

**Advisory Committee on Human Rights and Foreign Policy**

**and**

**Advisory Committee on Issues of International Public Law**

**THE USE OF FORCE FOR HUMANITARIAN PURPOSES**

Enforcement action for humanitarian purposes

and

humanitarian intervention

**Report no. 15**

**Advisory Committee on Human Rights and Foreign Policy**

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**Advisory Committee on Issues of International Public Law**

**THE USE OF FORCE FOR HUMANITARIAN PURPOSES**

<b>1.</b>	<b>INTRODUCTION</b>	<b>1</b>
<b>2.</b>	<b>DEFINITIONS</b>	<b>2</b>
<b>3.</b>	<b>LEGAL FRAMEWORK</b>	<b>5</b>
	<b>A. Enforcement action for humanitarian purposes</b>	<b>6</b>
	<b>B. Humanitarian intervention</b>	<b>7</b>
<b>4.</b>	<b>POLICY IMPLICATIONS</b>	<b>10</b>
	<b>A. Enforcement action for humanitarian purposes</b>	<b>10</b>
	<b>B. Humanitarian intervention</b>	<b>13</b>
	<b>C. Other instruments</b>	<b>14</b>
<b>5.</b>	<b>SUMMARY AND CONCLUSIONS</b>	<b>15</b>
	<b>ANNEX I Composition of Advisory Committee on Human Rights and Foreign Policy</b>	<b>19</b>
	<b>ANNEX II Composition of Advisory Committee on Issues of International Public Law</b>	<b>20</b>

**The Hague, 18 June 1992**

## 1. INTRODUCTION

- 1.1 On 13 February 1992 the Minister for Foreign Affairs and the Minister of Defence requested the Advisory Council on Peace and Security to compile a report on the role of the United Nations (UN) in the restoration and maintenance of international peace and security. In their request they pointed out that a number of significant changes had taken place in the international political arena which had affected the peacekeeping function of the UN. As the Ministers were aware that their request also raised a number of questions of international law, they stated that they would be grateful if the Advisory Council would invite the Advisory Committee on Problems of International Public Law to contribute to the report.
- 1.2 It is clear that the international law issues raised by at least one of the subjects under review by the Advisory Council -namely humanitarian intervention- have particular human rights implications. This prompted the Advisory Committee on Problems of International Public Law and the Advisory Committee on Human Rights and Foreign Policy to draw up a joint report on this subject, in the hope that such a report, in conjunction with the recommendations of the Advisory Council on Peace and Security and the related report prepared by the Advisory Committee on Problems of International Public Law on the strengthening of the role of the International Court of Justice, would help in the preparation of the memorandum on the role of the UN which the Ministers had promised to the Lower House of Parliament.
- 1.3 The points to be considered in this report are as follows. Section 2 discusses the definition of the use of force for humanitarian purposes, in which connection the report adopts the distinction generally made between "enforcement action for humanitarian purposes" and humanitarian intervention. The legal framework in which the two Committees believe the two concepts should be placed is examined in section 3. Section 4 looks at the policy implications of both concepts for the work of the UN in the future, and section 5 contains a summary and conclusions.

## 2. DEFINITIONS

- 2.1 The Committees are fully aware that the debate on humanitarian intervention is not a new one. Numerous academic studies and international conferences have considered in depth the issues of humanitarian intervention and the role which the UN should play therein. However, none of this has produced a unanimous answer to the question of the circumstances in which humanitarian intervention is necessary and permissible. Nor have the cases in which States have invoked the concept of humanitarian intervention to justify their intervention in another state served to clarify this question.
- 2.2 At the same time, however, the Committees are aware that recent years have witnessed a number of developments which may have given rise to a different situation. In the first place, the end of the Cold War has created opportunities for closer cooperation between the permanent members of the Security Council and hence for more effective action by the Security Council and the more effective operation of the UN system of collective security as a whole, in humanitarian emergencies and in other situations. Secondly, the Security Council has actually availed itself of these opportunities, for example in the resolutions which made possible action to combat Iraqi aggression against Kuwait. Thirdly, mention should be made of the special session of the Security Council of 31 January 1992, at which a number of ideas were aired as to how new substance could be given to the collective security system.
- 2.3 The two Committees believe that the term "humanitarian intervention" often leads to confusion or misinterpretation. In discussions and the literature a wide variety of situations are regarded as forms of humanitarian intervention, the most common being the following:
- a. the provision of aid, without the consent of the country concerned, to relieve overwhelming need which is endangering many lives;
  - b. the use of the powers of the Security Council laid down in Chapter VII of the UN Charter in response to large-scale human rights violations in a particular country;
  - c. intervention - without UN authorisation - by a country or group of countries, involving the use or the threat of force, in the territory of another country, in response to large-scale human rights violations there.
- 2.4 Although the reason for action in all three of these scenarios is that the lives of large

numbers of people are in danger, there are great differences in the way in which action is taken and the legal grounds on which it is or could be based. The Committees therefore feel that a clear distinction between the various situations outlined above is extremely important.

- 2.5 Situation (a) describes what is known as humanitarian emergency assistance.<sup>1</sup> In certain circumstances, for example if the government of the country in which the emergency has arisen refuses to accept the humanitarian emergency assistance on offer, this may lead to one of the other situations described above. The subject of humanitarian emergency assistance will not receive separate attention in the rest of this report. In the opinion of the two Committees, it suffices to say that the rules laid down in General Assembly resolution 46/182 on the strengthening of the coordination of humanitarian emergency assistance should be elaborated further in a convention on this subject.<sup>2</sup>

The central question in situation (b) above is whether, on the basis of article 39 of the UN Charter, a particular situation should be described as a threat to international peace or security. Responsibility for making a political judgement of this kind rests primarily with the Security Council<sup>3</sup>. If the answer to the question is in the affirmative, the Security Council has sole power under the provisions of chapter VII, to take decisions leading to enforcement action. The decision to take enforcement action in response to large-scale human rights violations involves no more than a specific application of the general instrument of enforcement action. The Committees would therefore prefer to see situations of this nature described as "enforcement action for humanitarian purposes".

The Committees believe that the concept of humanitarian intervention applies only in the third type of situation described in paragraph 2.3, namely cases in which one or more states intervene - without the previous authorisation of the Security Council - using force or the threat of force, in the territory of a third country to put an end to large-scale human rights violations taking place there.

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<sup>1</sup> See General Assembly resolution 46/182 of 19 December 1991: Strengthening of the coordination of humanitarian emergency assistance of the United Nations.

<sup>2</sup> Compare in this connection the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (1986).

<sup>3</sup> This primary power of the Security Council does not exclude the possibility of the Secretary-General or the General Assembly raising situations which they believe could pose a threat to peace and security.

2.6 In the opinion of the Committees, the concept of humanitarian intervention as used in this report may be defined as follows:

The threat or the use of force by one or more states within the territory of another state, with the sole aim of halting or preventing large-scale, serious violations of fundamental human rights which are taking place or which appear imminent, such rights being in particular the right to life of individuals, regardless of nationality, in cases where the threat or use of force is carried out without either the prior authorisation of competent UN bodies or the permission of the legitimate government of the country in the territory of which the intervention takes place.

2.7 By way of explanation the Committees would draw attention to the following points in relation to this definition. First, such intervention would be aimed at protecting the rights of individuals regardless of their nationality. Interventions designed to protect or take to safety nationals of the intervening state would not be defined as humanitarian intervention. Such cases could be described as the exercise by the intervening state of the right to individual or collective self-defence, in accordance with article 51 of the UN Charter. Secondly, the state on whose territory the intervention takes place has not invited the intervening state or states to act. If such an invitation had been issued, the resulting action would be defined not as humanitarian intervention but as the provision of assistance. Thirdly, this definition presupposes large-scale violations of fundamental human rights. The exact definition of "large-scale" and the question of what rights are referred to are open to different interpretations. The Committees will return to these points in section 4A.

### 3. LEGAL FRAMEWORK

- 3.1 As indicated in the previous chapter, the legal foundations for both humanitarian intervention and enforcement action for humanitarian purposes vary widely. This section will accordingly examine the question of legal foundations, beginning with the general legal framework which is of great significance in respect of both concepts.
- 3.2 The legal framework is largely determined by the UN Charter. Reference should be made primarily to article 2, paragraph 4 of the Charter, which prohibits the threat or use of force. The Charter itself allows for three exceptions to this ban, the first in article 42, which provides for the Security Council to use or authorise the use of force of arms. The Security Council may so decide if it determines that article 39 applies, i.e. there is a threat to international peace and security. The second exception is embodied in article 51, in the form of the right to individual or collective self-defence (which is discussed above in paragraph 2.7). Article 107 contains the third exception, namely action against the enemies of any signatories to the UN Charter during the Second World War, which is virtually without significance today.

The Committees believe that article 2, paragraph 4 of the UN Charter, with the exception of these three sets of circumstances, constitutes a ban on the use or threat of force. This view is confirmed, in the opinion of the Committees, by the *travaux préparatoires*, the context of and relation between the various relevant provisions and by a number of resolutions of the General Assembly, chiefly the Declaration on the Inadmissibility of Intervention (resolution 2131 (XX), 1965); the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the UN (resolution 2625 (XXV), 1970) and the Definition of Aggression (resolution 3314 (XXIX), 1974).

- 3.3 Article 2 paragraph 2 of the UN Charter obliges States to fulfil in good faith the obligations assumed by them in accordance with the Charter. Apart from the norms in respect of peace and security, standards as elaborated in articles 55 and 56 of the UN Charter relating to the international protection and promotion of human rights are of essential importance. These articles have served as the basis for a large number of UN resolutions and conventions, chief among them being the Universal Declaration of Human Rights (1948), the International Covenants on Civil and Political and on Economic, Social and Cultural Rights (both of 1966) and the 1948 Convention on

Genocide.

3.4 These human rights instruments and, in particular, the enforcement procedures for which they provide, have imposed a significant limitation on the scope of the principle embodied in article 2, paragraph 7 of the Charter, namely that the UN should refrain from intervention in matters which are essentially within the domestic jurisdiction of a State. Furthermore, the Committees believe that the commitment to international protection for and promotion of the fundamental rights of individuals and groups has developed into a universal obligation which rests on every state in the world community, both individually and collectively. It is an obligation which is increasingly affecting the evolution and application of international law, which originated as a way of regulating the relations between states and serving *raison d'état*.

**A. Enforcement action for humanitarian purposes**

3.5 As stated above, the Security Council may take enforcement action as soon as it judges that a situation has arisen which poses a threat to international peace and security. The legal foundation for this is provided by article 39 of the Charter. The relationship between the maintenance of peace and security on one hand and the protection and promotion of human rights on the other is not always clear. It is particularly difficult to decide whether human rights violations, on any scale, can or should be regarded as a threat to international peace and security. Recently, however, the Security Council has been increasingly inclined to treat serious human rights violations on a massive scale, which result or could result in substantial loss of life, as a threat to the stability, peace and security of a region, and notably of neighbouring countries (resolutions on Iraq (the Kurds), Yugoslavia and Somalia).

3.6 At first sight it would be desirable if the legal foundation for enforcement action for humanitarian purposes were formed not by a broad interpretation of the concept of a threat to peace and security but by an explicit provision in the Charter. However, that would require a formal amendment to the Charter, and the Committees do not favour such a move in view of the risks involved, especially given the prominent position in the Charter currently occupied by the ban on the use of force and the system of collective security. However, the Committees do believe that the Security Council or the General Assembly should pass an interpretative resolution defining the relationship

between the concept of a threat to peace and security and the protection of human rights. This point is discussed in more detail in section 4A.

- 3.7 In addition to the taking of enforcement action for humanitarian purposes by the Security Council, action may also be taken by regional organisations, or in the framework of regional agreements, with Security Council authorisation. The report of the Advisory Council on Peace and Security discusses the role of regional organisations. The Committees would simply observe that chapter VIII of the Charter restricts the options available to regional organisations when it comes to enforcement action.

#### **B. Humanitarian intervention**

- 3.8 One possible legal foundation for humanitarian intervention as referred to in paragraph 2.6 which is often advanced in the literature is the theory that the failure of the system of collective security embodied in the UN Charter has revived a rule on lawful humanitarian intervention which is presumed to have existed in customary law before the UN came into existence. In fact this theory - referred to as the link theory - amounts to applying the *rebus sic stantibus* doctrine to the provisions of the UN Charter concerning the protection and promotion of international peace and security, in such a way as to create a new exception to the ban on force laid down in article 2 paragraph 4.
- 3.9 The Committees feel it necessary to express reservations about a number of parts of this theory. Their main objection is to the assumption that a rule in customary law ever developed which constituted a legal basis for humanitarian intervention. In any event there are no good examples in state practice of action conforming to the definition of humanitarian intervention given above. Secondly, the Committees would raise the question of whether such a customary law rule could continue to exist alongside the Charter. After all, one of the aims of those who drafted the Charter was to reinterpret the *jus ad bellum*. Thirdly, even if a rule in customary law on humanitarian intervention did continue to exist alongside the Charter, the Committees doubt whether the link theory can still be deemed applicable in the light of the closer relations between the great powers and hence the removal of a major obstacle to the working of the system of collective security.

In view of these reservations the Committees would conclude that the link theory, interpreted to mean that an old customary law rule still exists alongside the present Charter, cannot serve to provide legal justification for humanitarian intervention. Nor is this position undermined by the fact that, despite the end of the Cold War, the Security Council will probably not always be able to respond effectively to threats to international peace and security.

- 3.10 The Committees note that at present international law offers no clear legal basis for the use or threat of force by states, without reference to chapter VII of the UN Charter, to combat large-scale human rights violations. However, the Committees also note that contemporary interpretations and applications of international law can no longer ignore the existence of situations in which fundamental human rights are violated on a large scale, while the international community takes no steps to halt such violations or to prevent worse violations in the future.

In this connection, as indicated in section 3.4, the Committees attach great importance to the growing significance of the obligation to international protection and promotion of human rights. The Committees believe that this obligation, which *inter alia* has imposed a restriction on the scope of article 2, paragraph 7 of the UN Charter, constitutes the first step to the development of a legal foundation of the kind under discussion. In highly exceptional circumstances, a state would then be justified in intervening in another state for humanitarian reasons. These circumstances would arise if fundamental human rights in the latter state had been violated on a large scale; if the state intervening had tried in vain to employ all other possible effective means to take action against the state which was guilty of such abuses (including attempts to mobilise existing instruments or to mobilise the UN or some regional organisation with UN authorisation); and if the intervention itself did not pose a greater threat to international peace and security than the continuation of the human rights violations which the intervention was designed to halt. These and other criteria will be examined at more length in section 4.

Stressing the risk that states would abuse the power to intervene on humanitarian grounds if such a power were explicitly recognised, the Committees would wish to do no more than acknowledge that a situation could arise where the human rights violations were so grave that a state might feel compelled to intervene. If so, the state would have to justify its intervention after the event, as such an intervention would

constitute in principle a serious breach of the legal order, and one which could only be justified if the state intervening could demonstrate in retrospect that it had to act in that way to forestall or redress a much more serious breach of the legal order. If the Security Council were not to undertake or authorise action in a situation where action was seen to be humanly unavoidable, the essential obligation of international protection of fundamental human rights could provide legal justification for a state's ignoring the ban on the use of force laid down in the Charter.

It must be remembered that states will not readily undertake humanitarian intervention of a kind that meets the criteria advocated by the Committees. After all, such intervention would entail placing the lives of nationals of the intervening state in grave jeopardy. Many states would simply not be prepared to do so unless it would serve their own immediate interests. (This point is developed in section 4B below.)

#### **4. POLICY IMPLICATIONS**

- 4.1 Before elaborating on the concepts of enforcement action for humanitarian purposes and humanitarian intervention without Security Council authorisation, the Committees would stress at this point that the former should, in practice, be preferred to the latter, in the form of either enforcement action by the Security Council itself or action by a regional organisation authorised by the Security Council. It is only if such enforcement action cannot be taken yet some action is seen as humanly unavoidable that recourse may be had to humanitarian intervention.

##### **A. Enforcement action for humanitarian purposes**

- 4.2 The proposal to amend the UN Charter in such a way that such action would explicitly be allowed and the risks entailed were discussed in section 3.6 above. However, this need not rule out the possibility of formulating further principles or guidelines which would clarify the relationship between international peace and security and international protection of human rights. As stated above, Security Council resolutions S/RES/688 (1991), on the repression of the Kurds in Iraq, and S/RES/733 (1992), on Somalia, provide an interpretation of chapter VII of the Charter by establishing a direct connection between large-scale human rights violations and a threat to peace and security. In its declaration of 31 January 1992, issued at the special session held at head of state and government level, the Security Council described humanitarian issues as a possible threat to peace and security:

"The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The UN membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters."<sup>4</sup>

In saying this, the Security Council laid what may become a foundation for enforcement action for humanitarian purposes.

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<sup>4</sup> Provisional Verbatim Record of the session of 31 January 1992: S/PV.3046, 1992, p. 143.

Special mention should be made in this connection of the proposals put forward by Zimbabwe at the special session of the Security Council of 31 January 1992. In response to the fact that the Security Council is increasingly being confronted by situations of serious internal humanitarian problems, Zimbabwe proposed:

"a careful drawing up and drafting of general principles and guidelines that would guide decisions on when a domestic situation warrants international action, either by the Security Council or by regional organisations. This could be one of the tasks this Council could entrust to the Secretary-General".<sup>5</sup>

4.3 The Committees support the drafting of more specific recommendations and guidelines. It should be noted in this connection that this could not lead to a formal restriction of the Security Council's power to interpret article 39. It could, however, assist in ensuring greater clarity and consistency in the interpretation of article 39 and in striking a balance between the UN's different objectives: the maintenance of peace and security (i.e. preventing armed conflicts) on the one hand and on the other the international promotion and protection of human rights. The Committees believe that these recommendations and guidelines could be laid down in the form of a resolution of the Security Council or the General Assembly.

4.4 The following points might be included in such a resolution:

\* The situation in question must be an emergency, in which fundamental human rights are being violated on a large scale. In the first place, this should be interpreted as attacks on people's right to life in the widest sense. This should be understood to mean not only actual killing, by summary executions or armed attacks by the military or the police on civilian targets, but all manner of large-scale life-threatening situations such as famine and natural disasters where proper care for the victims is rendered impossible. As regards the scale on which the violations must take place, the Committees are forced to the conclusion that it is impossible to provide a more definite yardstick than "on a large scale". Assessments will have to be based on individual cases.

\* The action taken should be in proportion to the gravity of the situation. First and foremost this means that armed intervention should be undertaken only if less far-reaching, i.e. peaceful, means have failed or are impossible. Secondly, the proportionality requirement relates to the way in which force is used or threatened and thirdly to

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<sup>5</sup> Provisional Verbatim Record of the session of 31 January 1992: S/PV.3046, 1992, p. 131.

the duration of the armed intervention. Here too, however, much will depend on the specific circumstances, for if human rights are being violated on a large scale there are often no conditions on which human rights can be effectively safeguarded in the short term. A brief intervention in and a rapid withdrawal from the country concerned could entail the risk that the impact of intervention would be short-lived and might even add to the dangers of the situation. To prevent a negative impact of this kind, the action taken might also encompass various forms of what might be called after-care, such as assistance with building up a new administrative apparatus and organising elections. The duties of the UNTAC units in Cambodia are a good example of the form such "after-care" can take.

- \* The effect of intervention on the constitutional structure of the country against whom it is directed should be limited to the minimum necessary to achieve the original objective. As stated above, this may mean, in certain circumstances, that intervention is designed to effect a number of changes in the constitutional structure.
- \* The threat posed by intervention to international peace and security should not be of such a nature that it might result in the loss of more lives than were being lost in the situation which prompted intervention in the first place. This poses a dilemma in respect of the use of force for humanitarian purposes, in that sufficient force must be used to put a stop to large-scale human rights violations but not enough to destabilise regional relations, as this could result in a greater loss of life than the loss of life that originally prompted the intervention.

4.5 The Committees are fully aware that it will be no easy task to frame a resolution of this kind. Moreover, it must not be forgotten that the responsibility for the ultimate decision as to whether a particular case of human rights violations on a large scale requires enforcement action for humanitarian purposes rests solely with the Security Council. The Council's decision will be a political one, depending to a great extent on the specific circumstances of the situation in question.

## **B. Humanitarian intervention**

- 4.6 In view of the singular nature of the circumstances in which states might decide to intervene, the Committees feel that it would be difficult to formulate further principles or recommendations in the UN framework. There might then be a danger of states abusing such a formulation by interpreting or applying the principles in too flexible a manner. On the other hand, it should be out of the question for the UN to lay down conditions under which states could intervene for humanitarian purposes if the UN itself were unable, in any circumstances, to take a decision.
- 4.7 This does not rule out the possibility of theory and state practice being developed outside the UN framework, in non-governmental, governmental or intergovernmental channels. Talks could be held, for instance, in the framework of European Political Cooperation, the Western European Union or the Conference on Security and Cooperation in Europe, with a view to formulating principles which regional organisations or their constituent countries could use as a basis for deciding whether action, preferably joint action, would be appropriate in particular situations, or whether intervention by third countries in a particular situation was or was not justified.

In addition, the Committees believe that in the event of humanitarian intervention it is essential for the state intervening to report immediately to the Security Council and render account for its action. The main principles underlying such a report, in addition to those outlined in section 4.4, should be as follows:

- \* The pre-eminent aim of the state intervening should be to protect human rights. The intervening state's own interests should play a subordinate role, and political, economic and other considerations should not, in principle, come into play.
- \* Effective action by the UN or by a regional organisation authorised by the UN must be impossible or likely to take too long to materialise.

### **C. Other instruments**

- 4.8 This report considers the question of how the international community could use or threaten to use force to halt large-scale violations of fundamental human rights. Posing the question in this form makes it impossible to discuss all manner of other responses to such violations. It should be stressed that numerous mechanisms exist within the UN system, many of which are inadequate in such situations and require improvement and expansion. The improvements might include procedures for fact-finding at an early stage, monitoring missions, observers, emergency sessions of bodies which could decide to take measures, early warning systems and a High Commissioner for human rights or for minorities. A number of promising developments are in train in these fields.
- 4.9 However, the Committees feel that the fact that their report devotes little attention to these developments should not create the impression that preventive instruments are of less importance. The opposite is the case. After all, the measures discussed in this report should be regarded as a last resort. It is only when no other instrument can be effective that resort can or should be had to enforcement action for humanitarian purposes or, if this is out of the question, possibly to humanitarian intervention.

## 5. SUMMARY AND CONCLUSIONS

- 5.1 The debate on humanitarian intervention is not a new one. However, recent years have witnessed a number of developments, notably closer cooperation between the five members of the security Council, which may have created a different situation.
- 2.5 The concept of humanitarian intervention often leads to confusion or misinterpretation. The Committees draw a distinction between **enforcement action for humanitarian purposes**, which is taken by the Security Council pursuant to chapter VII of the UN Charter in response to large-scale human rights violations, and **humanitarian intervention**. In the opinion of the Committees, the latter concept may be defined as follows: "The threat or the use of force by one or more states within the territory of another state, with the sole aim of halting or preventing large-scale, serious violations of fundamental human rights, which are taking place or which appear imminent, such rights being in particular the right to life of individuals, regardless of nationality, in cases where the threat or use of force is carried out without either the prior authorisation of competent UN bodies or the permission of the legitimate government of the country in the territory of which the intervention takes place".
- 5.3 The legal foundation for enforcement action for humanitarian purposes may be found in chapter VII of the UN Charter. Measures of this kind may be taken by the Security Council or by regional organisations with the Security Council's authorisation. It would obviously be desirable to clarify this legal foundation, by elaborating on the definition of a violation of fundamental human rights as a separate legal foundation and by exploring the relationship between this legal foundation and that provided by a threat to international peace and security. However, the Committees are not in favour of an amendment to the UN Charter in this area because of the risks this would entail. Nevertheless they do advocate that the General Assembly or the Security Council adopt a resolution formulating the legal foundation.
- 5.4 The Committees endorse the relevance of formulating further recommendations and guidelines for the application of enforcement action for humanitarian purposes in a resolution of the General Assembly or the Security Council. The following points could be considered:

- \* the situation in question must be an emergency, in which large-scale violations of fundamental human rights are - or soon will be - taking place;
- \* the action taken should be proportional to the gravity of the situation;
- \* the effect of the action on the constitutional structure of the country against which the action is directed should be limited to the minimum necessary to achieve the original objective;
- \* the threat posed by the intervention to international peace and security must never be of such a nature that it might result in the loss of more lives than were being lost in the situation which prompted intervention in the first place.

Of course, the responsibility for the ultimate decision as to whether a particular case of human rights violations on a large scale requires enforcement action for humanitarian purposes will continue to rest solely with the Security Council.

- 5.5 Article 2, paragraph 4, of the UN Charter prohibits the threat or use of force. The only three exceptions to this ban laid down in the Charter are as follows: the use or authorisation of the use of armed force by the Security Council (article 42), the right to self-defence (article 51) and action against enemies of the signatories of the Charter (article 107), the last of these being now of almost entirely historical significance.

Article 2 paragraph 2 of the UN Charter obliges States to fulfil in good faith the obligations assumed by them in accordance with the Charter. Apart from the norms in respect of peace and security, the norms elaborated *inter alia* in articles 55 and 56 of the UN Charter relating to the international protection and promotion of human rights are essential.

- 5.6 It is regularly alleged that one possible legal foundation for intervention for humanitarian purposes, without reference to the rules laid down in the Charter, could be the theory that the failure of the system of collective security embodied in the UN Charter has revived a rule on lawful humanitarian intervention in customary law. Since the existence of such a rule in customary law has not been proved, and since the five permanent members of the Security Council now work more closely together, the Committees believe that this theory provides insufficient grounds on which to justify humanitarian intervention.

- 5.7 At present international law does not offer a well-defined legal foundation for the threat or use of force by states, without reference to chapter VII of the Charter, to

counteract large-scale violations of fundamental rights. The Committees do, however, believe that the commitment to international protection and promotion of the fundamental rights of individuals and groups has developed into a universal obligation which rests on every state in the world community, both individually and collectively. It is an obligation which is increasingly affecting the evolution and application of international law, which originally regulated the relations between states and served *raison d'état*. In the opinion of the Committees, this obligation constitutes the first step towards a legal foundation for humanitarian intervention. A state may, in exceptional circumstances, be justified in intervening in another state for humanitarian purposes.

- 5.8 If action is called for in the light of large-scale human rights violations, it should preferably be taken by the Security Council or by a regional organisation authorised by the Security Council. Only if the Security Council or a regional organisation is unable to decide on action, would it be possible for a state or group of states to take the decision on humanitarian intervention, provided certain very stringent conditions have been satisfied. Any state which does intervene should report its action immediately to the Security Council and should render account.
- 5.9 It is unlikely that further norms will be developed within the UN framework for humanitarian intervention which is, in any event, bound to take place without reference to the UN. This does not rule out the possibility of principles being adopted in the framework of, for example, EPC, the WEU or the CSCE, which could be used to determine whether action - joint or otherwise - could be taken in a given situation or whether intervention carried out by third countries was justified. Considerations to be borne in mind in addition to those listed in point 4 are that the intervening state's own interests should play a highly subordinate role, and the pre-eminent aim of the state intervening should be to protect human rights. Political, economic and other considerations should not, in principle, come into play. Effective action by the UN or by a regional organisation authorised by the UN must be impossible or likely to take too long to materialise.
- 5.10 In addition to humanitarian intervention and enforcement action for humanitarian purposes, it is necessary to develop other, more preventive, instruments to address large-scale violations of human rights. These might include procedures for fact-finding at an early stage, monitoring missions, observers, emergency sessions of bodies which could decide to take measures, early warning systems and a High Commissioner for

human rights or for minorities. Humanitarian intervention and enforcement action for humanitarian purposes are instruments for use only in the last resort.

- 5.11 The Committees recommend firstly that the Minister for Foreign Affairs support Zimbabwe's invitation to the UN Secretary-General issued at the special session of the Security Council on 31 January 1992, to draft recommendations and guidelines for domestic situations which call for international action. Secondly, the Committees recommend that the Minister take steps, in the framework of EPC, the WEU or the CSCE, to formulate guidelines for humanitarian action either in the framework of the UN or outside it, in the event of large-scale human rights violations in any particular country.

## Annex I

### Composition of Advisory Committee on Human Rights and Foreign Policy (ACM)

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## Annex II

### Composition of Advisory Committee on Issues of International Public Law

Prof. Jhr. Dr. F.A.M. Alting von Geusau

Prof. Mr. M. Bos

Prof. Mr. Th.C. van Boven

Prof. Mr. L.J. Bouchez

Mr. G.M.M. den Drijver

Mr. P. van Dijk

Prof. Mr. C. Flinterman

Prof. Mr. F. Kalshoven

Prof. Mr. Ko Swan Sik

Prof. Mr. P.H. Kooijmans

Prof. Mr. R.H. Lauwaars

Mr. G.W. Maas Geesteranus

Mr. W.C. van Manen

Prof. Dr. H. Meijers

Mr. P. Peters

Prof. Mr. W. Riphagen

Prof. Mr. H.G. Schermers

Prof. Dr. J.W. Schneider

Prof. Mr. A.H.A. Soons (Chair)

Prof. Dr. W.D. Verwey

Prof. Mr. E.W. Vierdag

Prof. Dr. P.J.I.M. de Waart

Prof. Dr. K.C. Wellens

Mr. A. Bos

#### **Secretariat:**

Mr. H. Von Hebel

Dr. G.J. Tanja