

# **FAILING STATES**

## **A GLOBAL RESPONSIBILITY**

No. 35, May 2004

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## Foreword

On 28 May 2003 the Minister of Foreign Affairs, the Minister of Defence and the Minister for Development Cooperation asked the Advisory Council on International Affairs (AIV) and the Advisory Committee on Issues of Public International Law (CAVV) jointly to produce an advisory report on the problem of failing states. In the request for advice the Government stated that the events of 11 September 2001 had 'cast the issue of failing states in a new light, demonstrating that such states are no longer an isolated and distant problem. Today, these states pose a threat not only to their own populations but also to neighbouring states and indeed to the world community as a whole'.

The Government asked the AIV and the CAVV to consider in any event the following questions:

1. 'What is a workable definition of a failing state? In what situations and on what grounds should the international community (UN, IFIs, NATO, regional organisations) help prevent state failure or rescue failing states? What role could the Netherlands and the European Union play in this regard?'
2. 'What tools does the international community have to prevent states gradually collapsing and to help revive states that have already failed? What is the best way of using political and economic tools, including development cooperation? Does the provision of humanitarian aid play a specific role or not?'
3. 'Under what circumstances should military deployment be considered? How do external interventions of this nature square up with the doctrine of state sovereignty and the principle of non-intervention? Can military units be deployed preventively, i.e. before a state's authority collapses altogether? At what stage can government authority be deemed to have been restored to the extent that a peacekeeping operation can be ended without the danger of a resumption of hostilities? Can indicators be developed for the pre-hostility and post-hostility phases to show when a state has lost, or regained, the ability to function independently?'
4. 'Are there any developments in international law that allow the international community to hold non-state actors to account for offences that would be classified as human rights violations if committed by states or their representatives? What substance does the concept of state responsibility retain in failing states, and how should international law be applied in situations in which it is no longer clear who are the lawful representatives of the failing state?'

Chapter I of the report considers the definition of the term failed or failing state. Chapter II deals with some specific issues of international law resulting from the questions raised at point 4 above. Chapter III is given over to an examination of the causes and consequences of state failure and the grounds for the international community to combat such failure. Chapter IV deals with the non-military instruments that can be deployed. Chapter V describes on what grounds military instruments can be lawfully deployed and in what circumstances they can be deployed most efficiently. Chapter VI examines past experience of rescuing failed and failing states. Chapter VII contains a proposal for greater involvement of the UN. Finally, Chapter VIII gives

a brief summary and sets out some general policy conclusions. Specific recommendations are given at the end of each of the relevant chapters.

This advisory report was prepared by a joint committee, known as the Committee on Failing States, which consisted of the full CAVV and some members of the permanent committees of the AIV.<sup>1</sup> The Committee on Failing States was chaired by Professor N.J. Schrijver (member of the Human Rights Committee of the AIV and also a member of the CAVV). The vice-chair was Professor K.C. Wellens (chair of the CAVV). The other members of the joint committee were: Dr C.J.M. Arts (CAVV), Professor M.G.W. den Boer (AIV), A. Bos (CAVV), Professor T.C. van Boven (AIV), Dr M.M.T.A. Brus (CAVV), Dr O.B.R.C. van Cranenburgh (AIV), Professor B. de Gaay Fortman (AIV), Professor M.T. Kamminga (CAVV), Professor K. Koch (AIV), F. Kuitenbrouwer (AIV), Dr E.P.J. Myjer (CAVV), Professor P.A. Nollkaemper (CAVV), Dr B. Oomen (AIV), Ms J.W.H.M. van Sambeek (CAVV), Professor A.H.A. Soons (CAVV), Ms H.M. Verrijn Stuart (AIV), General A.K. van der Vlis (retd.) (AIV) and E.P. Wellenstein (AIV).

Dr M.C. Castermans-Holleman (AIV) was a corresponding member of the joint committee. She did not live to see the completion of the advisory report. It is with sorrow that the AIV and CAVV have noted her passing.

The joint committee was assisted in its work by the civil service liaison officers S. Fazili and Professor J.G. Lammers of the Ministry of Foreign Affairs. The secretaries to the committee were P.J.A.M. Peters (secretary to the AIV) and Ms C.D. Noland (secretary to the CAVV). They were assisted by the trainees R. Bartels, C.M.G. de Wit, J.P. Denkers and T. Juhász (all of the AIV).<sup>2</sup>

This report was adopted on 7 May 2004 in a coordinated procedure of the AIV and the CAVV.

1 The lists of members of the AIV and CAVV are included as an annexe.

2 In drafting the report the Committee was grateful to draw on information and ideas provided by Dr A. Bloed (AIV/CVV), R. van der Veen (Ministry of Foreign Affairs), M. Hollestelle (Pax Christi Netherlands), R. von Meijenfildt and J. Tuit (Netherlands Institute for Multiparty Democracy) and K.J.H.H. Sietsma (Control Risks Group Limited).

# I Definitions

## A. *The term 'state'*

### I.1 Initial observations

The term failed or failing state is of fairly recent origin. As such it has not yet been recognised and recorded in international law. Nonetheless it is used by politicians and academics, although not always in the same sense.

It is not really possible, or indeed necessary for the purposes of the present report, to formulate a legally watertight definition. Instead, it is sufficient to describe what is meant by the term in order to provide a framework within which the problems raised in the request for advice can be addressed.<sup>3</sup>

Naturally, any consideration of what constitutes a failed or failing state must be preceded by an examination of the term state. It should be noted in this connection that this term has evolved over time. In addition, the duties and functions ascribed to the state vary according to the legal, political, cultural or ideological perspective of the commentator.

If views on the essence of the state differ, it follows that views on when a state ceases to discharge its essential functions and therefore fails must also differ. There is also room for debate on whether a state that still discharges some of its essential functions can be said to have failed. These points will be dealt with briefly in the following sections in order to arrive at a workable definition of failed or failing states. There will be consideration of both the institutional approach (from the angle of the formal characteristics of the state) and the functional approach (from the angle of the substantive functions of the state). Some general questions connected with the definition will also be addressed.

### I.2 The state model

States as we now know them, as members of the international community, are based in large part on a West European model. Since the Middle Ages there has been a process in which sovereign authority has come to be linked with a territory and a population. The point at which the concept of sovereignty is generally thought to have crystallised is the Peace of Westphalia in 1648 and in particular the Treaties of Münster and Osnabrück. Under these treaties it was recognised that ultimately only a single sovereign power had control over a particular territory, rather than a number of overlapping authorities with powers defined geographically and by reference to a particular circle of persons.<sup>4</sup> The sovereign units existing at that time were recognised as independent states.

The concept of the state did not therefore flourish until relatively late in history and then only in the specific circumstances obtaining in a particular region. Since then states have

3 For a detailed analysis, see also the recent doctoral dissertation of G. Kreijen, *State Failure, Sovereignty and Effectiveness, Legal Lessons from the Decolonization of Sub-Saharan Africa*, Leiden, Brill, 2004.

4 See for example N.J. Schrijver, 'The changing nature of state sovereignty' in *The British Yearbook of International Law* 1999, Oxford, 2000, pp. 68-69 and the literature listed in it.

taken many forms in Europe. Outside Europe too there have always been sovereign empires of all shapes and sizes. These empires either foundered or were largely destroyed or broken by the advent of colonialism. Even the empires that were not colonised (China, Japan, Thailand and Ethiopia) did not retain their original structure. In the wave of decolonisation after 1945 the new states were often modelled (by the departing colonisers) on the states of Western Europe that had evolved historically. The state institutions too were modelled on those of Western Europe. However, some young states took as their model the states of Eastern Europe with their planned economies.

Other factors too promote a degree of convergence. The greater intensity of international relations and the growth of interstate structures have meant that all states are, in principle, expected to fulfil the same role. Indeed, this is laid down in Article 4 of the Charter of the United Nations. There is therefore a certain equality between the state members of the international community, certainly at the formal level. This is recorded for example in Article 2.1 of the Charter: 'The Organisation is based on the principle of sovereign equality of all its Members.' Despite this principle and the convergence referred to above, the state community remains heterogeneous. In any event, states are not equal in terms of power.

### **I.3 An institutional (formal) and a functional (substantive) approach**

International law has criteria for determining statehood. The basic criteria are still laid down in the 1933 Montevideo Convention, namely:

- (i) a permanent population;
- (ii) a defined territory;
- (iii) a government which exercises control over its territory; and
- (iv) capacity to enter into relations with other States (the criterion of independence).<sup>5</sup>

These basic criteria (or 'qualifications', as the Convention describes them), which relate to the effectiveness of the entity claiming the rights and duties of a state, have since been supplemented by other criteria of a more political and moral nature, namely:

- (i) independence should have been obtained in keeping with the principles of self-determination;<sup>6</sup> and
- (ii) independence should not have been obtained in order to carry out a racist policy.<sup>7</sup>

5 Article I of the Montevideo Convention on Rights and Duties of States, signed on 26 December 1933. See also: J. Crawford, *The Creation of States in International Law*, Oxford, OUP, 1979. I. Brownlie, *Principles of Public International Law*, 6th ed., Oxford, 2003, p. 71, specifies the third element: 'The existence of effective government, with centralised administrative and legislative organs, is the best evidence of a stable political community.'

6 See D.J. Harris, *Cases and materials on international law*, London, Sweet & Maxwell, 5th ed., 1998, pp. 102 and 111, P.H. Kooijmans, *Internationaal publiekrecht in vogelvlucht* (Public international law in a nutshell) 9th edition, Deventer, Kluwer 2002, p. 27 and M.N. Shaw, *International Law*, Grotius Cambridge 1997, pp. 145 and 146. When the white minority regime in the British colony of Rhodesia declared independence unilaterally in 1965, the Security Council called upon all states not to recognise the regime. Likewise, the Security Council called upon all states not to recognise the Turkish Republic of northern Cyprus, which proclaimed its independence on 15 November 1983.

7 See UNGA Resolution of 26 October 1976 in which the General Assembly called upon governments to withhold recognition from Transkei, after South Africa had granted it independence as the first black 'homeland'. See also Harris, *idem*, pp. 102, 110 and 111.

As they have now been endorsed by the great majority of states, statehood can be said to be dependent on fulfilment of not only the basic criteria of the Montevideo Convention but also these additional criteria.

Following the disintegration of the Soviet Union and Yugoslavia, the member states of the EU formulated a number of additional political criteria for recognition of new states in Eastern Europe and the former Soviet Union. For example, if a new state wishes to be recognised by the EU, it must:

- (i) respect democratic principles, human rights and the rights of ethnic and national groups and minorities;
- (ii) accept the principle that frontiers may not be altered by the use of force and, to this end, accept all agreements made about security and stability within the region;
- (iii) adopt all disarmament commitments entered into by the predecessor state.<sup>8</sup>

Failure to comply with these criteria does not mean that there is no state in legal terms. Recognition of these new states by the EU member states was, above all, of a declaratory nature; recognition mainly signified a willingness to enter into relations with the state concerned.<sup>9</sup>

Once a state exists (i.e. has obtained statehood), a temporary interruption in the effectiveness of its authority (for example as a result of internal unrest, civil war or hostile military occupation) does not affect its statehood. Even where there is protracted anarchy and *de facto* collapse of the state as an organisation, as in the case of Somalia and Sierra Leone, nothing has been done in state practice to deny the statehood of the entity concerned.<sup>10</sup> Nonetheless, the *de facto* situation may prevent normal relations. The Montevideo criteria are in keeping with the institutional (formal) approach to the concept of the state. The state must have its own existence and identity and may not, for example, form part of the private assets of a ruler or simply be his tool. The institutions of the state must be a constant factor in its existence. People must succeed one another within these institutions. One of the organs of the state is the government, which exercises *de facto* and effective control over the territory. Such control exists where the government has a monopoly on the use of force and where it makes choices as an institution and ensures that they have effect.

Another approach is based not on institutional characteristics but on the functions of a modern state. This is the substantive or functional approach.<sup>11</sup> In this approach, the entity has to fulfil substantive requirements concerning the results of its actions in relation to citizens. The essential functions of a state are to maintain security and public order and to deliver public services such as infrastructure, education and health care. Naturally, views differ on what services the state should provide or facilitate. The extent to which

8 EC Bull. 12-1991, pp. 120 and 121.

9 See P.H. Kooijmans, *Internationaal publiekrecht in vogelvlucht*, 9th edition, Deventer, 2002, pp. 24-27.

10 See Kooijmans, *idem*, p. 21; I. Brownlie, *Principles of Public International Law*, 6th ed., Oxford, 2003, p. 80 and D.J. Harris, *Cases and materials on international law*, London, Sweet & Maxwell, 1998, p. 82.

11 As regards the institutional and functional approach, see J. Milliken and K. Krause, 'State Failure, State Collapse and State Reconstruction: Concepts, Lessons and Strategies', in *Development and Change*, Vol. 33, No. 5, November 2002, *Special Issue: State Failure, Collapse and Reconstruction*, p. 753 ff.

existing states are successful in performing these functions varies. More and more norms, binding or otherwise, have come into existence. The state must perform treaty commitments, respect human rights, observe the rule of law, practise good governance and contribute to the joint efforts to make the world safer and more habitable (the environment, security, development, etc.). Judged by such criteria, a state is very likely to fall short.

#### *B. The term failed or failing state*

### **I.4 Some recent definitions**

After this brief consideration of the term state this section will examine the concept of state failure,<sup>12</sup> in other words the impotence of the central government.

Elements of a definition can be found in state practice and in the pronouncements of international organisations. The UN Human Rights Committee (civil and political rights) has stated that the procedures of the committee rest on the presumption that a state is 'in control of all its territory'. At one point this was not the case in Lebanon. The state could therefore not assume responsibility for the areas of its territory under foreign control.<sup>13</sup>

The European Security Strategy talks of states that are corroded from within and of the collapse of state institutions.<sup>14</sup> European Commissioner Patten has described failed states as 'countries where the institutions, coercive power and basic services of national government have simply crumbled away'. One court judgment should be mentioned here. The Dutch Council of State has defined the lack of a central government as 'the absence of any form of government authority', which includes a situation in which policing and the levying of taxation are organised by clans.<sup>15</sup>

As indicated in the request for advice, there are also other terms that partly coincide with the term 'failing states'. Examples are low-income countries under stress (LICUS), used by the World Bank,<sup>16</sup> 'fragile states' and 'difficult partnerships' (used by the OECD).

12 Commentators often refer to 'failed and failing states'. For the sake of readability this report generally uses the term 'failing state' on its own. However, where the text refers to a category of states in which the process of failure is complete, the term 'failed state' is used.

13 Report of the Human Rights Committee to UNGA, A/38/40, p. 79 (1983).

14 *A secure Europe in a better world*, December 2003, p. 8.

15 Specific situations in which application of the term 'representation' of a state gives rise to problems naturally have legal consequences. In the opinion of the Dutch Council of State, the lack of a central government means, among other things, that there can no longer be said to be 'persecution' within the meaning of Article 1A of the Refugee Convention (judgment of the Administrative Jurisdiction Division, 6 November 1995, NAV (1995) p. 1070, RV 1995 No. 4, GV No. 18d-13; for a consideration of the substance, see also NJB (1996), pp. 347-352. And see judgment of 19 March 1997, NAV (1997), p. 401; RV (1997) No. 2.

16 LICUS is an initiative to get 'chronically weak-performing countries [...] onto a path leading to sustained growth, development, and poverty reduction. [...] LICUS are highly diverse [...], several LICUS are 'policy-poor' [...], [s]everal LICUS such as Haiti have exceptionally weak government capacity [...], [s]ome LICUS – such as Sierra Leone – have recently emerged from conflict'. See *World Bank Group Work in Low-Income Countries Under Stress: a Task Force Report*, September 2002 at <http://www1.worldbank.org/operations/licus>. The

*cont. on next page »*

The literature frequently employs a sliding scale – weak, failing, failed, collapsed – based on the diminishing control exercised by a government. A weak state (or soft state)<sup>17</sup> is a state where the government has great difficulty in carrying out its own policies, above all because of the poorly equipped machinery of government, and in which *de facto* power is in the hands of informal networks. In a weak state, official bureaucracy is still a means of exercising this power. A weak state of this kind can be distinguished from ‘warlordism’ (a situation in which non-state entities exercise control in their own name) as there is still an attempt to serve the public interest, at least to some extent.<sup>18</sup> A failing state is a state that has become caught up in a process that may result in its becoming a failed state – a condition that will be reached when the government no longer has any control. A collapsed state is an extreme form of failed state:<sup>19</sup> there is no longer any government and there is instead a complete power vacuum. This applies in any event in Somalia and perhaps also in recent phases of the history of the Democratic Republic of Congo, Liberia and Sierra Leone.

For a proper understanding it is useful to examine what a failing state is not. Some states may be described as ‘ethically bad’<sup>20</sup> when assessed by the intentions of their government and the quality of its performance. A totalitarian regime terrorises and oppresses its people in order to maintain control. There are two categories of states of concern: criminal/predatory states and rogue states. In criminal/predatory states, the organs of the state are used by the (small) ruling class for self-enrichment at the expense of the general

» cont. note 16 from p. 8.

LICUS Task Force of the World Bank uses a definition that combines statistical and substantive elements. The Task Force focuses in particular on countries with an ineffective policy: ‘For analytic purposes, the Task Force has designated states whose per-capita incomes fall below the IDA operational cut-off (GNI of \$875 in 2001) and which combine poor policy performance or low service delivery capacity with a lack of responsiveness to their citizens, as LICUS. ...The result is a snapshot of about 30 states...The Bank’s concern is how to address a complex syndrome, not a set of specific countries...’ Idem, p. 3.

17 G. Myrdal, *The Challenge of World Poverty*, New York, Pantheon Books, 1970, chapter 7. R. van der Veen, *Afrika, van de koude oorlog naar de 21e eeuw* (What went wrong with Africa? A contemporary history), KIT Amsterdam 2004, p. 142: ‘African states are often characterised as having a ‘weak’ hold on their societies. This is most meaningfully translated as ‘ineffective’, rather than, for instance, ‘mild’. As little as the state was able to achieve, it was definitely not gentle, but remained as authoritarian as it had always been.’

18 William Reno, *Warlord Politics and African States*, Lynne Rienner, Boulder/London, 1998, p. 3.

19 See also R.I. Rotberg, ‘Failed States in a World of Terror’, in *Foreign Affairs*, Vol. 81, No. 4, July/August 2002, Council on Foreign Affairs, New York, 2002, p. 133 and R.I. Rotberg, ‘The New Nature of Nation-State Failure’, in *The Washington Quarterly*, Vol. 25, No. 3, Summer 2002, p. 90; I. William Zartman (ed.), *Collapsed States. The disintegration and restoration of legitimate authority*, Boulder/London, Lynne Rienner, 1995.

20 Compare the definition given in connection with a failed states project of the CIA. According to this definition, failed states are states where ‘democracy is overthrown; a civil war occurs; a change of government with extensive violence occurs; genocide occurs’. See Gurr, T.R., *Minorities at Risk. A Global View of Ethnopolitical Conflicts*, U.S. Institute of Peace, Washington, 1993.

population.<sup>21</sup> This need not be a failing state, but such an attitude may presage the failure of the state. In rogue states, by contrast, those in power deliberately adopt a policy that also infringes the rights of other states and the citizens of third countries.<sup>22</sup> Rogue states too will not generally be failing states. In a constitutional democracy the state is bound by the rule of law.<sup>23</sup> A state that is not a constitutional democracy need not be a failing state.

### **I.5 Choosing a definition**

The description in the request for advice can be taken as the starting point when choosing a definition. This includes elements of the Montevideo criteria. However, three aspects of this definition require some modification: namely the geographic scope of the authority, unwillingness to provide services and the creation of conditions for the delivery of services by third parties.

Clearly, the situation within a state may differ from region to region. The definition of a failed state need not necessarily be limited to cases in which there is a total absence of government authority. It may also include states where government authority is still exercised over parts of the territory or even throughout the territory (and where there are therefore also state organs), but where the power of the state to provide protection and other essential services falls below a given minimum. The first criterion in the request for advice is therefore modified by the rider that government authority is limited geographically.

On closer examination, the element of 'effective government' (in the formal approach) does not differ all that much from the element of 'delivery of essential public services to citizens' (in the functional approach to the duties of the state). Such difference as there is would seem to lie in the fact that the non-delivery of essential services may also be due to *unwillingness*. If the delivery or non-delivery of services in itself is a criterion, unwillingness to comply with the duties of the state also comes, in principle, within the concept of a failing state (as in the description in the request for advice). In this situation the government does have control over its territory (and this would not constitute failure under the Montevideo criteria). Unwillingness to comply with the duties of the state is an essentially different problem which requires a specific approach. In the present context it is better to focus from the outset on cases of states that are unable to exercise control and not on states that are able to do so but choose not to for reprehensible reasons of

21 Van der Veen uses the expression 'stationary bandits' to describe the role of some African presidents. R. van der Veen, *What went wrong with Africa?*, KIT Amsterdam 2004, pp. 169 and 192. Richard Joseph talks of 'prebendalism', mentioned in C. Allen, *Warfare, endemic violence & state collapse in Africa*, *Review of African Political Economy* No. 81, p. 377. Allen even talks of 'spoils' (*idem*, p. 367 ff.). 'Failed states prey on their own citizens', submits R.I. Rotberg in 'The new nature of state failure', *The Washington Quarterly*, Vol. 25, No. 3, Summer 2002.

22 The National Security Strategy of the United States (September 2002, p. 14) attributes certain properties to rogue states, the most important of which are as follows: '[They] brutalize their own people and squander their natural resources for the personal gain of the rulers; [and they] display no regard for international law, threaten neighbours, and callously violate international treaties to which they are party'. This therefore covers both criminal/predatory states and rogue states.

23 For a recent consideration of the meaning of this term, see 'The future of the national constitutional state', Report of the Advisory Council on Government Policy, No. 63, The Hague, 2002.

their own.<sup>24</sup> The Advisory Council has therefore decided not to adopt the element of 'unwillingness' in the government's definition.<sup>25</sup> However, it is worth noting that a state that is unwilling to deliver services may in due course become unable to do so.

The third criterion in the request for advice refers only to the delivery of services by the state itself. However, explicit allowance should be made for the possibility that a state may arrange for services to be delivered by third parties.

While recognising that no two situations are the same this report adopts the following definition of failing states, based on the definition in the request for advice:

*A failing state is a state which:*

- *is unable to control its territory or large parts of its territory and guarantee the security of its citizens, because it has lost its monopoly on the use of force;*
- *is no longer able to uphold its internal legal order;*
- *is no longer able to deliver public services to its population or create the conditions for such delivery.*

The three elements are not so much cumulative as different aspects of the same problem. The de facto loss of the monopoly on the use of force is the most fundamental characteristic of a failing state. The two other elements are subsidiary effects.<sup>26</sup>

24 Ayoob too opposes the view that state failure may result from both an inability and an unwillingness to deliver services; he applies the narrow definition. M. Ayoob, 'State-Making, State-Breaking and State Failure: Explaining the Roots of 'Third World' Insecurity', in L. van de Goor, K. Rupesinghe and P. Sciarone, *Between Development and Destruction – An Enquiry into Causes of Conflict in Post-Colonial States*, The Hague, 1996, pp. 80-81.

25 The definition given by the UK Foreign Secretary Jack Straw in the speech referred to in the request for advice differs on this particular point from the variant as ultimately formulated by the Dutch ministers. He limits his definition to states which are 'unable to deliver public goods to their population'. The advisory report therefore endorses the version chosen by the UK Foreign Secretary.

26 The term failed states was used by the AIV as long ago as 1998. Advisory report No. 2, *Conventional arms control: urgent need, limited opportunities*, The Hague, April 1998, p. 14, refers to failed states as states characterised by 'violent disintegration'.

## II International law issues

This chapter deals with three international law issues that are raised in point 4 of the request for advice, namely representation, state responsibility and non-state actors as possible perpetrators of human rights violations.

### II.1 Application of international law where it is uncertain who are the lawful representatives of the state

The last part of the question at point 4 is ‘... how should international law be applied in situations in which it is no longer clear who are the lawful representatives of the failing state?’ This is in fact two separate questions about the application of international law and the representation of the state, but the emphasis seems to be on the latter.

The general criterion is that as long as there is a government or some form of central government authority in a failing state it continues to represent the state. In practice, other states continue to do business with the sitting government. It may also be possible to do business with the *de facto* authorities in areas where the central government no longer has control.<sup>27</sup> Whether states do business is done with parties other than the central government is in principle a matter to be decided by each state concerned. However, they should not forget that they may possibly be held responsible for their actions later.

#### ***Representation of the state in bilateral relations***

A distinction can be made here between the following forms of representation: (i) political and diplomatic representation; (ii) representation of the state in legal proceedings before a foreign court; (iii) representation of the state before an international court; (iv) conclusion of bilateral treaty obligations; and (v) the legal effects of juridical and other acts performed in the exercise of public authority.

International law does not impose any limits on the maintenance of political and diplomatic relations by states with parties in a failing state. Relations may therefore be maintained with the ‘old’ rulers (i.e. the ‘legitimate’ government) and/or with the new rulers who have – or are trying to obtain – control over parts of the territory. In some countries the practice of recognising governments is a factor here. Some time ago the Netherlands ceased recognising governments and now recognises only states. This allows a certain flexibility since the Netherlands can, where necessary, enter into a dialogue with one or more parties of its choosing. It can therefore deal in a pragmatic way with the various political factions that exercise jurisdiction over parts of the territory.<sup>28</sup> Those in authority, who are often warlords, can be approached in their *de facto* centres of power with proposals for consultation.

However, there are limits under international law to the provision of assistance to parties in a failing state. States may not help to undermine a legitimate government through the provision of support to rebels, nor may they assist the legitimate government (or other

27 This could involve requests for permission to provide humanitarian aid or applications for diplomatic clearance for military flights.

28 An example is the conclusion of an arrangement with Somaliland for the return of asylum seekers.

parties) in carrying out activities in breach of obligations under international law. In the former case the legitimate government can hold the intervening state responsible and in the latter case the assisting state can itself be held responsible or jointly responsible for the violation.<sup>29</sup>

The question of who are the lawful representatives of a failing state becomes relevant above all when one of the parties in that state claims certain rights of the state, for example access to cash deposits abroad or control of assets abroad (for example embassy buildings), or claims state immunity or immunities derived from state immunity (such as immunity of the head of state, the prime minister or the foreign minister). Such matters are usually determined by the national courts of the state where the claim is made. In the Netherlands the courts have a large degree of independence in this connection; in other countries, the answer to this question is sometimes dependent on the recognition of the plaintiff as a legitimate representative of the government.

If a conflict results in an international dispute and the plaintiff applies as representative of the failing state to an international court or arbitral tribunal, it is up to the forum concerned to decide whether this party is the legitimate representative.

If one of the parties in a failing state has entered into bilateral treaty obligations with another state (and is accordingly recognised as the legitimate representative by that state), the validity of the treaty will depend on whether, at the moment of entering into the obligations, the party concerned could reasonably have been regarded as the representative of the state. This issue will arise only if the validity of the treaty is disputed by a new, legitimate government after restoration or partial restoration of central government authority.

The problem of the lawful representation of a failing state can also influence the question of what legal effect should be given abroad to juridical and other acts performed in the exercise of public authority by the party claiming to have government authority. This applies for example to the effect of court judgments (in so far as the court system is still functioning) in the failing state and the issuing of official documents. Here too, it will usually be the national courts of the state where such a question arises that have to decide whether the party concerned does represent the failing state.<sup>30</sup>

### ***Representation of the state in multilateral relations***

Where a state is failing, it continues to exist as a subject of law. The doctrine of recognition of governments can also be relevant to representation in connection with multilateral relations. Where there are competing governments, acceptance of credentials plays an important role in relation to representation at diplomatic conferences and conferences of parties and in international organisations and organs of such. If a party is accepted as a representative, it can enter into binding commitments on behalf of the state. There have been various occasions when two different governments have claimed to be the sole legitimate representative of a member state of the United Nations.<sup>31</sup> Examples are China

29 See also section 2 on the liability of parties who intervene in a failing state.

30 In 1995 the Administrative Law Division of the Council of State held that there was no longer a government in Somalia. RV 1995, No. 4 (6 November 1995).

31 H.G. Schermers and N.M. Blokker, *International Institutional Law*, Leiden, Martinus Nijhoff, 4th edition, 2003, pp. 199-205.

(1949-1971), Congo (1960), Yemen (1962), Cambodia (1972-1983 and 1997), Afghanistan (1997-2001) and the Dominican Republic (1965).<sup>32</sup> If a credentials committee does not accept the credentials of either party, no delegation of the country concerned may take part in the meeting. It is generally recognised that the UN General Assembly is the appropriate body to decide on delicate issues of credentials. Sometimes specialised agencies such as the IMF or WHO may also have to deal with this issue.

Sometimes it is necessary to decide specifically who can represent a state in entering into international commitments binding on the state as a whole, either in a multilateral convention with other states or a convention with an international organisation. If a party claiming to represent the failing state has been accepted at a diplomatic conference through the mechanism of acceptance of credentials, it will be able to bind the state. Since the rules applicable in that state to the approval of conventions must naturally be followed before the convention can be ratified, this may pose a problem.<sup>33</sup>

## **II.2 State responsibility**

### ***General***

State responsibility is of only limited importance in the context of failing states, as will become apparent in the remainder of this advisory report. The emphasis should be on prevention, restoration and reconciliation.

The international law on state responsibility is largely codified in the 'Articles on responsibility of States for internationally wrongful acts' of the International Law Commission (ILC Articles).<sup>34</sup> The ILC Articles are not drafted for failing states and therefore take no account of their special problems or the situation in which they find themselves. In legal practice, international law on state responsibility plays only a very limited role in relation to failing states. This law deals principally with cases where two or more states hold each other responsible bilaterally. There are no documented examples of cases in which one or more states have held a failing state responsible under international law for a violation of international law.

The ILC Articles do not relate to actions of international organisations against states, failing or otherwise. However, some parts of the law on responsibility may also influence the practice of international organisations and, conversely, the practice of international organisations may be relevant to the interpretation of the law on responsibility. Nor has the ILC included provisions on the criminal responsibility of states.<sup>35</sup> This form of state responsibility has hardly been developed in international law, but could in special circumstances

33 In the past provisions have been included in some conventions to facilitate their implementation or accession to them, for example in the Lomé/Cotonou Conventions between the European Union and the ACP countries. A special hook-on article was included in Lomé IV bis (1995) (Article 364(a)) to facilitate the possible later accession of Somalia. Owing to the domestic situation, this failing state had been unable to sign Lomé IV bis.

34 The text was prepared by the ILC and later submitted to the UN General Assembly, which took note of the document and attached it as an annexe to the text of a resolution: A/RES/56/83, 12 December 2001.

35 During the negotiations on the ILC Articles, a draft article on international crimes of states was dropped. See: J. Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge, CUP, 2002, pp. 16-20.

be of some importance in relation to failing states owing to the punitive elements of any sanction imposed and the possible preventive effect this may have. This point will not be examined in more detail here, since the commission of what is in principle classified as an international crime of a state constitutes in practice a violation of an 'ordinary' obligation under international law and can be dealt with as such.

### ***The principle of state responsibility of failing states***

Although the responsibility of failing states is of little importance in practice, it should be stated at the outset that as long as a failing state has functioning organs, even if they have control over only part of the territory, the state's failure cannot in itself prevent it from being held liable for breaches of international law.

A state is responsible if two conditions are fulfilled. First, there should be a breach of an obligation under international law.<sup>36</sup> It was stated in chapter 1 that, in principle, a failing state retains its legal personality. The internationally protected rights and international obligations of such a state therefore remain intact.

Second, the breach should be attributable to the state. As long as the person or entity causing the breach of the obligation is an organ of the failing state, the actions can, in principle, be attributed to the failing state.<sup>37</sup>

Nonetheless, international law on state responsibility includes a few grounds which may preclude the responsibility of a failing state in specific cases. These are the grounds which relate to the determination of a breach of an obligation or to the attribution and the circumstances precluding wrongfulness.

### ***Breach of an obligation***

First, the circumstances in which a failing state finds itself may mean that obligations of the state are not or no longer applicable throughout the territory of the state. For example, the question can be raised whether, in the case of a failing state, there is 'jurisdiction' in terms of the human rights conventions in the part of the territory over which the state exercises no control. If that is not the case, the state will not be obliged to ensure application of the conventions in that area and cannot therefore be held liable for violations of them.

Second, the fact of the failure may limit the ability of the state to comply with an obligation (for example, the obligation to afford protection to its citizens). The law on state responsibility contains no provisions on this subject. However, if the primary norm itself differentiates according to the nature or scope of the obligation or law, or makes a direct reference to the implementation capacity of a state, the fact of failure may mean that the state is unable to observe certain obligations. Examples are due diligence obligations and programme obligations.<sup>38</sup>

36 Articles 2(b) and 12 of the ILC Articles.

37 In this chapter the term 'actions' includes 'omissions'.

38 See for example article 4 of the UN Convention on the Rights of the Child: 'States Parties shall undertake such measures to the maximum extent of their available resources and where needed, within the framework of international cooperation.'

Third, the question arises of whether the failure of a state can suspend the operation of treaty obligations. The Vienna Convention on the Law of Treaties does not directly provide for suspension of treaty obligations in such emergency situations. In very exceptional circumstances, however, it is possible to invoke Article 62 of the Convention, which deals with the occurrence of a fundamental change of circumstances affecting the implementation of a treaty (*rebus sic stantibus*). In theory, a situation in which a state has lost control of all or part of its territory could constitute a fundamental change of circumstances. However, there is no established case law on this point since the provision has never been applied by an international tribunal.<sup>39</sup>

### **Attribution**

As regards the question of whether there can be said to be attribution within the meaning of Article 29 (a) and Articles 4-11 of the ILC Articles in the case of a failing state, much will depend on the nature of the government control exercised by or in the failing state. There are three possible scenarios. In the *first scenario*, central government authority has remained intact, but the power of the state to discharge certain responsibilities has been seriously affected. In such a scenario there will still be organs of government whose actions can be attributed to the state. In the *second scenario*, central government authority no longer functions properly, but there are still state organs that do function. An example would be local government authorities, high-ranking officials or persons with responsibility for the external relations of a state. Again, the actions of these state organs can be attributed to the state.<sup>40</sup> In the *third and most extreme scenario* there can no longer be said to be government authority or functioning state organs. Such a situation has not yet occurred, even in the case of Somalia. If such a situation were to occur, the actions of individuals might possibly not be attributable to the state within the meaning of Articles 4, 5 and 8 of the ILC Articles, even if these individuals were previously representing organs of a state.

It should be noted that state responsibility under Article 4 of the ILC Articles can be assumed to exist in cases where an armed opposition group functions as general *de facto* government and thus constitutes a state organ in its own right.<sup>41</sup>

If there is no government authority or functioning state organs in either all or part of the territory, actions in these areas can result in state responsibility only in two situations. *First* of all, Article 9 of the ILC Articles provides that in the absence of official authorities persons may exercise governmental authority and that their conduct may be attributed to the state. This attribution depends on the extent of the governmental authority which is exercised. There are no known instances of failing states in which this possibility has been applied. *Second*, under Article 10 of the ILC Articles the conduct of an insurrectional movement which becomes the new government of a state or establishes a new state may

39 See A. Aust, *Modern Treaty Law and Practice*, Cambridge, CUP, 2000, pp. 240-242.

40 See J. Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge, CUP, 2002, p. 95 with regard to Article 4 ILC Articles: 'Thus the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind of classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level.'

41 Article 4: *Conduct of organs of a State*. See also J. Crawford, *idem*, p. 115.

be considered an act of that state. The main importance of this provision would appear to be that, in situations where there is a civil war and a complete absence of effective governmental authority, principles of state responsibility remain applicable and can be applied, in any event in part, as soon as one of the movements concerned restores central and effective governmental authority.

#### ***Circumstances precluding wrongfulness***

If, despite the circumstances of a failing state, the conditions of violation and attribution have been fulfilled, the question arises of whether the state can invoke circumstances that preclude wrongfulness. In this case *force majeure*<sup>42</sup> would appear to be the only circumstance precluding wrongfulness. To what extent the relevant conditions have been fulfilled must be decided from case to case. In any event, the invocation of a circumstance precluding wrongfulness is without prejudice to the question of compensation for any material loss caused by the act in question.<sup>43</sup>

#### ***Application of state responsibility in practice***

Whether and, if so, how responsibility can be invoked will depend to a large extent on the circumstances of the failing state.

A distinction can be made in this connection between situations in which responsibility is alleged and given effect in the period in which the state can be regarded as a failing state, and situations in which responsibility is alleged for actions during the period prior to the restoration of central and effective authority.

If responsibility is alleged and given effect in the period in which the state is failing, no special problems will occur in the case of a central authority that functions but has only limited effectiveness. The government can then be held responsible. In the absence of a central authority, however, application of the principle is more problematic, always assuming that the state in question can be held responsible. For example, there is the question of to whom the notice of claim should be addressed.<sup>44</sup> In this situation, it would not seem possible either legally or practically to hold the state responsible.

If, once the situation has returned to normal, responsibility for conduct during the preceding period is alleged and proved, invoking and applying state responsibility does not give rise to any particular difficulty.

#### ***Reparation***

The circumstances of a failing state can limit the scope for reparation. Depending on the circumstances and the nature of the particular obligation, this may apply in particular to cessation of the violation, restitution and compensation.

#### ***Responsibility of third parties who intervene in a failing state***

Are states or international organisations which unilaterally intervene in a failing state or temporarily assume certain responsibilities of the state (with or without consent)

42 'The occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.' Article 23.1 ILC Articles.

43 Article 27(b) ILC Articles.

44 *Ibid.* Article 43.

responsible for breaches of international law in the failing state?<sup>45</sup>

As far as the responsibility of the UN is concerned in the context of peacekeeping and peace enforcement, an advisory report has already been drawn up by the CAVV.<sup>46</sup> If the organisation exercises powers of command and control, this results, in principle, in responsibility. The same can apply by analogy to states. The following questions may then arise. To what extent are conventions, such as human rights conventions, applicable outside the territory of the parties to the convention? Can force majeure be invoked? To what extent is there still state responsibility on the part of the failing state? Article 23 of the ILC Articles does not allow the defence of *force majeure* to be invoked if the situation of *force majeure* is due to the conduct of the state invoking it or if the state has taken the risk that this situation will occur. Where this applies this is a matter to which countries should give serious consideration before intervening in a failing state.

If a third state is involved in causing or aiding the process of failure it too may be responsible. Moreover, if there is a serious breach by a state of an obligation arising under a peremptory norm of general international law, Articles 40 and 41 of the ILC Articles suggest that states are obliged to cooperate in bringing the breach to an end. They also bar states from recognising as lawful a situation created by such a serious breach and from rendering aid or assistance in maintaining such a situation.<sup>47</sup>

### **II.3 Can non-state actors commit human rights violations or international crimes?**

Against whom can enforcement action be taken by an organ of an international organisation when rules are breached in a failing state? In the event of breaches of important rules, such as those relating to human rights, or a threat to international peace and security, all parties are in practice called to account by the political bodies of the UN. However, as this practice essentially involves reacting to *de facto* situations and is not really intended to articulate a legal status, it does not have any great value as a precedent.

#### **Individuals**

Individuals – including warlords and members of armed opposition groups – have obligations in the field of international humanitarian law and international criminal law. These obligations are based on conventions and on customary international law. Individuals who act in breach of these obligations are guilty of international crimes. The main codification of these crimes (genocide, crimes against humanity and war crimes) is in Articles 6-8 of the Statute of the International Criminal Court. Essentially these are acts which, if committed by states, would amount to serious violations of human rights.

In certain circumstances, individuals can be tried by international tribunals and the International Criminal Court. Under Article 28 of the Statute of the International Criminal Court, leaders of armed opposition groups may not only be criminally responsible for their own acts but also, in principle, responsible under international criminal law for acts of their subordinates.

45 See chapters V and VI for examples of such intervention.

46 CAVV advisory report No. 13 'Responsibility for wrongful acts during UN peace operations', 14 February 2002.

47 See also J. Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge, CUP, 2002, pp. 242-253.

The International Criminal Court can play a role only in cases where national states are unwilling or unable to investigate and try crimes committed in their country. In the present system, trial of crimes, including international crimes, is still primarily a function of national states.

### ***Armed opposition groups***

An armed opposition group does not refer to a general *de facto* government, which is an organ of state that stands on its own and replaces the former machinery of government. As noted in section 2, actions of such a government are regarded as actions of the state. Obligations resulting from human rights conventions are therefore applicable to *de facto*-governments.

Armed opposition groups are groups which conduct military action against a sitting government in order to capture power or bring about secession. Such groups have clear obligations under international humanitarian law, in particular under the common Article 3 of the Geneva Conventions and Protocol II to these Conventions regarding non-international armed conflicts.<sup>48</sup> There must, however, be some degree of organisation and participation in military operations. Armed opposition groups cannot be a party to the Geneva Conventions. There are sufficient indications that international organs consider that the common Article 3 and the overlapping articles of Protocol II are applicable as customary law to armed opposition groups.<sup>49</sup>

A clear distinction should be made between armed opposition groups and their individual members. These are different subjects of international law. In practice, international tribunals much prefer to prosecute individual members and/or the leaders of armed opposition groups rather than the group as a collective entity. One of the reasons for this is the relative elusiveness of armed opposition groups and the consequent difficulty of applying international rules effectively.

In principle, armed opposition groups do not have any formal legal obligations under human rights conventions. Such conventions are, after all, binding only on states. However, armed opposition groups may voluntarily undertake to observe human rights conventions or human rights standards.<sup>50</sup> This does not affect the treaty obligations of the state. There is little consistency in the practice of international organisations on the question of whether armed opposition groups are bound by human rights standards. The Inter-American Court of Human Rights and the rapporteurs of the UN Commission on Human Rights have

48 Article 3 reads: 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply as a minimum the following provisions.' This involves obligations concerning the humane treatment of prisoners and the protection of citizens at the time of armed conflict.

49 L. Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, 2003, pp. 19-26. See also the 'Decision on challenge to jurisdiction: Lomé Accord Amnesty' of the Sierra Leone Tribunal, Case No. SCSL-2004-15-AR72(E) and Case No. SCSL-2004-16-AR72(E) of 13 March 2004, section 47.

50 The government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional (FLMN) concluded an Agreement on Human Rights on 26 July 1990 in which the FLMN gave an undertaking, including an undertaking to the UN, to respect certain human rights criteria. These criteria were based on conventions to which El Salvador was a party.

formally adopted the position that it is not desirable to apply human rights standards to the actions of armed opposition groups. By contrast, the UN Human Rights Commission itself and the Security Council have repeatedly adopted resolutions based on the explicit assumption that fundamental human rights standards do apply to armed opposition groups.<sup>51</sup> The latter position is also supported by the Turku Declaration on Minimum Humanitarian Standards, which is applicable to 'all persons, groups and authorities'.<sup>52</sup> This legal development is in keeping with the view of the drafters of the Turku Declaration that there is a gap in the legal protection. However, this approach is not supported by the AIV and the CAVV. They take the view that the common Article 3 of the Geneva Conventions and Protocol II to these Conventions are sufficient in terms of substantive law, although they do not cover all situations in failing states. Any situations that cannot be covered in this way can be resolved by holding individuals criminally responsible.

### **Multinational corporations**

Multinational corporations can be a support for the state, but may also be or become involved in the process of failure. By paying royalties they can also help to sustain corrupt regimes and armed opposition groups. Multinational corporations do not yet have any explicit obligations under international humanitarian law or international criminal law.<sup>53</sup>

As stated previously, the traditional view is that human rights apply only between the state and the individual, in other words in a vertical relationship. However, it is increasingly accepted that human rights may also apply in a horizontal relationship, for example between enterprises and individuals. This would mean that multinational corporations could be sued before a variety of national courts for wrongful acts (a human rights violation being stated in this connection as an element of wrongfulness). This does not mean that all human rights provisions are automatically applicable to multinational corporations. Instead, each separate substantive treaty provision must be analysed to assess its suitability. However, it should be noted that many human rights are in the nature of a peremptory norm (*jus cogens*) from which no derogation is permitted, even by entities other than the state. Examples are the freedom of trade unions and the prohibition of torture.<sup>54</sup>

Another question concerns the possibility of holding multinational corporations directly accountable before international monitoring organs for performance of their obligations.

51 See for example Security Council Resolution 1193 (1998), paragraph 14, on the situation in Afghanistan; resolution 1998/70, paragraphs 2 and 5, and resolution 1997/47, paragraph 3, of the UN Commission on Human Rights.

52 Proclaimed by a group of experts in Turku (Finland) in 1990. See 89 *AJIL* (1995), pp. 218-223.

53 An attempt to give the International Criminal Court jurisdiction to try legal persons as well as natural persons failed in 1998 during the final negotiations on the Rome Statute. However, the inclusion of this provision was opposed not as a matter of principle but above all for practical reasons. See A. Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons', in M. Kamminga and S. Zarifi (eds.), *Liability of Multinational Corporations under International Law*, The Hague, Kluwer Law International, 2000, p. 191.

54 W. van Genugten and N. Jägers, 'Juridische gebondenheid van ondernemingen aan de rechten van de mens' (Human rights legally binding on corporations), in C. Flinterman and W. van Genugten (eds.), *Niet-statelijke actoren en de rechten van de mens; gevestigde waarden, nieuwe wegen*, The Hague, Boom Juridische Uitgevers, 2003, pp. 41-42.

This poses a problem.<sup>55</sup> There are various legally non-binding international codes which are intended to regulate the conduct of multinational corporations, particularly in order to deal with the adverse social and human rights consequences of their activities.<sup>56</sup> Linked to these codes are some fairly basic monitoring procedures, which are of only limited value.<sup>57</sup> A more recent initiative designed to establish international minimum standards is a draft entitled 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', which is presently under consideration by the UN Human Rights Commission.<sup>58</sup> The Netherlands should play an active role in this field.

### ***Criminal organisations***

Human rights conventions, international humanitarian law and international criminal law do not, in principle, lay down standards of conduct for criminal organisations. However, the existence of failing states sometimes leads to attempts to extend the application of international criminal law and general human rights norms to such organisations. Owing to the fight against terrorism, there is a perceptible trend towards the application of international criminal law to criminal organisations. The EU member states have always opposed the mention of human rights violations by criminal organisations in resolutions.<sup>59</sup> The AIV and the CAVV share this view and consider that criminal law measures to tackle criminal organisations in the context of the fight against terrorism can be strengthened.<sup>60</sup> Clearly, the actions of criminal organisations can have a negative impact on the possibilities to enjoy human rights. However, international law has not yet evolved to the point where these organisations can be held responsible for human rights violations. This does not detract from the criminal responsibility of individuals.

55 Given the lack of means for directly enforcing the human rights obligations of multinational corporations in the international field, there is an important role here for the national courts. An example of this is the American Alien Tort Claims Act, under which corporations can be held liable under civil law for violation abroad of provisions of international human rights conventions. Some civil suits are still being conducted under this Act in the United States. A federal court has held in at least one case that a corporation can be held liable for a breach of the ban on forced labour (*Doe v. Unocal*, Nos 00-56603, 00-57197, 00-56628, 00-57195, 2002 WL 31063976 (9th Cir. Sep. 18, 2002)).

56 Examples are the OECD 1976 Guidelines for Multinationals and the ILO's 1977 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

57 See also W. van Genugten and N. Jägers, 'Juridische gebondenheid van ondernemingen aan de rechten van de mens', in C. Flinterman and W. van Genugten (eds.), *Niet-statelijke actoren en de rechten van de mens; gevestigde waarden, nieuwe wegen*, The Hague, Boom Juridische Uitgevers, 2003, pp. 44-45.

58 See Resolution 2003/16 of 13 August 2003 of the UN Sub-Commission on the Promotion and Protection of Human Rights.

59 UN doc. A/58/PV.77, p. 19.

60 See the UN Convention against Transnational Organised Crime, concluded in Palermo on 12 December 2000, 40 *International Legal Materials* (2001) and at [www.odccp.org/palermo](http://www.odccp.org/palermo).

## II.4 Conclusions and recommendations

### ***Application of international law in cases where it is not clear who are the lawful representatives of a state***

In practice, the 'old' government continues to be treated as its representative for a long time. This is in keeping with the principles of international law underlying international relations. It does however mean that this government, which is often responsible in part for the failure of the state, is left in a special position for a long time. The practice concerning the acceptance of credentials does not always work satisfactorily at multilateral level and a good many differences can also occur at bilateral level. Some states limit their relations with failing states to an absolute minimum and do not enter into any new obligations while other states continue their relations on the same footing.

### ***State responsibility***

Where the circumstances are such that there is no effective means of exercising governmental authority, there can be no grounds for state responsibility and no way of applying the principle. It follows that application of international law to failing states is not always possible, effective or desirable in practice. It is also evident in practice that state responsibility is invoked *ex post facto* since there is normally more scope for the application of international law when a failing state is in the restoration stage, either in the same form or otherwise. In principle, third states and international organisations which intervene in a failing state can also be held responsible. This element could affect the decision on whether or not to take action in a failing state.

### ***Can non-state actors commit human rights violations and/or international crimes?***

Individuals and armed opposition groups have obligations under international humanitarian law and/or international criminal law. The AIV/CAVV consider that it would not be desirable to extend the specific obligations in the field of human rights, including the application of enforcement mechanisms under human rights conventions, to individuals and armed opposition groups. The position of other non-state actors under international law is generally less clear. Holding multinational corporations directly accountable for their human rights obligations under international law and before international monitoring organs still gives rise to problems. A positive approach could be taken to the development of international obligations or minimum norms for these actors. Measures under international criminal law against criminal organisations can be strengthened in the context of the fight against terrorism.

### **III State failure: causes, effects and the international community**

This chapter first identifies the factors that can cause state failure. It then goes on to examine the adverse effects of such failure. Finally, it considers whether the international community should concern itself with the problem of state failure and, if so, why and on what grounds.<sup>61</sup>

#### **III.1 Causes of state failure**

State failure is due to a combination of factors that vary from case to case. There is a chain of events and decisions by those involved. In such cases the factors that hinder the functioning of the state are more powerful than those that facilitate it. It is hardly ever possible to determine a single cause of failure. At most, a combination of factors can be identified.

The three elements of the definition at the end of chapter I are used to identify what factors are conducive to state failure. For the sake of brevity, these elements are referred to below as *security*, *legitimacy* and *services*.

*Security* is seriously compromised in a failing state. Other actors have undermined the state's monopoly on the use of force. This happens when opportunity, means and motive coincide. The authority of the state is inadequate as a result of defective physical and organisational infrastructure and the insufficient deployment of resources. There is room for competing powers. Non-state actors have the means to take advantage of this situation. There is a pool of discontented people to whom work, food, a home, status or even power and wealth can be offered. There are revenues from conflict trade (about which more will be said below) or foreign aid. And arms are available.

In a failing state the legal system has ceased to be effective, partly due to a lack of *legitimacy*. A large proportion of the population can no longer identify with the system and do not feel protected. This may be because the structure is no longer in keeping with local traditions. But it may also be because the legal system is corrupt and is abused by a ruling clique. Often, insufficient resources are deployed to carry out this function of the state effectively. The lack of legitimacy may be so marked that it causes the failure of a state even where there is relative prosperity, as in Yugoslavia.

The delivery of *public services* becomes impossible in a failing state because the security situation is such that the infrastructure cannot be maintained. In addition, the resources are lacking. The state does not have the personnel, expertise and funds to deliver public services. This is due to low government revenue and insufficient education and training.

These three elements tend to reinforce one another in a downward spiral: less security results in fewer services; less impartial and less effective administration of justice provides an additional reason for others to take over the provision of security and services; and

<sup>61</sup> The term 'international community' does not necessarily refer to an organised community with a common goal, but describes the collection of actors outside the failing state whose public, political and military actions may affect the state in question.

fewer services mean that there is less reason to be loyal to the government.

The underlying factors can be divided into three categories: the given circumstances, friction between institutions of different origin, and abuse of power. These factors combine together in different ways in each specific case.

### ***The given circumstances***

The given circumstances include factors that make it difficult for the state to function. They do not result directly in failure, but combined with other factors they increase the pressure on the state to the point where the system reaches breaking point. An example is poor economic development. Failing states are usually but not always countries that are backward in terms of development. Poor soil conditions, an unfavourable climate and mounting population pressure make it more difficult for a state to fulfil its functions. Its position in the international economy and economic dependence on industrialised countries and donors are a factor. Moreover, its participation in world trade is limited, one-sided and sometimes of little benefit to it.<sup>62</sup> These elements exert pressure on the economy and hence on the state functions that must be financed from the economy.

The state has insufficient means to assure itself of the loyalty of local leaders. Moreover, social problems tend to accumulate. A lack of education and training is hardly conducive to a productive or innovative economy. Epidemics such as HIV/AIDS and a non-functioning health care system reduce the potential of society. Large groups of unemployed young people are a recruitment pool for insurgents.<sup>63</sup> All these factors increase the vulnerability of the state.

In the battle for economic advantage, government power is a desirable commodity (and often the only accessible source of income). Once power has been captured, it is used for the benefit of the group concerned. In this process, legal certainty and hence the functioning of the economy are undermined still further. The presence of valuable commodities often proves to be not so much an opportunity for development as a factor that fans the struggle for control of them. 'Conflict trade' is the trade in non-military goods by which local war economies are financed.<sup>64</sup> It provides the local population with the possibility of earning a livelihood and enables non-state actors to obtain military power, which can then be used to gain control of a territory and thus undermine the state. Well-known examples of countries where this has occurred are Sierra Leone and the Democratic Republic of Congo.

Another given circumstance is the end of the Cold War. Africa, for example, has become less important since it is no longer the scene of a struggle for influence between the

62 *World Development Report 1997, The State in a Changing World*, Washington, World Bank, p. 11 ff. describes how effective states stand to benefit more from globalisation.

63 The World Bank points to the great influence of high unemployment. See Paul Collier et al., *Breaking the Conflict Trap: Civil War and Development Policy*, Washington, World Bank, 2003. In an article in the *International Herald Tribune* of 21 May 2003 Paul Collier submits that it is about 'the economy'.

64 See: Neil Cooper: *State Collapse as Business: The Role of Conflict Trade and the Emerging Control Agenda*, in: *Development and Change*, Vol. 33, No. 5, November 2002, p. 936. See also the AIV's advisory report No. 17, *De Worsteling van Afrika; veiligheid, stabiliteit en ontwikkeling* (Africa's struggle: security, stability and development), The Hague, 2001, p. 25 ff.

superpowers.<sup>65</sup> Strategic reasons for providing bilateral aid have ceased to exist.

Increasing cross-border contacts are making states more susceptible to adverse developments in neighbouring states such as instability, armed conflicts, natural disasters and economic setbacks. Where these developments compromise security and result in trade barriers, refugee flows, availability of small arms and movements of combatants, the consequent pressure may cause the failure of neighbouring states too.

***Friction between institutions of differing origin***

The expression 'friction between institutions of differing origin' is used here to mean the failure of the modern Western state to take root (both as a concept and as a collection of institutions) in a non-Western cultural environment. The structures of a specific state that fails are not usually those based on local tradition but those based on the (imported) West European state model. The transplantation of this model has in many cases proved fairly unsuccessful. The conditions that promoted state formation in Europe are lacking in many young states. In Europe, a protracted conflict often led to the development of structures that gave the emerging middle class more opportunities for equality, universally applicable rules, impartial administration of justice, accountability in government and influence over decision-making.<sup>66</sup> This process created national states with a national identity, language, culture and communications. By contrast, in post-colonial states the elites have displayed a lack of commitment to the institutions imported from the West. Moreover, not only the institutions but also the geographical units themselves were often defined and handed over by outsiders. National identity has thus been imposed from above on an ethnically heterogeneous population. Fragmentation may be accompanied by oppression of minorities. This is fertile soil for conflict. Although these factors have been singled out, it does not follow that ethnic homogeneity is essential if a state is to function effectively.

A state system can function only if there is some form of collective identification with the state. Such identification can form the basis of social discipline, deferred expectations and confidence in the results of the system. In order to survive, a state needs stability and a functioning bureaucracy. However, these elements are at odds with the reality of the situation in, say, sub-Saharan Africa.<sup>67</sup> There, patron-client relationships have continued to dominate, even after a period of colonisation.<sup>68</sup> These relationships are often accepted both by the elite and by the masses. In present-day Africa there are circumstances that militate against evolution towards an effective state: the elites have a vested interest in the informal structures and will continue to use the state to buy off their

65 See also William Reno, *Warlord Politics and African States*, Boulder, Colorado, 1998, p. 22.

66 As regards the importance of investing in the administration of justice, see Adam Smith, *An Inquiry into the nature and the causes of the wealth of nations*, New York, Collier, 1909, p. 471 ff.

67 M. van Creveld, *The Rise and Decline of the State*, Cambridge, CUP, 1999, p. 327; see also P. Chabal & J.P. Daloz, *Africa works, disorder as political instrument*, Oxford/Indianapolis, 1999.

68 See P. Chabal & J.P. Daloz, *idem* and R. van der Veen, *What went wrong with Africa?*, Amsterdam, KIT, 2004.

clients. This is done on the basis of short-term interests. To reward clients they have to remove resources from the economy.<sup>69</sup>

Mention should also be made in this connection of the helplessness of the general population. Owing to their low level of education and the absence of specific democratic traditions, they have no way of becoming more resilient. To some extent, the lack of effective and legitimate decision-making mechanisms is a corollary of this. Often there is no balance of power. There are no courts that can give authoritative rulings in an independent manner. The army has power and a lot of money. More generally, transparency and accountability are lacking.<sup>70</sup> Accordingly, the public debate is limited, and all the more so because of the absence of independent media.

### **Internal and external abuse of power**

Circumstances of the kind described above make the state vulnerable, and the friction between indigenous and imported institutions increases this vulnerability. To explain specific instances of state failure it is not sufficient to point to the objective existence of indigenous institutions with their patron-client structures; rather, emphasis should be placed on the abuse of these structures, in other words internal abuse. Patrons make the subjective decision to exploit the structures for their own benefit and to subordinate the state to their own interests. This breeds corruption. Cultural patterns are not a law of nature: 'state failure is man made'.<sup>71</sup> In a number of states this has taken the form of unbridled self-enrichment (the former Zaire is the most obvious example). The opportunity for self-enrichment can be explained by the fact that the rulers have no need – at least in the short term – of the support of the mass of the population. If individuals have nothing to offer in the form of labour or commodities, there is no need for the leaders to establish a pact with them.<sup>72</sup>

It is precisely the rulers who govern in a dubious manner who are most likely to invoke concepts of international law such as sovereignty and non-interference in internal affairs. This is why national rulers can hold out for so long against rebellion and early intervention from outside.<sup>73</sup>

69 '[T]he present economic crisis in Africa reinforces, rather than undermines, the patrimonial political order', P. Chabal and J.P. Daloz, *idem*, p. 44. Formerly such an order could be found in other parts of the world too. Only Europe evolved in a very different direction. Chabal and Daloz qualify this picture. *Idem*, pp. 60-61. At issue is not a return to the old relationships or the imposition of an alien system such as the West European model of the state (as contended by Basil Davidson in *The Black Man's Burden. Africa and the Curse of the Nation-State*, New York, 1992), but about an imperfect version of the traditional patronage relationship in which the elite is now given the possibility of relinquishing the old responsibility based on ethnicity. This increases the scope for abuse of power. To describe this as a 'return to traditional values' is a common misconception. When external pressure mounts, the 'system' proves unable to withstand crisis. This then produces an 'ethnic reflex' in which people's loyalties narrow to their own group.

70 World Bank, *World Development Report 1997, The State in a Changing World*, Washington, p. 162.

71 R.I. Rotberg, 'The New Nature of Nation-State Failure', *The Washington Quarterly*, Vol. 25 No. 3, 2002, p. 93.

72 William Reno, *Warlord Politics and African States*, 1998, Boulder/London, Lynne Rienner, pp. 39-40.

73 See Christopher Clapham, 'The Challenge to the State in a Globalized World', in *Development and Change*, Vol. 33 No. 5, November 2002, p. 778.

Another but often related type of abuse of power involves the actions of third parties: in other words external abuse of power. Foreign actors may have an interest in allowing a situation of state failure to continue. They may stand to gain from conflict trade or the arms trade. For example, the Liberian leader Charles Taylor played a role in the failure of Sierra Leone. And there are governments too that benefit from ensuring that other states remain weak.<sup>74</sup>

### ***Combinations of factors***

The three factors identified above (the given circumstances, friction between institutions and the abuse of power) cannot be treated as isolated phenomena. For example, the conflicts in eastern Congo are fuelled by such factors as the great geographical distance between government and groups of citizens, the absence of good governance, ethnic fragmentation, inadequate social and political identification with the state, the battle for control of natural resources, and regional political considerations. All these factors and dimensions must be taken into account when acting to rescue failing states.

### ***Decline of the state as a global trend***

Any description of the causes of state failure should consider whether the states in question have not been the victim of a global trend involving the decline of the state. There appears to be a pendulum movement. In the 1970s and 1980s the state was seen mainly as an impediment to development and was characterised as 'big government'. In the 1990s the state was the subject of a positive reappraisal. It came to be viewed less as part of the problem and more as part of a possible solution. Nonetheless, there are also general trends that undermine the power of the state as a political unit or encourage the rolling back of the state. Trends in evidence in modern industrialised countries are decentralisation, privatisation and the transfer of powers to supra-state institutions. Such phenomena are not usually seen in states that are failing.

However, other trends may play a role. Clearly, the theory of legal sovereignty does not guarantee that a state has complete freedom in practice to make rules and create a framework for the actions of its citizens. Factors that are gaining in importance are the world economy and technology. They create or limit the opportunities for individuals in ways that are beyond the control of state legislation. The state's scope for action is also limited because it needs to seek access to world trade and capital flows in order to achieve growth. And this imposes many demands on its policies. In view of the trends towards a comprehensive economic structure the function of the state is increasingly to coordinate local and global processes and structures.<sup>75</sup> Weak states in particular, which have little capacity to soften the impact of external influences, are therefore undermined still further. Individual international companies and networks also attempt to influence the policy choices of the state. In a parallel development, growing emphasis is being placed within the international community on the realisation of human rights as a subject of international concern. From a fairly objective viewpoint, this development too is putting the concept of unlimited sovereignty in perspective.

The limited opportunity for a state to pursue an independent course is a relevant factor in the light of global processes, but cannot be immediately described as a cause of state failure. It comes into the category of 'given circumstances'.

<sup>74</sup> For the legal aspects, see chapter II.2.

<sup>75</sup> Clapham, *idem*, p. 775.

The three categories of factors described above form the basis for the instruments which are available to the international community and its individual members and are described in chapters IV, V and VI.

### **III.2 Stages in the failure process**

The request for advice refers to means of preventing state failure or rescuing failing states. This covers a wide variety of situations. The presence of a large number of the factors described above constitutes a risk, even in cases where there are still no signs of actual state failure in practice. This risk exists where there are factors that can increase vulnerability, such as population pressure, unemployment and the presence of valuable and easily tradeable commodities and large numbers of small arms. The risk is heightened where they combine with the other two factors, first the friction between imported institutions of state and the (traditional) cultural environment and, second, abuse of power.

Can the policy instruments be linked to a stage in the failure of a state? Below is an impression of three overlapping stages of a process that leads to state failure.<sup>76</sup>

#### *Stage 1: widening divisions*

As a result of abuse of public office, the initial signs of vulnerability multiply and power and income become increasingly monopolised. Measurable indicators of the political situation are the unchanging and one-sided composition of the government and civil service (by ethnic, social and geographical criteria) and a political role for the military (including involvement in the budgetary appropriations). State property is misappropriated and transferred to trusted supporters of the regime, natural resources are exploited and sold without state involvement, and the state no longer gives priority to the delivery of public services. Ethnic conflicts are encouraged. In some cases, such as the former Yugoslavia, ethnic conflicts may play a more prominent role than the concentration of income. As a rule, the transfer of power is blocked either by the presence of a 'president for life' or by electoral manipulation.

#### *Stage 2: decline*

The government no longer has control of the entire territory of the state. The ruling elite grabs all state revenues and the political situation becomes violent.

#### *State 3: failure*

The position deteriorates to the point described in chapter I. The state has lost its monopoly on the use of force and warlords govern parts of the country. The functions of state are no longer exercised by state organs, and the state and its citizens try to survive independently of one another. People resort to an informal economy, production – particularly agricultural production – declines sharply, and a secondary, criminal economy starts to flourish. And there are large flows of migrants.

#### *Stage 4: rescue*

In the past state failure has often proved to be an irreversible process. The state does not revive of itself. Outside help is needed. Often, armed intervention is necessary to create the conditions for recovery, namely peace and order followed by a framework of law.

<sup>76</sup> Part of this description is taken from the analysis in C. Allen: 'Warfare, Endemic Violence and State Collapse in Africa', in *Review of African Political Economy*, No. 81, pp. 367-384.

### **III.3 Effects of state failure**

In an interdependent world the failure of states affects not only their own citizens but also people elsewhere. As indicated in the request for advice, failing states pose a threat at three levels:

*At national level:* a failing state does not offer its citizens security. There is unavoidable suffering and erosion of human dignity. Human rights are no longer guaranteed and impunity is widespread. Usually there is internal armed conflict that provides the backdrop for violations of the humanitarian rules of war. Many people are forced to leave their homes and flee en masse to another region or country. Society fragments, social capital is lost and mutual distrust increases. The very weak political system and the absence of legal certainty greatly increase the risks and costs of doing business. Economic malaise, social disorder and poverty increase. More specifically, state failure can destroy years of development efforts on the part of the international donor community.

*At regional level:* various cross-border effects mean that conflicts in failing states can jeopardise regional stability and security. The vacuum of authority in a failing state can attract countless criminal elements from the region. Often the region's trade and economy are adversely affected. Small arms are easily obtainable. Large groups of refugees initially seek refuge nearby.

*At global level:* failing states sometimes pose a threat to security beyond their own region. They are often a safe haven for criminal organisations and a base from which terrorist networks can theoretically exert influence worldwide. In addition, the implosion of the nation-state and mounting local conflicts create international flows of refugees. Drugs are often produced in areas (states or parts of states) which are beyond the direct control of effective governments. Smuggling routes are then established from these areas to support the illegal drug trade. Efforts are no longer made at local level to combat people smuggling. Moreover, the failing states are blank spaces on the map where no contribution can be made to worldwide sustainable development.

### **III.4 On what grounds does the international community concern itself with failing states?**

The question here is what objective basis exists for action to prevent state failure or resuscitate failing states. The grounds for intervention will differ according to whether the intervention comes from a nearby state, the region, more remote states, international organisations or the international community as a whole.

Roughly speaking, there are four categories of grounds for international involvement with failing states, analogous to the spheres created by the effects of a state failure: (i) the interests of the local population (solidarity); (ii) the interests of the region; (iii) the interests of the community of states in ensuring the proper functioning of the world order (peace and the world legal order); (iv) specific interests of individual states (security, migration pressure, natural resources and communications).

#### ***Solidarity with the local population***

Involvement and solidarity with oppressed people do not emerge only when the state fails, but are part of a continuum of prevention, aid and reconstruction.

In a number of cases, solidarity with the populations concerned is laid down in rules. For

example, an entire structure has been built within the framework of the UN to give form and substance to this solidarity. First of all, there are the UN Charter and the human rights conventions. The UN Charter stipulates that all members are expected to take joint and separate action to achieve various purposes, including a higher standard of living, full employment, and conditions of economic and social progress and development, solutions to international health problems and observance of all human rights (Articles 55-56). It is noteworthy that this was evidently considered important for the creation of conditions of stability and peace as long ago as 1945. In addition to this general duty to cooperate in international economic and social progress, the human rights conventions also create obligations to show international solidarity and take international action.

For example, Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'. This provision provides a basis for constructing grounds for international action.

Under these articles of the Charter, the Universal Declaration of Human Rights and the human rights conventions, states have an obligation to endeavour to prevent human rights violations. The Final Declaration of the UN Conference on Human Rights in Vienna in 1993 explicitly reaffirmed that the promotion and protection of all human rights is a legitimate concern of the international community.

Over the years UN bodies have issued a large number of declarations calling on the members of the international community to take more specific action. Mention should be made in particular of the Millennium Development Goals in 2000, which were intended to shape the joint efforts to fight poverty in the world. In agreeing these goals the international community confirmed its involvement in the situation in individual countries. If failing states constitute an obstacle in this connection (and they do), it is up to the international community to change the situation in such a way that the goals can be achieved.

The fate of the local population is indeed given priority in specific cases. The Security Council resolution on Guinea-Bissau is an example of humanitarian action. The resolution referred to 'the crisis facing Guinea-Bissau and the serious humanitarian situation affecting the civil population in Guinea-Bissau'.<sup>77</sup> A similar ground is applied in the context of peace operations, for example most recently in the resolution on Liberia, which contains the following passages: '*stressing* the urgent need for substantial humanitarian aid to the Liberian population', and '*expressing* also its deep concern at the limited access of humanitarian workers to populations in need, including refugees and internally displaced persons'.<sup>78</sup>

In the context of ACP-EU development cooperation, addressing the human rights situation in a country which is party to the Cotonou Agreement is emphatically legitimated.<sup>79</sup>

77 S/RES/1216, 21 December 1998.

78 S/RES/1509, 19 September 2003.

79 See the Cotonou Agreement, ACP-EU Partnership Agreement, 2000, Articles 9 and 96.

The provision of assistance at the request of a powerless government can be a form of solidarity. A recent example shows that this ground is generally accepted. The Australian government offered military and police assistance to the Solomon Islands in the summer of 2003 to restore law and order, and honoured its promise as soon as an official request was received from the fairly powerless government and parliament of that country.<sup>80</sup>

There are moves to put more emphasis on this ground. The International Commission on Intervention and State Sovereignty advocates recognition of a responsibility on the part of not only the sovereign state itself but also the international community to assist the local population that is affected. The Commission summarises this as 'the responsibility to protect'.<sup>81</sup> If solidarity is a ground for action, its counterpart is responsibility. Another ground within this category could be the efforts of a country to ensure the sustainability of its own development activities (and those of other donors) in a particular state.

### **Concern about the regional situation**

A ground for involvement may be the adverse effects of state failure on the situation in the region, for example on security, the economy or the humanitarian situation.

The importance of maintaining regional peace and security comes within the category of international peace and security which is explicitly recorded as a ground for involvement in the UN context. Article 24 (1) of the UN Charter confers on the Security Council primary responsibility for the maintenance of international peace and security. In discharging these duties the Security Council is required to act 'in accordance with the Purposes and Principles of the United Nations' (Article 24 (2)). The term 'international peace and security' extends in practice to a situation in a single state which has repercussions on other states. Article 52 of the Charter requests the members of regional arrangements to achieve pacific settlement of 'local disputes'. Such obligations are mainly reactive, whereas the obligations under Articles 55 and 56 are proactive.<sup>82</sup>

The Security Council has used the regional effects of a situation as a ground for international involvement in, for example, Somalia, Rwanda, Liberia and Haiti.<sup>83</sup> In the case of Haiti the Security Council noted that it was '*concerned* that the persistence of this situation contributes to a climate of fear of persecution and economic dislocation which could increase the number of Haitians seeking refuge in neighbouring Member States and *convinced* that a reversal of this situation is needed to prevent its negative repercussions on

80 The possible legal complications of an invitation are dealt with in chapter V.

81 See, inter alia, the core principles of humanitarian intervention in *The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty Ottawa*, 2001, Synopsis pp. XI-XIII.

82 See *idem The Responsibility to Protect, Supplementary Volume*, pp. 129 ff. for a general consideration of the nature of the international commitments.

83 Somalia (S/RES/733, 23 January 1992), ICTY/ICTR (S/RES/1329, 30 November 2000), Liberia (S/RES/1497, 1 August 2003). The analysis of the Australian interests at stake in the Solomon Islands takes a similar line. See *Our Failing Neighbour, Australia and the Future of Solomon Islands*, ASPI policy report, Barton ACT 2003.

84 S/RES/841, 16 June 1993.

the region'.<sup>85</sup> Such a reference is even more logical where there is intervention by means of a peace operation. In the case of Liberia the Security Council was 'deeply concerned over... its destabilizing effect on the region'.

### **World order**

The concern about international peace and security as described above also applies at global level. The international community has a responsibility to create and maintain a peaceful world order, in which states can discharge their obligations to their populations.<sup>86</sup> It follows that the toleration or even support of terrorism may be a ground for international intervention. The Security Council sanctions against Libya, Afghanistan and Sudan are examples of this.<sup>87</sup> Proscription of drug trafficking is also in the interests of the world as a whole. The Security Council referred in a resolution on Afghanistan to 'the vital importance of combating the cultivation and trafficking of illicit drugs'.<sup>88</sup>

### **Specific interests of other states**

The failure of a state may not only jeopardise the proper operation of the world order but also compromise the specific (national) interests of other states. Sometimes the ensuing chaos forms a breeding ground for activities that cause suffering thousands of miles away.<sup>89</sup> In the case of peace and security the limits of the collective interest are vague. This is a matter that is constantly debated in the Security Council. This is not to say that these interests are always legitimate grounds for involvement, but they may be important for the state in question. Access to natural resources or to a major port, avoidance of migration pressure, action to prevent rebels from regrouping far from their country and the curbing of smuggling can be important grounds for involvement.

A special example of such an interest is where the intervening state provides assistance to its own nationals in a third country. It is a well-established principle of international law that a state has the right to assist its own nationals in the event of emergencies abroad. The Entebbe operation mounted by Israel in Uganda during the Idi Amin regime is an example frequently cited in this context.

### **Conclusion**

Ultimately, involvement based on solidarity and involvement based on preservation of the world order come very close to self-interest: it is in any event a matter of enlightened

85 S/RES/1497, 1 August 2003.

86 R.H. Jackson denies this in 'Surrogate sovereignty? Great Power Responsibility and 'Failed States', Institute of International Relations, University of British Columbia, Working Paper No. 25, 1998. R.I. Rotberg, believes that a country serves its own interests by granting assistance 'in the interest of world peace'. 'The New Nature of Nation-State Failure', in *The Washington Quarterly*, Vol. 25, No. 3, 2002, p. 95.

87 In S/RES/1390, 16 January 2002, the Security Council notes as follows: 'Condemning the Taliban for allowing Afghanistan to be used as a base for terrorist training and activities, including the export of terrorism by the Al-Qaida network and other terrorist groups as well as for using foreign mercenaries in hostile actions in the territory of Afghanistan'. This is followed by the adoption of a series of measures.

88 S/RES/1401, 28 March 2002.

89 Speech of the British Foreign Secretary Jack Straw, 'Failed and Failing States', <http://www.eri.bham.ac.uk/seminars/jstraw060902.pdf>.

self-interest to prevent suffering and chaos in the world. This is necessary, after all, in order to help promote economic interests and successfully fight terrorism and crime. These considerations apply in particular to internationally oriented countries such as the Netherlands. The legitimacy of the grounds is of special relevance in connection with the question of whether there can be military intervention. This question is addressed in chapter V.

### **III.5 The purpose: support for the state**

What should be the purpose of international involvement?

In view of the theories on the decline of the state as it loses ground to supranational organisations or as a result of regionalism and globalisation, it has to be asked whether the state still has a central role to play.<sup>90</sup>

#### ***The value of the modern state***

The development of modern industrialised states in the 19th century and the emergence of new economies in eastern Asia has shown that an effective state is essential for development. This means a state which maintains the internal legal order and delivers public services, while at the same time facilitating, encouraging and supplementing – and serving as a catalyst for – the activities of individuals and businesses.<sup>91</sup> It would be inappropriate in this context to go into an unduly detailed (or perhaps unduly Western) account of the configuration of an effective state.

As a form of governance the state is still a worthwhile administrative mechanism. Policy is concentrated at the level of a geographic unit, thereby allowing a balance to be struck between different interests. It is at this level too where choices are legitimated. It is more probable that individuals can obtain protection from a sovereign entity at state level than from the international community or from other non-state actors.<sup>92</sup>

An informal form of governance is not an alternative to the modern Western state. Nor can a remote and determinist approach, based on the notion that in, say, sub-Saharan Africa a form of traditional conduct based on patron-client systems is both legitimate and advantageous, be accepted. Here 'legitimate' is used to mean 'accepted by the majority of the population' and 'advantageous' to mean 'a short-term gain for the person concerned'.<sup>93</sup> These mechanisms have major disadvantages.

90 See also the end of section 1 of this chapter.

91 'Certainly, state-dominated development has failed. But so has stateless development...Without an effective state, sustainable development, both economic and social, is impossible.' The International Bank for Reconstruction and Development/The World Bank: *World Development Report 1997, The State in a changing world*, Washington, Oxford, 1997, foreword.

92 Cf. O. Schachter, 'The Decline of the Nation-State and its Implications for International Law', 36 *Columbia Journal of Transnational Law* (1997), p. 23 and R. Mullerson, *Ordering Anarchy, International Law in International Society*, The Hague, 2000, p. 97.

93 P. Chabal & J.P. Daloz, *Africa works, disorder as political instrument*, Oxford/Indianapolis, 1999, p. 147. The authors refer to 'self-evidently historically determined Western concepts such as development, corruption, civil society or even the state' (p. 144).

The first disadvantage concerns the distribution or redistribution of goods and privileges. This cannot occur without discrimination since the distribution is linked to loyalties and services in return. In any event, it cannot take place in accordance with universally applicable rules and is not transparent. Uncertainty and dissatisfaction about the distribution of scarce goods is conducive to violence. A role in the opposition is worthless, only power pays.<sup>94</sup> So there is no attractive alternative. The second disadvantage is economic. Without legal certainty, investment shrinks. Ultimately, there is economic stagnation, which means that there is less to distribute and no prospect of growth and prosperity.<sup>95</sup> The third disadvantage is the failure to link up with the world economy. In order to benefit from globalisation a country must fulfil a number of strict requirements.<sup>96</sup> A society based on clientism and arbitrariness does not fulfil them. Indeed, if anything these three disadvantages reinforce one another.

Although the modern state is desirable as a form of governance, can it be achieved in the context of the traditions described above? In Western Europe personal ties (which also had features of patron-client relationships) have largely been replaced by job-related ties. Factors promoting a similar change exist in states whose structure is still based to a large extent on personal ties. Examples are the rising educational level of the population, the growing availability of information, the possibility of acquiring prosperity and influence through talent rather than status, and the fact that the economy is becoming increasingly embedded in the world economy are factors that will exert increasing pressure on a static view of a still fairly traditional society.

#### ***The state as an instrument of the community of states***

The state is also an instrument of the community of states and renders account for the performance of its international obligations. To do so, a state must have effective decision-making and enforcement mechanisms. The network of states must cover the entire world. In the international community the state is an important factor and bears a share of the responsibility.<sup>97</sup>

#### ***Not an end in itself but a means to an end***

The state should not be an end in itself, rather a means to an end. The propositions outlined in this section lead to the conclusion that the (modern) state does indeed have a

94 See also R. van der Veen, *What went wrong with Africa?*, Amsterdam, KIT, 2004, p. 103 and the sources cited by him.

95 'As Weber already noted long ago, the minimal conditions of predictability and judicial protection, which are building blocks of a modern economy, are incompatible with a patrimonial system.' P. Chabal & J.P. Daloz, *Africa works, disorder as political instrument*, Oxford/Indianapolis, 1999, p. 131.

96 Described by T. Friedman as a 'golden straitjacket', *Lexus or the Olive Tree*, New York, 2000.

97 'In the present state of relations under international law, sovereignty is increasingly an organisational principle designed to achieve certain standards and values agreed internationally, as represented among other things in human rights and the objectives in the area of peace and security, sustainable development and the creation of prosperity within and between States.' N.J. Schrijver, 'Begrensdde soevereiniteit-350 jaar na de Vrede van Münster', inaugural lecture, Amsterdam 1998, p. 41, also published in *Transaktie-tijdschrift over de wetenschap van oorlog en vrede*, Vol. 27 (1998), pp. 141-178. See also the 1993 government policy paper entitled *Een wereld in geschil* (A world in dispute) of J. Pronk, Minister for Development Cooperation, p. 12.

positive and central role to play. It is therefore desirable to promote a structure based on states.

The word failure itself seems to suggest that something must be done to help a state.<sup>98</sup> This is partly because the failure gives rise to so many problems, varying from the suffering of the population to adverse repercussions for the international community. At the same time, however, the perception is influenced by the criterion that the existing states are the norm.

The UN Decolonisation Declaration of 1960 recognised a right to self-determination for all dependent peoples. After the exercise of this right the new states would then be sovereign within their existing borders. The same applied to weak states, which had no right of existence in empirical terms and whose sovereignty had no internal basis of support.<sup>99</sup> As international relations increased, the young states sought confirmation of their sovereignty everywhere. Political views and international legal rules replaced the organic emergence and disappearance of political units at the level of the state.

When viewed in perspective in this way, it can be seen that the best course of action is not necessarily to maintain a unit consisting of territory, population and government at all costs. The real criterion should be more objective: would the situation be better if third parties involved themselves? The restoration of a state is not in itself of particular merit. The criterion must be the quality of the state for its citizens, the region and the international community. The point is not having a state but having an effective state.

The state need not necessarily be the same unit which previously failed. In any event, state formation and state succession are both possible under international law through peaceful decision-making. It is important for the old (or possibly new) entity to be viable in the long term and ultimately for the situation of the population to improve, and in general for negative effects at local, regional and world level to be eliminated.<sup>100</sup>

The aim in the short term must be to take steps to achieve that goal and remove the most disruptive effects, among other things through the provision of humanitarian aid. Chapter IV deals with the instruments for achieving these goals.

98 '[P]reventing states from failing and resuscitating those that fail is one of the strategic imperatives of our times', Speech of the British Foreign Secretary Jack Straw, 'Failed and Failing States', <http://www.eri.bham.ac.uk/seminars/jstraw060902.pdf>, p. 1.

99 'From that time empirical statehood as a valid ground for determining the right to sovereignty went into eclipse and juridical statehood became the basic criterion', according to R.H. Jackson in *Surrogate sovereignty? Great Power Responsibility and 'Failed States'*, Institute of International Relations, University of British Columbia, Working Paper No. 25, 1998, p. 9. H.H. Holm refers in this connection to the absence of positive sovereignty (i.e. sovereignty which is legitimated by obtaining the approval of the country's own population) and the continuation of negative sovereignty (i.e. sovereignty based on international recognition). 'The responsibility that will not go away; weak states in the international system', paper at *Conference on Failed states and International security: causes, prospects and consequences* at Purdue University, February 25-27 1998, p. 4. See also G. Kreijen, *State Failure, Sovereignty and Effectiveness, Legal Lessons from the Decolonization of Sub-Saharan Africa*, Leiden, Brill, 2004.

100 The government policy document *Een wereld in geschil* (A world in dispute) refers to international recognition of newly created states, provided that there are guarantees for the observance of human rights, in particular those of newly established minorities, 1993, p. 16.

## IV Means of combating state failure

### IV.1 State failure and policy priorities: a new paradigm

Chapter III noted that state failure has far-reaching consequences and that the international community and individual states have various grounds for taking action to prevent failure. The instruments which they use for this purpose must take account of the underlying factors described in that chapter. It will become apparent in this chapter that many of these instruments are already employed by the international community and individual states or groups of states. Preventing state failure or rescuing failing states is not usually the explicit objective, but policy aimed at reducing poverty and defending human rights may have this effect. Only in recent years has the need for explicit application of this objective, which cuts across country policy and theme policy, become more apparent. The recent Africa Memorandum by the Minister for Development Cooperation is a clear example of this.<sup>101</sup>

This policy document is not an isolated example. Since the early 1990s much has been written about failing states by researchers. Politicians too have devoted more and more attention to the phenomenon. For example, it is dealt with in the recent European Security Strategy<sup>102</sup> and in the speech of the British Foreign Secretary Jack Straw, which is quoted prominently in the request for advice. The anti-terror strategy of the United States deals with the problem.<sup>103</sup> And an Australian policy document uses the term 'paradigm' to show that this is not a separate aspect of policy but the key to policy as a whole.<sup>104</sup>

101 'Sterke mensen, zwakke staten' (Strong people, weak states), letter from the Minister for Development Cooperation to the House of Representatives of 3 October 2003, Parliamentary Paper No. 29.237, No. 1. This sets out a wide range of policy options relevant to state failure. See also the general policy document of the Minister for Development Cooperation of 3 October 2003 entitled *Aan elkaar verplicht* (Mutual interests, mutual responsibilities), which deals at length with stability as a precondition for development (Parliamentary Paper No. 29.234). The Dutch policy document on conflict prevention (2001) shed light on many aspects that are of importance here (early warning, coordination and a regional approach). The policy document on post-conflict reconstruction is mainly relevant to the last stage of failure. The conviction that attention should be focused precisely on the policy frameworks within which development processes take place has been widely accepted for some time. It was, for example, the theme of the policy document *'Een wereld in geschil'* (A world in dispute) of a former Minister for Development Cooperation, J. Pronk, Ministry of Foreign Affairs, The Hague, 1993.

102 *A secure Europe in a better world, European Security Strategy*, adopted by the European Council on 12 December 2003, p. 8. The EU bases its policy on its own security interests and advocates in this document the involvement of the EU in every national or regional problem which may impact this security. The EU wishes to use trade and development policies for this purpose.

103 *National Strategy for Combating Terrorism*, February 2003, US Government, p. 23: 'We will ensure that efforts designed to identify and diminish conditions contributing to state weakness and failure are a central U.S. foreign policy goal'.

104 *Our Failing Neighbour, Australia and the Future of Solomon Islands*, ASPI policy report, Barton ACT 2003, p. 28.

### ***Integrated policy: assessing the different interests and coordinating the response***

Preventing state failure and rescuing failed states requires international cooperation and consistent policy-making. The internal coordination, consistency and coherence of Dutch policy are dealt with first below. The drafting of integrated policy means first that all interests must be assessed and, second, that the instruments must be coordinated. One of the interests to be taken into account is the damage or potential damage to the interests of the Netherlands, for example in the areas of migration, crime, drugs, disease prevention and terrorism.<sup>105</sup> Account can also be taken of the interests of Dutch nationals, including immigrants who still feel a sense of involvement with their country of origin. The decision on the designation of target countries should be made by the government – after interdepartmental coordination – on the basis of an analysis of the gravity of the situation (for the local population, the region and the world), the interests of the Netherlands and the availability of effective Dutch policy instruments. Since such a decision would take explicit account of the domestic effects, its outcome might be different from a decision made solely on the basis of criteria relevant to foreign policy and development. Once this internal assessment has been made the decision must be communicated at European and global level and taken into account when the Netherlands helps to determine the priorities for geopolitical decisions and joins coalitions, allocates development aid and takes part in peace operations.

At this stage the drafting of an integrated policy involves combining and coordinating the instruments. In this connection, the purpose of the political approach, the economic and financial approach, the development cooperation approach and the security approach should be to prevent or rectify the consequences of state failure as described in chapter III. This also applies to the deployment of the resources available in these fields. The attitude should be that various government bodies deploy funds jointly for objectives established together. Expenditure in this field will to a large extent be development-related. Part of the funds can therefore be charged against the development cooperation budget (and also qualify as ODA funds).<sup>106</sup>

### ***Policy reversal in the allocation of funds for development cooperation***

Given the effects, the problem of failing states should set the tone for policy. In relation to efforts to achieve development objectives, a fresh look should be taken at the criteria applied by the Netherlands (and other donors) in deciding on the disbursement of development aid. It has long been recognised, both in the literature and in policy on development cooperation, that the aid efforts are relatively small in relation to other factors that influence development. Fluctuating commodity prices, financial crises, natural disasters and conflicts too can quickly destroy what has been built up by dint of great effort over many years. Conversely, an upturn in trade holds out much better prospects than the provision of development aid. State failure too should be examined from this perspective. The failure

105 The Advisory Council on Government Policy (WRR) lists specific Dutch interests (in the area of immigration and crime) namely as a factor in the choice of countries for development cooperation. *Ontwikkelingsbeleid en goed bestuur* (Development policy and good governance), WRR report No. 58, The Hague, 2001, p. 69.

106 In reaction to the specific questions of the government, the Advisory Council on International Affairs examined in advisory report No. 34, *Nederland en Crisisbeheersing, drie actuele aspecten* (The Netherlands and crisis management: three topical aspects) The Hague, March 2004, what position should be taken by the Netherlands on the 'odability' of expenditure in the context of an integrated security policy. See also the letters on this subject sent by the Minister for Development Cooperation to the House of Representatives of 12 March 2004 and 13 April 2004.

of a state can cause immense damage to people's lives and prospects and destroy everything that generations have worked for (including the contributions of donors). Is it not more important to prevent such damage than to help inherently stable states to make small advances? It should be noted here that development funds must be used for development purposes and that this must be reflected in the choice of aid recipients.

Is Dutch policy on the disbursement of development aid sufficiently aimed at preventing damage through state failure? Effectiveness, efficiency of disbursement and the requirements of good governance of the partner countries are important factors within this policy.

But in a country that is sliding towards failure, there are no guaranteed conditions for success. Government policy does not, by definition, fulfil the criteria of good governance. But this may not serve as an excuse for inaction. Indeed, the need to improve the situation is all the more urgent. Good governance is therefore not so much a condition that must be fulfilled for development cooperation as an object, indeed a priority, of development cooperation.<sup>107</sup>

It follows that funds for multilateral and bilateral development cooperation should be used not only to achieve the most striking results but also for purposes that hold out the prospect of averting future damage through state failure. Often this will be in states that have a poor record in terms of good governance or, more generally, do not offer favourable conditions for effective deployment of resources. This is not to say that the allocation criteria should be thrown overboard, merely that in certain cases they should be modified – and the aid relationship put on a different footing – in the light of a higher goal. The aim should be to prevent state failure and thus avert the damage that would otherwise be caused to the state and its population and also to third parties, including the Netherlands.

Take a country such as Nigeria. In recent decades there has been a real risk of state failure. If this had occurred, the damage would have been immense in terms of emergency relief, regional unrest, migration and crime. By contrast, a stable Nigeria has a positive impact on neighbouring countries and Africa as a whole.

All of this means that lack of progress in the area of good governance should not stand in the way of a policy designed to create the conditions for a stable state. Current Dutch policy defines the concept of good governance in common sense terms rather than in terms of conditionality. The Minister for Development Cooperation describes good governance (she often talks of 'better governance') as a practical prerequisite for sustainable poverty reduction. She does not regard it as an absolute criterion for partnership status. As she has stated, 'If partnerships are to be effective, countries must at least show willing to pursue good governance, and combine their good intentions with measures to bring about improvement.'<sup>108</sup> Although this is a more flexible approach than was adopted in the past, it still appears to exclude the possibility of providing aid in order to prevent a situation from deteriorating. The AIV has therefore formulated it rather differently: 'The choice of criteria [...] should be such that aid is only granted to countries where it can make a real

<sup>107</sup> See also *Ontwikkelingsbeleid en goed bestuur* (Development policy and good governance), Advisory Council on Government Policy No. 58, 2001, p. 58 ff.

<sup>108</sup> Policy document *Aan elkaar verplicht* (Mutual interests, mutual responsibilities), Parliamentary Paper No. 29.234, 3 October 2003, section 4.2.

contribution to the promotion of human rights.<sup>109</sup> This wording leaves scope for the deployment of aid to prevent deterioration in places where the government's commitment to improving governance is fairly superficial.

Recently, the opportunities for flexible use of aid in situations where the conditions are unfavourable have been significantly increased by the establishment of the Stability Fund. This makes it possible to finance existing and new activities in the field of conflict management.<sup>110</sup> The great advantage of the Stability Fund is that ODA and non-ODA funds can be used in countries that do not meet the good governance criteria. However, this should not mean that policy on failing states is confined to the Stability Fund (which is of limited scope), since large areas of the policy not covered by it can also be used to help prevent state failure or rescue failing states.

This approach is indeed common sense. Naturally, there must be the prospect of success in due course. Nor must corrupt governments be subsidised. If a government commits blatant violations of human rights, cooperation at government level is no longer possible. In that case, other ways must be sought of influencing the situation positively, in particular through local and international civil society organisations. In her policy document on Africa the Minister for Development Cooperation points out that other partners, such as non-governmental actors, must be sought in states that are in conflict and in failing states.<sup>111</sup> A similar conclusion is drawn by the European Commission in relation to what it terms 'difficult partnerships'. It calls for specific approaches that address the root causes of the problems, which are very often linked to governance, involving a range of measures tailored to the specific country context. It gives three reasons for choosing alternative approaches: (i) solidarity; (ii) the dangers of isolating a country; and (iii) aid effectiveness in the longer term. Examples of alternative approaches are humanitarian aid, support to activities carried out by civil society organisations and political initiatives.<sup>112</sup> The choice of specific instruments must therefore in each case take account of the possibilities. In addition, measures to prevent a deterioration in the situation form a legitimate part of the policy. This is in keeping with the paradigm that preventing state failure and the accompanying damage has a greater net effect than assisting further progress in stable states.

109 See AIV advisory report No. 30, *Een mensenrechtenbenadering van ontwikkelingssamenwerking* (A human rights based approach to development cooperation) The Hague, April 2003, conclusions p. 44.

110 See letter of the Minister for Development Cooperation of 3 October 2003, Parliamentary Paper No. 29.200, No. 10. The Stability Fund would allow expenditure of up to € 64.2 m in 2004, of which € 20 m would be freely disbursable (letter from the Minister to the House of Representatives of 12 March 2004). This consists largely of expenditure that previously came under other programmes. The establishment of the Fund is part of a trend. The United Kingdom has its (Sub-Saharan) 'Africa Pool' and 'Global Pool', and the EU is working to establish a 'Peace Facility'.

111 Policy document *Sterke mensen, zwakke staten* (Strong people, weak states) Parliamentary Paper No. 29.237, No. 1, 3 October 2003, section 6.2. Or, as the UN Committee on Economic, Social and Cultural Rights (CESCR) puts it in General Comment 8 on the effects of sanctions: ' [T]he inhabitants of a country do not forfeit their basic economic, social or cultural rights by virtue of any determination that their leaders have violated norms relating to international peace and security', UN Doc. E/C.12/1997/8.

112 See Communication from the Commission to the Council on Governance and Development, COM (2003) 615 final, of 20 October 2003, pp. 20 and 22-26.

### ***Three possible effects of policy***

Instruments that form part of the existing policy of third countries can affect the process of state failure in three ways. Such countries may improve the situation, exacerbate the situation or distance themselves from the state concerned.

Aid is often given with the best of intentions, for example in the form of project aid, but it may have the effect of fostering local rivalries as a result of the specific circumstances in the recipient country. In Somalia, for example, donors supported projects to promote arable farming, but unwittingly fuelled clan rivalries. The aid benefited certain clans and disadvantaged others, notably the cattle-owning clans, because the authorities arranged for the cattle to be driven off.<sup>113</sup> Another example is the aid given to Afghanistan for the improvement of education and bureaucracy in the 1970s. This undermined the old forms of social control and led to the emergence of new elites, who in some cases aligned themselves with the extreme Islamic and Marxist groups.<sup>114</sup> More generally, aid can also help to keep a government in the saddle. Preventing counterproductive effects requires a thorough knowledge of the local situation. It is necessary to identify any possible unintended effects of this kind in countries where there are various risk factors and to take them into account when deciding on action, in consultation with other donors.

Why do measures intended to improve the situation often not work? The answer is usually that the measures are not proportionate to the scale of the problem, for example, an arms embargo that is not enforced or a failure to follow through on declarations critical of corruption. Moreover, some countries and international corporations undermine the effectiveness of the measures taken by other countries, for instance because they have an interest in maintaining the status quo.

In some cases donors have turned their back on a country because there was too little prospect of achieving any result. Such an attitude will seldom have provided much incentive to improve the situation.

The basic principle should continue to be that the far-reaching consequences of state failure require and justify the taking of coordinated and vigorous measures by actors on the world stage. Owing to the finite nature of the available resources and, in many cases, the ultimate ineffectiveness of the measures, it will be necessary to be selective. Actors that have the means will have to engage in a continuous process of assessment to determine where they wish to deploy them. Consequently, countries can play a leading role in certain coalitions and focus on a failed or failing state and at the same time leave situations in other countries to other coalitions.

## **IV.2 The actors**

### ***Pooling***

Clearly, the fact that the Netherlands pursues a specific policy and makes concrete decisions is no guarantee against state failure. It is therefore essential to have international pooling (e.g. a common approach adopted by the EU, the OSCE, the UN or an ad hoc coalition of donors or other countries) or at least rigorous coordination. This applies in the

<sup>113</sup> *Humanitarian aid to Somalia*, report of the Operations Review Unit (IOV) on Somalia, The Hague 1994, p. 58.

<sup>114</sup> C. Cramer and J. Goodhand: 'Try again, fail again, fail better? War, the state and the 'post-conflict' challenge in Afghanistan', in *Development and Change*, Vol. 33, No. 5, November 2002, p. 894.

case of both positive measures (support) and negative measures (sanctions). The aim is to maximise the effectiveness of the chosen forum and the message it sends out. The choice is determined for example by whether the forum includes all the countries that can help efforts to prevent state failure; equally, efforts must be made to ensure that third states which contribute to the failure are bound by the decisions taken or can be held responsible on the basis of the decisions.

In recent years the foreign policy of the EU member states has increasingly become a subject of EU concern. The EU's security strategy emphasises that the capacity of the EU members must be pooled. This applies in particular to collective threat analysis, armed forces, funding, civil administration after an armed intervention, and diplomacy. This does not necessarily mean that the EU should always represent the member states in the forums established to coordinate the efforts of the international community and the donors to prevent state failure or rescue failed states (although this may be the case in the longer term). It does, however, mean that the EU should be closely involved in the policy by partners who form part of the forums and coalitions set up to help problem countries.

It concerns in particular the question of whether development cooperation with a particular country which is in danger of failing is still worthwhile and, if so, what form it should take. An assessment by a single donor, for example by reference to the good governance criterion, might easily lead to a decision to avoid (or discontinue) all involvement. In the case of states which are failing or may fail, strong donor coordination is essential in assessing the risks and expected effects of the deployment of resources and thereafter in ensuring, wherever possible in consultation with the government of the recipient country, that a balanced package of measures is compiled. Such an exercise goes further than the provision of funds. It is all about total policy and the most effective deployment of resources in the context of an integrated approach by all concerned.

### ***Regional actors***

Country situations should not generally be dealt with in isolation. It is widely accepted that it is preferable to tackle the problems in an entire region.

It is particularly important to involve countries in the region in the application of policy measures to the failing state. However, this does not mean that countries in the region are entitled to a veto on action by third parties. In the case of Zimbabwe, for example, action seems advisable in order to prevent failure of the state. The support of South Africa would obviously be desirable with a view to maximising the chances of success. The hesitant attitude of that country should not, however, lead to an easing of the political pressure on Zimbabwe. Action is rightly being taken simultaneously through the UN and through the British Commonwealth. In the past the international community has achieved success through temporary political intervention in countries such as Fiji and Gambia. Here political pressure was exerted through various channels (the Pacific states, the Commonwealth and, in the case of Fiji, the EU). It is advisable to create structures which result in regular contact and which are not used only when difficulties arise. The European Union's dialogues with third countries are a good example of this. This applies both to political dialogues based on bilateral agreements and to mechanisms based on the EU's multilateral agreements with the ACP countries.<sup>115</sup> However, care should be taken to

115 See COM(2003) 615 final, pp. 7-10, and K. Arts, 'Meeting the human rights commitment of the Cotonou Agreement: political dialogue requires investment', *The ACP-EU Courier*, No. 200, September 2003, pp. 21-23.

avoid a situation in which a party wishing to take action is hampered by the obligation to engage first in a time-consuming dialogue, which means that sanctions in particular have to be postponed for a long time.

Regional forums can make their own contribution to preventing state failure or rescuing failing states. They can establish standards, provide support, monitor and intervene. In the case of Africa the EU emphasises that any action is designed to support African measures for conflict prevention and peacekeeping through recent structures such as the African Union and the New Partnership for Africa's Development (NEPAD). The EU also wishes to provide support to pan-African human rights institutions and is devoting much attention to the fight against corruption.<sup>116</sup> Effective international monitoring mechanisms can be used to identify risks and retrograde developments. More generally, it would be a good thing if an OSCE-like mechanism were to be introduced in Asia and surrounding regions.<sup>117</sup> The fact that both the ASEAN Regional Forum and APEC are now developing their political dimension is a hopeful sign. Monitoring may lead to political action. Some organisations will act on their own authority. It is also possible for the UN to address a request to a regional organisation or to approve action by a regional organisation in advance, certainly in the case of armed intervention. The African Union has plans to establish rapid response brigades. In view of the reports on serious human rights violations committed by ECOMOG troops in Sierra Leone, the UN should in any event establish clear criteria before sanctioning action by third parties and should, in specific cases, draw up frameworks for intervention.

In many cases, however, the region itself is part of the problem. Often there are no regional economic and defence organisations able to offer failing states protection and provide them with a stable economic environment. A solution can sometimes be found if a stable region defines its borders more broadly. For example, the EU's positive policy measures for problem regions, such as the institution of the Stabilisation and Association process for the Western Balkans, fall into this category. In other cases, countries from outside the region which have an interest in ensuring stability will have to undertake to contribute to such structures.<sup>118</sup>

### ***Non-state actors***

The assistance of civil society organisations and other functioning actors is needed above all in the case of state failure. This is important in order not only to achieve results in the short term but also to encourage cooperation and the development of 'social capital' in the longer term. Civil society forms the backbone of a country and counterbalances institutions that function inadequately. The development of a vigorous civil society is important both to prevent state failure and to rescue a failing state.

116 European Commission: Communication to the Council, *Taking EU-Africa dialogue forward*, COM (2003) 316 final of 23 June 2003.

117 AIV advisory report No. 10, *De ontwikkelingen in de internationale veiligheidssituatie in de jaren negentig: van onveilige zekerheid naar onzekere veiligheid* (Developments in the international security situation in the 1990s: from unsafe security to insecure safety) The Hague 1999, p. 45.

118 See M. Ignatieff: 'State building and nation building', in R.O. Keohane and J.L. Holzgrefe (eds), *Humanitarian Intervention*, Cambridge, 2003, pp. 314-315.

This is also where the allies for state-building are to be found. NGOs can play an important role in gathering data, obtaining information about local problems and helping with reconstruction. Naturally, this involves a degree of risk since in the precarious circumstances of a state that is on the verge of failure these actors too can be corrupted or, more generally, not be truly representative. Here too, cooperation and the exchange of information between donors can often shed light on these matters.

The subject of doing business in conflict areas was dealt with at length in a recent government policy document.<sup>119</sup> It is gratifying to note that the government has stated that companies have an active and voluntary responsibility to the society concerned which goes beyond merely observing local laws. According to the policy document, a company should help to develop and build the society and in any event avoid undermining these processes. The Netherlands should try to ensure that the same approach is adopted by any international authority that may be established in failing states.

The subject of conflict trade has already been mentioned. The role of arms dealers in state failure is also relevant. While arms, particularly small arms, are often present and produced in the region itself, the illicit international trade in arms is also a major source of weapons and arms. The UN Programme of Action on Small Arms and Light Weapons, which was adopted on 21 July 2001, is the first move towards an international approach to the problem.<sup>120</sup> The states concerned meet every two years to review the effects on the monitoring of the production and trade in small arms. The next step should be to prepare a convention, provided that it incorporates obligations capable of being monitored. It is disappointing that there is little support within the EU for the introduction of binding agreements governing the weapons export policy of the member states. Further safeguards will have to be created, for example through the actions of the OECD Financial Action Task Force, against illegal transactions and the laundering of money earned from illegal arms transactions. The disclosure of information about the practices of financial institutions and of defective monitoring by governments is an instrument that can be used in this battle.

### **IV.3 Categories of policy instruments for prevention of state failure**

The various policy instruments are described below by reference to the stage in which they can have maximum effect. In the first stage, i.e. that of the widening divisions in society, there is still an opportunity to prevent the failure of the state by means of both general remedial policy and specific policies. Policies should link up with the three factors identified in chapter III.

#### ***General enabling policy***

One of the relevant factors in state failure is the pressure on the state. If a state is unsuccessful and has little to distribute, dissatisfaction increases. This makes the state vulnerable. Chapter III described the 'given circumstances' with which a state may be confronted. Where such circumstances exist in a particular state, they are not necessarily

119 *Ondernemen in conflictgebieden* (Doing business in conflict areas), letter from the Minister for Development Cooperation to the States General of February 2004, Parliamentary Paper No. 29.439 No. 1.

120 UN Doc. A/CONF.192/15. See also chapter III of AIV advisory report No. 2, *Conventionele wapenbeheersing: dringende noodzaak, beperkte mogelijkheden* (Conventional arms control: urgent need, limited opportunities) The Hague, 1998.

of an external nature. If economic malaise is viewed as a given circumstance, this may very well be due in part to government policy. In a broad sense all policy that can alleviate the pressure on the state is a means of prevention: e.g. poverty reduction by provision of material aid and improvement of economic prospects by national and international measures. Clearly, merely increasing the quantity of goods for distribution is no guarantee whatever of stability. What is crucial is the manner in which goods and well-being are distributed.<sup>121</sup> In this connection, equality for women and respect for human rights are not only an aim in themselves but also an essential precondition for the improvement of living standards in a country.<sup>122</sup>

Despite all the efforts of the international community and individual countries, the vulnerability of many states has to be recognised as a given. It is impossible to avoid the conclusion, however clichéd, that more will have to be done to provide countries with economic prospects, reduce population pressure, deal with the presence of large quantities of small arms and reduce the influence of the factors specified in chapter III that increase vulnerability.

Often the various factors are interconnected. Take the proliferation of small arms. Reducing the quantities of small arms in a country is not just a matter of cutting off the supply and collecting and destroying arms.<sup>123</sup> Clearly, sufficient funds must be made available for this purpose, but the underlying local problems connected with the acquisition and use of arms must also be addressed. The border area between Kenya, Uganda and Sudan is a case in point. During the course of the civil wars arms have fallen into the hands of the local population. Weapons are in demand among civilians because they are having to fight for cattle and pastureland as population pressure grows. Owing to the weakness of both traditional authorities and state institutions, this struggle can continue and escalate. This further undermines the state's monopoly on the use of force. Naturally, the institutions of the state (i.e. of the constitutional state) must be strengthened if it is to be able to exercise the monopoly on the use of force. But the approach to the problems will also have to focus on providing new means of subsistence for the local population and on dealing with the gun culture of the nomadic tribes.<sup>124</sup>

121 See also AIV advisory report No. 29, *Pro-poor Growth in de bilaterale partnerlanden in Sub-Sahara Afrika* (Pro-poor growth in the bilateral partner countries in Sub-Saharan Africa) The Hague, 2003, and AIV advisory report No. 30, *Een mensenrechtenbenadering van ontwikkelingssamenwerking* (A human rights based approach to development cooperation) The Hague, 2003, in which this approach is elaborated.

122 See also UNDP, *Human Development Report 2003, Millennium Development Goals: A compact among nations to end human poverty*, p. 50.

123 For an integrated policy on tackling the proliferation of small arms, see also AIV report No. 2, *Conventionele wapenbeheersing: dringende noodzaak, beperkte mogelijkheden* (Conventional arms control: urgent need, limited opportunities), pp. 24-31.

124 For a detailed analysis, see *Controlling the demand for small arms: the search for strategies in the Horn of Africa and in the Balkans*, Conference organised by Pax Christi Netherlands, The Hague, 8-10 December 2003, research reports.

In fact, measures to reduce the vulnerability of the state and boost the economy are of importance in all stages of the process leading to state failure.<sup>125</sup> However, outside intervention largely ceases to be effective during the stage of state decline, and a degree of authority must first be restored at the stage of state failure.

***Instruments to reduce friction between imported institutions and traditional culture***

Owing to the friction between imported institutions and traditional culture, the local population do not perceive the state to be the natural form of governance and do not identify with the structure of the state.

If a state is to have legitimacy, it must promote respect for human rights, democracy and the rule of law. The most obvious approach is to improve the existing institutions (by legislation, restructuring, training and monitoring mechanisms) and to provide clear information about the positive impact of the institutions. This can be effective if people at large still basically trust the machinery of government. If they do not, the basis of trust must first be established.

People are likely to have greater trust in institutions which they themselves have helped to create. These need not be based on the Westminster model, but can instead be rooted in local culture and tradition.<sup>126</sup> It is essential for this purpose that there should be a national dialogue between representatives of all relevant population groups.<sup>127</sup> Together they should identify national objectives and formulate policies for achieving them. Foreign donors and the international community as a whole can facilitate such a dialogue – or even demand it as a condition of providing aid – but should not control it. Control of the process should be in the hand of the local population. This is in keeping with a dynamic view of the concept of self-determination. However, if the existing power structure gives rise to human rights violations, this structure should not be sanctioned from outside as though it is a product of self-determination. The outside world is entitled to expect an authentic form of self-determination. In Guatemala it proved possible to create an atmosphere of shared responsibility and thus formulate a common basis for government policy.<sup>128</sup> This is also clearly the intention of the international community in Afghanistan. In certain cases, however, it may prove impossible to overcome the existing mistrust between population groups. International involvement must then be increased in order to provide everyone with protection and generate trust. Proposals to this effect are made in chapter VII.

125 In its report *Breaking the poverty trap* (Washington, 2003) the World Bank mainly focuses on improving the economy, both local and international.

126 For example, the establishment of Houses of Chiefs (indigenous parliaments) in the constitutional system of Ghana and South Africa.

127 Undoubtedly, attention should also be paid to the issue of accountability for the past. This subject is raised in chapter VI, section 2.

128 Twenty political parties took part in the dialogue, which was mounted with the assistance of UNDP and the Netherlands Institute for Multiparty Democracy and led to the drawing up in 2003 of an unpublished document known as *Agenda Nacional Compartida*.

In order to bring together the relevant actors in a single coherent group, donors and other countries and authorities concerned must coordinate their efforts. No one benefits from the formation of a range of coalitions, united fronts and governments-in-exile sponsored by countries with a specific interest. Nor is it sufficient simply to gather the warlords together and transfer power to them. Often they continue their own battles while sitting in the government. The aim must be to generate support among the population. Only on this basis can further programmes be developed.

Below is a summary of possible instruments, many of which are already used in existing policy.

It is important for human rights, democracy and the rule of law to deliver tangible results for the population, both in a material sense and in terms of participation in society. Donors can promote this in specific cases by providing aid. Examples are the funds provided for the development of political parties in Mozambique and for a TV debate between political parties in Tanzania. The population must have the opportunity to identify more closely with the state. Social cohesion can be promoted through improving the legitimacy of the state. National sports teams and athletes can serve as a catalyst for a sense of national identity. Dutch development aid has been used for this purpose in Zambia and Ethiopia. 'Social capital' can be developed from volunteer projects.

The donor community must ensure that the authorities take account of the interests and wishes of the population when establishing the development priorities for a country. This means that civil society should be sufficiently resilient and able to make its own contribution. The application of Poverty Reduction Strategy Papers can be a useful instrument, particularly if they have been authorised by the parliament of the country in question. The donor community has also used debt forgiveness as a way of making certain policy options more attractive. In the case of states in the first stage of failure, these instruments can be used to improve the legitimacy of the government (and the substantive policy).

The effectiveness of these instruments will be greatest if they reflect the political will of the national authorities (and of the ruling elite) to achieve a legitimate state. In the absence of the political will to tackle abuse of power, donors can nonetheless support positive elements. Trade unions, the media and education can be channels for achieving improvement in the longer term.<sup>129</sup> As noted above, donor coordination is always essential. In addition, the policy for each sector should form a coherent whole. For example, there is no point in reforming the courts if legislation, the public prosecution service, the police and the prison system are neglected.

Policy in all these fields may take the form of financial and technical assistance, or a dialogue established by the EU (and other players) with the countries and regions, and possibly sanctions. In recent decades it has become increasingly customary for donors to hold government authorities and other political actors to account for their domestic policy and its consequences. The instrument of international dialogue has become very popular, particularly with the EU. A dialogue with the government of a failing state is by definition impossible. However, dialogue can be established with countries which have in recent years run the risk of becoming failing states, such as Sudan and Pakistan. In the case of Sudan various international actors have rightly shown great perseverance.

<sup>129</sup> Similarly, an evaluation of positive measures by the EU is described in: K. Arts, *Integrating Human Rights into Development Cooperation: The Case of the Lomé Convention*, The Hague/London/Boston, Kluwer Law International, 2000, p. 316.

### ***Instruments to combat abuse of power***

Abuse of state power occurs where officials misuse their office for personal enrichment or in the interests of their own group. This abuse must be prevented or combated.<sup>130</sup>

First of all, government institutions must create a system that strikes a balance between the interests of the various actors. For this purpose, the principles of the rule of law should be taken as a guideline. The state is bound by these principles, which are well-known and capable of implementation.<sup>131</sup> The Advisory Council on Government Policy notes that it is necessary for the international community to hold each country accountable for the extent to which it complies with the quality criteria for a constitutional state.<sup>132</sup> It concludes that assistance must be provided to countries that need it. This report endorses that conclusion. The resident representative of the UN in each country with which the UN has a development cooperation relationship should devote attention to the coordination of such assistance.

Institutions that can provide a counterweight to abuse of power by government officials can be supported by developing their capacity. If the mechanisms for dispute settlement (parliament, the courts, mediation and reconciliation) are strengthened, this will provide an alternative to the use of force. The regulation of effective law enforcement (judiciary and police) is worthwhile only within the context of an overall plan. This also applies to the restructuring of the security sector (army and police), as has occurred in Afghanistan since 2001. If the representativeness and resilience of trade unions, consumer organisations and the media are guaranteed, this creates more opportunities for discovering and dealing with abuses of power.

Citizens must be able to appeal to these institutions for help. Transparency is an important weapon in the battle. To facilitate prevention, abuse should be identified at an early stage. To make this possible, capacity must be strengthened both at international and certainly at national level. National and international NGOs play an important role in this connection. Another relevant factor is the educational level of the population.<sup>133</sup>

Transparency can be promoted by means of international legislation which lays down substantive norms and provides procedures that can be applied in the event of violation. The legislation can also create obligations to pursue a particular policy at national level, as for example the provisions of the UN Convention against Corruption (2003).<sup>134</sup> Good

130 This subject is already clearly addressed in Dutch policy on development cooperation. Explanatory memorandum to the 2004 budget, p. 59 ff.

131 For a consideration of the different layers of this concept, see also report No. 63, *De toekomst van de nationale rechtsstaat* (The future of the national constitutional state) of the Advisory Council on Government Policy, The Hague, 2002.

132 *Idem*, p. 266. See also report No. 58, *Ontwikkelingsbeleid en goed bestuur* (Development policy and good governance) of the Advisory Council on Government Policy, The Hague 2001.

133 At their Evian Summit in June 2003 the G-8 issued an important declaration entitled 'Fighting corruption and improving transparency' and gave their support to an 'Africa Action Plan' to enable states to comply with the good governance standards of the New Partnership for Africa's Development' (NEPAD).

134 United Nations Convention against Corruption, adopted by GA/RES/58/4 of 31 October 2003 and included in UN Document A/58/422.

progress has been made in the last decade with the refinement of worldwide regimes for monitoring the origin of commodities (e.g. the Kimberly process). The Extractive Industries Transparency Initiative is also a useful voluntary initiative.<sup>135</sup> Schemes to counter money laundering and illicit arms trafficking as well as the anti-corruption convention have definite potential. Budget tracking, expenditure tracking and bodies of international recommendations are useful methods of rendering government finances transparent.<sup>136</sup> The international community can also make progress in respect of concrete country situations. Donors and international financial institutions are increasingly demanding transparency. The OECD Financial Action Task Force keeps a blacklist of non-cooperative countries.

The international community can help individual countries to improve their own structures in order to promote transparency and law enforcement. One essential topic is human rights. The realisation of specific rights such as freedom of expression and freedom of association and assembly can help to improve the capacity of the population to defend its own interests. International monitors and mediators too have a role to play here. For example, the OSCE's High Commissioner on National Minorities can identify ethnic tensions and abuses at an early stage and act as an intermediary. The human rights situation and elections can be monitored from outside.

### ***External abuse of power***

The UN has produced probing reports on the disappearance of minerals from the Democratic Republic of Congo.<sup>137</sup> To achieve greater transparency more widespread use should be made of this practice of naming and shaming, in other words in other countries too.

NGOs such as Transparency International and Global Witness uncover nefarious practices, for example corruption and illicit trading in commodities. Often such practices involve the activities of large corporations from outside the region, many of which are based in the West. This information must be made accessible to the population and policymakers in the countries where these corporations operate and where they have legal domicile. Disclosure can enable both citizens and government bodies, including the EU, to take account of this information when deciding on purchases, investments and policy. It is gratifying to note that more and more companies are undertaking to be bound by the OECD Guidelines for Multinational Enterprises of 27 June 2000 or are developing, in consultation with other stakeholders, specific standards for the promotion of transparency of this kind. If governments, media and the public, particularly in their capacity as consumers, monitor observance of these guidelines, this can generate competition that will benefit enterprises that operate in accordance with standards for responsible business conduct and handicap enterprises that do not.<sup>138</sup> In this way, naming, shaming and praising becomes a more effective instrument.

135 Launched by the United Kingdom. The participants include countries and enterprises. See [www.dfid.gov.uk](http://www.dfid.gov.uk). For example, the OECD Best Practices for Budget Transparency, May 2001.

136 For example, the OECD Best Practices for Budget Transparency, May 2001.

137 Report of the UNSC Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo, S/2001/357 and S/2003/1027 (Final report).

138 'Enterprises can strengthen their reputation by setting themselves targets and reporting on them.' *Winst van waarden* (Corporate social responsibility: part of the core business), Advisory report 00/11 of the Social and Economic Council (SER), The Hague, December 2000, p. 83.

Western countries can do more. They should hold companies based in their territory to account for specific acts which are contrary to the international standards already applied by governments (including the Dutch government) and which are contributing to state failure elsewhere in the world.<sup>139</sup> At present, most checks are made to determine whether foreign projects for which government support is requested comply with the standards. Companies that clearly commit such violations should be excluded not only from government support but also from obtaining orders. The basic principle is that enterprises should observe due diligence in order to avoid contributing, either directly or indirectly, to human rights violations and should not benefit from abuses of which they knew or should have known.<sup>140</sup>

In addition to external abuse by enterprises, attention must also be paid to abuse of power by other countries whose actions induce or perpetuate state failure. For example, in Cambodia (which had a long history of foreign intervention), peace and security could not be effectively guaranteed until certain countries in the region had been induced to cease backing the Khmer Rouge. The Netherlands should try to ensure that countries involved in such activities are called to account at an early stage by the UN and in regional forums.

#### **IV.4 Specific measures to deal with specific instances of state failure**

If a state enters the stage of decline many different instruments can be used to avert the failure or alleviate the effects. These instruments may be used to lessen the effects on the local population, the region or elsewhere.

There are many tried and trusted diplomatic and political instruments, for example declarations (UN resolutions and EU or OSCE declarations), political pressure, exclusion from international organisations, mediation in the broad sense (Special Representatives of the UN, OSCE, Council of Europe, EU, regional organisations or ad hoc coalitions) and dispute resolution (International Court of Justice and Permanent Court of Arbitration) in the event of underlying international friction.

Groups of interested countries known as groups of friends can take a country under their wing. In this stage of state failure, such groups should be in close contact with the Security Council. The group should seek dialogue with the principal actors in the country in question, and should in fact have an authoritative voice (as donors/decision-makers) in multilateral financial institutions. The group need not determine national policy, but it should determine the procedure: i.e. bring together those in authority at national level

139 The OECD Guidelines referred to above have also served as the basis for the inclusion of a criterion on responsible business conduct in the review of applications by Dutch companies for government support for activities abroad. Such reviews include criteria taken from other sets of standards agreed at international level, including ILO Conventions. The system is scheduled for evaluation in 2004. See the government memorandum entitled *Ondernemen in conflictgebieden* (Doing business in conflict areas), Letter from the Minister for Development Cooperation to the House of Representatives of February 2004, Parliamentary Paper No. 29.439 No. 1, section 4.1.

140 Commentary (b) on the first principle of the 'Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights', report E/CN.4/Sub.2/2003/38/Rev.1. The norms have been accepted by the UN Sub-Commission and presented to the Commission on Human Rights; see resolution 2003/16 of 13 August 2003. As regards accountability for past actions by enterprises, see chapter VI, section 2.

and inspire them to formulate a common agenda. The group should preferably contain countries from the region and may emanate from the UN (as in the case of Guinea-Bissau), from UN-related consultations (Afghanistan) or from other forums (such as the Organisation of American States (OAS) or a donor forum).

Assistance can be provided with peace processes (by the UN, the EU, relevant regional institutions and individual countries). Legal assistance can be given in this context (for example support with interim elections or the development of the legal system or civilian administration). Sometimes money may be needed quickly for disarmament or to provide combatants with the prospect of a life other than one of violence. Multilateral resources should be available on call for this purpose.

If a state fails within the meaning of the definition in chapter I, there is no longer an effective government over which influence can be exerted. However, there will be *de facto* power centres. Leaders, often warlords, can be approached with proposals for consultation. The initiative may be taken by neighbouring countries, the region, donors or international organisations such as the UN. The primary aim of the consultations should be to restore peace and security. International military assistance can also be provided for this purpose.

If necessary, sanctions too can be imposed in order to influence the main actors. Once again, tight coordination by the donor community (or the EU, UN or others involved) is essential. At the highest level, the Security Council may impose sanctions under the UN Charter.<sup>141</sup> A fairly common sanction is an arms embargo for the conflict zone. Often a major disadvantage is that an embargo strengthens the position of the party which has already collected the most arms or which can count on the support of neighbouring countries. In the case of Bosnia, for example, it became more difficult for the Bosnian Muslims to obtain arms, whereas little changed in practice for the Bosnian Serbs. In addition, general sanctions such as economic boycotts often have undesirable side-effects or a disproportionate impact on the civilian population. They require substantial political support, the provision of compensation for third parties and effective monitoring. In both authoritarian states and failing states, the citizens affected have very little influence over the actions of the leaders. Nonetheless, sanctions can be effective in stigmatising the leaders and help to curb, prevent and deter undesirable behaviour. They may also be used to convey the message that military intervention is the next step.<sup>142</sup>

It is hardly surprising that smart sanctions, which are designed to cause less damage to the population, have become a key concept in recent years. The question is how such sanctions can influence the behaviour of specific actors in positions of great power. Sanctions are targeted against people who have acquired a position of *de facto* power rather than legal power. They have a local monopoly on the use of force and are able to attract fighters to their cause. They do so by using economic resources that come from conflict

141 Article 41 of the Charter refers to 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication and the severance of diplomatic relations'.

142 On this subject, see the paper of the Department of Political Affairs of the UN Secretariat at the Interlaken II Conference, 29-31 March 1999, *A brief review of Security Council applied sanctions*, [www.smartsanctions.ch](http://www.smartsanctions.ch); see also the reports on sanctions from 1990 and 1998 of the International Institute of Economics, [www.iiie.com/execsum.htm](http://www.iiie.com/execsum.htm).

trade. If these leaders do not cooperate in restoring the structure of the state, efforts must be made to undermine their military and economic power. In such cases countries already impose travel restrictions and freeze the bank deposits of leaders and their relatives.<sup>143</sup> Cutting off income from conflict trade, for example by imposing certification requirements for diamonds, has proved fairly effective. Other possibilities are preventing the import of certain arms (munitions) and of luxury goods used by leaders to secure the loyalty of other people. In this connection proposals are also being made for systems of monitoring based on tip-off rewards and fines. A trial project could test their feasibility.

#### **IV.5 Measures to limit consequences of failure, including humanitarian aid**

Despite efforts to avert state failure, the international community may be confronted in specific cases with the adverse effects of such failure. These too must serve as a basis for policy. Although measures to alleviate the effects of state failure may be said to treat the symptoms only, they are no less necessary for all that. Such measures may consist of border controls, reception of refugees, humanitarian aid, prevention of the spread of disease and so forth.

Humanitarian aid must often be provided for the short term. A previous AIV advisory report examined in detail the risk of misuse of humanitarian aid and of the breaching of its neutrality.<sup>144</sup> It is relevant in the context of the present report to note that humanitarian aid will inevitably play a role of its own in the relationships between the local actors. The providers of aid should share their information and intelligence in order to analyse the situation properly. Thereafter they should coordinate the provision of smart aid in order to alleviate any unintended side-effects. This is necessary both from a political perspective and in the interests of efficiency. If the involvement of outsiders remains limited to providing humanitarian aid, this may in certain circumstances simply prolong a conflict. In Somalia, for example, the free inflow of humanitarian aid into Mogadishu in 1992 exacerbated the situation since the valuable goods that were brought in re-ignited the fighting.<sup>145</sup>

Sometimes it may ultimately be necessary to conclude that aid can no longer be granted in a worthwhile manner. For example, the UN Secretary-General, when talking about Somalia in the 1990s, stated that there are limits to what can be done and that the responsibility of the outside world does not replace that of local actors.<sup>146</sup>

The AIV argued in its report that a UN police force should be part of the United Nations Standby Arrangements System, in order to ensure the safe distribution of humanitarian aid. This would also be appropriate in states that are well on the way to complete failure.

143 A provision of this kind was peremptorily imposed by the Security Council in the case of the Taliban, S/RES/1333 (2000).

144 AIV advisory report No. 6, *Humanitaire hulp: naar een nieuwe begrenzing* (Humanitarian aid: redefining the limits), The Hague, 1998.

145 D. Shearer, 'Aiding or abetting humanitarian aid and its economic role in civil war', in M. Berdal and D.M. Malone eds. *Greed and Grievance: Economic Agendas in Civil Wars*, Boulder, Lynne Rienner, 2000, pp. 189-203.

146 *The United Nations and Somalia 1992-1994*, UN-DPI, New York, 1996, p. 87.

#### **IV.6 Final comments**

Many instruments have been reviewed in this section. However, the nature of the subject matter is such that a checklist of ready-made solutions cannot be compiled. As state failure is due to a combination of factors, numerous measures will have to be taken simultaneously in order to deal with the failure. Indeed, the subject matter is so difficult that results can be achieved only through the use of sound joint analysis, intensive cooperation, deployment of sufficient funds and manpower, long-term political commitment and unwavering efforts to create favourable conditions for state functioning.

The spectrum of instruments runs from general enabling policy to specific measures aimed at states or even individuals. Instruments of development cooperation or instruments in the political field may be used. The further a state descends down the slippery slope of failure the more far-reaching the measures will have to be. And the more far-reaching the measures, the greater will be the need for cooperation with third countries at a higher level. Armed intervention is a last resort. This is considered in chapter V.

#### **IV.7 Conclusions and recommendations**

For reasons of intelligent self-interest too, the Netherlands should have resources available to assist failing states. Good governance need not already be in place, but there should be a prospect of the money actually helping to realise human rights. This may also mean that funds are deployed in order to prevent a deterioration in the situation. The establishment of the Stability Fund is welcomed. The Netherlands should even consider flexibly deploying a much larger part of the funds available under the Homogeneous Budget for International Cooperation (HGIS). The Stability Fund is a good start, but use should also be made of other resources that can influence the course of development.

Decisions on whether to remove a country from the list of partner countries owing to a lack of good governance and on whether to restore a country to the list should be taken only after a joint EU analysis of the risks of continuing, severing or restoring links and of alternative ways of maintaining the links.

The role of third countries whose policies tend to induce state failure should be dealt with during the deliberations on the situation in the failing states themselves. The UN Secretariat should provide data on this of its own volition, by analogy with the reports on the illegal exploitation of natural resources in the Democratic Republic of Congo (DRC). The Netherlands should try to ensure that countries whose actions induce the failure of other states by abuse of power are called to account by the UN and in regional forums at an early stage.

Individual leaders profit from the chaos. It is therefore necessary to provide more incentives for compliance with rules and to make infringement of the rules less inviting. Greater transparency of the trade in natural resources and other financial transactions could contribute to this.

Large corporations and financial institutions based in the West sometimes play a role in the abuse of power by elites in failing states. Efforts must therefore be made to promote transparency, ensure compliance with OECD and ILO standards and codes of conduct, and achieve an alert response to transactions based on abuse of power for profit.

## V The use of military instruments

It was noted in chapter IV that one option is to use military instruments. Any such decision is influenced by legal, policy and practical considerations. These are examined below. The first subject to be examined is the lawfulness of the use of military instruments by states with or without the mandate of the UN (i.e. the Security Council). Use without mandate concerns the right to self-defence and possibly humanitarian intervention. Finally, this chapter examines the policy and practical considerations involved in the use of military instruments and, in broad outline, their use by the Netherlands.

### V.1 Use-of-force ban and the use of military instruments in failing states

Any consideration of the admissibility of the use of military instruments must start from the premises of state sovereignty, non-intervention and, in particular, the ban on the use of force. However, a growing body of opinion in international law advocates viewing these principles in perspective and weighing them against humanitarian considerations in a number of exceptional circumstances.

The ban on the use of force is contained in Article 2 (4) of the UN Charter and the obligation to settle disputes by peaceful means in Article 2 (3).

Under Article 24 (1) of the Charter, the Security Council has primary responsibility for the maintenance of international peace and security. Against the background of the ban on the use of force in Article 2 (4) the Security Council may, in the event of threats to the peace, breaches of the peace and acts of aggression, decide to take military action under Article 42 of the Charter. The other explicit exception to the prohibition on the use of force is contained in Article 51, namely the right of states to individual or collective self-defence until the Security Council has taken adequate measures.

In addition, the doctrine of intervention for humanitarian reasons (humanitarian intervention) has been developed in recent years. There is broad support for the idea that humanitarian intervention is lawful in certain circumstances. This is dealt with in a previous advisory report by the AIV/CAVV of April 2000.<sup>147</sup>

Given the ban on the use of force and the exceptions to this principle, to what extent should separate criteria and tests be applied in the case of failing states?

The first question is whether the ban on resort to force also applies in cases of failing states. This must be answered in the affirmative. Although there is no longer a functioning government, there is still a legal entity and the bearer of rights. The territory has not become 'terra nullius' (territory belonging to no state) which any foreign power may enter. The right to protection from intervention is vested in a state by virtue of its being a legal entity.<sup>148</sup>

<sup>147</sup> *Humanitaire Interventie* (Humanitarian Intervention), AIV/CAVV advisory report No. 13, The Hague, April 2000.

<sup>148</sup> W. Werner, 'Staat en volk in burgeroorlog' (State and nation in civil war), in: *Vrede en Veiligheid, tijdschrift voor internationale vraagstukken*, April 2001, pp. 1-23. In his dissertation G. Kreijen argues that this is a rather outdated approach. He considers that a better solution would be to withdraw recognition of the state in question (he gives Somalia as an example). The UN would then no longer need authorisation to assume control. *State Failure, Sovereignty and Effectiveness*, Leiden, October 2003, p. 332 ff. Commercial edition: Leiden, Brill, 2004.

This means that the ban on the use of force and the existing exceptions to it, which may be based on threats to the peace or breaches of the peace (Article 42), self-defence (Article 51) or large-scale human suffering (humanitarian intervention), are also applicable here.

## **V.2 Action authorised by the Security Council**

The basic rule is that the UN may not intervene in states. This rule is contained in Article 2 (7), but the wording of the rule limits the prohibition to 'matters which are essentially within the domestic jurisdiction' of a state.<sup>149</sup> In addition, Chapter VII of the Charter entitles the Security Council to intervene (and call upon states to intervene). However, the Security Council must first determine the existence of a threat to the peace or a breach of the peace within the meaning of Article 39 and then authorise military action to maintain or restore international peace and security (Article 42). These criteria form the basis for debate in the Security Council in a specific case. Once a decision has been made, this proves to be an almost formal criterion: if the Security Council considers one of the criteria to be applicable, then it is. However, a line of reasoning relevant to failing states can be distilled from past decisions.<sup>150</sup>

In practice, the Security Council treats large-scale human suffering as coming within the category of 'threat to the peace'. It may also treat other situations, such as a terrorist threat, as coming within this category.<sup>151</sup> In resolutions 1368 and 1373 (2001) the Security Council recorded that every act of international terrorism constitutes a threat to international peace and security. It defined heavy loss of human life and widespread material damage, in combination with the consequences for stability in the region, as a threat to international peace and security.<sup>152</sup> It also ruled that the flow of weapons undermined peace and security and the political efforts for national reconciliation in Somalia.<sup>153</sup> On various occasions the Security Council has ruled that the consequences of large flows of refugees constitute a threat to international peace and security in a region.<sup>154</sup> For example, the humanitarian crises and the exodus of people from Haiti, in combination with other factors, were held to constitute a threat to international peace and security in the region.<sup>155</sup>

149 It could be argued on the basis of the English text that interference is permitted, for example in the case of human rights violations, but that intervention (particularly armed intervention) is not permitted.

150 On this subject, see K. Wellens, 'The UN Security Council and new threats to the peace: back to the future', *Journal of Conflict and Security Law* (2003), Vol. 8, No. 1, pp. 15-70.

151 S/RES/1373 of 28 September 2001 concerning terrorism.

152 S/RES/733 of 23 January 1992 concerning Somalia.

153 S/RES/1425 of 22 July 2002 concerning Somalia.

154 S/RES/688 (1991) concerning the Kurdish-populated areas of Iraq; S/RES/1529 (2004) concerning Haiti, in particular 'the potential outflow of people to other states in the subregion'.

155 S/RES/841 of 16 June 1993. A trade embargo was imposed in order to enable President Aristide to regain his legitimate position. This was followed, after all, by an intervention in 1994.

### ***Separate ground?***

It was noted in chapter III that the international community has a responsibility to create and maintain a peaceful world order, in which states can fulfil their obligations to their people (and to the international community). A power vacuum in a state could serve as a ground for intervention, including military intervention: after all, there is no party with whom the outside world can deal on subjects such as the fight against crime, drug trafficking, the environment, capital flows and health care. The question is therefore whether state failure is an exception in its own right to the ban on the use of force, constituting a separate ground for intervention by the Security Council. It should be noted that military intervention on such a ground is not in conformity with existing international law. The Security Council has always based intervention in failing states on other grounds included in the Charter. Usually the description used in Article 39, i.e. a threat to the peace (of the region), is applied. Although the Security Council may have consistently reinterpreted the term 'threat to the peace', it has not allowed it to become diluted to the point where it is a catch-all for the world's ills.

Can it be concluded on the basis of these precedents that state failure always constitutes a threat to the peace within the meaning of Article 39? This must be answered in the negative, as is clear from the present situation in Somalia. This failing state has been more or less stabilised at a lower level of organisation without major adverse consequences for the region (or the world) and without large numbers of casualties. In addition, it is quite possible for the Security Council to categorise a situation as a threat to the peace but still not decide to take armed action. Under Chapter VI of the Charter, the Security Council has other means at its disposal to bring about a peaceful settlement of disputes.

The decisions of the Security Council are not arrived at purely on legal grounds; this is a political process in which political factors play a role. Sometimes the Security Council takes no action because of the political positions of its members, notably the permanent members, as happened in the cases of Rwanda, Haiti and Macedonia.

### ***Preventive action***

The request for advice raises the possibility of troops being deployed in a particular area for preventive purposes. Can the Security Council do or authorise this? The Security Council has the final word in determining whether there is a threat to peace and security. It follows that it may decide to deploy troops preventively (or authorise such deployment) in failing states.

## **V.3 Action without Security Council authorisation – self-defence**

The question is whether states may intervene militarily in failing states. The basic rule is contained in Article 2 (4) of the Charter. States may not use force. If they are attacked, however, individual and collective self-defence is permitted as a particularisation of the general right of a state to maintain itself. Article 51 states that nothing in the Charter impairs the inherent right of a state to defend itself in the event of an armed attack, as long as the Security Council has not taken the measures necessary to maintain or restore international peace and security. In other words, here too, it is the Security Council that is supposed to take action to remedy the breach of the law caused by the military attack.

If self-defence within the meaning of Article 51 is to be justified there should be an

armed attack.<sup>156</sup> This includes the example of an indirect attack, in which a state does not directly apply military force but uses non-state actors (for example rebel forces) which use military force against the other state.<sup>157</sup> A failing state cannot be said to have made an armed attack. However, an armed attack may have been organised from within that state or from its territory. The right to self-defence also extends to such attacks.<sup>158</sup> In the case of Afghanistan the Taliban were condemned in resolution 1378 (2001) for allowing Afghan territory to be used for terrorist attacks. Armed action taken in exercise of the right of self-defence can be assessed retrospectively by the Security Council or the International Court of Justice. Resolution 1368 and the Security Council's press statement concerning the invasion of Afghanistan by the United States of America and the United Kingdom in 2001 can be interpreted as recognition of the fact that the action was taken in self-defence.<sup>159</sup>

### ***Separate ground?***

Even where there is not an armed attack, the interests of other states may be harmed through a growth of crime, infectious diseases, migration flows, environmental disasters and forms of terrorism. If these events do not coincide with an armed attack, they do not in themselves constitute a justification for breaching the ban on the use of force on the grounds of self-defence. However, the Security Council itself naturally has the power to determine that there is a threat to the peace or a breach of the peace. If it does not define the event in this way, whether for substantive or for political reasons, or does not decide to deploy military force, a country that suffers from the adverse consequences of the failure of the other state does not have any legal ground for military intervention under international law as it stands. It is noted in chapter III that states and the international community can cite various grounds for involving themselves with failing states. These grounds will seldom be limited to a single category. In some situations the grounds for self-defence could be coupled with grounds for humanitarian intervention. The damage that individual states suffer in the areas of crime, migration, communication and smuggling will often not provide grounds for legitimate armed action. The states affected are then left empty-handed in legal terms.

### ***Preventive action***

Preventive action such as the stationing of troops without the consent of the state in question can be taken only with the authorisation of the Security Council. However, it should be noted in this connection that the Security Council is itself therefore under a corresponding obligation to take the concerns of the member states seriously and to intervene in good time. This applies in particular to the threat of terrorism and the proliferation of weapons of mass destruction in failing states. Although the sending of military observers is clearly of a different order of magnitude from the sending of armed forces,

156 The AIV/CAVV advisory report No. 36 *Preemptief optreden* on preemptive action (summer 2004) examines the concept of self-defence under the Charter and under customary law. It also deals with the question of the extent to which the threat of an armed attack can justify self-defence.

157 See the definition of aggression in GA Res. 3314 (XXIX), 14 December 1974 and the Nicaragua judgment of the International Court of Justice of 27 June 1986, No. 70, ICJ Reports 1986, pp. 14-150.

158 The *National Security Strategy* of the United States (Washington, September 2002) laments that 'America is now threatened less by conquering states than we are by failing ones'.

159 Security Council press statement of 8 October 2001, AFG/152; SC/7167.

the consent of the state in question is required in both cases. Crossing the frontier without the consent of the state would constitute a violation of its sovereignty. The consent should come from a government that exercises authority, as occurred in the case of Macedonia and Burundi (although these cases did not involve the right of third countries to self-defence).

#### **V.4 Intervention by invitation**

What is the effect of an invitation to intervene? It is generally assumed that the ban on intervention also applies where there is an invitation from a party within the failing state itself. Other states are prohibited from supporting insurgents (certainly by military means). Neutrality must be observed with regard to a country engaged in a civil war; it follows that even the former governing party cannot be supported. This is to prevent escalation and internationalisation of the conflict. To couch this in legal terms, the right of self-determination of the people in question may not be undermined.<sup>160</sup> This limitation does not apply to the Security Council, which may take whatever measures it sees fit. If the Security Council can intervene without an invitation, it may certainly do so by invitation. Recently, the Security Council granted retrospective authorisation for intervention by third states in an internal conflict, whether or not by invitation of the 'government'. Such an arrangement is not desirable and illustrates the need for timely decisions by the Security Council. At the same time, it has to be recognised that in these cases the operation might have been jeopardised if the decision had been made in advance. In the case of Côte d'Ivoire the French intervention took place at the invitation of the legitimate authority.<sup>161</sup> If the position of the government of Côte d'Ivoire had deteriorated to the extent that the country qualified as a failing state a formal invitation to intervene would have been more problematic.<sup>162</sup> In Haiti the request for international support came from the acting president, who had, in accordance with the rules of the constitution, formally succeeded President Aristide when he left the country.<sup>163</sup> An invitation to intervene emanating from rudimentary state organs (or persons belonging to these organs) could also be accorded a certain weight. From the point of view of the legal status of an intervention it is therefore important to determine whether such organs or people actually favour intervention. This occurred in the case of

160 And, in the case of a civil war or popular uprising, not even a (still) legitimate government. See R. Mullerson, 'Intervention by invitation', in L.F. Damrosch and D.J. Scheffer, *Law and Force in the New International Order*, Boulder, Colorado, Westview Press 1991, pp. 127-133. See also chapter II.1.

161 The press statement of the president of the Security Council of 31 October 2002 (AFR/506; SC/7558) refers to the 'appreciation for the efforts made by France to prevent, upon request of the legitimate authorities of Côte d'Ivoire, further fighting in the country, on a provisional basis, pending the deployment of the ECOMOG force'. The troop intervention was welcomed in a resolution: 'Welcomes the deployment of ECOWAS forces and French troops with a view to contributing to a peaceful solution...' (S/RES/1464 of 14 February 2003, paragraph 8). They were granted a mandate under chapter VII 'to take the necessary steps to guarantee the security and freedom of movement of their personnel under chapter VII and to ensure...the protection of civilians...' (idem, paragraph 9). See also N.M. Blokker: 'Is the authorization authorized? Powers and practice of the UN Security Council to authorize force by "coalitions of the able and willing"', in *European Journal of International Law*, vol. 11, 2000, issue 3, pp. 541-568.

162 As regards the question of representation in law, see chapter II. An invitation from the government of a failing state need not necessarily be a welcome development, given the nature of such governments.

163 S/RES/1529 of 29 February 2004, paragraph 2 (a).

the Solomon Islands. Indeed, it was on this basis that the Security Council approved the arrival of the coalition troops.<sup>164</sup>

In 1983 the American army invaded the island of Grenada, along with troops of six other Caribbean states. As justification for the invasion the United States cited the need to protect its citizens (800 American students) on the island. It also stated that Grenada had been militarised by Cuba and therefore posed a threat to the United States. Lastly, it referred to an invitation (of a dubious nature) from the Governor General. International reaction to the invasion was almost entirely negative.<sup>165</sup>

For reasons of policy, respect for the right to self-determination should not be taken to extremes. But in legal terms too the examples given above are not typical of the provision of assistance by invitation. It should be noted in respect of these examples that although there was an invitation from one side in the conflict, the aim of the foreign intervention was not usually to help that side to a military victory. In cases such as the intervention in Côte d'Ivoire, Haiti and the Solomon Islands the aim was to prevent human suffering, contribute to stability and find a lasting solution. This brings us logically to the question of interventions for humanitarian reasons (in the broad sense).

#### **V.5 Action without Security Council authorisation – humanitarian intervention**

It may be necessary to intervene on humanitarian grounds, namely in the event of large-scale human suffering. This section examines how the doctrine of humanitarian intervention is applied in the case of failing states.

##### ***The previous AIV/CAVV advisory report on humanitarian intervention***

In 2000 the AIV and CAVV published an advisory report entitled 'Humanitarian Intervention'.<sup>166</sup> Humanitarian intervention was defined as 'The threat or use of force for humanitarian ends by one or more states, whether or not in the context of an international organisation, on the territory of another state: (a) in order to end existing or prevent imminent grave, large-scale violations of fundamental human rights, particularly individuals' right to life, irrespective of their nationality; (b) without the prior authorisation of the Security Council and without the consent of the legitimate government of the state on whose territory the intervention takes place.'<sup>167</sup>

The passage continued by noting that for everyday purposes the use of force for humanitarian ends with Security Council authorisation is also labelled humanitarian intervention. The AIV and CAVV concluded in their report that the significance of human rights had become so great in international relations that states could no longer ignore large-scale

<sup>164</sup> Albeit in a press statement issued by the president (SC/7853 of 26 August 2003).

<sup>165</sup> Almost all democratic countries rejected the justification for the intervention. A draft Security Council resolution was vetoed by the United States. In keeping with the so-called Reagan Doctrine, the United States considered it legitimate to overthrow regimes supported by the USSR and thus to 'go to the help of peoples' of its own volition. The doctrine has little support in international law circles.

<sup>166</sup> AIV/CAVV advisory report No. 13, The Hague, April 2000.

<sup>167</sup> *Idem*, p. 35.

violations of human rights, even where the Security Council was unable to agree on international intervention. They also noted that there is no clear legal basis in international law for the use of force without the consent of the Security Council in order to prevent a humanitarian disaster. However the AIV and CAVV took the view that some circumstances were of such an urgent nature that they constituted 'justificatory grounds', i.e. grounds precluding the wrongfulness of certain acts of a state. If this were to happen, there could still not be said to be a right to humanitarian intervention not authorised by the Security Council, but there would be a certain scope for tolerating interventions of this kind. This would bring about a situation in which the intervening states would not necessarily have to fear all kinds of legal complications.

The AIV and CAVV considered that, pending formalisation of such scope for toleration, military intervention by states in other states should be permitted in the case of large-scale violations of human rights. For this purpose, however, an assessment framework should be developed so that it would be possible to determine in international debates whether the intervening states had acted correctly. A framework of this nature was elaborated in the advisory report.<sup>168</sup>

The government broadly endorsed the advisory report and referred to the assessment framework drawn up during conferences held in Noordwijk and Scheveningen. This contained fifteen points designed to serve as a guideline both for political decision-making on humanitarian intervention and for the implementation of such intervention.<sup>169</sup>

#### ***Differences between the problem of failing states and the problem of humanitarian intervention***

The instrument of humanitarian intervention can be relevant to failing states. The criteria developed for intervention in the case of large-scale human suffering also apply in cases in which this suffering occurs in a failing state. But it is not an instrument specifically tailored for such situations.

First of all, the problem in failing states can be much wider, namely the threat to law and order in the country concerned and the threat to international peace and security in the region. The Security Council decides on whether there is a threat to the peace. Large-scale human suffering (caused by people) could warrant such a conclusion.<sup>170</sup>

Second, large-scale human suffering may equally well occur in a state which is still functioning or is even responsible for the violations. This criterion was relevant to the assessment of the situation of Kosovo in Yugoslavia under Milosevic and of Iraq before the coalition intervened in 2003. As such, it falls outside the scope of the present advisory report.

Third, neither the trigger nor the timing is the same. In this connection, the concept of state failure is broader than large-scale human suffering. Intervention may well occur in a

<sup>168</sup> *Idem*, p. 30. The following questions arise in this connection: Which states? When? What conditions? When and how should intervention end? This assessment framework should not be confused with the 2001 Assessment Framework for preparation of the deployment by the Netherlands of military units.

<sup>169</sup> See the Humanitarian Intervention report of 30 October 2001; Parliamentary Paper No. 27.742.

<sup>170</sup> S/RES/688 (about the Kurdish-populated areas of Iraq), S/RES/733 (1992) about Somalia and S/PV 3046, 31 January 1992.

failing state (on the basis of either a threat to the peace in the region or self-defence) even though there is no large-scale human suffering at that time. An example would be Somalia at present. The timing of the operation may be determined by such factors as the probability of encountering little resistance.

Humanitarian intervention is conceivable in the case of a failing state, subject to the conditions listed in the AIV/CAVV advisory report of April 2000 and the assessment framework based on it.<sup>171</sup> As there is no effective government in a failing state it would be better for intervention to be based on large scale (man-made) human suffering rather than human rights violations. In the case of failing states, unlike states in which there is still a functioning government, military intervention need not be the last instrument chronologically (as prescribed in the assessment framework referred to above). It is, after all, important for the instrument to be deployed in good time. Nonetheless, action by states on their own authority should be subject to stricter criteria than action by the Security Council. Finally, the aim of a humanitarian intervention should be to end large-scale violations of human rights. At the end of the intervention the conditions should be such that human rights can be guaranteed and a process of 'post-conflict peacebuilding' can be initiated.<sup>172</sup> The situation in relation to failing states is not much different. The aim should be to build a viable state. The aim of creating conditions for the exercise of effective authority is very broad. It will have to include examination of the political system.

#### **V.6 Developments since the previous advisory report and the search for a solution to the problem of the lawfulness of military instruments**

The subjects of sovereignty and non-intervention, which go hand in hand with the ban on the use of force, are raised explicitly in the present request for advice.

As noted by the government in its response to the advisory report on humanitarian intervention, the concept of sovereignty has been put into perspective by other norms and ideals in recent decades. Sovereignty is ever more circumscribed by international law, for example by norms contained in conventions. At the same time, sovereignty is being increasingly linked to responsibility for maintaining order, peace and respect for human rights. There is a greater awareness of the need for joint action against terrorism, weapons of mass destruction, drug trafficking and threats to sustainable development. As sovereignty is put into perspective, the absolute nature of the principle of non-intervention diminishes. In certain circumstances intervention may even include the use of military instruments.

Two mutually inconsistent developments have occurred since the previous report of the AIV/CAVV. First, the topic of external intervention in a state which has not given its consent is broached more frequently and with less diffidence than in the past. Following the attacks of 11 September, the invasion of Afghanistan was accepted by many states, albeit as a case of self-defence. There has also been a sympathetic response to intervention in a series of other cases (no matter how much these cases differ from one another) in which humanitarian reasons have been crucial, namely East Timor, Democratic Republic of Congo, Sierra Leone, Côte d'Ivoire and Haiti (2004).

<sup>171</sup> In other words, the fifteen points specified in the Humanitarian Intervention report.

<sup>172</sup> AIV/CAVV advisory report No. 13, *Humanitaire Intervention* (Humanitarian Intervention), The Hague, April 2000, p. 34.

Second, there were mixed reactions to the speech of the United Nations Secretary-General at the opening of the General Assembly in 1999, in which he raised the subject of the dilemmas connected with intervention. Some states responded critically and adopted a very minimalist position on all related topics in which the issue of sovereignty could arise. It became apparent that the possibility of providing humanitarian aid without the explicit consent of the sovereign government could not be mentioned or implied in any way whatever in the UN without this giving rise to a vote.

It was in this atmosphere that the report of the ICISS was produced.<sup>173</sup> The reasoning in this report was based on a political interpretation of the concept of state responsibility. All states have primary responsibility for protection of their population, but ultimately also owe a responsibility to mankind to protect everyone from grave abuses wherever and whenever they may occur. The Commission rejected the concept of humanitarian intervention on the ground that it is misleading. It suggested instead the term 'military intervention for human protection purposes'. As regards intervention itself, the Commission recognised that while there was not yet a sufficiently strong basis to claim the emergence of a new principle of customary international law, growing state and international organisation practice suggests an emerging guiding principle, namely the responsibility to protect. This emerging principle is that 'intervention for human protection purposes, including military intervention in extreme cases, is supportable when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm or is itself the perpetrator'.<sup>174</sup> The Commission identifies six threshold criteria which must be fulfilled if there is to be military intervention: 'right authority', 'just cause', 'right intention', 'last resort', 'proportional means' and 'reasonable prospects'. Under 'just cause' it explicitly mentions large-scale loss of life in a failed state.<sup>175</sup> As regards the subject of 'right authority' the Commission plumps fairly and squarely for the UN Security Council, giving as a possible alternative a fairly theoretical procedure involving the General Assembly and a more practical procedure involving action by regional organisations. The action taken by ECOMOG in Liberia and Sierra Leone is mentioned as an example of authorisation after the event by the Security Council. The intervention by NATO in Kosovo is mentioned in passing as an example of intervention by a regional organisation in a non-member state. The ICISS suggests that even in such a case *ex post facto* authorisation could be a solution. However, it concludes that it would be impossible to get consensus on any set of proposals for military intervention which acknowledges the validity of intervention not authorised by the Security Council or General Assembly. It translates this into a message for the Security Council, namely that it should discharge its responsibility to protect and that if it fails to do so the intervention may be undertaken by an ad hoc coalition for humanitarian reasons. The legitimacy of the action by such a coalition would be strengthened if the six principles are observed.<sup>176</sup> This demonstrates that the principles are relevant to the doctrine of humanitarian intervention.

173 International Commission on Intervention and State Sovereignty (ICISS), *The responsibility to protect*, Ottawa, December 2001.

174 *Idem*, pp. 15-16.

175 *Idem*, p. 32.

176 *Idem*, pp. 53-55.

It has been noted above that international law does not provide a solution if the situation involving a failing state falls, for whatever reason, outside the scope of the concepts of threat to the peace, attacks on another state and large-scale human suffering. Instead of introducing a new assessment framework for the action taken by states against failing states it would be better to assign responsibility where it belongs, as the ICISS does, namely to the Security Council. This would provide the Security Council with the opportunity to apply existing concepts creatively where necessary. By contrast, the alternative – unilateralism – would sideline the international forums not only in individual cases but also generally.

It follows that the need for regulation of such intervention is increasing rather than decreasing. When assessing whether there is a threat to or breach of the peace and when subsequently formulating measures, the Security Council should systematically examine the adverse impact of failing states on their own population, the region, specific states and the international community. Indeed, there have been previous calls for the early warning capacity of the UN system to be boosted and for worrying country situations to be put on the agenda so that early action can be taken. This would enable the Security Council to be more effective in relation to failing states. The more scope for action which the Security Council has and uses, the less scope there is for states or groups of states to intervene on their own in a failing state. Intervention without a mandate of the Security Council could then take place only in very exceptional situations. In these cases too, intervention would in any event have to be referred to the Security Council.

Although consistency enhances the authority of the Security Council's actions, non-intervention in one case is not a reason for not intervening in other cases.

This raises the question of whether there is a duty to intervene. Intervention is in keeping with the purpose of the United Nations as described in Article 1 (3) of the Charter. The UN and individual states have a non-enforceable duty. If the Security Council has decided that armed intervention is necessary, states must facilitate this but are not required to make troops available. The duty would have to be based on chapter VII of the Charter, but agreements as referred to in Article 43 (1) have never been concluded. In the case of the Netherlands an extra factor to be taken into account is Article 90 of the Constitution, which provides that the government must promote the development of the international legal order. Participation – or continued participation – in military operations in response to a request from the UN is in keeping with this duty.

## **V.7 Efficiency of military instruments**

In what circumstances should the deployment of military instruments be considered? This is a question about efficiency, subsidiarity, likelihood of success, risks and value for money.

Military action is not a foregone conclusion even in cases where the circumstances connected with a failing state pose a threat to the peace, justify invoking the right to self-defence or make humanitarian intervention lawful.

Whether military action is efficient in the context of self-defence is a matter to be determined by the country concerned (whether it is lawful must be assessed by the Security Council or the International Court of Justice). Military action on the authority of the Security Council or in the event of humanitarian intervention must be assessed by reference to different criteria.

The first question that arises in connection with intervention in a failing state is whether it is worthwhile saving the state by military means. What should be the specific object of military intervention? Military intervention should serve the general aim of minimising the adverse impact of the failure of a state on the population, the region and the world (see chapter III). Above all, large-scale human suffering should be prevented or ended. Naturally, conditions must be created for the restoration of the monopoly on the use of force and for the installation of a government that exercises effective authority.

The second question concerns the circumstances that will face a military force that intervenes in a failing state. As the government notes in its request for advice on crisis management operations, intervention in intrastate conflicts generally entails many risks. Intervention requires 'robust mandates' and often a military capacity that allows the intervening force to operate in a situation where there is armed resistance. The request for advice dealt with this policy shift.<sup>177</sup> The experience gained of this harder line in the 1990s, when the instruments of the classic peacekeeping operation were applied to such conflicts (albeit in modified form), was discouraging.<sup>178</sup> It should be added that this development cannot be simply ascribed to the intrastate character of these conflicts. Also important in this connection is the spectre of international terrorism, which has become much more prominent in recent years. This second factor too can arise in connection with failing states.

The third question is who is prepared to carry out an operation. The UN still does not have command structures appropriate to a robust mandate. In recent years, such operations have therefore made use of other structures, backed by a mandate from the Security Council. ECOMOG and later the United Kingdom in Sierra Leone; the Australian-led coalition in East Timor; NATO in Bosnia; the United Kingdom, Germany and the Netherlands, and now NATO in Afghanistan. 'Regionalisation' of the implementation of crisis management may in due course become relevant for regions other than the European/Atlantic region, such as in West Africa with ECOMOG/ECOWAS<sup>179</sup> – although capacity there must be developed further. The Secretary-General has referred approvingly to regional peace forces that have stabilised a situation prior to a Security Council resolution in the case of Côte d'Ivoire (ECOWAS and the French) and Liberia (ECOWAS). He also mentions the cooperation with the troops of NATO (Afghanistan), the CIS, OSCE, ISAF in Afghanistan, and INTERFET in East Timor. He has invited NATO to engage in peace enforcement in Africa in the same way that the EU undertook Operation Artemis in East Congo as a bridging force.<sup>180</sup> This proposal deserves politically constructive examination.

Thereafter the following factual questions must be answered. What instruments are available? Are the available instruments sufficient to restore peace and order and go some

177 See AIV advisory report No. 34, *Nederland en crisisbeheersing: drie aspecten van crisisbeheersing*, (The Netherlands and crisis management: three topical aspects), The Hague, March 2004.

178 This helped to cause the setbacks that occurred in Rwanda, Somalia and Bosnia.

179 ECOWAS: Economic Community of West African States. ECOMOG is its military arm.

180 Opening remarks of the UN Secretary-General at a meeting with NATO parliamentarians, New York, 8 March 2004, SG/SM/9188.

way to meeting the more distant objectives?<sup>181</sup> Do the parties that play a role in the failing state support the search for a solution or, to put it another way, is there sufficient war fatigue? Is the timing right? What would be the costs to all sides in terms of casualties? Will the lot of the civilian population be improved after military intervention?

Are there sufficient resources and sufficient political commitment to ensure that the stage following military intervention can be brought to a successful conclusion? There must be a plan that goes further than restoring the monopoly on the use of force. There must be a prospect of funds that will allow the long-term involvement of the international community in the area concerned.

### **Timing**

At first sight it might seem attractive to treat military intervention as an instrument of last resort and to determine first, by reference to a subsidiarity test, whether all other instruments have been tried without the desired result. However, this approach should be viewed in perspective. Military intervention at an early stage may be desirable both in order to secure the object of the operation (for example preventing or ending large-scale human suffering) and for technical, military reasons and limitation of the risks to the military. This also raises the option of the preventive deployment of military units. It has been explained above that this is lawful only with a Security Council mandate or at the invitation of the legitimate government. But such deployment may be efficient for humanitarian reasons and, no matter how calculating this may sound, for financial reasons too. Timely stationing of military units will generally be cheaper than intervening once an armed conflict has broken out. The costs incurred by the international community in keeping order in Macedonia have been much smaller than the costs of intervention in Bosnia and Kosovo.

The primary problem in the case of failing states is intrastate tensions and conflicts; naturally, intervention from outside and the spilling over of the conflict to other countries can be a factor. Intrastate conflicts are an uncomfortable environment for military personnel who have a mandate to achieve effective stabilisation. Often the military front is not clear, information about the location of combatants is inadequate, negotiations have too many participants and a workable hierarchy is absent within the opposing groups. All of this leads to unpredictable situations. The military component in a peace operation must therefore be equipped more heavily. The force commander will in general keep control for longer before transferring it to a civilian governor, for example a special representative of the UN Secretary-General. In the course of a stabilisation operation the centre of gravity may shift towards the civilian governor. Strict coordination remains crucial in all circumstances.

### **Indicators**

For indicators that the situation in a country has reached the point where military intervention becomes appropriate, it is necessary to go back to the definition of a failing state in chapter I. Does the state still have a monopoly on the use of force, is the legal order still intact and can the state still deliver services? The first question is the most important. It is also necessary to examine the impact of the failure on the local population, the region, the international community and individual states.

181 In a recent study, the Rand Corporation concludes that the likelihood of fatalities is the smallest when an overwhelming force is deployed. James Dobbins et al., *Nation-Building, The inescapable responsibility of the world's only superpower*, Arlington, 2003, www.rand.org, p. 153.

The military part of an operation need not necessarily be ended at the same time as the civil part.<sup>182</sup> The ending of the military operation is dealt with briefly below.

The first step is to lower the level at which the international force operates, namely from a force that secures the peace (not under UN command) to a force that monitors the peace (under UN command). This is known in the jargon as switching from green to blue. This can be done once the 'stabilisation phase' has passed. The criterion for the departure of the green berets (i.e. the military force) is the nature of the situation that will exist after its departure, not the nature of the current situation. Can armed uprisings be expected which will have to be put down by means of coordinated and possibly large-scale action? Is there an effective truce?

Other indicators concern the transfer from forces under UN command to police forces. Will peace and order, once restored, continue? This question should not be answered primarily on the basis of how long there have been no disturbances. What is more important is whether the authorities of the restored state have a firm grip on the monopoly on the use of force and have the expertise and strength to maintain law and order in practice and, if so, whether the actual maintenance of law and order will not lead to fresh outbreaks of violence. A criterion is whether the local armed forces are able to act coherently and have a unified command structure. The switch to police duties could be initiated if there are no longer any military duties to be carried out, for example disarmament, mine clearance and guard duties involving arms larger than hand guns. Can all assistance and reconstruction operations be carried out by civilian forces?

Indicators for termination of the police duties by the international force can be found in the underlying causes of the failure of a state.<sup>183</sup> It is necessary to determine whether the authorities, and in particular the law enforcement apparatus, can be regarded as legitimate, and, at a practical level, whether the local police are capable of carrying out their duties.

An indicator of the need for the return of the foreign armed force is a sudden rise in the number of human rights violations and the inability of the government to offer protection against this. Large-scale internal or external migration is in turn an indicator of such a situation. The same applies to an increase in illegal trafficking in arms, an increase in international crime and, possibly, the activities of terrorists from the state in question. The most straightforward indicator is generally the government's loss of the monopoly on the use of force. Are there non-state actors that have taken over control of areas of the country from the government? Does the army still have a unified command structure? The other two elements in the definition of a failing state (i.e. whether the internal legal order is collapsing and whether the government can still deliver services) can also serve as indicators.

<sup>182</sup> As regards this last subject, see chapter VI, section 3, on exit strategies.

<sup>183</sup> See the description in chapter III, section 1.

## V.8 Dutch use of military instruments

Below are some observations on aspects of Dutch military deployment which may be relevant in the case of failing states.<sup>184</sup>

In the past the Netherlands has taken part in military interventions as a member of UN and other forces. This is in keeping with the role of the Netherlands in championing and applying the international legal order. The Netherlands has taken part both in classic peacekeeping operations (UNIFIL, UNFICYP and UNMEE) and in operations at the higher end of the spectrum of force (including ISAF and KFOR). Operations may be at either the higher or the lower end of the spectrum. It is important, especially politically, that Dutch military units should also be available for deployment on missions at the upper end of the spectrum of force and that the Netherlands should be willing and able to share with other countries the risks and uncertainties connected with an initial entry phase of deployment.<sup>185</sup> The Netherlands then has something to offer in the political debates on the problems in many regions and can fulfil its ambition of contributing to the international legal order.

This does not mean that the Netherlands should refrain from taking part in classic peace operations. It is, however, recommended that the Dutch armed forces should be deployed in those areas in which most effective use can be made of the very high calibre of their composition. In other words, complicated operations that require a high level of proficiency and resources as well as the ability to work closely with others, even in complicated situations. It may be assumed that this will mainly be in operations at the upper end of the spectrum of force.

Chapter VI advocates that Dutch development-related involvement in reconstruction operations should focus on a limited number of regions. This need not apply in the case of participation in peace operations. The Dutch contribution will generally be for a limited number of months or for at most a year or a few years. Thereafter others will, if necessary, take over. The Netherlands can also continue to monitor developments in the region at the political level, particularly through the EU. Other than in the case of reconstruction, it is not necessary to develop a long-term relationship with a country through a military operation to restore order. Indeed, it is actually better if the Dutch armed forces have gained varied experience in different regions.

184 See above: advisory report of the Advisory Council on Peace and Security, *Verloren onschuld, Nederland en VN-operaties* (Lost innocence: the Netherlands and UN operations) The Hague 1996; AIV advisory report No. 10, *De ontwikkeling in de internationale veiligheidssituatie in de jaren negentig – van onveilige zekerheid naar onzekere veiligheid* (Developments in the international security situation in the 1990s: from unsafe security to insecure safety) The Hague, September 1999; AIV advisory report No. 34, *Nederland en crisisbeheersing: drie aspecten van crisisbeheersing* (The Netherlands and crisis management: three issues of current interest) The Hague, March 2004. Dutch policy is described in the policy document on the political principles governing participation by the Netherlands in possible peace missions (letter of the Minister of Foreign Affairs and the Minister of Defence to Parliament of 8 April 2004). This policy document is so recent that no account could be taken of it in the present report.

185 On this subject, see AIV advisory report No. 34. 'Initial entry' is a NATO concept. The aim is to establish a foothold in the intended area of operation. 'Follow-on' involves the completion of a mission.

The Netherlands should also be able to make a flexible contribution to Civil-Military Cooperation (CIMIC) and other operations involving cooperation by the military in civilian development activities.<sup>186</sup> The need for practical assistance in the locality where the peace force is employed will exist particularly in failing states. Usually, both the infrastructure and public services will long have been neglected. In this connection, there need not be a strict focus on a few regions of the world, as applies in the case of long-term development efforts.<sup>187</sup> It goes without saying that active steps (in the form of deployment of knowledge of the local situation and rapid coordination with others who are active in the region) must be taken to avoid the projects being counter-productive.

In addition to military units, the Netherlands can also make available police units. On this subject see chapter VI, section 2.

## **V.9 Conclusions and recommendations**

Under international law as it stands, the failure of a state does not constitute an independent ground for intervention by the international community. But in the case of state failure another circumstance that does warrant intervention may exist at the same time. The Security Council may determine that there is a threat to the peace, which may include a situation of large-scale human suffering.

States may invoke the right of self-defence if they are attacked or are about to be attacked at any time; this applies until such time as the Security Council intervenes. If states do intervene, they should observe great transparency in this connection.

Humanitarian intervention other than through the Security Council may be justified in exceptional cases. Criteria for such intervention are being developed in international debate, to which the AIV and CAVV have contributed by means of their advisory report in 2000. The criteria developed for intervention in the case of large-scale human suffering also apply where such suffering takes place in a failing state.

In addition, it is possible that intervention by coalitions of states on other grounds and other than through the Security Council will start to be discussed as a result of the worsening security situation in a number of regions in the world, particularly in view of the threat of terrorism. However, the International Commission on Intervention and State Sovereignty initiated by Canada regards this as the responsibility of the Security Council. This approach deserves support. Strengthening the fabric of the international community can counter unilateral action of states that believe their interests are being jeopardised. Here there is also a role for the Netherlands. Military intervention is, in general, a last resort. The use of military intervention need not, however, be the last instrument chronologically since timing is a critical factor, particularly for the safety of the military personnel.

<sup>186</sup> The policy framework presented to the House of Representatives on 19 May 2003 (Parliamentary Paper No. 28.600 X, No. 45), defines CIMIC as ‘the interaction between military personnel used in a peace operation on the one hand and civilians and civil authorities in the region on the other’.

<sup>187</sup> This was also the line taken by the Minister of Defence and the Minister for Development Cooperation in relation to the participation in the UNMIL mission in Liberia. See the report of their trip to Africa in their joint letter to the House of Representatives of 27 February 2004.

Troops may be deployed preventatively only at the invitation of a failing state that is under attack from rebels or pursuant to a resolution of the Security Council. Under chapter VI of the UN Charter, military observers too may be deployed with the consent of the parties to a conflict. A possible role for NATO is in the deployment of military resources to achieve aims formulated by the UN. NATO should therefore respond in a politically constructive way to exploratory questions put by the UN Secretary-General.

The Netherlands can play a greater role politically within the EU and at global level in efforts to establish an international legal order if it also has military instruments capable of being deployed in a wide variety of situations, including situations at the upper end of the spectrum of force. It is therefore a good thing that the Dutch armed forces have adequate equipment and varied experience. This is one reason why military deployment need not be limited to the areas targeted for development cooperation, namely the Balkans, the Horn of Africa and the Great Lakes area. The same applies to related CIMIC activities.

# VI Restoration of failing states

## VI.1 Definition of 'restoration' and variants of sovereignty

The request for advice refers to the restoration of failing states as an objective. However, restoring the *status quo ante* is not always worthwhile. The object should instead be to create conditions for a state in which the government exercises effective authority, as described in chapter I. This should be a viable state, which has better qualities than its predecessor. Aspects that can be discussed in this connection are the independence (absolute or otherwise) and organisation of the state and its economic basis.

It is debatable whether a failed state should always be restored in the form of a state having unlimited sovereignty. It would seem better to be flexible in formulating solutions. Constraints on sovereignty have naturally existed for a long time and have taken the form of limitations accepted voluntarily (e.g. the ECSC, EC, EU and UN) and limitations arising from *de facto* situations as described in chapter III. There have also been precedents for the imposition of constraints on sovereignty. Germany was subjected to the Four Power Agreement, and Cyprus had to take account of the guarantor powers (but ultimately did not do so). Where a state fails, a creative redefinition can be attempted: instead of a modern state with its black-and-white concept of sovereignty (sometimes described as Westphalian sovereignty) a post-modern state with gradations and nuances can be created. This has the effect of 'unravelling' sovereignty as a total concept. In fact, this has already happened in the Balkans, in Bosnia and Kosovo.<sup>188</sup>

In the longer term, structures must be created that set standards for government conduct and hold out prospects for the population. A state can be embedded in an international framework as the final stage of a process of internal reform. In other cases, such frameworks have been created on an entirely voluntary basis. The EU, for example, has proved to be a stabilising force in Europe. Its member states no longer have the option of pursuing their own completely independent course in isolation. Any government which attempted this would very quickly be called to account by other governments, if only because such a course would be contrary to legally binding agreements. The Council of Europe and the OSCE are also safety nets, albeit less far-reaching. The idea of embedding states in an international framework is an important contribution to the debate.<sup>189</sup> It involves a reduction of sovereignty, but the stability will ultimately benefit the security of the individual state. For example, the future of the states and regions created from the former Yugoslavia ultimately lies in integration in the EU and NATO. If the regional structures are not strong enough (which is often the case), the state must be embedded either in a framework of states from outside the region or in the international community at large through continuing UN involvement. These other, more remote states will have to show commitment, generally based on the responsibilities and interests described in chapter III as grounds for involvement in failing states.

<sup>188</sup> See R. Keohane, 'Political authority after intervention: gradations in sovereignty', in R.O. Keohane and J.L. Holzgrefe (eds.), *Humanitarian Intervention*, Cambridge, 2003, p. 290.

<sup>189</sup> R. Keohane, *ibid* and M. Ignatieff: 'State building and nation building', *idem*, p. 311 ff.

There is also the question of whether the *status quo ante* should be restored as far as the structure and organisation of the state is concerned. Efforts must be made to create a state that does not suffer from the same defects as before. The risk factors must be limited as far as possible. The failing state cannot do this on its own.

The international involvement in the process of restoration and reconstruction should be used to introduce or anchor international standards in the new state. This should be done not only through treaties and conventions but also through codes and practice. For example, if a struggle for natural resources has played a role in the failure of the state, it is important to make use of the latest ideas when arranging control and supervision of the natural resources. Management of the natural resources could be placed temporarily under international control, as occurred in the case of Namibia.<sup>i</sup>

In the case of failing states, suffering to a large extent from the 'given circumstances', a plan must be made to influence the circumstances or in any event to mitigate their effects. The plan must ensure that the state will not be forever dependent on foreign funds.

## **VI.2 Reconstruction after military intervention**

In recent years, it has become increasingly common for a civil dimension to be added to military peace operations. Military intervention is necessary in order to create a degree of order. For this purpose, a temporary umbrella authority or a form of supervision or assistance is established in a country or area on behalf of the UN (or a group of countries). In addition to maintaining order, the object is to build or reconstruct the state. This can include disarming soldiers, protecting refugees, training police, monitoring elections, establishing an effective government and restoring the legal system.<sup>191</sup> Such activities are necessary in order to tackle the underlying causes of a conflict, for example a weak economy, social injustice and political repression. Even after intervention many countries still struggle with the problems that made intervention necessary in the first place. Greater emphasis is now being placed on ensuring lasting stability. In a Presidential Declaration in 1998 the Security Council too recognised that post-conflict peace-building was important and that activities in this area could be integrated into the mandates of peace operations.<sup>192</sup> The number of multidimensional mandates grew sharply in the 1990s, as did the overall number of mandates. The UN has undertaken 54 peace operations since 1945, 41 of them since 1988.<sup>193</sup> The specific problem of failing states is that there is no workable machin-

190 See also the government policy document *Ondernemen in conflictgebieden* (Doing business in conflict areas), letter from the Minister of Foreign Affairs to the States General of February 2004, p. 19, available as Parliamentary Paper No. 29.439 No. 1.

191 In 1992 the then UN Secretary-General B. Boutros-Ghali advocated the concept of post-conflict peace-building (also known as the multifunctional or multidimensional approach) in his 'Agenda for Peace'. B. Boutros-Ghali, 'An Agenda for Peace: Preventive diplomacy, Peacemaking and Peace-keeping', New York: UN 1992, No. 52.

192 Presidential Statement Security Council, PRST/1998/38, 29 December 1998.

193 Figures taken from: Michael Steiner: 'Seven principles for building peace', *World Policy Journal*, summer 2003, p. 87. See also: B. Boutros-Ghali, *Supplement to an Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, New York: UN 1995, No. 11.

ery of government that can carry out basic tasks. This is why a military presence is not sufficient and a civil component is crucial.

Some of the civil duties are discharged by the military organisation. This is known as Civil Military Cooperation (CIMIC).<sup>194</sup> Here too it should be emphasised that coordination with other organisations providing assistance is of great importance when choosing and implementing projects. It is precisely in these circumstances that CIMIC can act as a link with later reconstruction efforts.

Public diplomacy is an additional factor. The aim of the action should be made clear not only in the Netherlands and on the international stage but also to the rulers and population in the countries concerned (actual or potential failing states). This also certainly applies to the propagation of timely, preventive involvement.

### ***The chances of success in state-building or state reconstruction***

A recent survey by the Rand Corporation draws lessons from the contribution of the United States to major projects involving state reconstruction.<sup>195</sup> According to this survey success is linked to the level of effort measured in time, troops and money per inhabitant of the state. There appears to be an inverse correlation between the size of the stabilisation force and the level of risk: the higher the proportion of stabilising troops, the lower the number of casualties. Multilateral deployment is more complex, but can produce more thorough transformations and facilitate regional reconciliation. Unity of vision and command is essential in this connection. The support of neighbouring countries must be requested. State-building often takes longer than seven years. A project to help the local population come to terms with the past can be an important component of democratisation, but can succeed only if there is long-term commitment. Although the circumstances and quantitative data in the countries examined in the survey (Germany, Japan, Somalia, Haiti, Bosnia, Kosovo and Afghanistan) are not always typical of failing states or of the region from which they come, these general conclusions seem to provide a worthwhile pointer. Several aspects are discussed below.<sup>196</sup>

Strict coordination between the military commander and the civil commander, for example a Special Representative of the UN Secretary-General, is always essential.

Staying power too is of crucial importance: it is necessary that the international community should commit itself for a long period to the fate of the state that is being rebuilt. Decisions must be made on the basis of the results that are expected and needed and not on

194 See the Dutch policy framework contained in the government memorandum of May 2003, Parliamentary Paper No. 28.600 X, No. 45.

195 J. Dobbins et al., *Nation-Building, The inescapable responsibility of the world's only superpower*, Arlington, 2003, [www.rand.org](http://www.rand.org), Ch. IX.

196 See also M. Steiner (former Special Representative of the UN Secretary-General in Kosovo), in 'Seven principles for building peace', *World Policy Journal*, Summer 2003, pp. 87-93. He lists the following seven principles: clear mandate; match the mandate to the means; get it right from the beginning; learn as you go; finish what you start; the essential sequence (security and the rule of law first, democratisation later); changing bad habits; the art of letting go.

the basis of the current political situation.<sup>197</sup> In this connection it is a disadvantage that the different UN functions in the field of peace-building, post-conflict or otherwise, are built into the wider mandate for a peace operation. This results in constant pressure to end the peace operation. The chief criterion for this is generally the restoration of peace and security, as formulated in some way in the mandate. However, making an area ready for self-government and carrying out civil tasks takes time. It would therefore be better for this to be regulated in a separate partial mandate which continues once the peacekeeping operation in the narrow sense has been ended. Carrying out civil functions requires good coordination within the UN system and effective cooperation with other agencies and NGOs.

It would be useful if the civil component could be introduced in a sequence dictated by needs rather than by the more or less chance offer of assistance by member states. An alternative would be to arrange for a permanent force. To some extent this could be achieved through the UN by the formation of a pool and by drawing up lists of specialists. Civil capacity would then be available on call. The EU operates a pooling system of this kind within the CIVCOM mechanism in order to be able to respond quickly and effectively to events, as occurred for example in the case of the police missions to Bosnia and Macedonia. The Netherlands too can contribute to such pools.<sup>198</sup> This could involve both personnel on active duty and retired officials. Pools of reservists could be created for civil-military cooperation.

As regards the civil dimension, the Netherlands itself should concentrate on a limited number of country situations where it already makes a contribution within a donor structure. The present choice of the Balkans, the Great Lakes region and the Horn of Africa is in itself very ambitious. In addition, the Netherlands should have capacity ready in a number of specific areas in which it has demonstrated its special value in the past. Taking into account its experience in the Balkans, these areas are reform of the legal system, police, tax system and customs authorities, assistance with spatial planning and the establishment of a land register.

Funding constitutes a major problem. Operations to rescue a failing state are very expensive. Once again, prevention is much cheaper than rescue. This can be illustrated by some revealing figures published by the United Kingdom. For the operations in Bosnia, after a war lasting several years, the British taxpayer has already paid out GBP 1.5 bn. The figure for Kosovo, after quicker intervention, is set at GBP 200 m. And the preventive action in Macedonia, at a very early stage and with a limited force, cost only GBP 14 m. The UN has spent USD 1.7 billion in Cambodia.<sup>199</sup> Even operations in a small country

197 The return of the UN to areas where previous operations have failed to bring about lasting improvements obliges the international community to adopt a public position. For example, UN Secretary-General Kofi Annan expressed the hope, at the time of the adoption of the Security Council resolution on Haiti on 29 February 2004, that 'the international community is not going to put a band-aid on, and that we are not only going to help stabilise the current situation, but assist the Haitians over the long haul and really help them pick up the pieces and build a stable country'

198 The pool formed by the Dutch Centre for International Police Cooperation is an example.

199 For more figures, see *Carnegie Commission on Preventing Deadly Conflict, Final Report*, New York, 1997. This Commission states that the international community spent some USD 200 bn on controlling seven major conflicts (not all in a failing state) in the 1990s (Bosnia, Somalia, Rwanda, Haiti, the Persian Gulf, Cambodia and El Salvador). If a more preventive approach had been adopted, USD 70 bn would have been sufficient. Quoted in: ICISS, *The Responsibility to Protect*, Ottawa, 2001, p. 20.

can easily involve huge sums. For example, an operation to restore order in the Solomon Islands (500,000 inhabitants) would cost in the region of USD 640 m over a 10-year period.<sup>200</sup> For a proper assessment, it is important to compare these amounts with the enormous expense of state failure and the advantages of a properly functioning state. In the long run it is certainly cheaper to invest promptly in combating state failure. Post-conflict state-building is also a way of contributing to conflict prevention.

### ***Coming to terms with the past***

It is necessary for the purpose of state-building that society should come to terms with the past. As the UN too recognises, stability can be founded only on justice.<sup>201</sup> One way of promoting cohesion and stability in a dislocated society is for people to confront their own past in such a way that this has consequences for the position of both perpetrators and victims. A general amnesty, under which crimes against humanity are no longer persecuted, is not acceptable.<sup>202</sup> At the same time, it is clear that in the process of closure, there is a tension between the different objectives that must be pursued: i.e. peace, justice, truth and reconciliation. It is not possible to indicate the right balance in the abstract. Determining the truth and applying the law are the main elements of coming to terms with the past. In recent years much experience has been gained of different models. These include mechanisms designed to provide legal reparation for victims. There is also the case law developed by the ad hoc tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR). Owing to the complexity of the subject matter, it is not possible to examine within the remit of this document the relative advantages and disadvantages of truth and reconciliation commissions and tribunals in different circumstances.<sup>203</sup> A systematic survey of past experience could be a useful instrument in this connection. The legitimacy of the outcome of both tribunals and commissions is dependent on the fulfilment of certain basic conditions, namely that the chosen model is legitimate in the eyes of the population, that in principle all parties who were involved in the violence or in the conflict or its termination can be called to account, and that the proceedings are carried through to their logical conclusion. External assistance must be available for the conduct of the proceedings, for operation of the mechanisms to establish the truth, and for the provision of assistance to victims. Compensation for victims must be financed primarily from the state's own funds or other domestic resources.

### ***Holding foreign actors responsible***

The importance of exposing financial and economic wrongdoing deserves separate mention here. In the case of failing states such wrongdoing often involves the illegal exploitation of

200 *Our Failing Neighbour, Australia and the Future of Solomon Islands*, ASPI policy report, Barton ACT 2003, p. 47.

201 'Recognizing that accountability of perpetrators, including their accomplices, for grave human rights violations is one of the central elements of any effective remedy for victims of human rights violations and a key factor in ensuring a fair and equitable justice system and, ultimately, reconciliation and stability within a state.' See resolution 2003/72 on impunity, of the UN Commission on Human Rights of 25 April 2003. The Security Council resolution of 29 February 2004 on Haiti states that there will be no impunity for violators of human rights.

202 See the reservation of the UN to the inclusion of such a clause in the Lomé peace agreement on Sierra Leone.

203 On this subject see in particular N. Kritz (ed.), *Transitional Justice*, Washington D.C., United States Institute of Peace Press, 1995, and R. Teitel, *Transitional Justice*, Oxford, OUP, 2002.

natural resources, illegal trafficking in commodities, arms trading, money laundering and complicity in the theft of government funds. The self-enrichment of the leaders who have played a role in the failure of a state must be uncovered. Not only the leaders but also those who have aided and abetted them from abroad can be called to account, for example banks, law offices and commercial companies. The investigation of a number of specific situations could set a strong precedent. Criminal prosecutions for such wrongdoing often founder on account of practical problems in the case of failing states and on account of legal constraints in the case of other states. Outside support will be necessary to make such proceedings possible. Publicity in itself can form a strong sanction. For example, pressure can be brought to bear on foreign companies to change their policy and to reveal information that can lead to prosecution, in particular prosecution of the leaders of the failing state. An example would be information about cash flows.

### **VI.3 Exit strategies**

A decision to terminate a mandate is taken in the light of whether the mandate has been accomplished or is perhaps incapable of accomplishment. The wording of the original mandate is therefore the first criterion.

If the Security Council decides to deploy military instruments, this will be linked to the purposes of Article 1 of the UN Charter: i.e. the restoration of international peace and security and of respect for human rights. In the case of a failing state the restoration of international peace and security is not in itself the solution to the problem. The mission should have a different object or should be followed by a mission with a modified object. In practice, the Security Council has not objected to extending the concept of international peace and security and the threat to it. In the case of Haiti this ground has for many years been the basis of the Security Council mandate for the reform of the police.

Where there is intervention after state failure, the mission should be continued in one form or another until there is once again a state capable not only of maintaining order but also of functioning in other respects too. Greater emphasis is put on post-conflict peace-building than, for example, in the case of an inter-state conflict. Application of a formal criterion is not sufficient. For example, the holding of elections that bring a ruler to power would provide no guarantee whatever that the state would be viable or no longer pose a threat to the region. Elections cannot be equated with democratisation. For this, progress is necessary in other areas as well: i.e. a transparent executive, a competent legislature, a neutral judiciary and a free press. A discussion paper of the Dutch presidency of the Security Council cites in this connection the negative example of the termination of the UNOMIL mandate in 1997 after Charles Taylor had been elected president of Liberia.<sup>204</sup> Another example is the failure of the UN Security Council to provide adequate follow-up in Haiti to the intervention by a multinational military force in September 1994. The mandate was subsequently extended for short periods only and the mission suffered from the limited availability of resources. This made it impossible to plan for future operations and prevented the mission from developing momentum. The final transfer to the UN General Assembly in 2000 was based on the conviction of some members of the Security Council that the issue was development problems and domestic policy rather than international peace and security. This brought about a further reduction in the presence of UN personnel and of the influence of the UN. The instability remained. The Dutch paper noted that certain key countries in the UN had allowed their supposed national interests to prevail

204 Annexe to a letter of Permanent Representative Van Walsum to the Security Council, S/2000/1072, p. 4.

over the determination to solve the problem of Haiti. The argument of an absence of a threat to peace and security illustrates that a legalistic approach by the Security Council can cause discontinuity in tackling the problems of failing states.

Both theory and practice are now moving forward. As regards the former, it has been argued that an exit strategy should no longer be defined as an effort to achieve complete absence of foreign authority. The restoration of full and unlimited sovereignty need not be the logical starting point or the ideal. As submitted above, the aim should be to ensure that the state is embedded in supranational structures on a lasting basis. In practice too, gradual termination is now the received wisdom. In Kosovo administrative functions are being transferred to the local authorities wherever possible.

This is a promising combination: i.e. the certainty of complete withdrawal and complete restoration of sovereignty is waived, while at the same time functions are gradually transferred to a local administration. However, the functions transferred must be substantial if democratic responsibility is to have the chance of evolving. The population must be able to give its own new government the credit for achievements. Sovereignty is limited by the imposition of international standards and a residue of the decision-making power is left in international hands. Intervention is provisionally institutionalised for that residual power.

The criteria for determining the right moment for complete withdrawal of the international community are whether the divisions within the population can be resolved by means of old or new mechanisms, whether or not abuse of power is a fundamental characteristic of the functioning of the social structures and whether sufficient measures have been taken to end the vulnerability of the state.

#### **VI.4 Past experience gained with structures in post-conflict situations**

The factors cited in section 2 above (pressure to end the mandate combined with the need for patience; dominant influence of political hot issues combined with the need for the consistent management of the supply of administrative capacity) explain how it happens that the Security Council's approach of emphasising peace and security and the objective of the enduring restoration of failing states may diverge. This calls for adjustments to the mechanism used in crisis management operations in failing states.

The primary task of a foreign authority is to guarantee peace and security, but in many cases it is also called on to assume civil (including administrative) responsibilities. These generally include humanitarian aid, policing, financial matters, border control, enacting legislation, and administering justice. In some cases – in East Timor and Kosovo, for instance – authorities have created an entire government apparatus, headed by an international official. These structures of authority were developed in an ad hoc way (though guided by past experience) and their foundations varied. In almost all cases there has been some connection with, or at least recognition by, the UN.

A range of models has been used up to now. The examples, displayed in boxes (see below and in Annexe 3) relate to administrative models and any specific lessons to be learnt in that area. For this reason, not all the examples given here are of failing states.

### ***Cambodia***

The UN peace operation in Cambodia in 1992-1993 was unique. It was the first occasion on which the UN took over part of the government from an independent member state, albeit in combination with a coalition government of all factions, which was under the supervision of the UN. The UN subsequently organised elections. The Security Council emphasised that it was important for the elections to be held in May 1993.<sup>205</sup> The UN had its own radio station and prison and was responsible for propagating and protecting human rights at national level. The United Nations Transitional Authority in Cambodia (UNTAC) was established in February 1992. It consisted of between 15,000 and 20,000 UN personnel, including 3,600 personnel for supervision of the police organisation. After the withdrawal of UNTAC a few UN institutions remained in Cambodia to assist with the reconstruction of the country.

Below are some lessons that can be learned from the Cambodia operation:<sup>206</sup>

- The late deployment of UNTAC was one of the main flaws of the operation. Efforts should be made to reduce the delay between a negotiated settlement and deployment of a peace force and its associated mechanisms and infrastructure.
- The local influence of UNTAC was also limited by the fact that its departure date was set in advance.
- The UN Secretariat lacked the experience, resources and qualified personnel to organise a mission of such complexity and magnitude at short notice. The negotiators of the Paris Peace Accord and the UN Security Council apparently gave little thought to how the Secretariat might cope or whether it might need additional resources to organise and maintain UNTAC.
- The inadequacy of its advance planning affected UNTAC throughout its existence. This was due in part to the shortage of capacity at UN headquarters.
- UNTAC's loose strategic coordination arrangements resulted in waste, duplication of effort and lack of synergy. Better strategic coordination is needed between the components of large multi-purpose UN missions. Proper coordination between the military and civilian personnel of peacekeeping missions is essential if a mission is to be accomplished.
- In retrospect, the period of 18 months can be seen to have been too short to have any permanent effect. The many training courses and projects failed to produce an effective democratic system. However, many vital NGOs were created and continue to exist.

### ***Limitations of the present structure***

In current practice, in all its variant forms, the UN Secretary-General (as the most senior official of the UN's Secretariat) serves de facto as 'trustee' on the basis of a mandate issued by the Security Council, or sometimes by the UN General Assembly. He usually appoints High Representatives – to represent himself, not the UN as a whole – to lead the administration in countries/regions such as Kosovo, Bosnia, and previously East Timor, Cambodia and elsewhere. Oversight is exercised retroactively by the Security Council (or

<sup>205</sup> See S/RES/745, February 1992. The operation could not exceed 18 months.

<sup>206</sup> T. Findlay, *Cambodia, The Legacy and Lessons of UNTAC*, SIPRI Research Report No. 9, Stockholm, 1995.

by the UN General Assembly, especially where finances are concerned), which sets aside at most a few hours to debate the situation in a particular country, and even then focuses primarily on the political context and the future. As a result, only loose ties exist between the UN's political organs and the administration. Furthermore, these organs pay little attention to the 'horizontal' administrative issues that are constantly surfacing, regardless of the country or region concerned.<sup>207</sup> That is not to say that the Secretariat is not making a concerted effort in this regard – witness the model criminal code and code of criminal procedure that it drafted in response to a recommendation in the Brahimi report, the idea being that these could be introduced flexibly as part of the process of state building.<sup>208</sup>

The flexibility now available, which makes it possible to adjust a structure to a specific situation, certainly has its advantages. So does the room to manoeuvre currently possessed by the High Representative in the region. Even so, perhaps the time has come to make the installation and maintenance of temporary authority and the exercise of state responsibilities in principle into a matter for a political organ of the UN. This does not necessarily mean jettisoning flexibility. What matters is to improve the cohesiveness of the peace-building tasks performed by third countries in post-conflict situations, in military as well as civil areas of responsibility. Moreover, there has long been a need for well-coordinated international cooperation to bridge the gap between the end of a peace operation and self-administration.<sup>209</sup> If this problem is not addressed, intervention may very well do more harm than good.

207 'The Council does not have any mechanism, and its members seldom have much appetite, for scrutinising the conduct of an administration in detail.' Edward Mortimer, 'International Administration of War-torn Societies', in *Global Governance*, Vol. 10, No. 1, 2004, p. 13.

208 UN press release, 18 March 2004.

209 'The causes of conflict and the promotion of durable peace and sustainable development in Africa', report of the UN Secretary-General, 1998, A/52/871 or S/1998/318.

## VII Towards a better international approach

### VII.1 The institutional side of the reconstruction of states within the UN

Under the authority of the Security Council, the UN provides assistance in the reconstruction of failing states.<sup>210</sup> Given the Security Council's narrowly-defined remit in this area, it can do so only in situations posing a threat to international peace and security. Where necessary, military operations are mounted and the civil responsibilities associated with state-building can be assumed as a secondary matter. Some of the disadvantages of this approach are discussed above.

In the case of a failing state, the problem is generally violent *internal* conflict. To restore peace and order in such a situation, there is a need for an effective command structure that would not be feasible within the UN. In recent years, mandates of this kind have been carried out by ad hoc coalitions.<sup>211</sup> This makes it all the more logical to separate the mandate to restore peace and order from the mandate to rebuild a state. This would leave the UN free to focus on civil responsibilities. Cooperation and close coordination would obviously be essential.

On the UN side, there is a need for a more uniform structure within which all situations involving failing states can in principle be discussed and can become the focus of action undertaken or approved by the UN. An effective structure could also help to discourage unilateral tendencies in international politics. A separate UN forum should be created to discuss the fulfilment of mandates that extend until long after a situation has ceased to pose a threat to international peace and security. This forum should have a counterpart in the Secretariat, which now bears the primary burden in the administration of such territories.

It is essential to set up an international coordination point within the UN to address the problem of failing states, with enough authority to take on coordination and to leave the population of the region concerned in no doubt whatsoever as to the authority's legitimacy.<sup>212</sup> The UN could then take over, if necessary by way of military intervention or occupation but peacefully if possible, responsibilities relating to the preservation of the peace in, and the administration of, states that are undoubtedly failing, until order is restored and self-administration is possible again. Some of the state's responsibilities could be transferred, on the basis of an agreement or an explicit decision by a competent

210 The work done by many parts of the UN system also helps to *prevent* the emergence of failing states. In the spirit of Chapter IV this includes, for instance, the work done to tackle the negative effects of certain circumstances, to strengthen the bonds between state institutions and society, to help governments to operate more effectively and responsibly, and to curb abuses of power. The Security Council also has the task of taking prompt action to prevent crises.

211 See chapter V above and the AIV's advisory report No. 34, *The Netherlands and crisis management: three issues of current interest*, The Hague, March 2004.

212 Legitimacy remains a fundamental problem, according to the head of the UN's Peacekeeping Best Practices Unit, David Harland, in 'Legitimacy and effectiveness in international administration', in *Global Governance*, Vol. 10, No. 1, 2004, p. 15.

body (the Security Council), from a failing state to a foreign authority. In the case of a truly failed state, this transfer would involve sovereignty and the monopoly of the use of force.

The following pages describe possible models in which a political organ of the UN would have certain responsibilities in administering troubled territories.

### **General Assembly**

Although serious efforts have been renewed over the past year to improve the effectiveness of the UN General Assembly, the Assembly appears to be too impractical and unwieldy an organ to concern itself with administering territories. The mandate of the Fourth Committee (Special Political and Decolonisation Committee) of the UN General Assembly includes questions of decolonisation, but it takes more of a declaratory than an administrative approach. Furthermore, making exceptions to the general rule of non-intervention (Article 2 (7)) is not a task that can be entrusted to the General Assembly within the UN Charter system. This approach is therefore not to be recommended.

### **Trusteeship Council**

The UN Trusteeship Council, another principal organ of the UN, has guided a total of eleven trust territories to independence or to free association with a state. When the Security Council ended Palau's status as the last remaining trust territory in 1994, the Trusteeship Council's role was effectively played out, after 47 years. Meanwhile, the UN is taking on more and more responsibilities on an ad hoc basis in the areas of reconstruction, sustainable peace, and administration. Some voices have already been raised in favour of reviving the UN Trusteeship Council to take on some of these tasks.<sup>213</sup> This would require an amendment to the UN Charter, Article 78 of which rules out the application of the trusteeship system to territories that have become members of the United Nations, a provision based largely on respect for the principle of sovereign equality. Some have argued that such a decision would also require an amendment to the principle of non-intervention. Furthermore, the Trusteeship Council's history revolved around decolonisation, a heritage that makes it an emotionally charged institution to some extent. Finally, the Trusteeship Council's obligation to report back to the UN General Assembly could lead to long debates there. This approach is therefore not to be recommended either.

### **ECOSOC in conjunction with Security Council** <sup>214</sup>

In the 1990s, the United Nations Civilian Police Mission conducted a stabilisation operation in Haiti, which was followed by support in setting up a national police corps. This was made possible by a mandate to a series of UN missions.<sup>215</sup> The task of the Economic

<sup>213</sup> See e.g. the press conference of 8 September 2003, at which the UN Secretary-General stated that the member states must decide whether to give the Trusteeship Council this role; SG/SM/8855. G. Kreijen also advocates this approach in his doctoral dissertation, *State Failure, Sovereignty and Effectiveness*, Leiden, 2003, p. 300 ff. He argues that a failing state can be deprived of its statehood, thus obviating the need to obtain its consent for the establishment of a trusteeship (p. 395). Commercial edition: Leiden, Brill 2004.

<sup>214</sup> See also the guest editorial by the Portuguese prime minister J.M. Durao Barroso and the president of Mozambique, J. Chissano, in the *International Herald Tribune* of 8-9 May 2004. The authors advocate forming a new committee to promote peace and development with a mandate from the Security Council and ECOSOC.

<sup>215</sup> S/RES/1123 of 30 July 1997.

and Social Council (ECOSOC) was to promote the country's socioeconomic reconstruction. After the intervention of the Economic Community of West African States Monitoring Group (ECOMOG) in Guinea-Bissau, the Security Council approved the opening of a local UN office (UNOGBIS) to be headed by a representative of the Secretary-General.<sup>216</sup> The office was placed in charge of coordinating the UN's activities and helping to implement the Abuja Peace Agreement. The Ad Hoc Advisory Group of the Security Council and ECOSOC on Guinea-Bissau is a relatively lightweight arrangement, set up in 2002 at the instigation of the Security Council. It visits the country to demonstrate the UN's concern and commitment. Since the coup of September 2003 the local UN office has made a substantial contribution to policy, since it is regularly consulted by the new government. ECOSOC has called for donors to a trust fund to help organise elections and set up a meeting with the transitional government of Guinea-Bissau in New York. The ECOSOC Ad Hoc Advisory Group on Burundi, which was set up in 2003, focuses primarily on socio-economic development.

ECOSOC's structure, however, does not provide a sufficient basis for entrusting this organ with the implementation or monitoring of administrative tasks. ECOSOC is too unwieldy, has too little specialist expertise, and lacks operational capacity.

#### ***Implementation of state responsibilities by third parties***

In some cases a power that intervenes in a particular situation seeks from the outset to secure the UN's involvement. The legitimacy of the intervention is frequently recognised by a Security Council resolution after the event.<sup>217</sup> In some cases such recognition is couched in the form of a statement by the president of the Security Council, as happened in the case of a coalition led by Australia that had reached a prior agreement with the client country, the Solomon Islands.

On the basis of the above, the AIV has explored the best way of anchoring state-building in the UN system, under the responsibility of an organ with authority and wide-ranging powers.

## **VII.2 Elements of the proposal**

Before considering the question of the political organ best suited to the task, the Advisory Council will briefly discuss the Secretariat, which plays a key role in administering territories in the current situation. A new department of the UN Secretariat should be called into being to exercise UN authority over designated countries and territories ('administered territories') and to help governments perform their administrative responsibilities.<sup>218</sup> The new department could be called the Centre for Governance Assistance and should be headed by a senior official with direct access to the Secretary-General. This Centre should be divided up both geographically (i.e. by administered territory) and thematically (i.e. by area of government). It would have access to the UN's fund of information, including data

<sup>216</sup> S/RES/1233 of 6 April 1999.

<sup>217</sup> French and ECOWAS troops in Ivory Coast, S/RES/1464 of 14 February 2003.

<sup>218</sup> 'International administration' is currently dealt with as an additional task of the Department of Peacekeeping Operations. The work is not based on an official doctrine or thematic resolution adopted by the General Assembly or Security Council. Edward Mortimer, 'International Administration of War-torn Societies', in *Global Governance*, Vol. 10, No. 1, 2004, p. 10.

gathered by country teams (all local representatives of UN agencies accredited in a particular country). It could support the dialogue between the UN and the territories concerned. The Centre should take on a coordinating role for each administered territory, in respect of other UN agencies as well as donors. The official that the international community entrusts with the administration of a particular territory would be responsible for local administration, as in the current models.

The Centre would also acquire the role of a 'one stop shop'. Governments of ailing (but not yet failing) states could request its assistance to improve elements of their administration. These advisory services, to be arranged from New York, would require the participation of the UNDP, the office of the High Commissioner for Human Rights (in Geneva) and the UN's Office on Drugs and Crime (in Vienna), all of which are geared towards improving the implementation of administrative responsibilities. Other elements of the UN system should also make a contribution, such as the UNHCR, the World Food Programme, and the World Bank. As states could apply to the Centre on a voluntary basis, it would not acquire a wholly negative aura. States could also consult the Centre or request its assistance, under pressure from donors and international financial institutions on the basis of conditionality. This would constitute a relatively acceptable form of semi-voluntary cooperation. This does not mean that these institutions should apply additional criteria, but they could make it known, in accordance with their mandate, that a country is ineligible, or less eligible, for certain funds. The World Bank already does this: it assesses the quality of management and institutions in the public sector and takes it into account when making decisions. This procedure provides an alternative to simply blocking access to international funds, which generally causes further impoverishment, places the state under greater strain, and leads to decline.<sup>219</sup> It would be better for the international financial institutions (and the countries that exercise the most influence within them) to insist that states consult UN experts or farm out certain responsibilities to third parties. This basically amounts to a new style of structural adjustment, this time with governance and political factors taking precedence over economic criteria. Where providing advice is concerned, the Centre can operate under its own steam. If certain responsibilities have to be taken over, however, the approval of a political organ will be needed, as discussed below.

The implementation of the proposals set forth here could benefit from a general strengthening of the UN Secretariat's capacity. Proposals are already circulating to this effect, not all of which need to be discussed here. Possible improvements include:

- becoming better equipped for gathering and analysing data;
- more capacity to apply knowledge from the office of the High Commissioner for Human Rights in the UN's political work in New York;
- the appointment by the Secretary-General of a Special Advisor for the Prevention of Genocide, who would also report to the Security Council on impending massacres or other major human rights abuses such as ethnic cleansing.<sup>220</sup>

***The Security Council's powers make it the political organ of choice***

As a rule, the principle of non-intervention (Article 2 (7) of the UN Charter) prohibits the UN from governing Member States. Nonetheless, the Security Council possesses powers

219 As happened over the past few years in the case of Haiti; see chapter VI, section 3.

220 Address by the UN Secretary-General to the UN Commission on Human Rights, Geneva, 7 April 2004.

that create definite scope for the UN to administer a failing state. As was concluded in Chapter V above, the Security Council does not set out to determine whether or not a particular state is 'failing'; rather, it checks the applicability of the criteria in Chapters VI and VII of the Charter. If the state concerned is not yet truly failing and takes the initiative to ask the UN to take over elements of its administration, the Security Council can base its powers on Article 34 et seq. of Chapter VI of the Charter. Article 34 states that the Security Council 'may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute'. Under the terms of Article 35, any state may bring such a dispute or situation to the attention of the Security Council; this obviously includes the state in question. The Security Council could take over certain administrative responsibilities upon request by invoking its power to recommend at any stage 'appropriate procedures or methods of adjustment' (Article 36). Precisely because of the voluntary nature of the state's request, there is no reason for this to prompt objections.<sup>221</sup> Alternatively, if coercion is required in order to maintain or restore international peace and security, the Security Council could derive its powers to take coercive or other measures from Chapter VII (in particular Articles 39, 41, and 42) of the Charter. As things stand, peace operations conducted under a Security Council mandate continue beyond the actual restoration of peace and security. The continuance of measures could be said to be necessary in order to remove the factors that are causing the threat to peace and security.<sup>222</sup>

On the basis of these considerations, this advisory report proposes the following construction. The Centre would report at political level, by way of the Secretary-General, to a new permanent **Security Council Committee**, to be known here for the sake of convenience as the Committee on UN Administration and Governance Assistance. The Committee could be organised along the same lines as the Counter-Terrorism Committee (CTC). Like the CTC, the new Committee could be set up under Article 29 of the Charter, it would be able to call on the assistance of the appropriate expertise and it could be expected, as a subsidiary organ of the Security Council, to draw up its own work programme and to arrange the support it requires in consultation with the Secretary-General.<sup>223</sup> The members of the Security Council would all belong to the Committee, whose decision-making, like that of the CTC and UN sanctions committees, could work along the same lines as that of the Council itself. Even so, the specialist Committee should develop its own momentum and *esprit de corps*.

In order to address the specific problems posed by failing states, the new Committee would need powers to act with or without the consent or cooperation of the – sometimes rudimentary – government of the country concerned. A country's consent to the transfer of certain administrative responsibilities would be laid down in an agreement that would constitute the basis for the work of the UN Centre in that country. The agreement would be subject to the Committee's approval.

221 Cf. the Security Council Resolutions setting up peacekeeping forces to monitor the implementation of peace agreements, as in the case of Mozambique, S/RES/797 (1992) of 16 December 1992, which contains no reference to any 'threat to peace' or 'international friction'.

222 The repeated extensions of the project to professionalise the police in Haiti indicate that these powers are interpreted loosely. See e.g. S/RES/1212 of 25 November 1998 and S/RES/1277 of 30 November 1999. See also R. Wilde, 'From Danzig to East Timor and beyond: the role of international territorial administration', *American Journal of International Law*, vol. 95, 2001, pp. 583-606.

223 Cf. CTC Resolution of 28 September 2001, S/RES/1373, paragraphs 6 and 7.

In other cases, the scenario of consent would not be an option – for instance where a bloody civil war is making it impossible for the government to function. Under the terms of the Charter, the Security Council would first have to conclude, under Chapter VII, that there is a threat to the peace in a specific case, and that the situation calls for sustained UN intervention. The Security Council could then take measures to give the Committee control over the territory in question, as now happens where the UN fulfils administrative responsibilities such as guarding frontiers and organising elections.<sup>224</sup> Chapter VII of the Charter is invoked as justification in such cases. In any given case, this invocation must be based on the determination that the long-term fulfilment of these administrative responsibilities will significantly benefit international peace and security.<sup>225</sup> After this, the Committee would temporarily take over some or all of the state's sovereignty in the name of the international community as embodied by the UN and would be responsible for administrative tasks.

It is important to ensure that the new Committee possesses sufficient legitimacy to exercise effective long-term authority over 'administered territories'. The Security Council itself is better equipped to make an immediate assessment of a situation in terms of peace and security than to supervise a country's internal administration for years on end. The members of the Security Council should be urged to choose as their representatives on the Committee persons with proven ability and experience in administration. They could be supplemented with representatives of states (or groups of states, such as regional organisations) which are already acting in specific cases as protecting authorities, in consultation with the remaining authorities of a failing state and with a mandate from the Security Council.<sup>226</sup> The Committee could also invite states that have some particular involvement with the administration, such as representatives of countries supplying troops and major donors (by analogy with existing Security Council meetings with countries supplying troops and contact groups). The relevant elements of the UN system should also be involved here. The power of decision would remain vested in the Security Council members of the Committee. This would invest the Committee's composition with sufficient legitimacy.

In relation to failing states, the post of the UN Secretary-General's **Special Envoy/High Representative** would be retained, with the usual responsibilities. These would include building up the economy, restoring the legal system, training police, organising elections and so forth. This Special Envoy, or more properly perhaps, **Temporary Administrator**, would play a coordinating role in the area, supported by the UN Secretariat in New York. The Committee would retain ultimate responsibility for administrative tasks.

The advantage of this new construction is that knowledge could be accumulated and shared on different facets of fulfilling administrative responsibilities and exercising authority. In the event of a crisis involving a failing state, the response would be less reliant on initiatives taken by ad hoc coalitions. In addition, the Security Council mandate would provide the necessary legitimacy for each of the various forms of temporary authority. The

224 Both situations justify action by the Security Council under Chapter VII of the UN Charter.

225 See e.g. Security Council Resolution 1123 (1997) on Haiti.

226 Cf. the Trusteeship Council in its current form (see Article 86 (1) of the UN Charter). The Trusteeship had to consist, in equal parts, of member states that did and did not administer a trust territory; this included the permanent members of the Security Council, who were *ex officio* members of the Trusteeship Council.

authority of the Committee's decisions could give the Special Envoy in the UN-administered territory more authority in the fulfilment of his coordinating task vis-à-vis agencies and NGOs. Decision-making based on the Security Council model would mean that decisions would always be based on wide-ranging support from all parts of the geopolitical spectrum.

### ***Proliferation of bodies within the UN?***

The creation of a new branch of the secretariat or a new organ is often the UN's standard response to the emergence of a problem for which existing structures would have been perfectly adequate. But in other cases, devising a new forum has helped to attract attention to a particular subject and to ensure that that efforts are better coordinated (examples are UNCTAD, UNDP, UNAIDS, UNEP or GEF). Furthermore, state building is one of the great challenges of our time. Raising the profile and awareness of the essential global interests that are at stake may increase willingness to share in the costs of the necessary organisational structures and related operations.

Another possible objection concerns political viability. In certain cases the international community (or more accurately, the members of the Security Council) have consented to, or learned to accept, arrangements that give foreign authorities a say over running a country. But would this willingness extend to the codification of such practices? Would this not undermine the principle of sovereign equality?<sup>227</sup> It is to be hoped that concern for the fate of the population of the countries in question and for that of the world community in general will prevail. The Security Council's establishment of the CTC has shown that it is possible to achieve the momentum necessary to take a step forward. It is up to all those who endorse the principles of shared international responsibility for the fate of all people, and "the responsibility to protect", to seek to generate this momentum.

### **VII.3 Concluding remarks**

Taking all factors into consideration, a construction with a permanent organ set up under the auspices of the Security Council is best attuned to the need for speed and consistency and the approach that has developed over the course of time. This approach, as already noted, is itself flexible. The UN will continue to encourage regional actors and major donors and agencies to take the lead. Where the Security Council itself does not decide to intervene, actors that take the initiative internationally to restore a failed state should apply to the Security Council not just to have the legitimacy of their actions confirmed, but also in order to benefit from the UN's pool of experts and lessons learned from past experience.

Any accusations of neo-colonialism will have to be defused by ensuring that actions are carried out respectfully and in accordance with international law, by a refusal to pander to the national interests of a particular state that wants to assist in the administration of another state, by a refusal to tolerate the assisting or administering state gaining any economic benefit from this action, and by ensuring that the period of administration is finite and in principle geared towards the restoration of sovereignty.

### ***One final obstacle: financing***

It would not take much money to carry out these organisational changes at the UN, but actually administering territories is expensive. Where should this money come from?

227 E. Mortimer, 'International Administration of War-torn Societies', in *Global Governance*, Vol. 10, No. 1, 2004, pp. 12-13.

Preferably from the UN's regular budget. To use other funds for this purpose would undermine the broad legitimacy of the operation. Nonetheless, this use of funds may provoke considerable resistance. In the UN, budgetary powers are vested in the General Assembly. An effort must be made to secure the general consent of the UN General Assembly to the arrangements described above; otherwise, the political question of the division of powers may pose difficulties when specific budgets are at issue.

An alternative source would be the budget for peace operations. This would need the General Assembly's approval, but the costs would be divided up according to a different formula. There is also the option of implementing practical projects under the umbrella of an agency such as UNDP, in which the allocation of funds is less convoluted. But this would conflict with the power of the UNDP's Executive Council to allocate its own funds.

#### ***Multilateral fund***

An additional, supplementary idea was recently suggested by the head of UNDP, Mark Malloch Brown.<sup>228</sup> He proposed the creation of an emergency fund from which money could be drawn immediately when there is a breakthrough in international crisis situations. This would have to be a multilateral post-conflict fund that would draw on the expertise and resources of the sections of the UN system that are normally involved in responding to crises. He pointed out that currently the process of calling on donors to make contributions takes many months. In that crucial period, it is impossible to ensure an adequate follow-up to a peace agreement. Assistance during reconstruction (for instance for disarmament projects and employment) could make the difference between enduring peace and regression into a pattern of violence. The AIV and the Advisory Committee on Issues of Public International Law (CAVV) consider this a compelling argument. A fund of this kind could perhaps take the form of a collection of pledges or advances that can be called in at short notice, the modalities of which should be set out in a Memorandum of Understanding by all the donors involved.

Another possibility would be to channel funds through regional organisations, for instance along the lines of the EU's contribution to the work of NEPAD.

#### **VII.4 Conclusions and recommendations**

Prompt action by the UN Secretariat and Security Council can help prevent the emergence of failing states.

The Netherlands should adopt the position that when the UN is deliberating on whether to intervene in a failing state (and how), it must have an overview of all the threats posed by the state concerned (or from within its territory). The Secretariat should chart the impact on the population, region, the international community and individual states, using a standardised procedure.

The Netherlands should advocate (through the EU) the creation of a committee under the auspices of the Security Council (the Committee on UN Administration and Governance Assistance) to assume responsibility both for administering countries that have been placed under international mandate by means of a Security Council Resolution and for the Secretariat's work in improving the administration in specific countries that wish to avail themselves of the UN's expertise in this area.

<sup>227</sup> *International Herald Tribune*, 20-21 March 2004, p. 7.

In general, the UN's coordinating role in the rebuilding process should be strengthened, in relation both to high-level decision-making and to the High Representative's practical administration of the territory concerned. To this end, the responsibility for governing an administered territory should be vested in the aforementioned Security Council Committee.

There is a need for a multilateral post-conflict fund from which money urgently required can be made available immediately after a political breakthrough has been achieved in a crisis, for instance in a failing state. This would help ensure that the local population does not descend into a spiral of violence due to disappointment and lack of prospects.

# VIII Summary and general conclusions on policy

## VIII.1 Summary

A failing state can be defined as a state that:

- is incapable of controlling its territory, or large parts of it, or of guaranteeing the safety of its people, because it has lost its monopoly on the use of force;
- is no longer able to uphold its internal legal order;
- can no longer provide its population with public services or create the conditions for such provision.

A state that oppresses its population and makes reprehensible choices in the provision of services to its population is not a failing state, although it could become one in the longer term.

A failed state continues to exist as a legal entity. The general principle prohibiting intervention in the state's territory remains intact. The failing state's theoretical responsibility for its actions, and for its failure to act, will not in general have any practical consequences until many years after normalisation. Aside from invoking state responsibility, individuals and armed opposition groups may also be called to account under international humanitarian law and/or international criminal law. Under certain conditions, individuals may be tried by the International Criminal Court. It is also possible to sue multinational companies before a national court for unlawful acts. In such proceedings human rights violations are regarded as elements of unlawfulness.

State failure is largely man-made. Difficult circumstances may place a state under strain. Modern state institutions grafted into traditional societies may suffer from rejection symptoms. But it is people in positions of power within the country that choose to abuse that position for the benefit of themselves and their own group. In doing so, they undermine the structure of the state, until it eventually crumbles. There is always an international dimension. Opportunists and other interested parties outside the country exacerbate the process of decline.

The failure of a state has numerous harmful repercussions: for the state's own population, for the region, for the international community, and for individual third states. These repercussions give rise to corresponding grounds for intervention: solidarity with the population, the aim of regional stability, the aim of peace and security, and the interests of specific states. Ultimately there is a certain overlap between these grounds and self-interest, certainly in the case of Western countries such as the Netherlands: a stable world is the best environment in which to promote economic interests, to maintain the international legal order, and to combat crime, disease, environmental hazards, and terrorism.

The 'modern' state as a framework for economic growth, with balanced powers and a transparent and serviceable machinery of government, ultimately provides the best conditions in which to safeguard respect for human rights.

It is therefore important to preserve the state, not so much for its own sake as an institution, but for its population (and ultimately also for people elsewhere). States must be prevented from failing, because of the enormous costs of such failure, in terms of financial loss as well as pain and suffering. Policy instruments should be geared towards all the

factors that contribute towards a state's failure.

Action to prevent the failure of states and (where this is unsuccessful) to repair failing states exemplifies the crucial importance of integrated policy. Policy instruments from the spheres of development cooperation, politics, diplomacy, economic life, and defence must be deployed in conjunction. Focusing all these instruments on the task of preventing and repairing failing states could be called a new paradigm. The use of development funds should be viewed from the same perspective. To prevent the immeasurable harm that ensues from a failing state is a legitimate policy objective, in development terms and when viewed from the vantage point of the Netherlands' own interests.

Policy must be coordinated nationally and – more importantly still – internationally. What matters is the overall policy pursued, and achieving the most effective use of resources by pooling efforts.

The process leading to a failing state can be divided into several phases: *growing internal divisions*, *decline*, and actual *failure*. Different policy instruments are required in each phase.

In the phase of *growing internal divisions* there are three areas in which preventive measures may theoretically reduce the risk of failure in any state.

First, an effort should be made to mitigate the effects of the *adverse conditions* that place the state under strain and make it vulnerable (population pressure, a non-productive economy, unemployment, the proliferation of small arms etc.). Policy in this area is geared solely towards creating enabling conditions. Most elements of current development policy in fact come under this heading.

Second, more targeted policy is needed to reduce the *friction between institutions of different origins*. The people of the state concerned must be given an opportunity to find a mode of government, and to determine their priorities for the future within an authentic form of self-determination based on the participation of all groups in society. Actors from outside the country cannot steer an internal dialogue of this kind; at best, they can create enabling conditions. The same applies to economic policy. The principle underlying intervention must be to create a situation in which the population's human rights will be respected. Human rights are not only an end in themselves but also a means of bringing about effective participation and a yardstick of that participation.

Third, the *abuse of power* by leading government officials must be curtailed (at an early stage) by means of targeted policy. This means setting international standards, monitoring compliance, offering technical assistance, and conducting a political dialogue. In addition, creating conditions for transparency can help greatly to curb abuses. After all, transparency allows national and international actors alike to engage in 'naming, shaming and praising'. In their own policies too, Western countries should respond appropriately to revelations of abuses involving companies operating in such countries.

In the second phase, that of *decline*, it is scarcely feasible to use development policy to influence the country's fate. The accent then shifts to political action and possibly to sanctions geared towards influencing the main political actors.

Once *state failure* is under way, the international community's involvement is no longer optional; it has a responsibility to take effective measures. As a final resort, logically

speaking – but not chronologically – the option of military intervention must be considered. Besides the lawfulness of intervention, an assessment must be made of its appropriateness and of the risks involved.

The failure of a state does not in itself constitute grounds for intervention by the UN or by another state. The general prohibition on the use of force and the existing exceptions remain applicable. The Security Council may always intervene, including taking preventive action, by invoking the concepts in Chapter VII of the UN Charter, such as a threat to the peace (Article 39). States may defend themselves if they are attacked. In highly exceptional cases, and on the basis of strict criteria, it may be defensible for a state to intervene in a failing state (without involving the Security Council) for humanitarian reasons. The intervening state may not, however, station troops in the failing state preventively before involving the Security Council. Since states are adversely impacted by state failure in many ways but are scarcely permitted to take any military action, under international law as it now stands, the UN has a great responsibility to be watchful and decisive. Unilateralism can only serve to undermine its role.

Careful consideration should be given to the phase and manner in which the deployment of military resources can help prevent state failure or restore a failing state. There must be a clearly-defined objective, such as to restore the monopoly on the use of force or to mitigate certain negative effects of the state's failure. The next step is to assess the circumstances facing the troops on arrival, to find out who is prepared to contribute to the operation, and to estimate whether it is feasible to attain the objective with the available resources and what the costs would be in terms of lives lost on all sides. Ample resources are the key to maximising the chance of success, and will reduce risks to the troops themselves. In addition, an effective command structure is particularly crucial in an internal conflict. In practice, this means that the deployment of an ad hoc coalition is preferable to a UN force. Besides a short-term goal for the military operation, there must be a follow-up plan to set a course for the failing state's future. The ultimate litmus test is whether the lives of the state's population will be better after the intervention. Where the failure of a state has had specific adverse effects on third states, it is also necessary to take the population in these other countries into consideration.

Recovery will involve all the factors that played a part in the state's failure. This means that the state should not be literally restored as it was before. A plan must be devised to build safeguards against a repetition of the failure into the fabric of the state and into substantive policy. There is a growing recognition that this cannot be left wholly to the state itself.

The UN's current involvement in the restoration of failing states is a result of its having supplemented peace operations with the exercise of civil responsibilities. In the history of peace operations, this was an understandable and justifiable step to take. Partly through the broad interpretation of certain concepts in the UN Charter, this approach made it possible to contribute substantially to the restoration of states in numerous operations. It presents certain disadvantages, however. By their nature, military operations are of shorter duration than the reconstruction of a state. The withdrawal of troops is often determined more by military factors and criteria than by the sustainability of reconstruction. The need for coordination between the two dimensions is indisputable. The AIV and the CAVV believe that the UN should create a political coordinating organ for reconstruction efforts. This would reduce the democratic deficit and could help to discourage unilateralism. A permanent committee of the Security Council would be best suited to taking on such responsibilities. After any intervention by the UN, the ultimate responsibility for

fulfilling the tasks of the state, as transferred to the UN, would lie with this Committee.

The Committee's stature should contribute to the authority of the Temporary Administrator representing the UN in the country concerned. This official must be given strong coordinating powers. Major donors and UN agencies can be consulted at both levels. With its specialist orientation, the Committee will develop its own momentum and esprit de corps. Under its auspices, a newly created department of the UN Secretariat could advise and assist at the preventive stage, at the request of the state concerned. This too falls within the Security Council's responsibilities under Chapter VI of the Charter.

For the work to be done under the auspices of the Committee, the UN will need considerable financial elbow room. This is unlikely to materialise with the current style in which the UN budget is negotiated. A change of style is needed. The likelihood of achieving this will depend on perceptions of political urgency. A sense of urgency will mount as the adverse effects of failing states ripple out more widely. A fund which can be drawn on immediately would be a useful instrument for achieving timely international involvement.

## **VIII.2 General policy conclusions**

Taking all factors into consideration, the AIV and CAVV draw the following general policy conclusions:

In debates on international policy, the problem of failing states is here to stay. It is of the utmost relevance to human rights, security, and opportunities for development. The consequences of this problem (the extent and gravity of which have increased in recent years) impinge not only on people in the failing state, but also on those further afield. From the viewpoint of solidarity as well as in our own self-interest, it is imperative to find more effective means of curbing this trend.

Failing states help generate and fuel a variety of serious problems: terrorism, international crime and drug mafias, uncontrolled arms trafficking and the spread of the technology to produce weapons of mass destruction, and chaotic flows of refugees (sometimes in combination with ethnic conflict). These problems in turn can all help to precipitate state failure.

As much as possible, actors that possess the necessary resources must together pursue policies designed to prevent, avert and reverse the process that leads to state failure. And where it has proven impossible to tackle a particular situation directly in good time, the negative consequences must at least be mitigated as far as is possible. Policy must be harmonised on the basis of a common analysis, and the more intrusive the measures adopted, the more closely they need to be coordinated. Given that the available resources will always be finite, and that their effectiveness will sometimes be limited, it is necessary to adopt a selective approach.

There will be a need for coalitions willing to commit themselves in the longer term, in cooperation with the states in the region of the failing state. A policy of this kind can succeed only with the use of ample resources, manpower, and political clout over a long period of time.

Military intervention is the most formidable instrument, but that does not mean that it can be deployed only if all other means have failed; the early deployment of troops can be effective. Under the UN Charter, the Security Council bears primary responsibility for the deployment of military resources. Its actions should be prompt and effective enough

that there is no need for any party to intervene without involving it (other than temporarily, in self-defence). If much more vigorous action is called for than in a traditional blue-helmet operation, it is greatly preferable to grant a mandate to an existing coalition capable of exercising the necessary force, provided its actions are carefully embedded in an integrated approach. To achieve this, the Security Council and the UN Secretariat must be reorganised to enable them to take more preventive action and to improve the effectiveness and consistency of their actions.

By means of creative ad hoc interpretation of the Charter, the Security Council, whose responsibility begins as soon as there is any threat to international peace and security, has already carved out considerable scope for the UN to play a part in preventing crises, in intervening where peace is threatened, and in state building.

To promote the consistency and sustainability of such policies, the AIV and CAVV believe that responsibility for the problem of failing states should reside with a permanent committee of the Security Council (the Committee on UN Administration and Governance Assistance, modelled after the Counter-Terrorism Committee). This Committee would take over certain tasks of government, either at the state's request or on the basis of intervention by the Security Council. Those tasks would be delegated to a UN official based in the failing state who would have strong powers and the support of a specialist department of the UN Secretariat. The end of such an operation must be determined by an exit strategy based primarily on the question of whether the causes of the state's failure have been addressed.

To enable different parts of the UN system to respond quickly and effectively, a new fund needs to be created from which money could be drawn immediately to finance post-conflict measures.

The Netherlands can only help to draft and promote proposals along the lines suggested above as part of a strong coalition. The most obvious forum through which to promote a policy of this kind is the EU, which explicitly incorporated the problem of failing states into its Strategic Concept of December 2003. The AIV and the CAVV therefore advocate initiating political debate on this issue first within the EU. If there is sufficient support for this approach there, the debate can be continued within the UN.

**Request for advice**

- |   |   |
|---|---|
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|   |   |
| 2. Prof. K.C. Wellens<br>Chairman, Advisory Committee on Issues<br>of Public International Law<br>Postbus 20061, 2500 EB Den Haag |   |

|                 |              |                |                    |
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*Re* Request for advice on failing states

Dear Mr Korthals Altes, dear professor Wellens

The events of 11 September 2001 have cast the issue of failing states in a new light, demonstrating that failing states are no longer an isolated and distant problem. Today, these states pose a threat not only to their own populations but also to neighbouring states and indeed to the world community as a whole.

It is not easy to give a watertight definition of failing states.<sup>1</sup> Where is the dividing line between a poorly functioning state and a failing state? A failing state is in any event one that:

- is unable to control its territory and guarantee the security of its citizens, because it has lost its monopoly on the use of force;
- is no longer able to uphold its internal legal order;
- is no longer able or willing to deliver public services to its population.<sup>2</sup>

1 Other terms are also used: the World Bank refers to low income countries under stress (LICUS), while the OECD/DAC uses *difficult partnerships*.

2 See for example the speech made by UK Foreign Secretary Jack Straw to the European Research Institute, Birmingham, on 6 September 2002; see also Robert H. Jackson, 'Surrogate Sovereignty? Great Power Responsibility and "Failed States"', Institute of International Relations, University of British Columbia, Working Paper No. 25, November 1998.

A failing state's authority has been undermined *de facto* to the extent that all or part of its territory exists at times in a vacuum of authority. The absence of state authority is usually exploited by non-state actors like armed groups of rebels, political movements (in some cases organised along ethnic or religious lines), local warlords and criminal or terrorist networks, including ones from outside the state.

Failing states pose a threat at three levels:

- *At national level:* a failing state does not offer its citizens security. Its very weak political system fosters economic malaise and social disorder. Poverty increases. Human rights are no longer guaranteed and crimes frequently go unpunished. There is often internal armed conflict that may lead to violations of the humanitarian rules of war.
- *At regional level:* various cross-border effects mean that conflicts in failing states can jeopardise regional stability and security. The vacuum of authority in a failing state can act as a magnet for countless criminal elements from the region. There are often negative effects on the region's trade and economy. Large groups of refugees initially seek refuge nearby. Together these circumstances can destabilise a region.
- *At global level:* failing states sometimes pose a threat to security beyond their own region. They are often a safe haven for criminal organisations and a base from which terrorist networks can theoretically exert influence world-wide. In addition, the implosion of the national state and mounting local conflicts create international flows of refugees.

As we know, it then takes a very great effort on the part of the international community to start remedial action through humanitarian aid, international mediation attempts, peace-keeping missions involving the military, reconstruction aid, repatriation efforts, initial steps towards development cooperation and so on. Furthermore, these efforts are not always effective. The question is how intensively the international community can or should become involved in nation-building. Should the central authority of the state be restored from the outside, for example by imposing some form of international administration? Or is this kind of paternalism.

Another problem is that failing states obstruct the working of the international legal system, based as it is on the principle of the sovereignty of nation states. International security is built largely on the ability of states to prevent national chaos and to stop it spilling across national frontiers. It is questionable whether state responsibility is a viable concept in areas where the recognised government in reality lost its authority long ago. This prompts the question of how to deal, especially (though not exclusively) in failing states, with crimes committed by non-state actors that would count as human rights violations if perpetrated by states or their representatives.

Against this background, we would ask you to provide an incisive analysis of the subject of failing states and to produce an advisory report on a possible approach to this problem. The following questions may serve by way of guidelines:

1. What is a workable definition of a failing state? In what situations and on what grounds should the international community (UN, IFIs, NATO, regional organisations) help prevent or rescue failing states? What role could the Netherlands and the European Union play in this regard?

2. What tools does the international community have to prevent states gradually collapsing and to help revive states that have already failed? What is the best way of using political and economic tools, including development cooperation? Does the provision of humanitarian aid play a specific role or not?
3. Under what circumstances should military deployment be considered? How do external interventions of this nature square up with the doctrine of state sovereignty and the principle of non-intervention?<sup>3</sup> Can military units be deployed preventively, i.e. before a state's authority collapses altogether? At what stage can government authority be deemed to have been restored to the extent that a peacekeeping operation can be ended without the danger of a resumption of hostilities? Can indicators be developed for the pre-hostility and post-hostility phases to show when a state has lost, or regained, the ability to function independently?
4. Are there any developments in international law that allow the international community to hold non-state actors to account for offences that would be classified as human rights violations if committed by states or their representatives? What substance does the concept of state responsibility retain in failing states, and how should international law be applied in situations in which it is no longer clear who are the lawful representatives of the failing state?

This same request has been submitted to the Advisory Committee on Issues of Public International Law/ Advisory Council on International Affairs. We trust that the two advisory bodies will cooperate in issuing a joint advisory report. We look forward with interest to receiving your report.

Yours sincerely

Jaap de Hoop Scheffer  
Minister of Foreign Affairs

Henk Kamp  
Minister of Defence

Agnes van Ardenne-van der Hoeven  
Minister for Development Cooperation

<sup>3</sup> See e.g. the *core principles* for humanitarian intervention in the Report of the International Commission on Intervention and State Sovereignty: 'The Responsibility to Protect', December 2001, Synopsis pp. XI-XIII

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## List of abbreviations

|                 |  |
|-----------------|--|
| <b>ACP</b>      | African, Caribbean and Pacific States                          |
| <b>AIV</b>      | Advisory Council on International Affairs                      |
| <b>AJIL</b>     | American Journal of International Law                          |
| <b>APEC</b>     | Asia-Pacific Economic Cooperation                              |
| <b>ASEAN</b>    | Association of South East Asian Nations                        |
| <b>ASPI</b>     | Australian Strategic Policy Institute                          |
| <b>CAVV</b>     | Advisory Committee on Issues of Public International Law       |
| <b>CIA</b>      | Central Intelligence Agency                                    |
| <b>CIS</b>      | Commonwealth of Independent States                             |
| <b>CIVCOM</b>   | Committee on Civilian Aspects of Crisis Management             |
| <b>CUP</b>      | Cambridge University Press                                     |
| <b>DRC</b>      | Democratic Republic of Congo                                   |
| <b>ECOMOG</b>   | Economic Community Cease-Fire Monitoring Group                 |
| <b>ECOWAS</b>   | Economic Community of West African States                      |
| <b>ECSC</b>     | European Coal and Steel Community                              |
| <b>EU</b>       | European Union   |
| <b>GA</b>       | General Assembly   |
| <b>GEF</b>      | Global Environment Facility                                    |
| <b>HGIS</b>     | Homogeneous Budget for International Cooperation               |
| <b>ICC</b>      | International Criminal Court                                   |
| <b>ICISS</b>    | International Commission on Intervention and State Sovereignty |
| <b>ICJ</b>      | International Court of Justice                                 |
| <b>ICTR</b>     | International Criminal Tribunal for Rwanda                     |
| <b>ICTY</b>     | International Criminal Tribunal for the former Yugoslavia      |
| <b>IDA</b>      | International Development Association                          |
| <b>IFIs</b>     | International Financial Institutions                           |
| <b>ILC</b>      | International Law Commission                                   |
| <b>IMF</b>      | International Monetary Fund                                    |
| <b>INTERFET</b> | United Nations Sanctioned International Force in East Timor    |
| <b>IOV</b>      | Operations Review Unit   |
| <b>ISAF</b>     | International Security Assistance Force (in Afghanistan)       |
| <b>KFOR</b>     | Kosovo Force   |
| <b>KIT</b>      | Royal Tropical Institute                                       |
| <b>LICUS</b>    | Low-Income Countries Under Stress                              |
| <b>NATO</b>     | North Atlantic Treaty Organisation                             |
| <b>NAV</b>      | Asylum and Refugee Law Newsletter                              |

|                |   |
|----------------|---|
| <b>NEPAD</b>   | New Partnership for Africa's Development                      |
| <b>NJB</b>     | Nederlands Juristen Blad (Dutch law journal)                  |
| <b>NGO</b>     | Non-Governmental Organisation                                 |
| <b>OAS</b>     | Organisation of American States                               |
| <b>ODA</b>     | Official Development Assistance                               |
| <b>OECD</b>    | Organisation for Economic Cooperation and Development         |
| <b>OPEC</b>    | Organisation of Petroleum Exporting Countries                 |
| <b>OSCE</b>    | Organisation for Security and Cooperation in Europe           |
| <b>OUP</b>     | Oxford University Press                                       |
| <b>RV</b>      | Rechtspraak Vreemdelingenrecht (immigration law reports)      |
| <b>SC</b>      | Security Council  |
| <b>SWAPO</b>   | Southwest African People's Organisation                       |
| <b>UN</b>      | United Nations  |
| <b>UNCTAD</b>  | United Nations Conference on Trade and Development            |
| <b>UNDP</b>    | United Nations Development Programme                          |
| <b>UNEP</b>    | United Nations Environment Programme                          |
| <b>UNFICYP</b> | United Nations Peacekeeping Force in Cyprus                   |
| <b>UNHCR</b>   | Office of the United Nations High Commissioner for Refugees   |
| <b>UNGA</b>    | United Nations General Assembly                               |
| <b>UNIFIL</b>  | United Nations Interim Force in Lebanon                       |
| <b>UNMEE</b>   | United Nations Mission in Ethiopia and Eritrea                |
| <b>UNMIL</b>   | United Nations Mission in Liberia                             |
| <b>UNOGBIS</b> | United Nations peace-building support office in Guinea-Bissau |
| <b>UNOMIL</b>  | United Nations Observer Mission in Liberia                    |
| <b>UNSC</b>    | United Nations Security Council                               |
| <b>UNSG</b>    | Secretary-General of the United Nations                       |
| <b>UNY</b>     | United Nations Yearbook                                       |
| <b>US</b>      | United States of America                                      |
| <b>USSR</b>    | Union of Soviet Socialist Republics                           |
| <b>WB</b>      | World Bank  |
| <b>WFP</b>     | World Food Programme  |
| <b>WHO</b>     | World Health Organisation                                     |
| <b>WRR</b>     | Advisory Council on Government Policy                         |

## Models of UN governance

The following boxes describe experience gained in the recent past of various models of UN intervention in states (not necessarily failing states). They illustrate the matters dealt with in chapters VI and VII.

### **New Guinea**

In 1962-63 parts of the administration of West New Guinea were temporarily transferred by the Netherlands to a UN Temporary Executive Authority. This was done in order to facilitate the transition of the territory from Dutch colonial government to administration by Indonesia. It was noteworthy that UNTEA was established by and under the control of UN Secretary-General U Thant, with the support of the General Assembly.<sup>4</sup> UNTEA was headed by a UN Administrator. In order to guarantee peace and security and to maintain law and order, two peace operations were instituted, in this specific case by the UN General Assembly, namely UN Military Observers in West Irian and the UN Security Force. Another function of the UN was to supervise a plebiscite to enable the inhabitants of New Guinea to express their view on their future. This finally took place in 1969 and resulted, in circumstances that were often criticised, in a vote to become an integral part of the Republic of Indonesia.<sup>5</sup>

It is noteworthy that the General Assembly of the UN was the source of authority for the Secretary-General and the operations.

### **Namibia**

In 1920 the League of Nations placed the former German colony of South West Africa under the mandate of the Union of South Africa. For a long time this was to all intents and purposes an annexation. But as greater importance became attached to human rights, including the right of peoples to self-determination, and criticism of the apartheid system in South West Africa grew, the General Assembly of the United Nations (the successor to the League of Nations) revoked this mandate in 1966.<sup>6</sup> At the same time the General Assembly established the UN Council for Namibia. However, this Council was never able to meet in Namibia. In 1974 the Council adopted a Decree for the Protection of the Natural Resources of Namibia, which barred any person or entity from prospecting for, taking, extracting, processing, exporting or distributing any natural resources without the Council's consent. Anyone who breached this prohibition could be held liable by the future government of an independent Namibia.<sup>7</sup> The Council also established the Institute for Namibia in Zambia in 1974. This institute provided information to Namibians to enable them to administer Namibia after independence.

- 4 See UNGA Res. 1752 (XVII), 21 September 1962. The plan for UNTEA was attributable mainly to the American Ambassador to the UN Elsworth Bunker.
- 5 P.B.R. de Geus, *De Nieuw-Guinea Kwestie. Aspecten van buitenlands beleid en militaire macht* (The New Guinea Question. Aspects of foreign policy and military power), Martinus Nijhoff: Leiden, 1984.
- 6 See UNGA Res. 2145 (1966).
- 7 N.J. Schrijver, 'The UN Council for Namibia v. Urenco, UCN and the State of the Netherlands', in *Leiden Journal of International Law*, Vol. I (1988) pp. 25-48.

In an important advisory opinion in 1971, the International Court of Justice ruled that the continued South African presence in Namibia, in breach of resolutions of the UN General Assembly and subsequently the Security Council too, constituted an illegal occupation.<sup>8</sup> Only after the end of the Cold War did it prove possible to reach agreement that the Cubans should leave Angola and the South Africans should leave Namibia. On the basis of a Charter for Namibian Independence agreed by the Security Council in 1978,<sup>9</sup> the UN guided Namibia to independence in 1989-1990 by supervising the administration temporarily continued by South Africa, the demobilisation and repatriation of resistance fighters and the organisation of free and fair elections. This United Nations Transition Assistance Group (UNTAG) was led by the Special UN Representative Martti Ahtisaari. Although the operation got off to an extremely unfortunate start when it became engaged in skirmishes on the border with Angola (resulting in 300-400 fatalities among SWAPO fighters and 30 South African soldiers), this UN operation in Namibia eventually proved fairly successful. South Africa withdrew from the country under international supervision and, after free and fair elections, Namibia acquired independence in 1990 on the basis of a constitution introduced with the support of the UN. The comprehensive functions of this UN peacekeeping operation are seen as the start of a new stage in UN peacekeeping.<sup>10</sup> This is the only time that a large council has been established for a specific area.

### ***Bosnia-Herzegovina***

One aspect in particular of the structure in Bosnia deserves attention. This is the position of the UN High Representative, who is also the Special Representative of the EU. The High Representative has the so-called Bonn powers, which confer a far-reaching power to intervene in political appointments, legislation and so forth within the nominally sovereign territory of Bosnia. These powers provide a useful way of breaking an impasse. However, they were formulated with a view to the relationship with the governed area and not the relationship with donors and NGOs. This affects the reconstruction.

Once a stable phase has been reached it is useful to link the provision of aid in state-building to performance criteria and an informal policy dialogue. This can be part of a multilateral agreement. For example, donors in Bosnia have linked aid to human rights, cooperation with the ICTY and the right of displaced persons to return. For this purpose it is necessary for donors (including the international financial institutions) together to adopt a single consistent policy and not allow themselves to be played off against one another.<sup>11</sup> Varying interests connected with

8 ICJ Reports 1971, p. 3.

9 See S/RES/435 (1978).

10 N.J. Schrijver, 'Introducing Second Generation Peacekeeping: the case of Namibia', in *6 African Journal of International and Comparative Law* (1994), March 1994, pp. 1-13.

11 As regards Bosnia, see K. Boyce, 'Aid conditionality as a tool for peace-building', *Development and Change*, Vol. 33, No. 5, November 2002, special issue: State Failure, Collapse and Reconstruction, p. 1028.

geopolitical, commercial and migration factors can induce countries to act alone. In terms of its coordination format the reconstruction operation for Bosnia is one of the most ambitious models of its kind. The Office of the High Representative coordinates reconstruction under the Dayton Peace Agreement, albeit only by means of persuasion and not by virtue of the authority conferred on it.

The question arises of whether it would be possible and worthwhile to grant the High Representative, through the Security Council, authority not only in relation to the area but also in relation to the donor community and the NGOs.

### **Kosovo**

After the military intervention by NATO in Kosovo and the subsequent withdrawal of the Yugoslav army in 1999, the Security Council passed Resolution 1244 which placed Kosovo under the control of United Nations.<sup>12</sup> Kosovo was not designated as a sovereign territory and the UN did not acquire sovereign powers; the Peace Accord of June 1999 confirmed that Kosovo was a province of Serbia and that its status would be determined at a later date. The UN mission in Kosovo was named UNMIK.<sup>13</sup> The military wing of the international authority was organised by NATO with the authorisation of the Security Council. The Security Council requested the Secretary-General to report regularly on the progress of this UN mandate to the Council. In order to coordinate the activities of UNMIK the Secretary-General has appointed a Special Representative. Since August 2003 this has been Harri Holkeri (Finland). The report to the Security Council describes how UNMIK has been transferring responsibilities one by one to the provisional institutions of self-government.<sup>14</sup> The Security Council confirms the priorities set and course taken by UNMIK and gives instructions to the political actors.<sup>15</sup> The Security Council has determined that observance of eight standards takes precedence over the issue of the status of Kosovo. In other respects, the Security Council focuses mainly on the current political dimension of the problems in the region and barely concerns itself with the actual administration of the region.

### **East Timor**

Under UN control a new state has been built in East Timor.<sup>16</sup> Security Council Resolution 1272 of 25 October 1999 granted the UN Transitional Administration in East Timor (UNTAET) authority to which only sovereign states would normally be entitled in the international legal order and which comprised both civil and military elements.

12 Officially the UN is not the sovereign authority in Kosovo and the region is still part of Serbia, but in practice Belgrade has no say whatever in the affairs of the province and the UN has quasi-sovereignty.

13 United Nations Interim Administration Mission in Kosovo.

14 Most recently in the report of 15 October 2003, S/2003/996.

15 Statement by the President of the Security Council of 12 December 2003, S/PRST/2003/26.

16 Jarat Chopra, 'The UN's Kingdom of East Timor', *Survival*, Vol. 42, No. 3 (2000), p. 17.

UNTAET was given a peace operation mandate. This resulted in constant pressure to end the operation. However, the aim of the mission was to prepare the territory for independence. The mission has accomplished a great deal despite the fact the institutional structure and culture of the UN in New York and that of the mission itself were not geared to the performance of such functions. It is also important not to lose sight of the fact that reconstruction can take a long time, even in cases where law and order has been restored. In addition, participation of and interaction with the local population in the acting government or through consultation can promote the success of such a mission.<sup>17</sup> The aim is to involve the local population from the outset of an international intervention in order to ensure that the new government structures correspond to the reality of local society.

A lesson to be learned from UNTAET is that it is better for peacekeeping and governance missions to be carried out separately under separate mandates.

17 As a result of the absence of such participation, the East Timorese population gradually came to feel that UNTAET was taking a different course from the one they had envisaged (according to a speech of the head of UNTAET Sergio Vieira de Mello, 2 June 2000, at the *Tibar Conference*). See also Anthony Goldstone, 'UNTAET with hindsight', in: *Global Governance*, Vol. 10, No. 1, p. 85.

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\*\* Also available in French and Russian.

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\*\*\* Joint report by the Advisory Council on International Affairs (AIV) and the Advisory Committee on Aliens Affairs (ACVZ).

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**List of past reports**

1. Commentary on preliminary report by Christopher Greenwood entitled International Humanitarian Law and the Laws of War (23 December 1998)
2. Commentary on preliminary report by Francisco Orrego Vicuña and Christopher Pinto entitled Peaceful Settlement of Disputes (23 December 1998)
3. Commentary on preliminary report by Hans Blix entitled The development of international law relating to disarmament and arms control since the First Hague Peace Conference in 1899 (23 December 1998)
4. Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property as proposed by the International Law Commission (14 October 1999)
5. Commentary on International Liability for Injurious Consequences Arising out of Acts Prohibited by International Law (16 December 1999)
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