

Peace or Human Rights?

The dilemma of humanitarian intervention

Barend ter Haar

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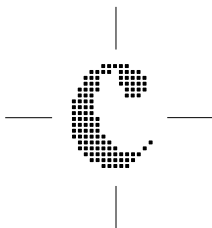
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Preface

Ten years ago I wrote a book on arms control of biological weapons, reflecting on the work I had done in the previous years. This essay is a reflection on an important part of my daily work since then, first at the Netherlands Delegation to NATO and subsequently at the Security Policy Department of the Ministry in The Hague. It is an effort to systematize personal experiences rather than a study on the basis of existing literature.

I am grateful for the sabbatical leave that the Ministry of Foreign Affairs granted me to write this essay and for the willingness of the Clingendael Institute to provide me with all the facilities to write and publish it. I like to thank the staff of Clingendael for their hospitality and in particular Fred van Staden, Jan Rood and Marianne van Leeuwen for their support and advise and Birgit Leiteritz for preparing my draft for publication. I am aware that in this essay I touch upon a wide range of subjects on which others have far more expertise. I therefore also like to thank Niels Blokker, Hans Labohm, Dick Leurdijk and Jan Geert Siccama for their comments and advise. Of course the sole responsibility for the final text remains with me.

1 Introduction

Two thousand years ago the Roman legions brought European civilization a great step forward by bringing a large part of Europe under the Pax Romana. Eight hundred years later, Islamic armies laid the foundation for a blossoming of Islamic culture. From the sixteenth century onwards European men of war and guns helped spread the blessings of European civilization to the ends of the earth and only two centuries ago French armies occupied a large part of Europe under the banner of *Liberté, Égalité, Fraternité*. The idea that war can be an instrument for the good has never been undisputed. But the history of mankind knows a great number of wars like those mentioned above that, certainly in retrospect, were widely considered as wars for a just cause.

The horrors of the First and Second World Wars, and the threat of a Third World War that might have led to the end of civilization, brought war into total discredit. It seemed that the time when anybody would claim that starting a war could be an honorable undertaking had gone forever. But now the thread of history seems to be taken up again due to the need to intervene for humanitarian reasons. Are we on the warpath again? Are we going to impose our values on the rest of the world, this time not in the name of Rome, Christianity or Communism, but in the name of human rights?

It is a difficult dilemma, because our pursuit of justice clashes here with our pursuit of peace and stability. How can we obey the moral imperative not to stand by with folded arms when mass murder is taking place on the other side of the border, without jeopardizing the existing order of sovereign states and without undermining the prohibition of the use of force in international relations?

Before trying to answer that question, I will propose a definition of humanitarian intervention and discuss the question of why the subject suddenly arouses so much attention.

What is the meaning of humanitarian intervention?

The expression humanitarian intervention is used with different meanings. Sometimes it includes any intervention to save human lives in another country, even when armed forces play no role. In legal literature its meaning was, at least until very recently, usually limited to armed interventions without the agreement of the government involved and without a mandate from the Security Council. In this essay I will use a somewhat wider definition, by including armed interventions with a Security Council mandate. The definition is, however, limited to interventions in which armed force is used, even if only as a threat. It does not include humanitarian operations in which military forces are solely used for civil tasks such as building refugee camps. Neither does the definition include interventions that are mainly directed at rescuing foreign nationals.¹ The definition is therefore as follows:

Use of military force by one or more states on the territory of another state but without its consent, to prevent or halt gross and massive violations of fundamental human rights, without regard to the nationality of the victims.

In using a definition along these lines I join what seems currently to be the prevailing trend. It is interesting to note the political background of this trend.² Until recently the discussion on humanitarian intervention mainly took place among lawyers. From a legal point of view the most interesting question was clearly the justification and possible legal basis for humanitarian intervention without a Security Council mandate. But in this way the discussion was, from a political point of view, put on the wrong foot, by concentrating on development

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- 1) Sometimes the distinction between an intervention to rescue foreign nationals and a humanitarian intervention can become blurred, as was the case with the British intervention in Sierra Leone in May 2000. Its original purpose was to rescue foreigners, but subsequently its purpose broadened to stemming the advance of the rebel forces. But interventions to rescue foreigners usually remain limited to that purpose.
 - 2) Typical examples of this trend are the two reports that Dutch advisory councils published in 1992 and 2000. In 1992, in their report *On the use of force for humanitarian purposes*, the Advisory Committee on Issues of Public International Law and the Advisory Committee on Human Rights limited the expression to interventions without a mandate from the Security Council. In 2000 the Advisory Committee on Issues of Public International Law and the Advisory Council on International Affairs stated in their report on *Humanitarian intervention* that intervention with a Security Council mandate would be more accurately described as enforcement action for humanitarian purposes. They noted, however, the prevailing tendency to include such actions under the concept of humanitarian intervention and decided to join this wider definition.

of the exception to the rule rather than on strengthening the rule. As the discussion moved from the legal to the wider political field, the definition had therefore to be broadened to make room for the argument that the answer to the dilemmas of humanitarian intervention will primarily have to be found in clarifying and strengthening the role of the Security Council.

Another concept that requires some comment is *international community*. Those two words are needed to express the idea that mankind has a number of common interests that justify common action. But one should not lose sight of the fact that the expression does not refer to an entity with all the characteristics of a community, such as a sense of common destiny and responsibility, a shared view of the future and functioning rules and institutions. In many respects the expression international community refers to nothing more than a virtual community, the political concept of such a community.

The United Nations embodies this concept and may have the best credentials to speak and act in the name of the international community, but as long as the gap between what it says and what it does is so wide, it cannot claim to have exclusive rights. Regional organizations and groups of states often pose as spokesman or agent of the international community. Good examples are the role of the Contact Group with regard to former Yugoslavia and the role of ECOMOG in Liberia. Such actions do raise the question of on what basis their self-appointment rests, but the Security Council is usually willing to legitimize such actions. However, misuse of the concept remains easy. Just as on a national level anybody can pretend to speak in the name of the silent majority, on the international level anybody can pretend to speak for the international community.

Why suddenly so much interest?

Concern about respect for human rights in other countries is nothing new, but prevention of war used to have priority. The Charter of the United Nations mentions under its purposes both the maintenance of international peace and security and promoting and encouraging respect for human rights, but it only provided concrete instruments for the implementation of the first purpose. Both the Charter and the Universal Declaration of Human Rights stressed the fundamental importance of respect for human rights, but implementation was left almost completely to individual states. The international instruments that were developed subsequently to promote implementation were toothless. The Charter was much more vigorous with regard to the maintenance of international peace and security. It did not limit itself to prohibiting use of force in international relations (with a few exceptions, such as for self-defense), but provided the

Security Council with the authority to take all necessary measures, including military action, to maintain or restore international peace and security.³

The priority given to the maintenance of international peace and security was partly successful. A nuclear Armageddon, which would have been the largest possible violation of human rights, was successfully prevented. But a price was paid for that. The international promotion of human rights often received little more than lip service. The governments of the countries where human rights were most seriously trod upon liked to point at article 2 paragraph 7 of the Charter that states that the United Nations should not *intervene in matters which are essentially within the domestic jurisdiction of any state*. The Western democracies did not shy away from criticizing the human rights violations in Eastern Europe, but their main preoccupation was to prevent tensions between East and West getting out of hand. And therefore they did not come to the rescue of the Hungarian people who in 1956 revolted against communist dictatorship. They were also usually reluctant to become very critical about gross violations in countries that, from a military point of view, belonged to the Western side. Their fear that strong pressure on repressive regimes would play into the hand of the communists or the communist-backed opposition was often stronger than their concern about the wrongdoings of these regimes.

The end of the Cold War offered new opportunities to promote human rights. The countries of the former Eastern Bloc did, at least for a short period of time, put aside all their reservations about the Western interpretation of human rights, democracy and the rule of law. The agreements that were reached on these subjects by the then Conference on Security and Cooperation in Europe (CSCE)⁴ used to be limited to what the *East* was willing to accept. But the Charter of Paris, which was adopted in 1990 by the summit of the CSCE, went as far as the *West* could go.⁵ The espousal of Western values, if not always yet in practice at least in principle, paved the way for the acceptance of the European former communist countries as members of the Council of Europe, the European bulwark of human rights and democracy. As a result the inhabitants of these countries received the possibility of filing complaints against their own governments before the European Court of Human Rights.

Outside Europe, human rights, democracy and the rule of law also profited from a favorable wind. Repressive regimes no longer had to be spared out of fear

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- 3) Although it should be remarked that the articles 43 to 47 on the provision of armed forces to the Security Council were never fully implemented.
 - 4) The CSCE changed its name in 1994 to Organization for Security and Cooperation in Europe (OSCE).
 - 5) The United Kingdom, for example, was not willing to accept that countries should have a (written) constitution, because it does not have one itself. Several Western countries proved unwilling to go very far in describing the rights of members of minorities because of the minorities in their own countries.

for a communist takeover. The World Conference on Human Rights that was held in Vienna in 1993 reaffirmed in its Declaration and Program of Action that protection and promotion of human rights is the first responsibility of governments, but that it is also a legitimate concern of the international community.⁶ The conference, however, did not give a clear answer to the question of to what type of action this concern might lead in the case of gross and massive violations of human rights. It did little more than welcoming the convening of emergency sessions of the Commission on Human Rights and welcoming that 'other ways of responding to acute violations of human rights be considered by the relevant organs of the United Nations system'.⁷ Of more concrete effect was the decision to establish a High Commissioner for Human Rights. But the most important breakthroughs took place in the field of international criminal law. The International Criminal Tribunals for former Yugoslavia and Rwanda were established; a former head of state (Pinochet) was indicted in a foreign country for violations of human rights committed in his own country, and the Statute of the International Criminal Court was adopted.

Now that the Security Council was no longer paralyzed by the Cold War, local conflicts could be dealt with more effectively. Because the threat of a worldwide conflict had disappeared, many countries suddenly had more troops available for peacekeeping missions than before. But at the same time new and old local conflicts surfaced. As a result the number and size of peacekeeping operations by the United Nations grew dramatically.

These operations often succeeded in keeping the peace, but in an important number of cases the instruments of classic peacekeeping proved to be completely insufficient. This led to the miserable failure of the United Nations in Rwanda and Bosnia. In Rwanda in 1994 the UN force was largely withdrawn at the very moment when its presence might have saved thousands from genocide. A year later the Dutch UN troops were pulled out of Srebrenica, which was declared a safe area by the United Nations, at the moment when Serbian soldiers started killing thousands of Muslim men and boys from this area.

In evaluating those disasters, many came to the conclusion that in cases like this neutrality is an immoral concept. It was widely felt that the international community should put an end to such gross violations of human rights, if necessary without asking the consent of the local authorities. Humanitarian intervention was high on the international agenda.

6) Document A/CONF.157/24, Part I, Chapter III, paragraph I,1 and I,4.

7) Document A/CONF.157/24, Part I, Chapter III, paragraph II.8.

Conclusion

In summary one could draw the following provisional conclusions:

- The end of the Cold War made it possible to put promotion of human rights higher on the international agenda without risking a Third World War.
- In the course of the last ten years a consensus has been growing that the international community should not sit idle when grave and massive violations of human rights, such as genocide, take place.
- The classic instrument of UN peacekeeping proved unsuited for preventing or stopping such violations of human rights.

In other words, there is a need for humanitarian intervention, the political climate for humanitarian interventions is relatively positive, but it remains unclear which instruments are available for that purpose.

That leaves many questions to be answered. Does the UN Charter allow humanitarian interventions? Has the use of force in international relations, which was solemnly renounced, become an acceptable and suitable instrument again? And why should the international community intervene? Does it have a real interest in stopping violations of human rights, or is it an impulsive reaction to horrifying pictures on television? What should the purpose of humanitarian interventions be: to stop the most visible symptoms or to deal with the underlying problems?

The purpose of this essay is to contribute to the discussion on humanitarian intervention by considering the main arguments in favor and against and by making some suggestions on a possible approach of the identified problems. The next chapter looks at the moral arguments for humanitarian intervention. Chapter 3 argues that it is prudent to consider any gross and massive violations of human rights as a potential threat of regional peace and security. The thesis of chapter 4 is that the risk that a disturbance of regional peace and security will have serious consequences for worldwide peace and security is such that addressing grave violations of human rights should be considered a national interest of all countries, including those that are not directly affected by them.

Chapters 5, 6 and 7 deal with the main problems of humanitarian intervention: the assumed incompatibility with sovereignty, its legal basis and the practical disadvantages and problems. Chapter 8 offers some suggestions to address these problems and in chapter 9 I will discuss a possible framework for assessing humanitarian interventions.

2 The moral imperative of action

The best way to present the moral argument is to have a closer look at a few examples of grave and massive violations of human rights.

Cambodia (1975 –1979)

When the Khmer Rouge took power in Phnom Penh in April 1975, they introduced a new national anthem that did not bode well for the future:

*The red, red blood splatters the cities and plains of the Cambodian Fatherland,
The sublime blood of the workers and peasants,
The blood of revolutionary combatants of both sexes,
That blood spills out into great indignation and a resolute urge to fight,
17 April, that day under the revolutionary flag,
The blood certainly liberates us from slavery.*

A year after the takeover the president of Democratic Cambodia, Khieu Samphan, delivered a speech in the same style:

Our entire nation has clearly and forever written with its own fresh blood a new and brilliant page of history for our race and for coming generations. It is actually the masterpiece written with fresh blood and achieved through the sacrifices of flesh and bones of our people.

These words were less metaphorical than one would wish and came close to an accurate description of what was going on.⁸ The Khmer Rouge leadership

8) As almost all relations with the outside world were severed and few records were kept, there is relatively little known about what happened exactly. The information in this paragraph is based on translations of radio broadcasts

believed that a really new society could only be built if every remnant of the previous feudal and capitalistic society was eradicated. But this new society was a racist society. Ethnic minorities were persecuted. When a Khmer husband had a Vietnamese wife, she had to leave. If she stayed she would be killed.⁹ After the conquest of Phnom Penh, all of the almost two million inhabitants were forced to leave to the countryside within a few days. Even those in hospitals were not spared. Those that were not able to make the journey were often left to die on the side of the road. People who were considered to be suspect, for example because of their social or ethnic background, were sooner or later killed. They were often beaten to death with a shovel or killed by putting a plastic bag over the head.

Wearing glasses was suspect, because glasses were considered to be a sign of wealth or decadence. Books were prohibited, because books in the Cambodian language were considered to be feudal and books in foreign languages were instruments of imperialism. The distrust of learning was so great that a pharmaceutical factory was headed by a woman of seventeen years old who claimed that engineers and technicians were not needed. The workers that produced aspirin and tetracycline by hand were mostly illiterate children of twelve to fourteen years old. Foreign pharmaceuticals were spurned. Khieu Samphan even boasted that 'we have no machines.' Two hundred small tractors received from China were left to rust.¹⁰ The man who was appointed head of the transportation section of the Ministry of Foreign Affairs was a tribesman who had never touched a car before. He did not dare to sit in the cabin, but sat on the roof as if on the back of an elephant. Money was abolished.¹¹

published by FBIS and on the following books:

- *The Pol Pot regime: race, power, and genocide in Cambodia under the Khmer Rouge, 1975-79* by Ben Kiernan (New Haven 1996)
- *Cambodge année zéro* by François Ponchaud (Paris 1977), translated into English as *Cambodia year zero* (London, 1978)
- *L' utopie meurtrière, un rescapé du génocide cambodgien témoigne* by Pin Yathay (Paris 1980)
- *Sideshow, Kissinger, Nixon and the destruction of Cambodia* by William Shawcross, (London 1979)
- *Eerst doodden ze mijn vader (First They Killed My Father)* by Loung Ung (Amsterdam, 2000)

9) Kiernan p. 108.

10) Kiernan p. 320.

11) The members of the Khmer Rouge that represented Cambodia in the General Assembly of the United Nations probably did use money in order to travel to New York, but they were very thrifty indeed. In 1977 as a member of the Netherlands delegation to the UNGA, I met some of these mass murderers, including Ieng Sary, in the coffee shop of the UN headquarters. One had to pay for the tea bag, but water and sugar could be added to taste without additional costs. Ieng Sary and his henchmen therefore drank hot water with sugar.

For millions of Cambodians family life was abolished. Children were separated from their parents. Married women had to live apart from their husbands. When a visiting Vietnamese doctor asked how women could become pregnant in this system, the wife of Ieng Sary, the deputy Prime Minister, answered angrily: 'You do not understand the problem of women at all.'¹² Because everybody is equal, everybody had to wear the same black clothes. Who dared to plant vegetables for private use or to leave his designated place of residence to visit a relative a few kilometers away risked capital punishment. Mutual aid, such as sharing rations, was prohibited as a sign of reactionary individualism. The whole of Cambodia became like a prison camp. About 1.5 million of its 8 million inhabitants were starved or beaten to death. It seems likely that the genocide would have continued if Vietnam had not intervened.

At the end of 1978 the United Front for National Salvation of Kampuchea was established in Hanoi. In the beginning of 1979 Vietnamese forces occupied most of Cambodia and installed the United Front in Phnom Penh. Most countries condemned the Vietnamese invasion and the Khmer Rouge was allowed to retain its seat in the United Nations for another ten years. The Vietnamese forces remained in Cambodia for ten years.

Rwanda (1994)

Hutus and Tutsis had lived together for several hundreds of years in what is now called Rwanda.¹³ The difference between the two groups had over time become smaller as a result of mixed marriages. The Tutsis were a minority but they had provided the upper class during most of the colonial period. Mass killings of members of the other group started during colonial times, but they intensified after Rwanda received its independence in 1962. At the end of 1963, for example, more than ten thousand Tutsis were slaughtered and a quarter of million Tutsis fled over the border. The Tutsis that had fled to Uganda set up an army, the Rwandan Patriotic Front (RPF). Among radical Hutus arose the idea that the 'cockroaches,' as they named the Tutsis, should be systematically destroyed.

12) Kiernan p. 162.

13) This short overview is mainly based on the following publications:

- *The United Nations and Rwanda 1993-1996*, The United Nations Blue Books Series, volume X (New York 1996)
- *We wish to inform you that tomorrow we will be killed with our families* by Philip Gourevitch (London 1998)
- *Leave none to tell the story* by Alison Des Forges (Human Rights Watch 1999)
- *Report of the independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda*, prepared by a commission under the leadership of the former Swedish prime minister Carlsson (Document S/1999/1257)

They started building weapon stocks and training groups of young militia. The most important among those were the *interahamwe*, 'those that attack together.' The members of these groups drew up lists of Tutsis and exercised in the use of machetes and hand grenades.

It seemed an encouraging sign that the United Nations decided in late 1993 to send a peacekeeping force to Rwanda to help implement the peace agreement that had been concluded on August 4 1993 in Arusha between the government of Rwanda and the RPF. The United Nations Assistance Mission in Rwanda (UNAMIR), which was headed by the Canadian Major General Dallaire came up to strength during the first three months of 1994. But at the same time the number of indications that preparations for a genocide were going on kept growing. On January 11 1994, Dallaire reported to UN headquarters in New York that a top-level *interahamwe* trainer had provided him with information about the Hutu extremists' plans. They planned *inter alia* to kill a number of Belgian UNAMIR soldiers, who because of their training and equipment formed the backbone of UNAMIR. They expected that as a result Belgium would decide to withdraw its troops and that the RPF would be provoked to resume the civil war. The informant had been ordered to register all Tutsis in Kigali. He suspected that this was in preparation for their extermination. A few months later he proved correct. He said that he was willing to tell the location of an illegal stockpile of weapons on the condition that he and his family would receive UN protection.

Dallaire took the informant seriously and suggested to New York to grant him protection and to raid the arms cache. But UN headquarters decided differently. Dallaire was instructed to give all the information that he had received to the president of Rwanda, although the informant had told Dallaire that the plans to kill Belgian soldiers and exterminate the Tutsis originated from circles close to the president. Another grave mistake was that the UNAMIR command was not informed about a report on the situation in Rwanda that was presented in 1993 by the Special Rapporteur of the Commission on Human Rights on extra-judicial, summary or arbitrary executions, Mr Ndiaye.¹⁴ In this report Ndiaye pointed out the serious risk of genocide in Rwanda and recommended a series of steps to prevent further massacres. The report seems to have been largely ignored.

On April 3 1994 Radio Mille Collines, a radio station that actively propagated ethnic hatred, announced that during the next three days 'there will be a little something here in Kigali, and also on April 7 and 8 you will hear the sound of bullets or grenades exploding.'¹⁵ On April 6 1994 the president of Rwanda was killed. Almost immediately the massacres started. The murderers worked fast

14) See Carlsson report pp. 6 and 31.

15) Gourevitch p. 110.

and systematically to kill all Tutsis and members of the Hutu opposition. If they became tired of hacking and clubbing, they sometimes just cut the Achilles tendons of their victims to prevent them from fleeing and continued their work the next day. But cutting tendons was usually unnecessary, because the Tutsis had nowhere to go. Many of them sought refuge in churches or in the neighborhood of the UNAMIR forces, but usually to no avail. After ten Belgian soldiers had been brutally murdered, Belgium withdrew its troops, exactly as the Hutu extremists had predicted. As Belgium withdrew its troops, other countries such as Bangladesh followed.

On April 20 1994 the Secretary-General presented the Security Council with three options. The first option would have come close to a humanitarian intervention. It called for immediate reinforcement of UNAMIR and a change in its mandate to enable it to enforce a cease-fire. The two other options were a reduction of UNAMIR from more than 2,000 to 270 men and a complete withdrawal. The next day the Security Council chose the second option. That left open the possibility for UNAMIR to play an intermediary role, but removed almost any remaining capacity to stop the genocide. In the meantime the massacres went on. Women and young girls were systematically raped, tortured and maimed, while males were subjected to torture and extreme degradation before being killed.¹⁶ By the end of April 1994 200,000 people had been killed. About 2 million people had fled their houses. Most of them had little food and no security.

On May 4 1994 the Secretary-General finally called a spade a spade when he stated on a television program: 'Here you have a real genocide.'¹⁷ That was still a bridge too far for the Security Council, but on May 17 1994 it adopted a resolution¹⁸ that at least reversed its earlier decision to withdraw most of UNAMIR. It very carefully avoided stating that genocide was taking place in Rwanda,¹⁹ but it authorized an expansion of UNAMIR to 5,500 troops and mandated UNAMIR 'to contribute to the security and protection of displaced persons, refugees and civilians at risk.' But it did not refer in this context to

16) *The United Nations and Rwanda* p. 44.

17) *The United Nations and Rwanda* p. 51.

18) Resolution 918 (1994).

19) In its preambular paragraphs the Resolution condemned 'the very numerous killings of civilians' and it implicitly referred to the Genocide Convention by recalling 'that the killing of members of an ethnic group with the intention of destroying such a group, in whole or in part, constitutes a crime punishable under international law.' The explanation for this extreme circumspection can be found in article 1 of the Convention, which reads as follows: *The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.* Several members of the Security Council obviously felt that by conceding that a genocide was taking place, they would be forced to take stronger action.

Chapter VII of the Charter, which would have given UNAMIR a mandate to enforce this protection.²⁰ Very few countries were willing to provide troops, and the troops that were made available did not have the necessary equipment. As a result, two months later less than 500 troops had been deployed. At the same time the number of victims of the genocide had grown to 800,000. At the end of June 1994 the Security Council agreed with Operation Turquoise, the deployment of a mainly French force in southwestern Rwanda. But the end of the genocide was mainly the result of the fact that at that time the RPF had conquered almost all of Rwanda. The RPF's victory resulted in an enormous population movement. The Hutu extremists actively stimulated this movement because it assured them of a human shield in the refugee camps and of a basis for recruitment.

At the end of July 1994 almost one million of the seven million inhabitants of Rwanda had been killed and five million had fled their homes. The exodus of 1.5 million Hutus into Zaire caused the spread of civil war to that country. Although the genocide in Rwanda was by no means the only cause of civil war in Zaire, it has certainly contributed to chaos and human misery in that country. It is estimated that even in the period between July 1998 and June 2000, as a result of the war between Hutu-led and Tutsi-led forces in eastern Congo (formerly named Zaire), 1.7 million people have died, mainly of disease and hunger.²¹

Conclusion

What would our judgment be in retrospect about the Vietnamese invasion in Cambodia in 1979 and the lack of a humanitarian intervention in Rwanda in April 1994? The last case is relatively simple. The Secretary-General of the United Nations and the governments of Belgium²² and the United States have conceded that they made grave mistakes in 1994. A humanitarian intervention would have been justified and feasible. It might not have prevented the ensuing war in Zaire, but it would have saved the lives of many thousands of people.

20) The Resolution did refer to Chapter VII, but only in part B which deals with the arms embargo.

21) According to a report by the International Rescue Committee, a New York-based non-profit organization. According to the estimate of the IRC, during the 22-month period 600,000 deaths would have been statistically normal for a population of 19 million. In fact 2,300,000 deaths are estimated to have occurred.

22) The Belgian prime minister, Mr Verhofstadt, declared in Kigali on April 7 2000: *Au nom de mon pays, je m'incline devant les victimes du génocide. Au nom de mon pays, au nom de mon peuple, je vous demande pardon (La Belgique et l'Afrique Centrale de 1960 à nos jours, Bruxelles 2000, p. 296).*

The case of Cambodia during the period of the Khmer Rouge is somewhat more difficult. In view of the extreme violations of human rights, a humanitarian intervention mandated by the Security Council would certainly have been justified. But would it have been feasible? China would almost certainly have vetoed a Security Council mandate, and anyway very few countries would have been willing to send their troops to Cambodia, so shortly after the fall of Saigon. And as for Vietnam, it did intervene only after four years when hundreds of thousands of Cambodians had been killed, and it intervened less for humanitarian than for strategic reasons. It cannot be denied that the human rights record of Vietnam itself was very bad, but neither can it be denied that the Vietnamese invasion put an end to the Cambodian massacres and that Vietnam has not, as was feared, misused the invasion to occupy Cambodia permanently. On balance and in retrospect, the Vietnamese invasion therefore seems justified.

The conclusion to be drawn from these two cases is that if the international community has the capacity to prevent or stop grave and massive violations of fundamental human rights, it is under a moral obligation to do so, provided that such action is feasible and sensible. The condition stipulated in the last clause is crucial, because in case of grave violations of human rights, humanitarian intervention will often not be feasible or sensible. A country that does not want to contribute to such action will usually not have great difficulty in finding an excuse for doing nothing. However, it would be important to agree that the burden to prove (or at least make credible) that a country is not in a position to contribute is on that country.

Now some will argue that this sounds nice, but is unrealistic, because nobody is going to wage war for purely altruistic reasons. Why should a state that is not directly affected be willing to provide troops for robust forms of peace-keeping in countries such as Rwanda and Sierra Leone? The answer is contained in the notions of self-respect and long-term self-interest. The first notion is of a moral nature. Can a country and its politicians stand aside as genocide takes place when they are able to prevent or stop it and still preserve their self-respect? The reactions of the international community to the genocide in Rwanda illustrates that there is a point at which a so-called a-moral foreign policy becomes immoral.

The crux of the second notion is the question of whether humanitarian intervention is in the final analysis indeed a form of disinterested help or is in the national interest of the intervening state. I will argue that in principle the latter is the case, because gross and massive violations of human rights are a potential threat to global peace and security. The outline of the argument reads as follows:

- 1 Grave and massive violations of human rights are a potential threat to regional peace and security.
- 2 International peace and security are in the final analysis indivisible.

- 3 Assuring and enlarging the current level of prosperity and well-being is dependent on maintaining and strengthening global peace and security.
- 4 Addressing grave and massive violations of human rights is therefore in principle in everybody's long-term interest.

To prove this argument I will first explain why gross violations of human rights should be considered as a potential threat to regional peace and security. After that I will argue that it is sensible for all states to consider addressing such grave violations as a national interest.

3 Human rights and regional security

What the eye doesn't see the heart doesn't grieve over. So why should we bother about grave and massive violations of human rights, as long as these violations do not threaten our peace and security and certainly as long as they do not appear on television? And even if they appear on television, should we succumb to the CNN factor? Wouldn't it be more sensible to refrain from intervening in other countries unless international peace and security are directly threatened?

Violations of human rights as a potential threat of regional peace and security

Grave and massive violations of fundamental human rights do indeed not automatically lead to a threat of the peace and security of other countries. However, a closer look leads to the conclusion that such violations so often have effects on peace and security on the other side of the border, that it would be reckless not to consider such violations as a potential threat to at least regional peace and security. Sometimes such a threat materializes very quickly, for example because refugees cross the border and threaten to destabilize existing balances in a neighboring country. The movement of Hutus to Zaire in 1994 and the expulsion of Albanian-speaking inhabitants of Kosovo into Macedonia in 1999 are recent examples.

In other cases the international consequences are much more indirect and surface only years later. The stubbornness of the Armenians in the negotiations about Nagorno Karabach, for example, cannot be seen apart from the Armenian distrust against everything that is or seems Turkish, although the mass killings of Armenians took place about 80 years ago. It is furthermore an empirical fact that regimes that have little respect for the rights of the people in their country often also have little respect for international obligations. Iraq and North Korea are clear examples. Often, but not always: Romania under Ceausescu is an example

of a country with a bad human rights record that observed its international obligations in an accurate manner.

It is therefore to be welcomed that the Security Council in practice uses an extensive interpretation of its competence to take measures to maintain or restore international peace and security, by mandating operations that are primarily directed at putting an end to violations of human rights within a country. In the recent past such interventions have taken place in Somalia, northern Iraq, Liberia, Rwanda and Haiti. In all these cases the violations of human rights had trans-boundary effects, usually in the form of refugees, but the real motivation for those interventions was the violation of human rights within the borders of those countries.²³ In most of the cases mentioned above, the Security Council did refer somewhere in the Resolution to a threat to international peace and security, but in some of its most recent Resolutions it no longer bothered to do so. The Resolution that mandated setting up a multinational force for East Timor under Chapter VII, for example, did speak about a *threat to peace and security*, leaving away the word *international*.²⁴

Conclusion

It is not possible to state with certainty that gross and massive violations of fundamental human rights will always directly or indirectly lead to an actual trans-boundary threat of international peace and security. But the chance that it will is so large that it would be irresponsible to postpone taking measures until peace and security are in clear and present danger. The saying that prevention is better than cure is also applicable here. Grave and massive violations of human rights should therefore always be brought to the attention of the Security Council and the Security Council should take it upon itself to pay serious attention to any such violation, in order to consider what measures can be taken to prevent or stop the violations.

23) A detailed discussion of the mandates for these interventions can be found in *Humanitarian intervention* by Sean D. Murphy (Philadelphia 1996), p. 284 ff.

24) See the penultimate paragraph of Resolution 1264 (1999).

4 Human rights and national interest

In the previous chapter I have illustrated that it makes sense to consider grave and massive violations of fundamental human rights as a potential threat to regional peace and security. But what about the rest of the world? Will the potential trans-boundary effects be limited to the countries in the direct neighborhood and would, as a consequence, only these neighbors have an interest in addressing these human rights violations? The genocide in Rwanda might have had serious consequences for the whole of central Africa, but weren't the consequences for Europe negligible? And what interest do India and Indonesia have in solving the Kosovo problem? In other words, are international peace and security divisible? To answer that question we will have to take a closer look at the national interest and consider to what extent it can be affected by grave violations of human rights in other countries.

What is the national interest?

The definition of national interest is an issue for eternal debate, but most will probably agree that the essence of national interest is the maintenance and strengthening of prosperity and welfare of the population of the country. Now for the purpose of our discussion it is useful to make a distinction between economic and security aspects of the national interest and to introduce the concept of global national interests. For the rich industrialized countries the economic aspect boils down to the maintenance and strengthening of high levels of prosperity. But the maintenance and strengthening of prosperity and welfare also requires a high level of security. Security is essential to keep a country free from threats from abroad, not only from military attacks, but also from other threats such as international organized crime, international terrorism, trans-boundary effects of environmental disasters and worldwide epidemics of incurable diseases.

Global national interests can be distinguished from individual and regional national interests. Most of what we usually call national interests, such as promoting foreign investment, protection against military attacks from abroad and promotion of exports, can effectively be looked after by a national government on its own or together with a limited number of other countries in an association such as the European Union or NATO. There are, however, a growing number of national interests that cannot be adequately protected in such a manner.²⁵ A clear example of such an interest is the depletion of the ozone layer. It threatens the lives of millions of people, but it cannot be solved by any state on its own. To prevent thousands of cases of skin cancer is clearly a national interest, but only a global approach can serve this national interest in an effective manner. To express the specific character of these interests one could speak of global national interests.²⁶

We will now have a closer look at the relevance of grave violations of human rights for respectively the economic and security aspects of the national interest and for global national interests.

The divisibility of the international economic order

Maintaining and strengthening prosperity requires more than international trade. It is to a high degree dependent on an effective international division of labor, which requires a free flow of people, products, services, money and investments. Trade is possible between primitive people, but a sophisticated division of labor with the accompanying movement of highly qualified expatriate personnel and international investment requires a high level of legal security and therefore something like an international economic and legal order. An ideal worldwide division of labor would include all countries and regions of the world. But it can be quite effective without that. From an economic point of view, we could limit

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- 25) The distinction between individual and global national interests is to a certain extent arbitrary. From a theoretical point of view several of the national interests that most states pursue individually or regionally would probably be better served by a global approach. A rational division of labor between national, regional and global levels of governance on the basis of the subsidiarity principle does however require the existence of organizations to perform such functions at these levels. The Organization for the Prohibition of Chemical Weapons (OPCW) and the International Atomic Energy Agency (IAEA) are among the few examples of such organizations at the global level.
 - 26) The concept of global national interests corresponds with the concept of global public goods. I use the first expression to prevent the false impression of a contrast between national interest and global public goods.

the international order to the countries that really and substantially participate in the international traffic of people, goods and investments.

Failed states such as Somalia and Sierra Leone, and states such as Burma and the Democratic Republic of Congo do not really participate in the global exchange of people, knowledge and investments. Grave violations of human rights in those countries usually do not preclude extraction of raw materials and trade. There is no compelling economic reason to integrate such states in the worldwide division of labor. On the contrary, the costs of such integration might be larger than the economic yield. From a narrow economic point of view we do not have to worry about large-scale violations of human rights in these countries. Perhaps diamonds will become more expensive, but who cares?

The same logic applies in the case of grave violations of human rights in developing countries that are partly integrated in the world economy such as India and Indonesia, as long as these violations remain limited to remote areas of such countries. From a narrow economic prospective there is little reason to worry about such violations, as long as the sectors and regions that are integrated in the world economy remain unaffected.

An open question remains to what extent integration in the worldwide division of labor can coexist with grave violations of human rights. It would seem logical to expect that the greater emphasis on rule of law, education, freedom of movement and freedom of information that go with integration in the world economy must have a beneficial effect on the observance of human rights, but one has to admit that in the past expectations that trade and investment would have a beneficial effect on respect for human rights have often proven wrong. It could be concluded that from a narrow economic point of view the international order is divisible.

The indivisibility of international security

As long as massive violations of human rights remain limited to countries or regions on the periphery of the international order, the prosperity of the rest of the world will not suffer, at least – and here we come to the crux of the matter – as long as these violations do not threaten regional peace and security. But as we have concluded in the preceding chapter, that is very improbable.

The question we have to address now is whether it can be safely assumed that grave violations of human rights that pose a potential threat to regional peace and security will not develop into global threats. The answer is no. But this answer is based on a risk assessment rather than on irrefutable logic.

Two factors should be taken into consideration. The first is the growing vulnerability of open and prosperous states to threats from outside. Because of the disproportional growth of international trade, traffic and communications the

spread of international crime, drugs and terrorism travel over the globe is becoming easier. The same is true for the spread of infectious diseases.²⁷ As the world population and industrialization are growing the risks of trans-boundary environmental disasters such as Chernobyl grow too. And last, but not least, as a result of the continuous development and spread of science and technology new and shady regimes such as Iraq and North Korea are developing weapons of mass destruction. If current trends continue missiles from Iran or North Korea will soon be able to reach any country in the world. It can be expected that this vulnerability will further rise, as long as technological progress and the integration of the world economy continue and international trade and traffic continue to grow.

The second factor to be taken into account is the correlation between grave violations of human rights and the rise of these new threats. Such violations of human rights often coincide with either a failing state (Sierra Leone) or a criminal regime (Iraq). Failed states provide an excellent breeding ground for terrorism, production and trade of drugs and organized crime. The lack of environmental regulations and of a system of health care can also make such countries the origin of trans-boundary pollution and the dissemination of diseases. Criminal regimes like those of Iraq and North Korea spend extraordinary efforts to develop weapons of mass destruction.

On the basis of these two factors it would seem sensible to take the chance seriously that the consequences of grave violations of human rights will not be limited to a disturbance of regional peace and security but eventually will be felt much wider.

Protection of human rights as a global national interest

We can now draw the conclusion that it is sensible to consider grave and massive violations of fundamental human rights as a potential threat of both regional and worldwide peace and security. All countries of the international community therefore have a global national interest in addressing such violations. But even when international action is feasible and sensible, if the countries that have the relevant capabilities have no specific national interest in taking the initiative for action, the international community might remain passive.

It is the familiar problem of public goods. Nobody has a specific individual interest in keeping the streets in its neighborhood clean, but everybody has a general interest in it. Now the people in the neighborhood have three options.

27) Because inter alia of improper use of antibiotics many infectious diseases are becoming resistant to existing medicines. A problem like this can only be solved at a global level.

They can clean the streets together, by taking turns and dividing the job in small parts. Or they can provide money and hire somebody to do it. Or they can remain passive out of fear that their neighbor might contribute less than they do themselves.

With regard to grave and massive violations of human rights, the international community has comparable choices. Such violations should either be addressed by the United Nations, and in particular by the Security Council, as a potential threat to international peace and security, or, by default, by a regional organization or individual states. What is essential is that countries recognize that grave and massive violations of human rights present a potential threat to the maintenance of international peace and security, and that therefore the maintenance of international peace and security is a global national interest.

Conclusion

It is not necessary to subscribe to the gloomy picture painted by Robert Kaplan in *The Coming Anarchy*²⁸ to agree that it is not sober and realistic, but reckless and foolhardy to consider grave violations of human rights and the resulting disruption of local society as something that does not and will not affect other states. In the final analysis international security is indivisible and any potential threat to regional peace and security should consequently be considered as a potential worldwide threat.

To prevent possible misunderstanding it should be stressed that recognition that individual states have a real interest in addressing grave and massive violations of human rights in other states does not automatically imply that remedial action is also feasible and wise. In the following chapters reasons will be given why this is often not the case. But the fact that it is often not feasible or wise to intervene should not lead to the false conclusion that we have no real interest in what is going on. It would rather seem wise to accept the unwelcome truth that we have a real interest in what goes on in other countries, but, at least for the time being, often lack the means to take effective action. Chechnya provides a clear example of this. The danger that brutal behaviour of Russian troops against non-combatants will deepen and prolong this conflict is real, as is the danger that Georgia and Azerbaijan will become involved. Nevertheless, the options the international community has to force Russia into respecting humanitarian laws of war such as bombing Moscow or sending troops to the Caucasus are either impracticable, or would only worsen the overall prospects for peace and stability.

28) *The Coming Anarchy* by Robert D. Kaplan (New York, 2000).

5 The principle of sovereignty

What is sovereignty?

An objection that is often raised against humanitarian intervention is that it would undermine the principle of sovereignty and imperil the system of sovereign states. To judge this argument we should first agree on a working definition of sovereignty. There does not exist a generally agreed definition of sovereignty. But most would agree that our current concept of sovereignty dates back to the Westphalian Peace of 1648. After a long and extraordinarily bloody war, the states that considered themselves the heirs of the Roman and Carolingian empires and protectors of the Roman Catholic Church recognized the existence of independent Protestant states. By doing so they gave up the pretense of a hierarchy of states and grudgingly accepted the fact that some of these states supported a heresy that was contrary to their fundamental principles. Since that time the concept has evolved, but it would seem that the two key characteristics remain the following:

- the right to organize a country according to its own preference and
- the right to participate in international relations on an equal level with other sovereign states.

This concept is at the root of the Charter of the United Nations and has provided a framework for all the states that have become independent since then.

The significance of sovereignty

Promotion and protection of human rights require a government that promulgates laws and enforces them, if necessary by using violence. Without a government the law of the jungle would reign. Justice, education and social security

would come to nothing. Sovereignty provide a government with essential instruments to function effectively. Its competence to make laws and its legitimate monopoly on the use of force to enforce them makes it the most important protector of human rights (but also opens the possibility of becoming their worst enemy).

The concept of sovereignty protects governments against two types of danger. The first danger is that within the state somebody else might claim the right to promulgate and enforce laws. The second danger is that another state might have a different view on the way a state should be organized and might claim the right to impose its view. According to the concept of sovereignty both claims are prohibited. Sovereignty therefore helps states to protect themselves against internal anarchy and external war.

The limitations of sovereignty

On the face of it, humanitarian intervention is therefore contrary to the principle of sovereignty. But that would only be the case if sovereignty was an absolute right. Some like to pretend that it is, in particular regimes that feel uneasy about their human rights record and want to protect themselves against outside interference. But I suggest that the proposition of an absolute right is untenable and that the most sensible approach of sovereignty is to consider it as a functional right. Sovereignty should not be considered as an inalienable right that a government has received in eternal property, but as a right that it has received on loan in order to fulfill its functions. I will leave aside the philosophical question whether this loan has been received from God, nature or the people for whom it has to fulfill its functions. More relevant is that those people may terminate the loan if the government makes improper use of it. An other logical consequence of this functional approach is that the content of sovereignty changes as its function changes.

A sovereign country does of course have to comply with international law. But also the internal use of its sovereign powers is bound by certain limitations. Hugo Grotius already pointed to that in the seventeenth century. The Dutch revolt against the Spanish king Philip II was considered to be justified because Philip had misused his sovereign powers. The idea that sovereignty does not give government a license to do whatever it likes is clearly not new. Neither new is the idea that the subjects have the right to revolt if the misbehavior of their lord is going too far. The scope of a sovereign government for policy-making is therefore not only limited by external, but also by internal boundaries. If it transgresses the external limitations, the international community is entitled to take corrective action, for example by suspending membership of international organizations, by

imposing sanctions or, in extreme cases, by military action. If a sovereign government oversteps the internal limits, revolt by the population can be justified.

This leaves open the question whether and to what extent a government is responsible to the *international* community for its *internal* policy. Under what circumstances would it be conceivable that the international community is entitled to take corrective action in the case of internal misbehaviour of a government? I suggest that this can be the case under the following two circumstances:

- when internal misgovernment constitutes a direct or indirect threat to other countries;
- when the international community has a co-responsibility for a particular policy.

The first case is evident. A government may use the sovereign rights of the state, but in return it has not only to promote the well-being of the people on its territory but also to behave as a responsible member of the international community. A government is therefore obliged to govern its country in such a manner that it does not constitute a direct or indirect threat to other countries. This could be the case if it would give a free hand on its territory to international crime or terrorists. But a country could also develop into a threat by mismanaging industries that can threaten the environment of neighboring countries (Chernobyl). These are all examples of internal policy with trans-boundary consequences.

Protection of human rights is a special case, because international involvement does not have to limit itself to violations of human rights that may have trans-boundary effects. In this field a government is not only accountable to its own population, but, as I will argue in the next paragraph, also to the international community.

The division of labor between state and international community

In 1923 the Permanent Court of International Justice made the following interesting statement: *The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations.*²⁹ In other words, when the international relations are further developed, for example as a result of the process of globalization, the division of labor between sovereign governments and the international commu-

29) Advisory opinion with regard to the nationality decrees issued in Tunis and Morocco, PCIJ, ser. B, no. 4, 1923, p. 24. See the contribution by Thomas G. Weiss and Jarat Chopra in *Beyond Westphalia: state sovereignty and international intervention* edited by Gene M. Lyons and Michael Mastanduno (London 1995).

nity will also change. In the field of human rights such a change has taken place since the Second World War. It became clear that some states used their monopoly to protect and promote human rights for the opposite purpose and used the principles of sovereignty and non-interference as shields to hide their crimes from the eyes of the world. A number of worldwide and regional treaties and structures were therefore developed that enabled the international community to become more involved, but initially little priority was given to their actual application. The end of the Cold War provided new opportunities, both to develop this division of responsibilities further and to implement it.

The essence of this new division of labor is that states have a primary responsibility for promoting and protecting human rights, but the international community has a subsidiary responsibility. As several politicians will consider this view as a personal threat, it is not surprising that a clear and general consensus about it does not yet exist. But the prevailing trend is so undeniable that some people speak about the beginning of the third age of human rights. The World Conference on Human Rights stated that promotion and protection of human rights is a legitimate concern of the international community,³⁰ although it failed to explain what type of measures the international community should take to express its concern in case of grave and massive violations of human rights. But the establishment of the International Criminal Tribunals for former Yugoslavia and Rwanda followed by the adoption of the Statute of the International Criminal Court pointed the way.³¹ And so did the indictment of Pinochet, the former dictator of Chile. Characteristic of the change of view on the division of labor between states and international community was the request by the government of Sierra Leone to set up an international tribunal for war crimes committed in that country.

Conclusion

The proposition that the people of a country can as a last resort be justified in deposing their lord dates back to the sixteenth century. This proposition can be widened by stating that also the international community might, as a matter of last resort, be justified in deposing a sovereign government in the case of grave and massive violations of human rights. In the final analysis the purpose of sovereignty is to protect the people, not to protect the governments, and the

30) See A/CONF.157/24).

31) For further details see *Reflections on the International Criminal Court* edited by Herman A.M. von Hebel, Johan G. Lammers and Jolien Schokking (The Hague 1999).

principle of sovereignty therefore under extreme circumstances does not have to stand in the way of a humanitarian intervention.

6 The legal basis

The prohibition of the use of force in international relations

One of the most significant differences between the content of sovereignty in 1648 and these days is that whereas until the First World War the concept of a just war was still widely accepted, states nowadays have, at least in principle, almost completely forsworn the use of force in their mutual relations. The right to take military measures in case of a threat to international peace and security has been ceded to the Security Council. It is sometimes argued that even the Security Council is not authorized to take enforcement measures for purely humanitarian purposes. This argument runs as follows:

The members of the United Nations have committed themselves not to use force against other countries. Article 2 para. 4 after all reads as follows:

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.

For all practical purposes only two exceptions exist to this rule. In the first place the right of self-defense that is stipulated in Article 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

The second exception can be found in Chapter VII. The most relevant clauses are the following:

Article 39:

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

Article 41:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions.

Article 42:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.

Also relevant in this regard is Article 2 para. 7:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state (...); but this principle shall not prejudice the application of enforcement measures under Chapter VII.

And, so goes this argument, Chapter VII only allows for enforcement measures to maintain or restore international peace and security. I will not go into the question of whether this interpretation is technically correct, but I will argue that, even when this interpretation would be in accordance with the purposes of the founding fathers of the Charter, it is no longer tenable.

Law and justice

Law and justice are not identical. This is particularly true in the case of international law. International law is often a compromise between the demand for regulation and predictability of international relations on the one hand and the desire of governments to keep their hands free on the other. But although international law is therefore in many respects inadequate and incomplete, it is not an incoherent collection of arbitrary arrangements. Its authority is to a large extent based on the principles of fairness and justice that form its foundation. It is therefore very difficult, and in the long run impossible, to uphold a rule of international law if it runs counter to what is generally considered to be fair and just. The fundamental political question with regard to the legal basis of humanitarian intervention is therefore not whether humanitarian intervention is in accordance with the current state of international law, but whether the current state of international law is in accordance with what is just, fair and feasible.

The question to answer is therefore whether a rule that would prohibit a humanitarian intervention under any circumstances could be considered just and fair. That is clearly not the case. It is impossible to argue credibly that the international community was not allowed to intervene in situations such as occurred in Cambodia or Rwanda because the Charter does not provide for that possibility. Although some governments for obvious reasons are loath to admit it, there exists

almost universal agreement that under extreme circumstances a humanitarian intervention can be justified.³² It is therefore possible to draw the provisional conclusion that under certain circumstances and conditions (which we will discuss later) international law should not stand in the way of humanitarian intervention.

But that is not all. To be viable and effective such a new rule should not only be in accordance with our sense of justice and fairness. It should also be clear, to prevent misunderstandings, and feasible and should not be in contradiction with other rules of international law. We will therefore have to find a solution for the tension that we noted between the letter of the Charter and the concept of humanitarian intervention. The most elegant way to accomplish that would be by amending the Charter, but that road is not very practicable and it is very unlikely that it could lead to the desired result in the foreseeable future. The other possibility is a reinterpretation of the Charter that would provide room for humanitarian intervention. This is the route that the Security Council takes in practice by giving a very wide interpretation to a *threat to the peace* in article 39 of the Charter. In practice the Security Council often does not consider it necessary to establish a link with the *international* peace to get involved. But it has so far refrained from developing this into a general rule, although it came closer when the President of the Security Council declared on behalf of the Security Council *that large-scale human suffering is (...) sometimes a contributing factor to instability and further conflict and affirmed the need for the international community to assist and protect civilian populations affected by armed conflicts*³³ leaving aside the question of whether such an armed conflict is an international or an internal conflict. I will come back later to the possibility of clarifying the rules for a humanitarian intervention by developing a framework for assessment.

Humanitarian intervention without a Security Council mandate

As argued above, there is little reason to doubt the legal basis of humanitarian interventions with a Security Council mandate. That leaves open the question of whether humanitarian intervention without a mandate from the Security Council can also be justified, for example when the Security Council proves unable to take quick and effective action because one of the permanent members is frustrating action for improper reasons. A clear example of such improper reasons was

32) This is what can be deduced from private remarks by representatives of governments that are hesitant to agree to the concept of humanitarian intervention out of fear that it might be used against them.

33) Statement of the President of the Security Council in connection with the Council's consideration of 'Protection of civilians in armed conflict' on February 12 1999.

provided by the refusal of China to agree to an extension of UNPREDEP's mandate in order to punish Macedonia for entering into close relations with Taiwan. The Secretary-General of the United Nations, Kofi Annan, described the dilemma eloquently in his address to the General Assembly on September 20 1999:³⁴

To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask – not in the context of Kosovo – but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defense of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?

To those for whom the Kosovo action heralded a new era when States and groups of States can take military action outside the established mechanisms for enforcing international law, one might ask: Is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents, and in what circumstances?

Within the United Nations the reactions to Kofi Annan's clear language were reserved. The discussion about humanitarian intervention is still strongly colored by the issue of Kosovo. The states that were critical about NATO's action against Milosevic are unwilling to agree with the idea that unilateral action might be justified in a case when the Security Council is not able to take the necessary action, because that could be interpreted as an indirect justification of NATO's intervention.³⁵ In addition several governments fear that they might themselves in the future become the victim of a humanitarian intervention.

Conclusion

The chances for early agreement on a clear definition of humanitarian intervention are therefore slim. That is regrettable, because more clarity about the legal

34) Document GA/9596. The main body of his address also appeared as an article in *The Economist* dated September 18 1999.

35) Of course there is no necessary link between the two. Prof. P. de Waart, one of the Federal Republic of Yugoslavia's lawyers in its case against a number of NATO countries before the International Court of Justice, recently defended the first proposition but supposedly is of the opinion that in the case of NATO's action the necessary conditions were not fulfilled. See p. 124 of *De laatste oorlog: gesprekken over de nieuwe wereldorde* by Jan Marijnissen and Karel Glastra van Loon (Amsterdam 2000).

status of humanitarian intervention would be in almost everybody's interest. It would seem that in view of the requirements and opportunities of the current international situation, the following would be a reasonable argument:³⁶

- The international community carries a subsidiary responsibility for the protection of human rights.
- The Security Council carries the responsibility to take remedial action in case of grave and massive violations of fundamental human rights.
- The legal basis for possible military action by the Security Council is provided by an extensive interpretation of Chapter VII of the Charter.
- There is no legal basis for humanitarian intervention without a mandate from the Security Council. Nevertheless, such an intervention can be justified if the Security Council proves unable to take the necessary action and if a number of strict criteria are fulfilled.
- A framework for assessment should be developed that could fulfil two functions:
 - as a guideline for action by the Security Council;
 - and as strict criteria for the emergency exit of non-mandated intervention.

36) For a more extensive discussion of these arguments I refer to the report *Humanitarian intervention, legal and political aspects* by the Danish Institute of International Affairs (DUPI) (Copenhagen 1999) and to the joint report *Humanitarian intervention* that was published in the Netherlands in April 2000 by the Advisory Council on International Affairs and the Advisory Committee on Issues of Public International Law.

7 Practical disadvantages

Even when we would agree that fighting grave and massive violations of human rights wherever they occur is in our interest and in conformity with international law, we could come to the conclusion that it is unwise to use military force for that purpose. Use of force means violence and violence has many disadvantages that do not disappear when the purpose of violence is lofty. Most of the objections against humanitarian intervention mentioned in this chapter are the well-known objections against war in general, but some are specific drawbacks of humanitarian intervention.

Deliberate killing and destruction are inevitable

Humanitarian intervention might be justified, but it remains a manifestation of war. To put an end to violations of human rights it will be necessary to defeat the violating government or party. This means war and that comes unavoidably with intentional killing and wounding of soldiers and with deliberate destruction of not only weapons, but also of military-relevant infrastructure that also serves civil purposes, such as railways and bridges.

Collateral damage is unavoidable

Even when all possible precautions are taken, it is practically unavoidable that some bullets and bombs will accidentally hit civilians or civil buildings that fulfill no military relevant purpose.

The costs are very high

Conducting a military operation is very expensive, even more so when maximum efforts are undertaken to limit the number of victims among one's own forces. The costs of NATO's air campaign above Kosovo and Serbia, for example, are counted in billions of dollars. Such figures probably include a number of fixed costs that make it difficult to compare the total costs just like that with the amount of money spent on conflict prevention and promotion of human rights and good governance. Nevertheless it remains true that every euro or dollar of tax money can only be spent once.

Only the symptoms are treated

The purpose of a humanitarian intervention is usually limited to preventing or putting an end to violations of human rights. But if the root of the problem is a criminal regime, it would seem logical to continue the intervention until that regime has been completely defeated, as happened in the Second World War with the Nazis. However, the Second World War was not a humanitarian intervention and humanitarian interventions usually leave the root of the problem untouched. Although the international community knew what to expect from Saddam Hussein after the use of chemical weapons against Kurdish civilians, it was not willing to dethrone him when the possibility presented itself after the liberation of Kuwait. When Saddam subsequently turned against the Shiites in south Iraq and against the Kurds in the north, the Security Council took measures that could be characterized as humanitarian interventions, but it left Saddam in his saddle.

But even when an armed intervention would succeed in dethroning an evil dictator, would that solve the problems behind the human rights violations? In the case of Saddam it would certainly help, but it would not solve the problem of the Kurdish quest for independence. In former Yugoslavia the problem is even clearer. Milosevic is without doubt a major hindrance for reaching a stable peace in the region and he carries a heavy responsibility for stirring up ethnic tensions. But isn't he a symptom too, rather than the origin of the rise of ethnic thinking in former Yugoslavia? How could we otherwise explain that he still commands so much support in Serbia, after he has led his country from defeat into disaster. Is the root of the problem not rather to be found in the widespread belief among the inhabitants of former Yugoslavia that their future is better served by ethnic cleansing than by reconciliation and cooperation? The difficult relationship between the ethnic Albanians and the other inhabitants of Kosovo proves both that not all problems can be blamed on Milosevic and that military force cannot solve all these problems.

It can provoke violations of human rights

Another serious objection against the concept of humanitarian intervention is that it could provoke violations of human rights and could therefore aggravate conflicts. Take Kosovo again as an example. The ethnic Albanians have for many years protested in a non-violent manner against the withdrawal of their rights. The international community took note with sympathy of the peaceful efforts of Rugova and his followers, but remained passive. Only when some Kosovars started using violence against what they considered to be a Serbian occupation, and when they managed to provoke a Serbian reaction, did the international community become more actively involved. It is difficult to escape the conclusion that the use of violence by the UCK paid off. A large number of Kosovars was killed and most were forced to leave their houses temporarily, but the chances that Kosovo will become independent have never been better.

There is no reason to believe the accusations that the UCK was responsible for the murder of ethnic Albanian civilians in Racak, or the insinuation that the explosion in the Sarajevo marketplace was the work of the Muslims themselves. But the reasoning behind these stories does point to a potential serious problem. Both these massacres provided an important incentive for military involvement by the international community. Some party might be tempted to draw from this the conclusion that by provoking such a massacre among one's own population, the world's public opinion could be won over to their case and the international community might be induced to intervene.

Unrealistic expectations are raised

The wide attention given to the concept of humanitarian intervention might give rise to the expectation that from now on the international community will put its money and forces where its mouth is, and therefore will intervene whenever grave and massive violations of human rights take place. But that is completely out of the question. In most cases the international community is not able or willing to intervene, for a whole range of more or less convincing reasons. Sometimes the adversary is too strong. Sometimes it is feared that an intervention will lead to even bigger problems. But often the states that should provide the necessary forces are simply not willing to commit their forces to such a risky operation. It should be noted in this context that very few countries have the capability to field at short notice a credible force far from the home base. For the foreseeable future humanitarian intervention will therefore remain the rare exception rather than the rule.

Selectivity is unavoidable

In view of the widespread occurrence of grave violations of human rights on the one hand and the small available capacity to intervene on the other, difficult choices will have to be made. The Security Council might make its choice on the basis of a more or less objective comparison of the different situations that require international military involvement. But the states that have to provide the necessary forces will make a choice on the basis of their perceived national interest. As a result European states will be more forthcoming in providing forces for operations in former Yugoslavia than in central Africa. Such selectivity does not necessarily imply the use of double standards of judgement. A European country might acknowledge that the violations of human rights in Sierra Leone are worse than those in Kosovo, but nevertheless decide to send its forces to the latter. Near is my shirt, but nearer is my skin. This gives the Security Council a difficult dilemma. Should it mandate operations on the basis of an objective assessment of the situation in the world, or rather on an assessment of the available forces?

8 What can be done?

There are no easy answers for the dilemma's of humanitarian intervention. Some of the suggestions offered have their own draw-backs. Others do not seem feasible in the short term. However, in front of seemingly insurmountable obstacles it is useful to remind ourselves that experience shows that we will not only be confronted by unforeseen problems, but also by unforeseen opportunities. Who foresaw in 1984 the opportunities for healing the division of Europe that presented themselves five years later? We ought therefore not to be taken completely by surprise when some of the following suggestions that seem unrealistic now, become feasible in the future.

Take preventive measures

Prevention of violations of human rights is by far the most important thing to do. And if this prevention fails, the second most important thing to do is to take effective non-military measures to stop such violations and thereby prevent the need for humanitarian intervention because it is a costly and awkward instrument with many disadvantages. But it is beyond the scope of this essay to give an overview of all the different types of measures that could be taken for that purpose, ranging from economic development and education to good governance and conflict management. The following suggestions and options are therefore directed at assuaging the problems that confront us when preventions fails.

Take a comprehensive and integrated approach

An effective policy to prevent the need for military action is often hindered by the widespread tendency to consider promotion of development, human rights and good governance on the one hand and security policy on the other as completely

separate issues. This separation ignores the fact that – even more so now that the main security problem is intrastate warfare rather than interstate warfare – these fields of policy are closely linked. Because security is an essential precondition for development and the promotion of human rights, an effective development policy should also be directed at the creation of a secure environment. Conversely, a sensible security policy requires the promotion of development, good governance and human rights to lay the foundations for greater security.

This requires that the virtual walls between the human rights in-crowd and the security in-crowd be removed. Within the United Nations, and in particular between the world of human rights in Geneva and the world of international security in New York, much has changed for the better since the disaster in Rwanda in 1994, when the commander of the peacekeeping force was not even aware of an ominous report from Geneva. But breaking down walls is not enough. The experience with the removal of walls between the ministers of foreign affairs and development cooperation in the Netherlands makes clear that integration requires much more than combining some departments and introducing new procedures. It requires an almost continuous and deliberate effort to deal with the sometimes almost subconscious differences in culture and world view.³⁷

Take a long term view

Gross violations of human rights present themselves usually as acute problems that require immediate action. Under the pressure of public opinion politicians might be tempted to concentrate all their efforts at short term measures. Regrettably the possibilities of immediate and effective remedial action are often very limited, and this easily leads to the cynical view that really nothing useful can be done and that outside involvement in internal problems only prolongs and does not solve the problems.

How can we steer a sensible middle course between hubris and cynicism, between becoming overactive, expecting immediate results and becoming lethargic? First of all we should be realistic and modest about our current capabilities and recognize the gap that exists between what we profess is our goal and the means that we have made available to reach that goal. But that should not hinder us from setting more ambitious goals for the long term. Today's failures should be seen as reasons for strengthening our capacity for future occasions.

37) One of those misunderstandings between both worlds is that security policy is often identified with narrow national interests and development and human rights policies are considered to be completely disinterested and unselfish idealistic undertakings. Both images are of course harmful caricatures.

Firmness when a decision has been taken

For the reasons given above, we should be modest in setting goals for the short term. However, if we have made a decision, we should make clear to ourselves and to the outside world that we really mean business. The effrontery of people like Milosevic and Saddam Hussein was certainly influenced by their evaluation that the international community would prove to be a paper tiger in its reaction to their criminal acts. Among the lessons that could be drawn from the events in Bosnia were that European involvement in former Yugoslavia was not an option but a necessity, that firmness and resolve are needed in a confrontation with somebody like Milosevic, and that neutrality is not an option when eye to eye with an imminent massacre. But although the future of Kosovo is clearly linked to that of the European Union (it is surrounded by future members of the European Union, and might one day be a member too, as part of a democratic Federal Republic of Yugoslavia or on its own), Milosevic still felt that he had reason to doubt the resolve of some European members of NATO. Fortunately an intervention by ground forces was not necessary to disprove him.

Clarify the responsibility of the international community

The role that the international community could and should play to promote and protect human rights is unclear. The World Conference on Human Rights formally declared promotion and protection of human rights to be a legitimate concern of the international community, but it did not make clear what the international community should do to express its concern in case of grave and massive violations of human rights. The Security Council has in some concrete cases been willing to take measures under Chapter VII to deal with grave internal violations of human rights, but has never made a clear statement on its role with regard to humanitarian intervention, and neither has the UN General Assembly. The framework for humanitarian intervention that is discussed in the next chapter provides elements that could be used in such a declaration.

Strengthen the early warning capacity

In case of unconfirmed reports about grave violations of human rights, the first thing to do is to send independent observers to the region. Several measures could be taken to expedite the deployment of such human rights observers, such as:

- development of a register of people that are available at short notice for this task;
- agreement in advance by governments to accept such observers on their territory.

The accuracy and objectivity of the information would be enhanced by having a variegated field of observers. Furthermore, the larger the number and the spread of observers, the greater is the restraining influence on the situation. The presence of other observers in addition to those mandated by the United Nations should therefore be promoted. The following list illustrates what types of visits and missions might be included in a master plan to broaden the coverage of the region in question as much as possible:

- visits of representatives of the United Nations in the field of human rights such as the UN High Commissioner for Human Rights, and special rapporteurs of the UN Human Rights Commission;
- incidental visits of other UN representatives, e.g. from UNHCR, UNDP, UNICEF and FAO;
- temporary expansion of embassy staffs with the purpose of regularly visiting the region in question;
- coordination between embassies to optimize the coverage of visits by personnel of the embassies;
- (semi-)permanent observer missions of regional organizations (such as the OSCE observer mission in Kosovo);
- promotion of the presence of local and international press;
- promotion of the presence of observers of relevant NGOs such as Human Rights Watch and Amnesty International.

In addition, the processing of information could be strengthened. The amount of information that is available, *inter alia* by e-mail, telephone and through oral reports of victims and other witnesses, is often so overwhelming that it is difficult to deal with. Non-governmental organizations might be able to play an even more important role in collecting, processing and distributing such information. But this role should not be left completely to NGOs. Official reports will often be required to force some politicians to face up to the facts.

Improvement of the capacity to observe the human rights situation can help to prevent some violations, but it is not a universal remedy. Observers cannot be everywhere at the same time, and they will often not be admitted to the places where the risk of violations is very high. The unwillingness of the Russian government to accept foreign observers in Chechnya is a clear example. The reasons that are put forward by Russia are to some extent credible, in particular the fact that Russia cannot guarantee their security. But Russia could not take away the

impression that the methods that it used in Chechnya could not bear the light of day.

Strengthen the operational capacity of the United Nations

If readers were under the impression that we are on the eve of a proliferation of humanitarian interventions, they can be reassured because the opposite is closer to reality. Kofi Annan, the Secretary-General of the United Nations, has repeatedly called upon nations to draw lessons from the failures of the United Nations in Rwanda and Bosnia.

Few governments wanted to contradict him in public. But the facts make clear that we are still confronted with the same dilemma. Everybody agrees that something should be done, but nobody is willing to do it themselves and everybody hopes that somebody else will take care of it. Nobody contradicts that the international community failed in 1994 when it allowed genocide to happen in Rwanda. But since then the conflict has spread to Congo and taken more than one million lives. And who is willing to provide the necessary forces for peace-keeping? One could object that sending a UN force is not feasible as long as so many foreign armies are active on Congolese soil, so let's take Sierra Leone as an example. A British force of less than 1000 men was able to make a real difference there,³⁸ but who was willing to replace these troops with other well-trained troops?

In several places in Africa the situation is such that external intervention could make a real difference. A mandate for such an intervention could probably be obtained without much difficulty. But the number and quality of forces that are on offer are far below the mark. The problem is that for the implementation of military operations the United Nations is completely dependent on the willingness of its members to provide the necessary means.

To improve the readiness of states to contribute to United Nations peace-keeping operations a stand-by arrangement was set up. By the end of 1999, 87 states had committed 147,500 troops.³⁹ But there is no guarantee that they will indeed be made available if the UN needs them. When the UN approached the participating countries to provide forces for deployment in Rwanda in 1994, not one of them was willing to do so. The stand-by arrangement proved to be a stand-aside arrangement. A main reason for the unwillingness to provide forces for emergencies such as Rwanda in 1994 is the risks of such operations. Most nations are willing to provide forces for classical peacekeeping operations, but are very reserved about sending their forces into a situation that is unclear and that contains a serious risk of escalation. Furthermore, the forces that are made

38) They arrived to rescue foreigners in view of the advance of rebel forces and the collapse of the UN force, but they also helped to turn the tides.

39) See the *Progress report of the Secretary-General on standby arrangements for peacekeeping* (S/2000/194).

available often lack sufficient equipment and training and are usually not able to reach the theater of the operation by themselves.

So, what can be done? The UN's Department for Peacekeeping Operations in New York should be strengthened considerably to enable it to plan, prepare and steer military operations. With around 400 employees it is understaffed and overburdened. In addition the stand-by system should be considerably improved. Particular attention should be given to bridging the gap between political agreement with a Security Council mandated operation and the lack of practical will to provide the necessary forces. Members of the United Nations that have the ambition and capability to play a worldwide role might take it upon themselves to contribute in principle to any operation that they support politically. The European Union might give a good example in the context of the development of a European Security and Defense Policy. It could, for example, declare that it in principle will take part in any operation that it has supported in the Security Council.⁴⁰

Providing the United Nations with its own capacity for rapid response could also be considered. The Netherlands, for example, in 1995 proposed the establishment of a brigade by the Security Council, which could rapidly be deployed in anticipation of the arrival of regular forces provided by the member states.⁴¹ Such a standing force would however have a number of disadvantages. It might raise suspicion that the Security Council wants to become the world's policeman, it might easily become overburdened and it would anyhow remain highly dependent on the forces of member states for logistics, intelligence, escalation dominance and sustainability. But as long as the gap between what member states want the United Nations to do and the amount of forces that they are willing to make available at very short notice persists, an option like this should not be discarded.

However, it is important to keep in mind that for the foreseeable future the United Nations will not be able to implement an enforcement operation such as a humanitarian intervention fully on its own. Delegation of tasks will often remain the best option. But that still leaves a large number of difficult operations to plan and steer for the UN itself with the help of forces provided by the member states.

Make national armed forces fit for UN operations

40) This presupposes that one of the members of the Security Council will speak for the European Union, which would anyhow be a logical consequence of the development of a Common Foreign and Security Policy.

41) For the text of the proposal and a discussion see *A UN rapid deployment brigade* edited by Dick A. Leurdijk (The Hague 1995).

Most armed forces are still aimed at territorial defense and are not equipped and trained for long distance operations. In former times this would have been considered as a reassuring sign of the defensive character of those forces, but now the implication is that very few countries are capable of deploying a credible force far from their territory. A telling fact was the difficulty that NATO's European members encountered in assembling some tens of thousands of personnel for operations in former Yugoslavia, although on paper the combined manpower of their forces is in the neighborhood of two million. An important step that countries could take to strengthen the capability of the United Nations is therefore an adaptation of their armed forces to the requirements of UN-mandated operations. Areas that deserve special attention, apart from increasing the real availability of existing forces, are the provision of civil police resources, strategic air- and sealift, multi-role logistics and road transport.

But preparing for UN operations requires more than that. Operating in a different culture and cooperating with international organizations such as UNHCR and ICRC poses different requirements than classic defense. The experience of earlier peacekeeping operations has made it clear that it is prudent to take the possible need for escalation into account. But the recent experiences in Bosnia and Kosovo show that the possibility of de-escalation should also be reckoned with. The Dutch artillery went to Macedonia to provide fire support in case of a confrontation with the Serbian army and their presence helped to prevent the need for such a confrontation.

The gunners fulfilled this role admirably, but they were rewarded with a completely different task in and around Orahovac in Kosovo. The peacekeeping task they had to fulfill there had little to do with providing fire support and bore more resemblance to the job of a policeman. That they managed to accomplish this task does not imply that any gunner is an accomplished policeman. Certainly in the case of a humanitarian intervention it is to be expected that the intervening forces will subsequently be confronted with humanitarian tasks.⁴²

Promote military cooperation and standardization in preparation of UN operations

One of the recurring problems of UN operations is that the forces for a particular operation are collected with little or no regard to training, equipment, procedures, etc. Beggars can't be choosers. The result is often an incoherent force that has great difficulty in operating as a unity. In the case of classic peacekeeping

42) The intervention force should, of course, not try to compete with civil organizations that are specialized in humanitarian tasks, but neither should they refrain from urgent humanitarian jobs as long as the civil capacity is lacking.

operations these problems are surmountable, but for enforcement operations such as humanitarian interventions they are prohibitive. It is therefore customary to delegate such operations to coalitions of states that are capable of operating as a coherent force, either because they are used to operating together, such as the members of NATO, or because one nation is in the lead.

The effectiveness of UN operations would be greatly enhanced if all troop contributors would gear their procedures, regulations and working methods to each other. This might sound a fantasy, but important steps have already been made in that direction, particularly in Europe. Preparation for joint peacekeeping operations is an important subject of bilateral cooperation in the framework of NATO's Partnership for Peace program and also one of the main activities of the Euro-Atlantic Partnership Council (EAPC), the framework for cooperation that has been set up by NATO and that includes almost all European states.

An important initiative outside the NATO framework is the Stand-by Forces High Readiness Brigade (SHIRBRIG).⁴³ The purpose of this initiative was to provide the United Nations with an effective brigade that would be ready for deployment at a considerable distance from the home base within 15 to 30 days. It consists of units from twelve states that have been trained to the same standards and use the same procedures and interoperable equipment. Deployment is prepared by a small permanent planning element that in case of deployment will provide the nucleus of the brigade's staff. Combined exercises regularly take place. The brigade was declared available to the United Nations at the end of January 2000. If the concept proves itself, it might set an example for establishing comparable units.⁴⁴ However, SHIRBRIG is established for the purpose of Chapter VI operations. It is conceivable that its scope would be widened to include more robust forms of peacekeeping under Chapter VII, but SHIRBRIG is not equipped for real war fighting.

Cooperation in the field of peacekeeping also takes place (although often still in an embryonic form) in other international frameworks such as the ASEAN Regional Forum (ARF).⁴⁵ As long as closer forms of military cooperation within the UN framework are a bridge too far, regional forms of cooperation like these could be used and expanded to develop de facto worldwide standards for peacekeeping operations.

43) See www.shirbrig.dk.

44) The participating countries are mainly European (Austria, Denmark, Finland, Italy, the Netherlands, Norway, Poland, Romania, Spain and Sweden) but include also Argentina and Canada. The geographical distribution will be widened when Jordan and Senegal join.

45) The ARF includes all east and southeast Asian countries and Australia, Canada, India, New Zealand, the United States, Russia, and the European Union.

Rich countries could provide support to less-developed countries to help them bring their forces up to those standards.⁴⁶ In developing a European defense policy and in elaborating the new tasks of NATO, special attention could be given to preparation of forces for possible operations under the authority of the United Nations.

Strengthen regional capacities

Chapter VIII of the Charter of the United Nations provides for the possibility that regional organizations deal with the maintenance of international peace and security in their region.⁴⁷ This arrangement could also be used with regard to humanitarian interventions authorized by the Security Council.⁴⁸ Such a regional approach has several advantages. It relieves the Security Council and the Secretariat in New York and it makes it easier to involve the regional states more closely in decision-making and implementation than in the case of an operation led by the Security Council.

The question is whether a regional approach should be considered just an option or as the preferred option that the countries in the region should always try before referring an issue to the Security Council. The fundamental issue at play here is the question of whether countries have special responsibility for what happens in their region. An extreme answer to this question was the self-bestowed right of the former Soviet Union to intervene on the territory of its 'friends' to prevent a non-communist government from coming to power. This so-called Brezhnev doctrine was clearly at odds with the right of nations to choose their own government. At the other extreme were those that believed that

46) The enormous differences in the level of training and equipment should not be underestimated. In Sierra Leone, for example, soldiers received annually only one bullet. In Nigeria, the country that provided the backbone of the west African peacekeeping force ECOMOG, no unit larger than a company received any field training between 1996 and mid-1999. See 'African private security' by Herb Howe in *Conflict Trends* of June 2000.

47) Article 52 para. 1 reads as follows:
Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

48) Article 53 para. 1 reads in part as follows:
The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.

the other European states bore as little responsibility for what happened in former Yugoslavia as for the situation in Tibet or Zaire. The European Union did not have to adopt a new type of Brezhnev doctrine to admit that it has a special interest in developments in states that are potentially future members of the European Union and to recognize that this carries a special responsibility with it. The North Atlantic Treaty Organization (NATO) has answered the question by its involvement in Bosnia and Kosovo.

But the only European organization that meets all the criteria of a regional organization to deal with regional peace and security is the Organization for Security and Cooperation in Europe (OSCE), because it encompasses all European states.⁴⁹ This is both the strength and the weakness of the OSCE. Which aspect comes most to the fore is largely dependent on the input of the member states and on the capacity and the dedication of the Chairman in Office. An organization like the OSCE is not suited for implementing a humanitarian intervention, but it can play an important role in conflict prevention and conflict management

Provide funds to make forces by third parties available

When a country believes that a humanitarian intervention is called for, but is not in a position to provide sufficient forces for its implementation, it could consider contributing to the deployment of other forces by making funds available for financing such deployment. Such financing can take different forms, such as:

- financing operations of the United Nations;
- subsidizing or financing forces of another country;
- hiring soldiers from a private company.

Financing operations of the United Nations

It is unusual to consider the financing of regular UN peacekeeping operations as a form of financing foreign forces, because in principle all members of the United

49) The Federal Republic of Yugoslavia (FRY)'s membership was suspended in 1992. Afterwards doubts arose about the wisdom of this decision as it complicated the efforts of the OSCE to play its new role in conflict management and gave the FRY a pretext to expel the OSCE missions from *inter alia* Kosovo. The decision can be considered as characteristic of the transformation that the OSCE was going through from a conference to discuss *inter alia* violations of human rights to an organization with crisis prevention and crisis management as its main tasks.

Nations contribute to such operations both financially and with forces. There are indeed a number of countries that provide both, but there are a few rich countries that contribute very few troops (e.g. the United States) and there is a small number of developing countries that provides relatively large forces. That is, of course, very laudable but it is difficult to escape the impression that the main reason for providing so many forces is sometimes related to the financial compensation that the governments receive for the forces they provide. In the case of highly paid soldiers from rich countries, these reimbursements might not completely offset the real costs, but for countries that field soldiers without much equipment and with low pay, it might be a welcome addition to the budget.

Subsidizing or financing forces of another country

Contributions in kind are the most common form of subsidizing the provision of forces by another country, for example by providing transport to the area of operations. When the forces that are provided do not have sufficient equipment at their disposal, the provision of means of local transport, weapons, communication equipment, etc., is also very welcome. Other countries can also provide logistical support. In practice almost any type of support takes place, varying from mutual support between countries that both provide forces, to the situation where one country provides the manpower and another takes care of transport, equipment, etc. An example of the first type of support is the material support that the Netherlands provided to Bulgarian and Ukrainian forces in former Yugoslavia. Examples of the second type can be found in Africa where Western countries provide transport and equipment to African peacekeeping forces.

An alternative to providing such support in kind is paying directly or indirectly for the provision of forces by another country. An example is the financial aid that the Netherlands has provided to Ghana and Mali in exchange for their participation in peacekeeping forces in Liberia and Sierra Leone. Such cooperation incidentally raises the question of to what extent the government that finances the forces of another country is co-responsible for the actions of those forces. From a legal point of view that is probably not the case, but from a political viewpoint it would seem that a government is always responsible for the consequences of what it does and thus also for the consequences of the way it spends public money. It could therefore be argued that it would be useful to scrutinize the risks of the operation and the fitness of the forces that will be financed.

Hiring soldiers from a private company

Employment of mercenaries and private armies is very controversial. In 1989 the General Assembly of the United Nations without a vote adopted a resolution opening for signature the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*.⁵⁰ But ten years later only 19 states had ratified the Convention and it has not yet entered into force.⁵¹ At the same time humanitarian organizations have been forced, particularly in Africa, to hire armed irregulars to protect convoys and stockpiles of aid goods. And in Sierra Leone the South African private company Executive Outcomes proved to be more disciplined, better trained and more effective in providing security and stability than most of the governmental soldiers that were provided by a number of West African nations led by Nigeria. These 200 mercenaries managed to drive the rebels from Freetown, but as soon as the mercenaries left the rebels returned. Early in 1999 they entered Freetown and caused a massacre.⁵² In Bosnia, Military Professional Resources Inc (MPRI), a private company from the United States, did not directly participate in the civil war, but played an important role in setting up the army of the Bosnian Federation, spending about \$600 million. In the aftermath of the genocide in Rwanda in 1994 the United Nations considered the option of making use of mercenaries to separate armed elements from refugees in the refugee camps in eastern Zaire.⁵³

Hiring private companies for protecting human rights has many disadvantages. But what is the alternative if no suitable regular forces are made available? Some of the companies involved do their best to portray themselves as being not only cheaper, but also more disciplined and effective than many governmental forces.⁵⁴ They pretend that their soldiers are better trained, also in the field of the humanitarian laws of war, than most regular soldiers. Of course we should not take these pretenses at face value, but neither does it make sense to discard the option off hand if the only alternative is the deployment of ill-trained and undisciplined regular forces, which themselves are a threat to the human rights of the population that they are supposed to protect. In his report to the UN Commis-

50) The definition of mercenary employed in the Convention is so restrictive that most soldiers of fortune probably fall outside its scope.

51) Entry into force requires 22 ratifications.

52) See *The Worst Place on Earth* by James Traub in the New York Review of Books of June 29, 2000.

53) At a press conference on June 12 1997 Kofi Annan stated: *What happened was, about two years ago, when we were trying to see what could be done to separate the armed elements from the refugees on the Rwandan-Zairian border and no Governments wanted to offer troops, one of the options that was looked at was the possibility of bringing in other elements – not necessarily troops from Governments – who might be able to provide security.*

54) See, for example, the website of the British company Sandline: www.sandline.com.

sion on Human Rights of January 13 1999, the special rapporteur on the question of the use of mercenaries states⁵⁵ that the use of mercenaries is unacceptable, even when the aim is to restore a constitutional regime. But he continues: *This means, however, that the international community must promote the development of effective and global security mechanisms and give its backing to the work of the United Nations.* And that is indeed the point: what should a legitimate government do as long as such security mechanisms are lacking?

A well-known argument in favor of limiting the competence to carry heavy arms to members of a national army is that they are moved by patriotism and idealism, whereas mercenaries do it only for the money. This argument had some validity at a time when the main task of armies was the defense of the homeland, but is this argument still credible? Why is a soldier willing to go to an unknown land to fight an unknown enemy? Is he motivated by patriotism and a desire to contribute to international peace and security? Or is he driven by a lust for adventure and a high salary? And if the latter is the case, what is the difference with a mercenary?

Private police forces used to be frowned upon at the national level, but presently they have taken over many of the functions of the official police. In the United States, for example, the number of private police is three times as high as the number of public police.⁵⁶ Private armed forces that are three times as numerous as regular armed forces would indeed be a very worrisome development. But this is very unlikely. Less worrisome would be the acceptance of employing private forces for certain tasks, such as protection of aid convoys. Regulation of phenomena such as this that occur anyway might be preferable to continuation of the current policy of condemning in principle and tolerating in practice. The arguments against hiring mercenaries remain strong, but they lose much of their force if they are used by countries that consider employment of their own forces as too risky and have no alternatives on offer.

Prosecute the criminals

Humanitarian intervention is not feasible or sensible in many cases of grave and massive violations of human rights. The least that the international community could do in such cases is to ensure the indictment and prosecution of the criminals that are responsible for these violations. This might also help to deter politicians and others from committing such crimes. The establishment of the Statute of the International Criminal Court is therefore of utmost importance. In anticipation of the entry into force of the Statute, use could be made of the

55) Paragraph 31 of Document E/CN.4/1999/11, available on www.unhchr.ch.

56) See p. 86 of *An Empire Wilderness* by Robert D. Kaplan (New York 1998).

example of the existing tribunals for former Yugoslavia and Rwanda, and of the existing legal possibilities for indicting political leaders, such as Milosevic and Pinochet, for the crimes against humanity that have been committed under their authority.

9 A framework for humanitarian intervention

Introduction

An agreement on the do's and don'ts of humanitarian intervention could help to push back the risk of misuse of the concept and promote international acceptance. Such a framework could consist of four parts:

- a preamble that would set out the purpose of the framework;
- an indication of the type of violations of human rights that should trigger consideration of a humanitarian intervention;
- a list of factors to be taken into account when a humanitarian intervention is under consideration;
- guidelines for the conduct of a humanitarian intervention.

By accepting such a framework the Security Council would give a warning to notorious violators of human rights and encourage itself to take the necessary measures to make humanitarian intervention a more feasible and credible option. The framework described in this chapter is written with a view to possible use by the Security Council, but it should be noted that it could also play a different but essential role in assessing the possible justification of a non-mandated humanitarian intervention.

It could be argued that a framework should be adopted by all members of the United Nations, in view of the fact that if the Security Council decided on a humanitarian intervention, all members of the United Nations are in principle supposed to contribute to measures. A possibility towards accomplishing this would be adoption of the framework through a resolution of the General Assembly of the United Nations. This would involve all members of the United Nations directly. However, the political hurdles that have to be overcome to reach agreement either in the Security Council or in the General Assembly are many and are high.

Two functions of the framework

A framework for humanitarian interventions could play two roles that should be clearly distinguished: one to guide interventions with a Security Council mandate, and one to restrain the option of an intervention without such a mandate. The Security Council could use it as a guideline for decision-making on humanitarian interventions and as a warning signal for potential violators of human rights, but it should not be considered as a straitjacket. The Security Council is, after all, competent to decide on armed interventions for other reasons than grave violations of human rights.

In addition, the framework could help to restrain the possibility of misuse of the emergency solution of a non-mandated humanitarian intervention. Such an intervention would in principle remain prohibited and fulfilling all the criteria would not therefore not necessarily signify that unilateral action is justified, but conversely, a unilateral action that would not satisfy all the criteria would not be justifiable.

Preamble

The possible consequences of the violations for international peace and security will probably also come up during the decision process, but they should not be considered a condition for intervention and they should therefore not be included in the following list. By not including the threat to international peace and security as a condition, the Security Council would indicate that it reserves the right to take any necessary measures in case of grave and massive violations of human rights without waiting until it is clear that these violations will lead to a concrete trans-boundary threat to international peace and security. This position could be further clarified in the framework's preamble, for example by borrowing words from the third preambular paragraph of the Rome Statute of the International Criminal Court,⁵⁷ in a paragraph along the following lines: *Recognizing that grave and massive violations of fundamental human rights threaten the peace, security and well-being of the world.*

57) This paragraph reads as follows: *Recognizing that such grave crimes threaten the peace, security and well-being of the world.*

The trigger for intervention

Grave and massive violations of fundamental human rights

A humanitarian intervention should remain an exceptional measure. Not every violation of human rights, not even every severe violation of human rights, should be reason to consider such an intervention. To prevent the misunderstanding that any grave violation of human rights would be reason to consider a humanitarian intervention, the concept should be restricted to *grave and massive violations of fundamental human rights*.

Grave violations of human rights take place in every country, often even by government representatives. The competence to use force to maintain or restore order, which most police officers have, is for example a competence that requires much self-control, discipline and wisdom, particularly if criminals or hooligans use force against the police. That some police officers lose their self-control under such circumstances is indefensible, but such excesses are not a reason to consider military intervention. Humanitarian intervention should therefore only be considered in cases of grave violations of fundamental human rights that take place on a *massive* scale.

It is tempting to add *systematic*, to indicate that a large number of unrelated incidents are insufficient ground for an intervention. But the disadvantage is that it will often be difficult to decide whether there is a system in wide-scale violations of human rights. The murder of the Muslim men and boys of Srebrenica was unquestionably committed in a systematic manner, but what about hacking off the arms and legs of innocent civilians, including women and children, in Sierra Leone? Was there system in that madness? Would it make a difference if the dismembering had taken place completely at random and without any recognizable system?

There is a second reason not to become too precise in describing how severe violations should be to justify an intervention. An evil regime could consider this as a license to violate human rights as long as it did not exceed this threshold. It is thus undesirable to define precisely which human rights should be considered as fundamental. According to the Vienna Declaration of the World Conference on Human Rights: *All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.*⁵⁸

58) See A/CONF.157/24, III, I para. 5. It should be noted that the article continues with the following somewhat ambiguous addition: *While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.*

One could be tempted to draw from this the conclusion that all human rights are equally fundamental. But this point of view is untenable. To illustrate this I will give two imaginary examples. Assume that the international community discovers that the members of an Indian tribe in the middle of South America have never enjoyed the right that is incorporated in Article 24 of the Universal Declaration of Human Rights to have periodic holidays with pay.⁵⁹ This would be a massive violation of one of the human rights. But would we consider this a grave violation? And would we deem this sufficient reason to consider a humanitarian intervention? Of course not. But assume now that the international community discovers that the same members of the tribe are all threatened to be killed, a clear violation of Article 3 of the same declaration.⁶⁰ In the latter case the international community ought to consider what action to take, including possibly military action.

The inescapable conclusion is that some human rights are more fundamental than others. This argues for including the word fundamental in the description of the trigger for humanitarian intervention. It might seem tempting to try to define precisely which human rights are so fundamental that their violation could trigger a humanitarian intervention. But that would be a Sisyphean labor. Take a right that intuitively will be considered by most people as one of the most fundamental rights: the right of integrity of the person. It can be well argued that obligatory vaccination is a violation of this right. Now let's assume that eradication of a grave disease requires that the whole population below a certain age is inoculated, and the government therefore forces all children and students to be vaccinated. Would that be a reason for humanitarian intervention? A more difficult example is the following: How would the international community react if the government of a country where female circumcision is still widely practiced decides to make this compulsory?

Fortunately it is not necessary to decide precisely which human rights are so fundamental that their violation could trigger a humanitarian intervention. A decision to intervene for humanitarian reasons can and will never become a semi-automatic decision based on a mechanical application of a number of criteria. In every concrete case the gravity, the scope and nature of the violations will be weighed against *inter alia* the specific circumstances of the violations. A framework for humanitarian intervention could therefore be limited to an indication of the sort of violations that are relevant in this context. Useful clues can be found in the International Covenant on Civil and Political Rights and in the Statute of the International Criminal Court. It could be argued that consideration of a humanitarian intervention should be triggered by genocide, by crimes against humanity,

59) The full text of Article 24 runs as follows: *Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.*

60) Article 3 runs as follows: *Everyone has the right to life, liberty and security of person.*

by war crimes and by gross and massive violations of non-derogatory civil and political rights. As will become clear from the following short overview of the main content of the relevant articles, their content does to a large extent overlap.⁶¹

Genocide

Possibly the most convincing reason to consider a humanitarian intervention is genocide. According to article 6 of the Statute of the International Criminal Court, which was taken literally from the genocide convention,⁶² genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a* Killing members of the group;
- b* Causing serious bodily or mental harm to members of the group;
- c* Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d* Imposing measures intended to prevent births within the group;
- e* Forcibly transferring children of the group to another group.

Crimes against humanity

A second group of violations that should trigger consideration of a humanitarian intervention are *crimes against humanity*. According to article 7 of the Statute of the International Criminal Court, these are *inter alia* the following acts when they are committed as part of a widespread or systematic attack against civilians:

- murder;
- extermination;
- enslavement;
- deportation;
- imprisonment in violation of fundamental rules of international law;
- torture;
- rape.

61) But important differences do exist: the genocide convention does not cover the murder of political group (e.g. all members of a political party) or social group (e.g. everybody with an academic background, such as in Cambodia).

62) Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, which entered into force in 1951.

War crimes and massive violations of non-derogatory civil and political rights

It would seem that the violations that should trigger consideration of a humanitarian intervention are covered by genocide and crimes against humanity. A special reference to the war crimes that are defined in article 8 of the Statute would for this purpose therefore not be necessary. The same would seem to be the case for the rights that are declared to be non-derogatory in the International Covenant on Civil and Political Rights. Article 4 of this Covenant does provide for the possibility that parties may, under extreme circumstances, take measures that derogate from their obligations under the Covenant. In other words, in time of public emergency a state does not have to respect the human rights that it has agreed to respect in this Treaty.⁶³ However, a number of human rights are excluded from derogation. They will have to be respected even in extreme circumstances. These non-derogable rights are in particular the following:

- the right to life;
- no torture or cruel treatment or punishment;
- no slavery;
- no arbitrary imprisonment;
- no guilt for an offence that was not an offence at the time it was committed;
- right of recognition as a person before the law;
- freedom of thought, conscience and religion.

Criteria for a decision to intervene

In cases of grave and massive violations of human rights, such as those mentioned above, the Security Council will have to consider the expediency of a humanitarian intervention. A number of factors should be taken into consideration in the decision process.⁶⁴

63) The full text of article 4 paragraphs 1 and 2 reads as follows:

1 In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.

2 No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

64) The criteria and guidelines proposed in this chapter are to a large extent based on the discussions that took place during two brainstormings that were held in the Netherlands in November 1999 and April 2000. The Chairman's conclusions of

Reliable and objective evidence exists of grave and massive violations of fundamental human rights or of the threat of such violations

Accusing the enemy of atrocities can be a valuable weapon in the propaganda war. A party might want to convince international public opinion that the other side is violating human rights on a massive scale, either to provoke a humanitarian intervention or to prevent international criticism about its own behavior by demonstrating that the oppressed group consists solely of terrorists and criminals. In cases of rumors of grave violations of human rights, it is therefore of crucial importance to send independent observers as quickly as possible to the region concerned. An additional advantage is that the presence of observers often proves to have a preventive effect on human rights violations.

The responsible government is unwilling or unable to take adequate action, or is even responsible for the violations

The government of the country concerned has the primary responsibility for the promotion and protection of human rights. A humanitarian intervention only comes into consideration if the government is itself responsible for the violations (like Saddam Hussein in northern Iraq) or not able to take the necessary measures, for example because it no longer exists (as in Somalia in 1992).

There is a clear urgency to act and other means are not available

As long as there is time to try to prevent violations of human rights with non-military means, those efforts should be continued. Military force should only be used when alternative means to deal with the issue within the time constraints of the situation are not available. In that sense use of military force should be used as a last resource. But when use of force has become unavoidable, it should be used as soon as possible. It will therefore often be very difficult to decide what is the right moment to use force. How can one be sure that all available non-military means have indeed been exhausted? But the pursuit of a non-military solution should not be used to mask unwillingness to intervene. In Bosnia the international community had for years grasped any straw to avoid an effective military intervention, yet in the end use of force proved unavoidable. How many victims could have been prevented if the international community had intervened earlier and more forcefully? Desperate diseases need desperate remedies. In

those two meetings have been published in letters of the minister of foreign affairs (www.minbuza.nl) to the Netherlands Parliament.

short, the tension between the aim to use force only as a last resource and the aim to prevent rather than punish violations of human rights will be with us and can probably only be addressed successfully in concrete cases.

The primary purpose of the intervention is to stop the violations

Even though all states profess to believe in the common purposes of the United Nations, the willingness to provide the operational and financial means to accomplish its common goals are very limited. As forces and resources are scarce, states usually prefer to provide them for purposes that also benefit their short-term national interests. This is in particular the case with deployment of armed forces. The states that are able to send forces that are sufficiently trained and equipped to undertake a humanitarian intervention are usually very reticent to risk the lives of their soldiers. It is therefore not easy to find an example of a humanitarian intervention that took place solely on the basis of considerations of international peace, justice and security. In practice other interests also play a role.

In 1971 India put an end to violations of the human rights of the inhabitants of East Pakistan by the armed forces of Pakistan. But India killed two birds with one stone. As a result of the Indian intervention Bangladesh became independent and India from then on only had to reckon with a Pakistani threat on its Western border. When in 1979 Tanzania put an end to Idi Amin's reign of terror, the intervention was generally applauded. But the direct cause of the Tanzanian intervention was Uganda's invasion of Tanzania.⁶⁵ One might expect that such specific national interests would not play a role when the Security Council decides on a mandate for a humanitarian intervention. Why should the Security Council agree to an intervention that serves the national interests of the intervening states? But an intervention requires that countries are willing to contribute sufficient forces. And, as noted above, the countries that are able to provide such forces are often only willing to do so if they believe some specific national interests are involved. The reason that NATO countries were willing to start an extensive bombing campaign in 1999 and not in 1992, 1993 or 1994, was not that the atrocities committed by the Serbs in 1999 were worse than those committed in Bosnia and Croatia in those earlier years, but the fact that it took NATO countries so long to realize that their vital interests were at stake in former Yugoslavia.⁶⁶

65) See Murphy p. 105.

66) The German minister for foreign affairs Fischer was quoted in *Le Monde* of March 25 2000 as follows: *En [dernière] analyse, il y va de la question de savoir dans quelle Europe nous voulons vivre demain.*

The conclusion we can draw from this is that additional motives to intervene cannot be excluded and do not have to be excluded as long as they do not determine the course of a humanitarian intervention.

The action is supported by those for whom it is intended

When Italy invaded what was then Abyssinia in 1935, it defended its action by pointing to the abolition of slavery in the territories it had occupied. Italy pretended to have freed 16,000 slaves. A few years earlier Japan had defended its occupation of Manchuria as an obligation to protect the population against the threat of anarchy. Hitler claimed something similar when he decided to invade what was left of Czechoslovakia in 1939.⁶⁷ In short, when the official explanations that governments give when they decide to invade another country are taken at face value, most of them could be considered as some sort of humanitarian intervention. But it is a matter of course that a humanitarian intervention should be supported by the people for whom it is intended, and it is very doubtful whether the population of the countries invaded by Italy, Japan and Germany just before and during the Second World War supported those invasions. This criterion can therefore help to distinguish false from genuine humanitarian interventions.

The opinions of the countries in the region have been taken into account

The neighbors of a country that is the object of an intervention will have to be closely involved in the operation, if only because their cooperation will usually be indispensable. Their territory might be needed as base for the intervening forces, or they might have to tolerate the transit of military or military-related goods. They will have to play an important role in enforcing an embargo, etc. In addition, the neighboring countries will probably be most seriously afflicted by the possible side effects of an intervention, such as refugees, loss of trade, loss of trade routes, etc. The Security Council should involve these countries closely in the decision-making process, even though they will usually not be members of the Security Council. But although their views should be taken very seriously, they should not receive a de facto veto over the intervention.

67) See Murphy p. 61.

The action has a reasonable chance of success at acceptable costs

The western world escaped unscathed from the Cold War because it did not succumb to the temptation to let our armed forces come to the rescue of the victims of communist oppression. This choice was not too difficult, because the risk that such a military intervention would have led to a Third World War was too big. But now that the Cold War is over, the choices have become real and therefore more difficult. The possibilities for humanitarian intervention have widened. It would, however, be a great mistake to think that the overwhelming military force of the countries that support human rights and the United Nations will make almost any humanitarian intervention feasible.

The sad fact is that under current circumstances the opposite is true. Due *inter alia* to the weakness of the United Nations and the lack of available means, the chances of success are often too small to make a humanitarian intervention feasible. The consequences of this innocent-looking criterion of a reasonable chance of success at acceptable costs are therefore more far reaching than one might realize at first glance. It is clearly very unlikely that the international community would be able to undertake a humanitarian intervention in Tibet at acceptable costs and with a reasonable chance of success. The same would be true for an intervention in Chechnya.

But also when the international community is not confronted with a heavily armed permanent member of the Security Council, the chances for a quick success can be minimal. Deposing a loony dictator like Idi Amin was easy,⁶⁸ but how to make an end to a civil war in which both parties commit grave violations of human rights? And would it be feasible to intervene in Algeria or in Sudan, and at what costs? The crucial question is therefore what costs are considered to be acceptable. The practical arrangements that the international community has set up in Kosovo and Northern Iraq are protectorates in almost every aspect besides their name (and are in many aspects reminiscent of the trusteeship system that was set up after the Second World War). It is not very likely that the international community would be willing to bear the expenses of comparable measures for every country that is not able to govern itself in an acceptable manner.

The action is not likely to lead to larger problems

This can be considered as a special case of the preceding criterion. Suppose that the situation in Aceh gets out of hand and a humanitarian intervention would put an end to large-scale violations of human rights. And suppose that this would lead to a conflagration of wars of independence and ethnic conflicts in other parts

68) According to some reports Tanzania lost only one tank.

of Indonesia, resulting in a civil war that would lead to the disintegration of Indonesia. Would we dare to say that the intervention in Aceh had been a success? The same logic can be applied to Chechnya.

Guidelines for implementing a humanitarian intervention

When a humanitarian intervention is undertaken the following guidelines should be followed. This would apply both for mandated and for non-mandated interventions.

The purpose of the intervention should be made clear and public from the very beginning

In the case of an intervention mandated by the Security Council, both the countries that are not members of it and the parties in the country where the intervention takes place should be informed about the precise purpose of the intervention. In the case of a non-mandated intervention this is even more urgent. Such a public statement of purpose will make it more difficult to change the purpose subsequently and will help to prevent misuse of the concept of humanitarian intervention.

The use of force should be limited to what is necessary to attain the stated goals and be proportionate to these goals

The amount of force and destruction should be as limited as possible. However, one should have no illusions about the amount of violence that might be required, and should not be deceived by the expression *humanitarian intervention*. Its purpose might be humanitarian, but its working method is war.⁶⁹ Hit-and-run actions to liberate someone from a prison on hostile territory might work for rescuing individuals, but certainly not for rescuing thousands of people from genocide. That will require large-scale action for a prolonged period of time. It will probably require neutralizing not only the air defense and the air force of the enemy, but also at least part of its ground forces. To do so effectively will usually be very difficult without attacking targets that also serve civil purposes, such as bridges and railways. Which objects are legitimate targets for attack and under what circumstances, are issues that require regular evaluation and discussion

69) Although the expression *war* is usually avoided in official declarations, because of its juridical implications.

among allies. But the inescapable outcome of that debate will be that at least some civil buildings or structures are so important from a military perspective that destroying them could be legitimate. It will often not be easy, if not impossible, to decide in advance what amount of force will be required. The NATO air campaign in 1999 in and around Kosovo provided a clear example of this. What was expected to be a relatively short air campaign several months. A ground campaign proved eventually not to be necessary, but that might have been otherwise.

There should be full compliance with the rules of international humanitarian law

The intervening forces should not demean themselves to the level of their opponents and should comply with the rules of humanitarian law, even when this limits their freedom of maneuver.

The effects on the political system of the country should be limited to what is strictly necessary to accomplish the purpose of the intervention

The purpose of this rule is to prevent an intervention from being used for purposes other than preventing or ending gross violations of human rights, for example to settle a score with a government that one dislikes. According to this rule it is not allowed to make use of an intervention to change the government or to change the constitutional system, unless, and this is where the shoe pinches, it is required to fulfill the purpose of the intervention. The crucial question therefore is how the purpose of the intervention is defined: how deep does an intervention have to go to be successful? Is it sufficient to be successful in the short term or should one also strive for lasting success? It would seem that such questions can only be answered in concrete cases.

There should be full reporting to the Security Council

The Security Council will usually not take the implementation of a humanitarian intervention upon itself, but will mandate states or an organization of states. These states should report regularly and completely, both during and after the end of the intervention. In the case of a non-mandated humanitarian intervention reporting would of course be crucial to justify the action. It seems worth considering the development of a standard for reporting that could be used as a guideline. Such a standard could encompass *inter alia* the following elements:

- the general purpose of the operation;
- an outline of the plan to fulfill that purpose;
- an outline of the military plan;⁷⁰
- measures that have been taken to prevent or limit collateral damage;
- measures to ensure compliance by one's own forces with humanitarian law;
- cooperation with other international organizations such as the UNHCR;
- cooperation with non-governmental organizations;
- account for the use of violence.

The purpose of such reporting is, of course, not to set up a new bureaucracy producing papers. It does not seem worthwhile to give the Security Council or the General Assembly detailed information about, for example, the stockpile of woolen socks of the intervening forces. The report should give insight into the general course of the operation and make clear what measures are taken to implement the mandate of the Security Council and to ensure observation of relevant rules and guidelines. An obligation to account for the use of violence, to report on collateral damage and on the measures taken to ensure the observation of international humanitarian law will help to draw attention to these unpopular aspects of waging war and will make it easier to demand serious attention for these aspects in the Security Council and General Assembly.

A smooth transition to post-conflict peace building should be promoted

A humanitarian intervention is not a film that ends the moment that the evil forces are defeated. The most difficult part of the job will often start when the military operation has successfully come to an end. The organization or state that has taken upon itself the responsibility to intervene cannot abandon that responsibility the moment that it has fulfilled its military objective without regard for the results. It should assure a smooth transition to the phase of peace building.

Refugees will want to return and take up their lives and will often have to settle again among people who are connected to those that were responsible for the gross violations of human rights. Infrastructure might have to be repaired. The economy will have to restart. New democratic and juridical structures might have to be set up, etc., etc. And although the intervention force will often be able to play an important role by maintaining order, protecting minorities, removing landmines, by arresting war criminals, etc., one should not expect the interven-

70) The details of military operational plans would not have to be made public if that endangered the success of the operation. But this argument should not be misused to limit the reports to trivialities.

tion force to fulfill all these peace building tasks, because other type of organizations are better equipped to fulfill them.

Again, the implementation of this guideline presents us with a dilemma. On paper the distinction between the conflict phase when the intervention takes place and the post-conflict phase in which other organizations start building peace seems quite clear. But in reality the distinction is much less clear. Although the conflict phase in Bosnia formally ended in 1995, the presence of a sizable international force remains necessary. In northern Iraq the humanitarian intervention has led de facto to an independent Kurdish state under international protection.⁷¹ The dilemma is that by stressing too much the rule that countries which intervene cannot simply relinquish that responsibility at will, few countries might be willing to take such a responsibility on their shoulders.

In view of the difficulty in finding countries that are willing and able to provide well-equipped and well-trained forces for UN operations in countries such as Sierra Leone, the UN might sometimes be forced to interpret this guideline very flexibly. It is preferable to have an intervention force for too short a time than to have nothing at all.

71) See 'Inside the Saddam-free zone' in *The Economist* of June 10 2000.

10 Conclusion

Genocide and other grave violations of human rights will be with us for the foreseeable future. To allow such horrors to unfold when we have the capacity to stop them would not only run counter to our moral self-esteem, but would also be short-sighted from a point of view of national interest. Violations of this magnitude present a potential threat to international peace and security and are therefore in the long run a risk to the well-being of any country in the world. Addressing grave violations of human rights whenever that is feasible is therefore not only a moral imperative but also a sensible policy to defend the long-term interests of a country.

The capacity of the international community to prevent and if necessary to stop such horrors is still limited, but it has grown over the years and can grow further. In this essay a number of suggestions have been made to strengthen it. Many of the recommended measures can be taken by individual states or in cooperation with other states. But some of them require global measures and thus the further development of the international order. It is easy to point to the manifold deficiencies of the concepts of international community and international order. But although they may not yet be in full existence, they are more than just blueprints of the future. The Security Council, the International Criminal Tribunals and the efforts of individual countries to contribute to the international common goods of peace, development and human rights by providing peacekeepers and development aid, are foundations on which we can build.

Among all the available instruments to promote and protect human rights, humanitarian intervention is the least suitable instrument to promote human rights. There is therefore little reason to fear a new age of just wars. International peace and order will remain a priority above international intervention to promote human rights and justice, and we do not have to regret that, because war and anarchy remain the greatest threats to human rights. Nevertheless, the contradiction that is suggested by the title of this report is false in the final

analysis. The chance that grave and massive violations of human rights will lead to a threat to international peace and security is so large that we have no other choice than to strive for peace and human rights at the same time. We should be very modest and reticent about the possibility of using humanitarian intervention to make the world a better place. But sometimes situations will occur where a humanitarian intervention is needed and feasible. Agreeing on a framework for such situations would help to prevent misuse and help us prepare for the eventuality.

About the author

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