to the minimum demands of the protective action (Verwey). Primary goal to remedy gross human rights violations (..) the intent must be to use the least amount of coercive measures necessary to achieve its purpose (..) and to intervene for as short a time as possible, with disengagement as soon as the specific limited purpose is accomplished (International Law Association).

Notably, the use of force should have strictly humanitarian purposes and thus in principle should not be directed against the political structures of the state.

Should have a minimal effect on authority structures in the state and a prompt disengagement should follow the intervention (Moore); the long-term political independence and territorial integrity of the target state must not be imperilled by the intervention (Scheffer); the intent must be to have as limited an effect of the authority structure of the concerned state as possible, while at the same time achieving its specific limited purpose (..) (International Law Association).

Although corresponding to a traditional notion of humanitarian intervention, these requirements of necessity and proportionality may not be so clear-cut from a practical point of view. An intervention, although from the outset intended to serve strictly humanitarian purposes, may nevertheless result in political or territorial changes. It is even arguable that if a humanitarian catastrophe is likely to be prevented only by an intervention striking against the political system which deliberately caused it, only such an intervention is suitable and therefore necessary and proportionate from a humanitarian point of view.

"Respectable arguments may be made that the only means for effectively ending widespread human rights deprivations is to engage in a massive invasion that ousts the local government and installs a new government more sensitive to human rights concerns." (Murphy). Also the necessity for prompt withdrawal of forces is problematic (Murphy). The political impact upon the structures of authorities of intervention should be confined to a minimum, unless the structure of authority in the state is a direct cause of the human rights violations (Verwey).

3.3.5. DISINTERESTEDNESS OF INTERVENING STATE(S)?

In order to ensure their impartiality, the ideal is the complete disinterestedness of the intervening state(s), that is, the absence of self-interest. However humanitarian intervention is not only a costly business in the economic sense; it also involves a risk to the lives of the nationals of the intervening states. Conducting a humanitarian intervention may have negative internal political repercussions for the governments of the intervening states. From a realistic

point of view, states may need more than humanitarian motives to be willing to intervene in a substantial way – be it a desire to avoid cross-border refugee flows into the intervening state or even strategic or economic interests in re-establishing order in the target state.[14] This is why intervention is most often carried out by neighbouring states or regional agencies.

Relative disinterestedness of intervening states – the overriding purpose must be humanitarian (Lillich); the humanitarian purpose and objective of the intervention must be paramount (Scheffer); relative disinterest, overriding motive should be the protection of human rights(Verwey). Primary goal to remedy gross human rights violation and not to achieve some other goal pertaining to the self-interest of the intervening state(s) (International Law Association).

In conclusion, there is probably on an abstract level a general agreement among Western legal scholars on the basic conditions for legitimate humanitarian intervention, although their concrete content, interpretation and application may be subject to debate. The minimum requirements which relate to recognised legal principles are 1) that the Security Council fails to act (effectively), 2) that the intervention is directed against gross and massive violations of human rights or international humanitarian law and 3) that the use of force is necessary and is applied in a proportionate manner. Apart from the obvious requirement that humanitarian intervention must be conducted in compliance with the international norms concerning warfare as laid down in international humanitarian law, the criteria under item 3 form a rather vague standard.

These "criteria" will be relevant in any case of humanitarian intervention without Security Council authorisation. Whereas they go some way in narrowing the scope for arguing that a humanitarian intervention is legitimate, they do not answer the paramount political and legal-political questions: Should states undertake humanitarian intervention without Security Council authorisation at all? If so, how should this option be fitted into the existing or an emerging new legal order?

4. FOUR LEGAL-POLITICAL STRATEGIES ON HUMANITARIAN INTERVENTION – THEIR POLITICAL FEASIBILITY, LEGAL-POLITICAL CONSEQUENCES AND DYNAMICS

To approach an answer to the above questions, it seems helpful to return to the four legal-political strategies on humanitarian intervention, which were presented in Chapter I – each with their different implications for the

international legal and political order and political, moral and legal-political advantages and drawbacks.

The following section takes a closer look at the feasibility and legal-political implications of these four strategies. While current international law and the principal arguments for and against the legitimacy of humanitarian intervention are important, the political realities of the present day have to be taken in account as well. The feasibility and desirability of various strategies will have to be weighed against a combination of these legal, legal-political and political considerations. It must be noted in advance that the ensuing analysis is based on the general assumption that the international climate in the future situations discussed is fairly similar to that of the present.

In the following the four legal-political strategies, outlined in Chapter I, are presented in ascending order based on the extent to which they deviate from the present situation:

1. The status quo strategy – exclusive reliance on the Security Council to authorise humanitarian intervention. The first strategy is simply to stick rigorously to the existing rules, that is, ruling out entirely the option of humanitarian intervention without authorisation from the Security Council. It preserves the Security Council as the sole centre for authoritative decision-making on humanitarian intervention. An enhanced version of this strategy, implying a higher degree of consensus in the Council, will also be considered. It will be denoted as the strategy of status quo plus. Likewise, the merits of a strictly limited legal and controlled framework developed within this strategy will be discussed.

2. The ad hoc strategy – humanitarian intervention as an "emergency exit" from the norms of international law. This strategy keeps open the option to undertake humanitarian intervention in extreme cases if the Security Council is blocked. The ad hoc strategy does not, however, seek to challenge the existing legal order. On the contrary, it aims at preserving the Security Council as the sole centre for authoritative decision-making on humanitarian intervention by justifying such intervention without Security Council authorisation on political and moral grounds only, as an "emergency exit" from the norms of international law.

3. The exception strategy – establishing a subsidiary right of humanitarian intervention under international law. This strategy seeks to modify existing international law by establishing – through amendment of the UN Charter or

through state practice – a subsidiary right of humanitarian intervention outside the auspices of the Security Council when the Council is unable to act. The assertion of such a legal right would presumably be accompanied by a set of rules and criteria defining i.a. the extreme cases where such a subsidiary right of humanitarian intervention is justified on legal grounds. In its pure form, this strategy implies an amendment to the UN Charter. A less formalised variation would be a doctrine of humanitarian intervention adopted by an international body or a group of states. Due to its less than universal recognition, this variation is termed the exception strategy minus. Finally, state practice of humanitarian intervention might in itself lead to the establishment of such a subsidiary right, if justified on legal grounds.

4. The general right strategy – establishing a general right of humanitarian intervention under international law. This strategy represents the most fundamental change to settled international law. It could either be established through an amendment to the UN Charter, establishing a general right of humanitarian intervention in defined cases of massive human rights atrocities as a parallel to the right of self-defence, or outside of the Charter, thereby relativising the status of the United Nations. In other words, it would allow for humanitarian intervention without authorisation from the UN Security Council and leave humanitarian intervention to the states as a lawful option to be applied at their own discretion. Like strategy 3, it could also be a doctrine of humanitarian intervention adopted by an international body or a group of states. Due to its presumably less than universal recognition, such variation would be the general right strategy minus.

In some ways these strategies are alternatives, in other ways they overlap. If strategy 1 is chosen in isolation, it is an alternative to the other three strategies. Strategies 2 and 3 are exceptions to strategy 1 and coexist with it as "safety valves" in cases of extreme humanitarian emergency where the Security Council fails to act. Strategies 2 and 3 are alternatives to each other, whereas strategy 4 generally speaking negates the other three. The purpose of safety valve strategies 2 and 3 is to keep open the option of humanitarian intervention in situations where the Security Council, without due reason, fails to act in the face of genocide, mass displacement or grave breaches of international humanitarian law. Strategy 4 generally does not envisage a need to defer to the Security Council.

All four strategies are presently being discussed in political and legal doctrine and are also, to varying degrees, being pursued in state practice.

4.1. The status quo strategy – exclusive reliance on the Security Council to authorise humanitarian intervention

Besides being a legal-political strategy status quo is at the same time a description of the present Security Council regime with focus on the capacity for co-operation and consensus-building in the Council. The status quo regime is in full accordance with the UN Charter and thereby with international law. A legal-political strategy may seek either to preserve or amend a legal regime. The status quo strategy seeks to preserve the present regime, the authority of the Security Council and the existing international legal order.

The status quo strategy could be reinforced in several ways. Such steps concern, for instance, the development and strengthening of global and regional capabilities, including UN capabilities, for conflict management and humanitarian intervention (of course authorised by the Security Council as is inherent in the status quo category). The creation of more evenly distributed capabilities for conflict management, including the non-military instruments of conflict management, and of closer co-ordination between global and regional capabilities would add to the legitimacy and effectiveness of such capabilities, thereby enhancing their deterrent value. Acting under Chapter VIII of the UN Charter, regional organisations could be allocated a greater implementation role than today. The existence of such credible capabilities to coerce norm-breakers would tend to reduce the pressures for humanitarian intervention in both its forms, thereby minimising the need for actually activating the safety valve mechanism.

Other steps with the same purpose include the possibility to modify the veto right in some of the modest, but not altogether unrealistic, ways that have been proposed and to modify the composition of the Security Council, also to a rather modest extent as may appear politically feasible. Another choice is long-term efforts to attack the root causes of humanitarian emergencies by way of development assistance and conflict prevention, including a strengthening of global and regional human rights regimes.

The problem with these steps is that, lacking a decisive impulse, they are not backed by sufficient political will to make them really dynamic agents in the search for ways to enhance the capacity for consensus-building in the Security Council. The status quo strategy tries to emphasise the responsibility of the permanent members of the Security Council to come together on humanitarian issues, but there is no guarantee that it can achieve this purpose. Its drawback is that it leaves the victims of human rights atrocities without hope of international rescue in situations where the Security Council is blocked

by a veto, whatever the reasons for the veto may be. This makes the status quo strategy in its pure form unrealistic, since exclusive dependence on a deadlocked Security Council is politically and morally unacceptable to many states confronted with humanitarian disasters in another state. The status quo strategy will thus gradually erode the legitimacy of the Security Council and may ultimately have negative consequences for the respect for international law. Furthermore, it does not bring acute pressure to bear on permanent members which, notwithstanding their responsibility in principle, are inclined to use the veto for national political reasons.

Thus, the status quo strategy in its pure form is part of the problem and not of the solution. This strategy, in its pure form, can therefore be discarded.

In the following analysis, we will switch to *the status quo plus strategy*, briefly referred to earlier, in order to evaluate the potentials in the status quo category. It seeks to obviate the need for more radical alternatives. The "plus" in the name of this strategy indicates that it aims to establish a higher degree of consensus in the Council than at present. The enhanced capacity for consensus-building in the Security Council in a status quo plus regime would come to fruition mainly by virtue of dynamics emanating from strategy 2 or (less likely) 3 as described under these strategies. These dynamics entail a pressure on the Security Council that if it fails to authorise humanitarian intervention, intervention might conceivably take place without authorisation. The status quo plus regime would hardly be able to function in isolation from these dynamics. It is a main point, however, that the status quo plus regime (with its more or less outspoken link to strategy 2) implies that the need for the safety valve functions of 2 or 3 would be considerably diminished. The advantage of the status quo plus strategy is that, on balance, this strategy holds the potential to promote a non-divisive solution of the dilemma mentioned at the outset between protection of individuals and enhancement of the international political and legal order.

Returning to the discussion of criteria for humanitarian intervention, it has been proposed to develop a strictly limited legal and controlled framework within the Security Council regime. If the purpose of such a framework were to derogate from the provisions of the UN Charter and to create possibilities for action as envisaged under strategy 3 it would require a revision of the Charter, including of the veto right, which is hardly politically feasible. If, on the other hand, the purpose were to regulate action undertaken in accordance with the Charter as is, it would limit the options of the permanent members of the Security Council in ways that, traditionally, they have not been willing to accept.

Obviously, the motivation for such criteria would be to reassure those countries sceptical of humanitarian intervention even in its authorised form and at the same time, by creating such legal norms in the "secure environment" of the Security Council, to limit and influence the possible conduct of humanitarian intervention without authorisation from the Security

Council. This contagious effect of formalised criteria is, at the same time, their weakness. Instead of reassuring the sceptical countries, the formalisation of criteria might spur their suspicions that it would serve to legitimise unauthorised intervention as well.

Under any circumstance, a formal set of criteria for humanitarian intervention is hardly needed and would probably be difficult to agree upon. The idea may deserve further study but, on balance, it is difficult to see its usefulness and feasibility in the present situation.

Though the status quo plus strategy could be supported if some of the measures mentioned above under the pure status quo strategy were implemented, it is not absolutely dependent on them. A status quo plus regime gains viability mainly from the dynamics emanating from strategies 2 or (less likely) 3. Its main characteristic is an enhanced capacity for consensus-building in the Security Council as compared to the present situation.

4.2. The ad hoc strategy – humanitarian intervention as an "emergency exit" from the norms of international law

This strategy keeps open the option to undertake a humanitarian intervention in extreme cases when the Security Council is blocked. It does not, however, seek to challenge the authority of the Security Council.

Under this strategy, humanitarian intervention without Security Council authorisation would be justified on moral and political grounds only, as an "emergency exit" from the existing norms of international law, which are not questioned. This strategy, therefore, like the first one, aims at preserving the Security Council as the sole centre for authoritative decision-making on humanitarian intervention. It serves the purpose of putting an end to human rights atrocities without jeopardising the existing international legal order, but rather dynamically reinforcing it.

The ad hoc strategy aims at conditioning the future conduct of the permanent members in the direction of consensus when faced with crimes against humanity etc. Thus, though the short-term purpose of actual application of this strategy is to escape for a short moment from an adverse effect of failure of the UN Security Council to act in a concrete situation, its long-term objective is to reinforce the efficiency of the Security Council and the existing legal order and to make itself superfluous.

The long-term objective of the ad hoc strategy can gain credibility if, generally, the members of the Security Council co-operate in good faith and thus prove that it is indeed their intention to enhance the potential of the Security Council. Establishing and maintaining patterns of co-operation and allocating the necessary resources to the initiatives of the Security Council will serve to alleviate suspicions of abuse of humanitarian intervention.

Some of the dynamics at work between the status quo plus strategy and the ad hoc strategy can be characterised as follows:

The dynamics of embeddedness. These dynamics are linked to those situations where, as in the Kosovo case, an unauthorised enforcement action is deeply embedded in a UN context, before, during and after the action. From a political perspective such dynamics will tend to lessen the gap between authorised and unauthorised humanitarian intervention. The Security Council resolutions under Chapter VII of the Charter in the process leading to the intervention in Kosovo illustrate this mechanism as does, for instance, the 12-3 vote in the Security Council rejecting a draft resolution sponsored by Russia, which would have condemned the NATO operation as a violation of Article 2(4) of the UN Charter.

These dynamics are linked to some other dynamics of considerable importance:

The dynamics of respectable co-operation. This pertains to enhanced UN co-operation with individual countries, regional organisations and other sub-contracting agencies and organisations. Once a country or a regional organisation has established a reputation of working together with the United Nations under UN mandates and in a responsible and impartial manner, it will of course at the same time have accumulated a capital of credibility and legitimacy. Should such a country or an organisation decide to intervene without authorisation from the Security Council, its good track record of co-operation with the UN would support its claims that the intervention is justified. Mutual identification between organisations could gradually develop. This mechanism has implications far beyond crisis situations. Although most countries in the world subscribe to the values of democracy and human rights, it is after all relatively easy to define those countries that pursue these values actively and work for them in good faith.

The dynamics of integration by violation. This touches on the consequences of interventions without an authorisation from the Security Council. If such actions are initiated because of failure to act in the Security Council, with high international acceptability and without serious condemnation from UN organs (or maybe even with implicit support), they will tend to motivate the members of the Security Council to act more in unison in subsequent cases of a similar nature. The prospect of being able to influence the mandate for an enforcement action would serve as a stimulus even for sceptical members in such situations.

Intentionally shaping such dynamics should, of course, never be part of the justification for or purpose of unauthorised intervention. These dynamics are to be seen only as side effects of unauthorised intervention.

Taking into consideration the characteristics of the ad hoc strategy as an "emergency exit" from the norms of international law, although not in conformity with international law, all of these dynamics point to the necessary precondition for its positive effects: that if at all applied it is done with high legitimacy, high international acceptability, in accordance with international humanitarian law and in a way that can credibly be justified with reference to the criteria that, although not formalised, are part of international legal doctrine and general public discourse. On the negative side the assumption is that if used *excessively* and if *not* in conformity with these conditions the dynamics of the ad hoc strategy would tend to bifurcate in the direction of a status quo minus condition (less capacity for consensus-building) *and* an exception strategy minus condition, that is an exception strategy without universal recognition (cf. below). It is evident that in order to unfold its positive potentials the ad hoc strategy has to be kept within narrow margins.

4.3. The exception strategy – establishing a subsidiary right of humanitarian intervention under international law

This strategy seeks to modify existing international law by establishing, through amendment of the UN Charter or, more realistically, through state practice, a subsidiary right of humanitarian intervention outside the auspices of the Security Council when the Council is unable to act. This objective could be pursued by justifying humanitarian intervention in such cases on legal grounds, that is by alleging an (emerging) new right of intervention under international law under specified circumstances (criteria).

The exception strategy may be supported by pursuing international or regional agreement on a declaration to the effect that there exists such a right and by defining the criteria for its application. It squarely challenges the Security Council as the sole centre for authoritative decision-making on humanitarian intervention by seeking to establish an alternative, subsidiary framework for authoritative decision-making. The exception strategy thus aims at formalising the political and moral demands for action in the face of genocide etc. into the body of international law by creating a legal option for humanitarian intervention outside the Security Council if necessary.

Like the ad hoc strategy, it may dynamically reinforce the efficiency of the Security Council, but it does not seek to maintain the Security Council as the sole centre for legally authoritative decision-making on humanitarian

intervention. Therefore, to a larger degree than the ad hoc strategy, the exception strategy takes the risk of undermining the authority of the Security Council and thereby weakening the existing international legal order pertaining to the use of force.

In other words, the exception strategy deals a blow to the veto from the *outset*. Unlike the ad hoc strategy, it does not, in principle, defer to the Security Council and its procedures of decision-making, but rather strives to establish an alternative legal basis for action. The ad hoc strategy, in contrast, only *subsequently*, if the Security Council fails to act, is willing to consider intervention if there exists a political or moral emergency, which necessitates action, notwithstanding the lack of legal basis. Considering how jealously the permanent members of the Security Council guard their right of veto, it is vital to understand this difference between the ad hoc strategy and the exception strategy.

Taking into account the amount of opposition against humanitarian intervention, it can hardly be considered politically feasible to establish a subsidiary right of humanitarian intervention outside the Security Council through amendment of the UN Charter. It would have to be established through state practice. Attempts to modify the existing rules would risk exacerbating the differences of opinion over these highly sensitive matters and to have a destructive rather than constructive impact on the possibility of averting victimisation of civilian populations. Considering the opposition to humanitarian intervention, it may even be argued that attempts to formalise criteria for humanitarian intervention in a legally binding form or as a political doctrine would bear negatively on the possibilities for enhancing co-operation in the Security Council. The fact that the exception strategy challenges the sole authority of the Security Council for humanitarian intervention would attract opposition from China, India, Russia and other countries.

It should not be overlooked, though, that in some respects strategies 2 and 3 share the same space of discourse. In this "cohabitation", there is a further source of dynamic development on the international scene. Even if there are many arguments against strategy 3, there is no denying that it is a powerful agent in the global discussion and, by its mere presence in the debate, exerts some influence on strategies 1 and 2.

4.4. The general right strategy – establishing a general right of humanitarian intervention under international law

This strategy is the most far-reaching as it aims at establishing a general right of humanitarian intervention outside the Security Council on a par with the right

of self-defence in Article 51 of the UN Charter. It could be achieved by amending the UN Charter, but there are other ways as well.

From a formal point of view it might be argued that there is little difference between strategy 3 and strategy 4 since the general right strategy is in fact subsidiary in the sense of Article 51. According to the logic of Article 51 a hypothetical humanitarian intervention conducted in accordance with a general right could only proceed until the Security Council had taken measures necessary to maintain international peace and security. However, it is easy to imagine situations where the Council would not be able to take such measures. In addition, strategy 4 does not presuppose, as does strategy 3, that the possibilities for an authorisation by the Security Council have been exhausted before the intervention is initiated. In this sense, the general right strategy does not comply with one of the fundamental criteria discussed above. It clearly transcends the limits of a safety valve strategy.

The general right strategy could also seek to establish itself outside the UN Charter, thereby relativising the status of the United Nations and the Security Council. The chances of universal recognition of this model are even smaller. Realistically, it could only seek to become a doctrine of humanitarian intervention adopted by a group of states or a regional organisation. The consequences for the existing international legal order would presumably be even more serious than in the preceding example.

That the general right strategy should succeed in amending the UN Charter is not a realistic option in the foreseeable future because of the fierce opposition that it would meet in the Security Council and in the General Assembly. Furthermore, it would probably have even more serious consequences for the role of the UN system and notably the Security Council than the exception strategy. It would rob the Security Council of some of its most important tasks and give ample room for abuse by states with less benevolent motives. Compared with the exception strategy, it has few, if any, political and moral advantages for the protection of individuals, whereas it has more negative consequences for the existing international legal order.

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Since, as has been argued above, the pure status quo strategy is not realistic, four strategies remain for final assessment in the concluding chapter: the status quo plus strategy, the ad hoc strategy, the exception strategy and the general right strategy.

Chapter VII
Conclusions

1. SOLUTION OR LEGAL-POLITICAL STRATEGY?

The international community is repeatedly confronted with painful questions when civilian populations are victimised in never-ending civil wars or exposed to atrocities by their own governments. Many difficult choices concerning the role of the United Nations and of the international community have to be made in such cases. This decision-making process is invariably characterised by complex political, moral and legal considerations and by weighing these considerations against each other. In hard cases, it will often prove difficult, if not impossible, to reconcile moral-political, legal and legal-political considerations and objectives in a satisfactory manner.

These are problems with no final solution to them, if by 'solution' is understood a political, moral or legal initiative that will once and for all make the problems disappear and end all discussion. In that sense, this report cannot offer a solution, as can no other treatise on the problem of humanitarian intervention. There can thus be no illusions that the present uneasy relationship between highly developed human rights norms and relatively weak mechanisms for their enforcement will find a permanent solution.

It is quite another matter, if 'solution' is understood as a strategy or an approach for creating a space for dynamics of co-operation, procedures and capabilities that promise to *reduce* the problem. In such a process-oriented perspective, it may indeed be possible to point at dynamics, approaches and strategies that at a given time will appear more desirable than others to a majority of observers.

The present period, characterised by a low degree of tension in the international system, has been called 'the unipolar moment'. The Western states led by the United States have a predominant position in the system, but evidently there are limits to this pre-eminence both in time and degree. The present favourable moment implies a special responsibility for the Western states to strengthen the international legal order and the credibility and capacity of the UN Security Council.

At this point of the analysis, the report will concentrate on one of the most important constraining factors in the international handling of humanitarian

emergencies, namely the occasional failure of the Security Council to act in situations where there is an obvious need for action.

In the following sections, the discussion on the feasibility and desirability of different strategies and ideas that were presented in Chapter VI will be brought to a conclusion.

2. CURRENT INTERNATIONAL LAW

Under current international law there is no right for states to undertake humanitarian intervention in another state without prior authorisation from the UN Security Council. Humanitarian intervention without Security Council authorisation is incompatible with Article 2(4) of the UN Charter which generally prohibits the use of force in international relations, excepting only the use of force in self-defence against an armed attack and the use of force mandated by the Security Council under Chapter VII of the Charter. Article 2(4) basically created a new legal order ("tabula rasa") as regards the use of force between states. The practice of the International Court of Justice supports this conclusion; the Court has strongly emphasised the prohibition on the use of force for whatever reason, and, arguably, has implicitly rejected the doctrine of humanitarian intervention (without Security Council authorisation).

Neither does the legal argument about a state of necessity provide a special right of humanitarian intervention in extreme cases without Security Council authorisation. The legal defence of necessity is extremely narrow in scope, requiring that an essential state interest be at stake for the acting state with no comparable interest thereby being violated in the target state. Furthermore, it is in any case highly controversial whether the use of force can be legally justified as an act of necessity except in self-defence against armed attack.

As to the question whether state practice after 1945 has changed the status under international law of humanitarian intervention without Security Council authorisation it must be kept in mind that the development through state practice of a new rule of customary law allowing for humanitarian intervention without Security Council authorisation in derogation from the fundamental prohibition on the use of force would require a strong and consistent consensus among a vast majority of states in the world.

State practice during the Cold War (1945-89) does not support the assumption that a right of humanitarian intervention (without Security Council authorisation) has become a part of customary international law. Only a few interventions could arguably be said to have been truly humanitarian,

and even in these cases the intervening states were reluctant to rely on a doctrine of humanitarian intervention. Likewise, there was no general acceptance by the world community. Indeed, state practice in this period as well as international declarations on the use of force between states rather reaffirmed the general character of the prohibition laid down in Article 2(4).

Nor is state practice after the end of the Cold War (1990-99) as yet sufficiently substantial or accepted to support the view that a right of humanitarian intervention without Security Council authorisation has become part of customary international law. There has not been general support for a legal right of such intervention. On the other hand, there is growing support for such a view among governments and legal experts. Furthermore, criticism of unauthorised interventions has generally been muted, and there has even been implicit support from the UN when the intervention was truly humanitarian. State practice since 1990 may thus evidence a greater acceptance that humanitarian intervention without Security Council authorisation may be necessary and justified in extreme cases. Yet, these events do not amount to the conclusion that a legal right of humanitarian intervention without Security Council authorisation has been established under international law. It is still premature to assess whether such a right may be emerging under international law.

3. THE ROLE OF THE UN SECURITY COUNCIL

As shown, according to current international law, the UN Security Council is the only locus for authoritative decision-making on the use of force (including use of force for humanitarian purposes). Historically speaking, this represents an extremely important compromise between great power and small state interests. It can also be viewed as an attempt to diffuse some of the tensions between political and legal considerations, between order and justice. This compromise was reached under extraordinary historical circumstances and would probably be hard to re-establish if once undermined. The 1990s have been marked by a remarkable progress as to consensus formation in the UN Security Council, and as long as there are reasonable hopes that the effectiveness of the Security Council may be further strengthened, the Council is an indispensable element of the international legal order that should not be easily dismissed.

If, at some time in the future the UN Security Council turns out to be consistently unable to act in situations of threat to international peace and

security, including humanitarian emergencies, this body will have entered on a course of self-destruction. There will always be other, less rigid fora of great power co-operation and international co-operation ready to take the place of the Security Council, some of them perhaps regionally based. However, there are major uncertainties connected with the functioning of such hypothetical alternatives. One might fear that, on balance, they would lead in the direction of great power dominance.

At the present stage, the UN Security Council is a highly desirable component of any strategy to protect victimised populations and to tackle the dilemmas of the order/justice dimension. As recent events show, however, there is evidently a growing demand for a safety valve so that gridlock in the Security Council does not thwart international attempts to avert humanitarian tragedies. The safety valve is needed, first of all, for the sake of the victims, but also to protect the Security Council against itself. In the view of the important services which the Security Council may have to offer in the building of international rule of law, the challenge is to design the safety valve so that it will not eventually undermine the Security Council or relegate it to political irrelevance.

4. EASING THE TENSIONS BETWEEN LEGAL, MORAL AND POLITICAL CONSIDERATIONS

4.1. Combining legal and moral-political perspectives

There is no magic formula to bring together the requirements of existing international law and the moral and political considerations which justify humanitarian intervention without Security Council authorisation. The discussion on humanitarian intervention raises questions of the utmost complexity and importance. It cannot be reduced to either political, moral or legal considerations. Of course there are rules and norms to support decision-makers, but there are also hard political and legal-political choices to be made. The challenge is to keep open the option for humanitarian intervention without Security Council authorisation in extreme cases, without jeopardising the international legal order.

4.2. Political, legal-political and moral considerations on humanitarian intervention

There are strong moral and political arguments related to the creation of a humane international legal order. These arguments speak in favour of the

legitimacy of humanitarian intervention without Security Council mandate in cases where the most serious crimes against individuals take place, and the Security Council is blocked. On the other hand, such interventions, should they become legal under international law, might blur the hard-earned and now generally recognised prohibition on the use of force between states, put the fragile collective security system at risk and thus undermine basic tenets of the international legal order in its present stage of development. In addition, the risk of abuse of a legal doctrine is real and should be taken into account when considering whether to invoke a legal right of intervention without Security Council authorisation or to simply justify intervention without Security Council authorisation case-by-case on political and moral grounds outside the law.

4.3. Criteria for humanitarian intervention?

If one takes the view that there is no right of humanitarian intervention without Security Council authorisation under existing international law, criteria for humanitarian intervention may serve either to justify ad hoc intervention in extreme cases on moral-political grounds in breach of international law or to justify intervention by asserting a new right of intervention, thus possibly contributing to the development of such a right in international law. The mode of justification is a political choice but has important implications. There may be good reasons to prefer a political-moral justification, thus leaving unchallenged the general norms of international law on non-use of force.

As to formalisation of criteria, it could be argued that the development of criteria is best left to legal doctrine, that is the professional discussion among international lawyers, and to the general public debate. The fundamental criteria discussed will still be relevant when states justify an intervention in breach of international law, even in the absence of formal declaration. What is more, the prospects for international agreement on criteria are already poor, given that the issue of humanitarian intervention is controversial.

On the other hand, notwithstanding the disagreement about their desirability and status, there seems to be a general agreement on the content of criteria for humanitarian intervention on an abstract level. First of all, only the most serious and massive violations of human rights and international humanitarian law which threaten the lives and well-being of large groups of civilians may justify intervention. These violations can be summed up as ‘genocide’, ‘crimes against humanity’ and ‘war crimes’, acts for which there is now also individual

criminal responsibility. Secondly, the Security Council must be unable to act or unable to act effectively. Thirdly, the use of force must be necessary and must be applied in a proportionate manner. These are the basic criteria. Normally, two other criteria are added: that the intervention should be multilateral and that the intervening states should be disinterested. Although it may minimise the risks of abuse to undertake intervention on a multilateral basis, for instance within the framework of a regional organisation or agency, unilateral intervention may also be legitimate. Moreover, while relative disinterestedness of the intervening state(s) is preferable, complete disinterestedness is utopian and cannot be required.

It is clear that it is impossible to establish anything close to a simple, unambiguous check list. Of course, the inability of the Security Council to act may be assessed in a rather objective way. The scope of the violations required can also, to some extent, be determined in the abstract. However, the concrete assessment will often require discretion. Apart from the norms concerning warfare as laid down in international humanitarian law, the requirement of necessity and proportionality is a rather vague standard and may be assessed differently, if not to say arbitrarily, from case to case.

5. FOUR LEGAL-POLITICAL STRATEGIES CONCERNING THE FUTURE OF HUMANITARIAN INTERVENTION

In Chapter I, four possible legal-political strategies were presented. The pros and cons connected with these four strategies were discussed in Chapter VI. In the coming years, the political and legal dynamics of humanitarian intervention can be expected to be shaped by the policy alternatives delineated in these strategies. The political choices concerning these strategies is decisive for the political and legal outcome.

On the face of it, as regards strategies for humanitarian intervention, there seems to be only the choice between complying with the UN Charter, that is relying exclusively on the Security Council for authorisation for humanitarian intervention, or recognising that, if necessary, states are justified in extreme cases to undertake humanitarian intervention outside the Security Council. However, on a closer look, the choice to be made is much more complex.

Following Chapter VI of the report, this concluding chapter gives a final assessment of the feasibility and legal-political consequences of four selected strategies for humanitarian intervention.

1) The *status quo plus* strategy – exclusive reliance on the UN Security Council to authorise humanitarian intervention
2) The *ad hoc* strategy – humanitarian intervention as an "emergency exit" from the norms of international law
3) The *exception* strategy – establishing a subsidiary right of humanitarian intervention
4) The *general right* strategy – establishing a general right of humanitarian intervention

Strategies 2 and 3 are alternatives which both presuppose co-existence with strategy 1. This is especially so for strategy 2. Strategy 4, the general right strategy, may exist in isolation from strategy 1, the status quo plus strategy.

On the premises that the goal is to reinforce and make viable the existing international legal order and strengthen the UN Security Council, it is our conclusion that, on balance, a combination of the status quo plus strategy and the ad hoc strategy is preferable to the two alternative strategies 3 and 4. At present, an *isolated* status quo plus strategy is not realistic. Status quo plus presupposes dynamics emanating from, in particular, the ad hoc strategy which keeps open an "emergency exit" from international law for humanitarian intervention in extreme cases. Even if not applied, the mere existence of this option creates dynamics for enhanced consensus-building in the Security Council.

In the choice between the ad hoc strategy and the exception strategy, the former is the the one that holds the better promise for maintaining and reinforcing the existing legal order and strengthening the UN Security Council. However, unless the ad hoc strategy is used only rarely, it will cease to be a plausible option for enhancing the role and effectiveness of the Security Council. Indeed, frequent use of the ad hoc strategy would tend towards establishing a legal exception. The general right strategy holds the greatest potential for relegating the Security Council to political irrelevance.

The ad hoc strategy is that of the alternative strategies which has the least dramatic implications for the existing international legal order, since it does not seek to create a new legal norm for the use of force. Also, it could be claimed that it does not deviate at all from the present situation, since it is already here. This lies in the nature of the strategy. An essential merit of the ad hoc strategy is that there is no need to negotiate new legal frameworks or to formulate doctrines and declarations, all of which would most likely exacerbate the

present disagreement about humanitarian intervention without Security Council authorisation. This does not mean that humanitarian intervention under the ad hoc strategy would be left without legal guidance. As already noted, the fundamental criteria discussed above are relevant even in the absence of a formal declaration. The drawback of the ad hoc strategy – that humanitarian intervention without authorisation from the Security Council continues to be not in conformity with international law – is at the same time its strength. This fact gives intervening powers strong incentives to co-operate as closely as possible with the Security Council before, during and after any intervention.

The legal dynamics of the ad hoc strategy are primarily directed towards keeping the UN Security Council in the focus of the attempts of the international community in dealing with humanitarian disasters, while at the same time allowing for improved protection of individuals.

Like the ad hoc strategy, the exception strategy may dynamically reinforce the efficiency of the UN Security Council, but does not seek to maintain the Security Council as the sole centre for legally authoritative decision-making on humanitarian intervention. Therefore, to a larger degree than the ad hoc strategy, the exception strategy implies the risk of undermining the authority of the Security Council, thereby undermining the existing international legal order pertaining to the use of force. In other words, the exception strategy deals a blow to the veto from the outset. Unlike the ad hoc strategy it does not, in principle, defer to the Security Council and its procedures of decision but, in advance, signals an alternative legal basis for action. The same is true of the general right strategy, only to an even higher degree.

From these considerations, and on the premises noted above, the combination of the status quo plus strategy and the ad hoc strategy stands out as preferable to other strategies. It recognises that in extreme cases, humanitarian intervention may be necessary and justified on moral and political grounds even if an authorisation from the UN Security Council cannot be obtained, while at the same time confirming, in principle, the exclusive legal authority under international law of the Security Council to take decision on humanitarian intervention. In this way it keeps open the option for humanitarian intervention outside the Security Council as a "safety valve" while at the same time enhancing the functioning of the existing international legal order and the efficiency of the Security Council – that is a status quo plus regime.

If the ad hoc strategy is applied only rarely, because the UN Security Council is in most cases able to act, it can confirm the existing legal order and may even serve to strengthen the efficiency of the Security Council (its dynamic will go

in the direction of the status quo plus strategy). If, on the other hand, the ad hoc strategy is applied more widely because the Security Council is often unable to act despite a moral and political determination of many states to act, the UN Charter system will come under pressure and its legitimacy and authority will decline. If so, the repeated ad hoc derogations will form a pattern of state conduct which, if supported by a vast majority of states, will in time modify the existing norms of the UN Charter by establishing a legal doctrine of a (subsidiary) right of humanitarian intervention outside Security Council auspices. In this case, the dynamics of the ad hoc strategy would take a new direction and point towards creating a legal exception.

6. A LOOK INTO THE FUTURE? EXCURSION ON THE EAST TIMOR EXPERIENCE

It is an intriguing question whether the East Timor experience sheds new light on these conclusions. East Timor is a special case in the sense that an enforcement action under Chapter VII has taken place on the request of the target government (Indonesia) while at the same time its own military forces were deeply involved in the very persecution of civilians in East Timor that had led to international concern. The whole operation looks more like an admission by the Indonesian government (after a united pressure from the five permanent members of the UN Security Council and perhaps international economic organisations) that it was not able to shoulder its responsibility for internal security and thus had to accept international help. Though formally being an enforcement action, the operation has some of the characteristics of peace-keeping. Indeed, enforcement operations for humanitarian purposes with the consent of the target government take on the characteristics of 'humanitarian assistance', rather than 'humanitarian intervention'.

Although it is evidently impossible to draw any conclusions on the basis of this case and a few others resembling it, this pattern might be repeated in the future. The dependence of weak states on international support may create strong incentives to give consent to enforcement action for humanitarian purposes. Such mechanisms would, of course, hardly work in cases with especially intransigent states, but to the extent that they really did work, the risk of gridlock in the UN Security Council would presumably be reduced. Having the consent of the target government, the Security Council's deliberations on an authorisation of a humanitarian intervention, or more correctly 'humanitarian assistance' would be much less controversial, because it does not touch upon the sovereignty of the target state.

If this perspective for enhanced consensus-building in the UN Security Council materialises in the future, it would tend to minimise the application of any of the alternative strategies discussed in the present report. This would strengthen a status quo plus regime and be of assistance in keeping the ad hoc strategy in its role as a moderate but sufficient emergency exit for humanitarian intervention – and a discrete agent for the strengthening of the Security Council and the existing international legal order.

Notes

Chapter I

1 Article 107 (under Chapter XVII on "Transitional Security Arrangements") which allows for enforcement action against the enemy states of the Second World War is no longer relevant.

2 Strictly speaking the East Timor case was not a humanitarian intervention in the sense of the above definition. According to Resolution 1264 (1999) of the UN Security Council the East Timor action took place on the *request* of the Indonesian government. The action was on the other side an enforcement action taking place according to Chapter VII of the UN Charter. The text of UN SC Resolution concerning the request is as follows, "Authorizes the establishment of a multinational force under a unified command structure, pursuant to the request of the Government of Indonesia conveyed to the Secretary-General on 12 September 1999, with the following tasks: to restore peace and security in East Timor, to protect and support UNAMET in carrying out its tasks and, within force capabilities, to facilitate humanitarian assistance operations, and authorizes the States participating in the multinational force to take all necessary measures to fulfil this mandate". Other parts of the resolution are those typical for humanitarian intervention, "Reaffirming respect for the sovereignty and territorial integrity of Indonesia," ... "Expressing its concern at reports indicating that systematic, widespread and flagrant violations of international humanitarian and human rights law have been committed in East Timor, and stressing that persons committing such violations bear individual responsibility," ... "Determining that the present situation in East Timor constitutes a threat to peace and security," and "Acting under Chapter VII of the Charter of the United Nations, ...".

3 The standard discussion of order and justice is Hedley Bull, The Anarchical Society: A Study of Order in World Politics, London: MacMillan, 2nd edition, 1995.

4 Cf. on the notion of legitimacy e.g. B. R. Roth, Governmental Illegitimacy in International Law, 1999, p. 15ff (notably 33ff)); P. Malanczuk, Humanitarian Intervention and the Legitimacy of the Use of Force, 1993, p. 5.

5 Military and Paramilitary Activities Case, ICJ Reports 1986, paragraphs 207-8.

Chapter II

1 K. J. Holsti, *The State, War, and the State of War*, 1996, p. 21.

2 K. J. Holsti, *The State, War, and the State of War*, 1996.

Chapter III

1 GA Res 2131 (XX), adopted by 109 votes, none against and with one abstention. GA Res 2625 (XXV) adopted without a vote; The Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States from 1981 (GA Res 36/103) – more far-reaching than its predesessors – met with opposition from Westem states; adopted by 120 votes, 22 against and with 6 abstentions.

2 In the *Corfu Channel Case*, ICJ Reports 1949, p. 35 and in the *Military and Paramilitary Activities Case*, ICJ Reports 1986, para. 202.

3 See e.g. Jennings and Watts, Oppenheim's International Law, 9th ed., Vol. I, 1992, pp. 430ff.

4 See e.g. the International Court of Justice in the *Military and Paramilitary Activities Case*, ICJ Reports 1986, para. 191.

5 See e.g. Jennings and Watts, op.cit., p. 434; Beyerlin, Prohibition of Intervention in Wolfrum (ed.), United Nations; Law, Policies and Practice, Vol. 2, 1995, p. 806.

6 *Military and Paramilitary Activities Case*, ICJ Reports 1986, paras. 228 and 241 respectively.

7 See e.g. the International Court of Justice in the *Military and Paramilitary Activities Case*, ICJ Reports 1986, paras. 202-3, cf. 188.

8 GA Res. 2625 (XXV), 1970, third principle.

9 *Military and Paramilitary Activities Case*, ICJ Reports 1986, para. 245.

10 *Military and Paramilitary Activities Case*, ICJ Reports 1986, para. 242 et seq.

11 See e.g. R. Higgins, The Development of International Law through the Political Organs of the United Nations, 1963, pp. 69 et seq; Goodrich, Hambro and Simons, Charter of the United Nations, 3rd ed., 1969, pp. 78 et seq; Beyerlin, op. cit., p. 811.

12 See e.g. Ermacora on Article 2(7) in Simma (ed.), The Charter of the United Nations, 1995, p. 148; Brownlie, Principles of Public International Law, 1998, p. 296.
13 *Military and Paramilitary Activities Case*, ICJ Reports 1986, para. 205.
14 *Tunis-Morocco Nationality Decrees Case*, PCIJ, Series B, No. 4, 1923, pp. 23-24.
15 U.N.C.I.O. Documents, Vol. VI, pp 507-508 (June 1945).
16 Cf. The Permanent Court of International Justice in the *Tunis-Morocco Nationality Decrees Case*, PCIJ, Series B, No. 4, 1923, p. 24; confirmed by the International Court of Justice in *the Military and Paramilitary Activities Case*, ICJ Reports 1986, para. 258.
17 Alf Ross, De Forenede Nationer, 1963, p. 75; Max Sørensen, Folkeret, 1971, p. 68; See also McDougal and Reisman, Rhodesia and the United Nations; The Lawfulness of International Concern, American Journal of International Law, Vol. 62, No.1, 1968, pp 1-19.
18 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion, ICJ Reports 1971, para. 131.
19 *Case of Bulgaria, Hungary and Romania*, Advisory Opinion, ICJ Reports 1950, p. 601.
20 *Barcelona Traction Case*, ICJ Reports 1970, para. 33-34.
21 *Military and Paramilitary Activities Case*, ICJ Reports 1986, para. 218.
22 Cf. Rajan, United Nations and Domestic Jurisdiction, 1961, pp.289-96 (291); Brownlie, 1998, p. 296 and 574; Jennings and Watts, op.cit., p. 989.
23 *Case of South Africa in Namibia*, Advisory Opinion, ICJ Reports 1971, para. 129-131.
24 *Military and Paramilitary Activities Case*, ICJ Reports 1986, para. 267.
25 Declaration of the Occasion of the 25th Anniversary of the United Nations, GA Res. 2627 (XXV).
26 Security Council, provisional verbatim record of the 3046th meeting, S/PV.3046, p. 92-93.
27 Quoted from Brownlie, 1998, p. 566.
28 GA Res. 95 (1) of 11 December 1946.
29 International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. Established by Security Council Resolution 827 (1993).
30 International Tribunal for Rwanda. Established by Security Council Resolution 955 (1994).
31 Rome Statute of The International Criminal Court adopted on 17 July 1998 in Rome. A/Conf.183/9. The statute will enter into force when ratified by 60 states (Article 126). So far, 84 states have signed the statute (excluding among others the United States) and only a handful of states have ratified it.

Chapter IV

1 The Cold War climate initially made it impossible to agree on conditions such as the character of armed force, the distribution of contributions between the member states, the structure of command etc.
2 See e.g. Goodrich et al, op.cit., p. 316; Frowein on Article 42 in Simma (ed.), op.cit., p. 633.
3 *Certain Expenses of the UN*, Advisory Opinion, ICJ Reports 1962, p. 167.
4 *South Africa in Namibia*, Advisory Opinion, ICJ Reports 1971, para. 110.
5 GA Res. 377A (V) of 3 November 1950; adopted by 52 votes to 5, with 2 abstentions. The United States proposed it in response to veto by the Soviet Union in the Security Council during the Korean War.
6 This is first of all due to changes in majorities within the General Assembly and the revival of the Security Council since 1991. See Bothe on Peace-Keeping in Simma (ed.), op.cit., p. 573; Nolte, Uniting for Peace in Wolfrum (ed.), op.cit., p. 1341-47.
7 Cf. Nolte, op. cit., p. 1346; Goodrich et al, op.cit., p. 52.
8 Cf. Delbrück on Article 24 in Simma (ed.), op.cit. p. 402 .
9 Maintenance of "international peace and security" is the foremost purpose of the UN (Article 1(1)) for which primary responsibility is conferred upon the Security Council (Article 24(1)) and the purpose of measures taken under Chapter VII is to "maintain international peace and security" (Article 39 i.f.).
10 Cf. Kelsen, The Law of the United Nations, 1951, p. 19; Blumenwitz, Maintenance of Peace and Security in Wolfrum (ed.), op.cit., p. 865.
11 Cf. Kelsen, op.cit., p. 19; Österdahl, Threat to the Peace, 1998, p. 12.
12 Cf. Kelsen, op.cit., p. 19.
13 See Goodrich et al, op.cit., p. 296 et seq; International Law Association, Yearbook 1976, p. 522.
14 Cf. the Statement of 11 March 1992 by the President of the Security Council, stating in para. 34 that "*inasmuch as the repression of the population continues, the threat to international peace and security in the region mentioned in resolution 688 (1991) remains.*"
15 The subsequent peace-keeping operation, UNOSOM (SC Res 751 (1992)) proved unsuccesful.
16 Both China and India voted in favour of Resolution 794.

17 Subsequent SC Res. 1203 (1998) basically reiterated the demands from Res. 1160 and 1199.

18 UN Secretary General Report to the General Assembly on the work of the Organization, 1991, UN Doc. GAOR, 46th Session, supplement No. 1 (A/46/1), p. 5.

19 The call in Resolution 221 (1966) upon the UK to use force if necessary to enforce the embargo on Southern Rhodesia was a special case. Southern Rhodesia by then was still a territory under the UK.

20 *Certain Expenses Case*, Advisory Opinion, ICJ Reports 1962, p. 168.

21 Cf. the International Court of Justice in the *South Africa in Namibia Case*, Advisory Opinion, ICJ Reports 1971, para. 89.

22 As mentioned earlier this option is hardly ever used. The UN Secretary General, in his report entitled "An Agenda for Peace", has called upon the Security Council to use this option more often in order to strengthen the legitimacy of its actions, Report of 17 June 1992, UN Doc. A/47/277.

Chapter V

1 See Brownlie, International Law and the Use of Force by States 1963, p. 338 (with references to Grotius and Vattel); Malanczuk, Humanitarian Intervention and the Legitimacy of the Use of Force, 1993, p. 7 et seq. (with references to Grotius, Suarez and Gentili). The development of this theory coincides with the development of the modern concept of state sovereignty by Hobbes and Bodin.

2 Some refer to the so called "Holy Alliance" of the monarchies of Austria, Prussia and Russia after 1815 as an important precedent. But the principle of intervention established by the Holy Alliance had the purpose of securing the monarchies; in case of rebellion etc. in one state the other states were given the right and duty to intervene. And the principle of the Holy Alliance failed to be recognised in the international legal order, cf. Malanczuk, op.cit., p. 8 with footnote 104.

3 Lauterpacht, International Law and Human Rights, 1950, p. 32.

4 See Murphy, Humanitarian Intervention, 1996, pp 33-64; Brownlie, 1963, p. 340 after examining state practice before 1945, concludes that, *"no genuine case of humanitarian intervention has occurred with the possible exception of the occupation of Syria in 1860 and 1861."*

5 Generally speaking, the authors in favour of humanitarian intervention were on the Anglo-American side, although joined by some continental European writers, whereas authors opposing the doctrine were on the continental European side, cf. Malanczuk, op.cit., p. 10 et seq.

6 Brownlie in 1963 (1963, p. 340) concluded that *"With the embarrassing exception provided by Germany [Czechoslovakia, 1939] the institution has disappeared from modern state practice."*

7 Lauterpacht has been a leading authority for the view that the doctrine was part of customary law, (Lauterpacht in L. Oppenheim/H. Lauterpacht, Oppenheim's International Law, 8th ed. 1955, p. 312); The International Law Association's Sub-committee on the International Protection of Human Rights in International Law has found that the doctrine was clearly established in state practice before 1945, and that only its limits not its existence is subject to debate (International Law Association, Yearbook 1970, p. 636); This conclusion was taken over by J.L. Fonteyne (The Customary International Law Doctrine of Humanitarian Intervention: Its current Validity Under the United Nations Charter Cal.West. ILJ, Vol. 4, 1974, p. 203ff (235)); On the other hand, Brownlie finds that state practice, with one exception, offers no genuine case of humanitarian intervention and furthermore considers it "extremely doubtful" whether the doctrine has survived condemnations of intervention in international declarations of the 20th century (Brownlie, 1963, p. 338-42); Beyerlin, referring to the few examples of genuine humanitarian intervention in state practice, finds it "debatable" whether the doctrine, although then supported by a majority of writers, was clearly established under customary international law of the time (Beyerlin in Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 3, 1982, p. 212); Verwey is equally sceptical (Verwey, Humanitarian Intervention in the 1990s and Beyond: An International Law Perspective in Pieterse (ed.), World Orders in the Making, 1998, p. 191); Malanczuk concludes that although the doctrine advanced in the literature and also found use in state practice, a critical examination of state practice of the 19th century does not persuasively establish the general acceptance of a doctrine of humanitarian intervention (Malanzcuk, op.cit., p. 11); Pape also rejects that the doctrine was part of customary international law, referring to the substantial minority of scholars opposing it and to the lack of uniform definition (Pape, Humanitäre Intervention, 1997, p. 85).

8 In international law before 1945, the right of forcible self-help by states to protect nationals and property abroad was clearly established, cf. International Law Association, Yearbook 1970, p. 635.

9 See Randelshofer on Article 2(4) in Simma (ed.), The Charter of the United Nations, 1995, p. 124-6.

10 This is the clearly dominant view in legal doctrine, cf. Randelshofer, op.cit., p. 124 with footnote 147; Malanczuk, op.cit., p. 27 (both with references). Representing this view are e.g. Randelshofer, op.cit., p. 118 and 124 et seq; Beyerlin in Bernhardt (ed.), op.cit., p. 212 et seq; Murphy, op.cit., p. 358; Oscar Schachter, International Law in Theory and Practice, 1991, p. 128; Malanczuk, op.cit., p. 27.

11 Cf. International Law Association, Yearbook 1970, p. 636.
12 Cf. e.g. Brownlie, 1963, p. 342; Malanczuk, op.cit., p. 27.
13 See Brownlie, 1963, p. 365-67.
14 Cf. Reisman and McDougal, Humanitarian Intervention to protect the Ibos, in Lillich (ed.), Humanitarian Intervention and the United Nations, 1973, p. 171 et seq. See also the conclusion of the ILA Sub-Committee that *"it does not seem impossible to reconcile a limited right to intervene for humanitarian purposes with the strictures of Article 2(4)"*, International Law Association, Yearbook 1970, p. 637.
15 First developed by Jessup, A Modern Law of Nations, 1948, p. 170-71, this theory was restated by Lillich, Forcible Self-help by States to Protect Human Rights, Iowa Law Review, Vol. 53, 1967, p. 344-51 and has since gathered several proponents.
16 See e.g. Delbrück on Article 24 in Simma (ed.), 1995, p. 400-2.
17 According to customary international law, as codified in the Vienna Convention on the Law of Treaties (1969), Article 62, a fundamental change of circumstances (*clausula rebus sic stantibus*) may in exceptional cases have the effect of terminating or suspending a treaty. This modality is clearly not relevant with regard to an assessment (subjective) that the Security Council has not been efficient.
18 *Corfu Channel Case*, ICJ Reports 1949, p. 35.
19 *Military and Paramilitary Activities Case*, ICJ Reports 1986, para. 188.
20 *Military and Paramilitary Activities Case*, ICJ Reports 1986, para. 268.
21 *Legality of the Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, para. 38.
22 *Case concerning Gabcíkovo-Nagymaros Project*, ICJ Reports 1997, para. 50-58.
23 Cf. among others J.A. Frowein, Jus Cogens in R. Bernhardt (ed.) Encyclopedia of Public International Law, Vol. 7, 1984, p. 329.
24 *Corfu Channel Case*, ICJ Reports 1949, p. 35. Quoted by the Court in the *Military and Paramilitary Activities Case*, ICJ Reports 1986, para. 202.
25 Cf. Report of the International Law Commission, Draft Articles on State Responsibility, 1980, GAOR 35th Session, Supp. No. 10 (A/35/10), p. 96.
26 Gulmann et al., Folkeret, 1989, p. 167-170; Brownlie, 1998, p. 468 et seq.
27 Cf. Oscar Schachter, International Law in Theory and Practice, 1991, p. 128.
28 *Military and Paramilitary Activities Case*, ICJ Reports 1986, para. 188 and 202.
29 Cf. Murphy, Humanitarian intervention, 1996, p. 193.
30 Cf. e.g. Malanzcuk, Humanitarian Intervention and the Legitimacy of the Use of Force, 1993, pp 17-19; Murphy, Humanitarian Intervention, 1996, pp 182-98; Verwey, Humanitarian Intervention and Beyond in Pieterse (ed.), World Orders in the Making, 1998, p. 187 with footnote 9; Sarooshi, The United Nations and the Development of Collective Security, 1999, pp 226-32.
31 Press Release SC/6659 of 14 April 1999.
32 Press Release SG/SM/6938 of 24 March 1999.
33 Press Release SG/SM/6949 of 7 April 1999.
34 *Case Concerning Legality of Use of Force*, Order of 2 June 1999, para. 15-16.

Chapter VI

1 F.R. Tesón, Humanitarian Intervention; An Inquiry into Law and Morality, 2nd ed., 1997, p. 314. Tesón also argues that humanitarian intervention is lawful under the UN Charter and supported by state practice, if both are seen in the light of his moral philosophical theory. The universality of Tesón's moral philosophy is questioned by Malanczuk, 1993, p. 5 et seq.
2 Reisman and McDougal, Humanitarian Intervention to Protect the Ibos, in Lillich (ed.), Humanitarian Intervention and the United Nations, 1973, p. 168
3 Verwey in Pieterse (ed.), 1998, p. 198.
4 Cf. e.g. Malanczuk, 1993, p. 27.
5 Cf. Malanczuk, 1993, p. 27.
6 Thus Malanczuk 1993, p. 30 et seq ; Oscar Schachter, International Law in Theory and Practice, 1991, p. 126 (Murphy, Humanitarian Intervention, 1996, p. 385); Murphy, 1996, p. 384.
7 Murphy, p. 386 (regards the General Assembly principles for humanitarian assistance "humanity, neutrality and impartiality" being as far as the international community can agree at present)..
8 Malanczuk, 1993, p. 31.
9 International Law Association Report 1972, p. 609-24; International Law Association Report, 1974, p. 220; International Law Association Report, 1976, p. 519 and 521 et seq.

10 Wright, The Legality of Intervention Under the United Nations Charter, American Society of International Law Proceedings 79, 86 (1957), quoted in International Law Association, Report 1970, p. 636. Cf. Malanczuk, 1993, p. 30.
11 International Law Association, Report 1970, p. 636.
12 Cf. Article 42 of the UN charter according to which the Security Council may decide upon the use of military force if non-military measures *"would be inadequate or have proved to be inadequate."*
13 Cf. Murphy, 1996, p. 385.
14 Murphy, 1996, p. 385, International Law Association, Report 1970, p. 640, footnote 43.