# THE NETHERLANDS AND THE RESPONSIBILITY TO PROTECT

## THE RESPONSIBILITY TO PROTECT PEOPLE FROM MASS ATROCITIES

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# Contents

# Foreword

In September 2005, the World Summit marking the 60th anniversary of the United Nations (UN) reached agreement on the Responsibility to Protect, an overarching concept for the responsibility of states and the international community as a whole to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

The acceptance of the Responsibility to Protect (R2P) was regarded as one of the World Summit's key achievements. Advocates of the concept described the relevant paragraphs in the summit's Outcome document as historic and as a vehicle for implementing the call 'never again', which is heard after every genocide or other form of large-scale human rights violations. Five years later, however, it appears that the concept still raises many questions and that it is often difficult to implement in practice.

In recent years, the Netherlands has been a strong advocate of R2P. It played an active role in the negotiations in 2005 and has sought to pioneer the further development and implementation of the concept ever since. Moreover, the Netherlands recently took over from Canada the chairmanship of the informal, New York-based group of friends of the Responsibility to Protect.

Against this background, the Advisory Council on International Affairs (AIV) decided that it would be a good idea to issue an advisory report on R2P. Almost five years after its acceptance, it is important to examine the conceptual and operational issues connected to R2P and consider what role it should play in Dutch foreign policy. An advisory report on this issue can also be viewed in the light of the advisory report on humanitarian intervention issued by the AIV and the Advisory Committee on Issues of Public International Law (CAVV) in 2000.[1]

Although the present report is not a response to a formal request for advice, the Ministry of Foreign Affairs has indicated that it would welcome an advisory report on this issue. This was confirmed by Minister of Foreign Affairs Maxime Verhagen at a meeting with the AIV's Human Rights Committee on 1 October 2009.

Partly on the basis of consultations with the relevant policy departments at the Ministry of Foreign Affairs, the AIV has formulated the main question of this advisory report as follows:

- What can be done in the coming years to develop R2P and put it into practice and how can the Netherlands contribute to this?

As part of this question, the AIV has formulated the following subquestions:

- How can the substance and scope of R2P be clarified?
- In the international political situation as it is today, what realistic opportunities exist to make R2P more operational? Does the UN Secretary-General's report of January 2009 provide a good starting point in this regard?
- In the international political situation as it is today, how can the Netherlands help to develop R2P and put it into practice in the immediate future?

1 AIV/CAVV, 'Humanitarian Intervention', advisory report no. 13, The Hague, April 2000.

The first, introductory chapter describes the context in which agreement was reached on R2P in 2005 and briefly considers subsequent developments. Chapter II analyses various conceptual and normative questions relating to the concept, such as whether it consists of new or existing elements; whether it is a concept, a principle or a norm; how it relates to humanitarian intervention; how it relates to sovereignty; and how to determine its scope. Chapter III discusses practical aspects of R2P, such as strengthening the relevant UN instruments, promoting regional cooperation, non-military forms of pressure, forms of military action and the availability of civilian and military capacity. Chapter IV examines how the Netherlands can help to develop R2P and put it into practice. Finally, chapter V presents a summary and the main conclusions of the report, which also give the AIV's answers to the questions mentioned above.

This advisory report was prepared by a joint committee of the AIV, consisting of Professor T.C. van Boven (chair), Professor K.C.J.M. Arts, D.J. Barth, T. Etty, Professor C. Flinterman, Professor W.J.M. van Genugten, R. Herrmann, F. Kuitenbrouwer, Professor N.J. Schrijver, Ms H.M. Verrijn Stuart and, as an additional external expert, Professor P.A. Nollkaemper. The committee met eight times between September 2009 and May 2010. The executive secretary was Ms A.M.C. Wester, assisted by Ms M. Sprakel, Ms B.A. Kuiper-Slendebroek, Ms S.R. Airoldi and Ms L.M. van Paaschen (trainees).

The committee met with several officials from the United Nations and Legal Affairs Departments of the Ministry of Foreign Affairs and the Permanent Mission to the United Nations in New York. The AIV is very grateful to them for their willingness to share their views with the committee.

The AIV adopted this advisory report on 4 June 2010.

# I Background and developments since 2005

## I.1 Background

At the UN World Summit in September 2005, the participating heads of state and government reached agreement on the Responsibility to Protect (often abbreviated as R2P or RtoP), which was included in the summit's Outcome document (see annexe I for the relevant paragraphs). This confirmed the notion that states, with the support of the international community, have a responsibility to protect persons within their jurisdictions from genocide, war crimes, ethnic cleansing and crimes against humanity. In addition, it was established that the international community, through the UN, has a responsibility of its own to use diplomatic, humanitarian and other peaceful means to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity – the crimes to which R2P specifically applies. If peaceful means prove inadequate and a state is clearly unable or unwilling to assume the responsibility to protect its people, the international community can take collective action through the Security Council. The World Summit also agreed that the UN General Assembly would continue consideration of R2P, bearing in mind the principles of the UN Charter and international law.

The acceptance of R2P was the culmination of a lengthy process. At the end of the 1990s, it appeared that international support for humanitarian intervention, in which military action without Security Council authorisation was often regarded as an option, was limited. In his *Millennium Report*, published in 2000, the then UN Secretary-General, Kofi Annan, asked the following question:

> If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?[2]

To answer this question, Canada helped to establish the International Commission on Intervention and State Sovereignty (ICISS). At the end of 2001, ICISS introduced the R2P concept,[3] building on the idea of 'sovereignty as responsibility' previously advocated by Francis Deng in his capacity as the UN Secretary-General's Special Representative on Internally Displaced Persons. The Responsibility to Protect, as defined by ICISS, consisted of three elements: prevention, reaction and rebuilding.

In the wake of the attacks of 11 September 2001 and the subsequent 'war on terror', there was initially little interest in this new concept. This changed when the High-Level Panel on Threats, Challenges and Change, which was established by Kofi Annan, published its report in December 2004. This report – *A More Secure World:*

2 Kofi A. Annan, *'We, the Peoples': The Role of the United Nations in the 21st Century* (New York: United Nations, 2000), p. 48.

3 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001).

*Our Shared Responsibility* – included a recommendation concerning R2P.[4] In his own report published prior to the UN World Summit in 2005 – 'In Larger Freedom: Towards Development, Security and Human Rights for All' – the Secretary-General emphasised the need for governments to take action against actual or imminent large-scale human rights violations and called on them to embrace R2P.[5] In doing so, he emphasised that it is first and foremost the responsibility of individual states to protect persons within their jurisdictions and that this responsibility only passes to the international community if a state is unwilling or unable to provide such protection.

At the 2005 UN World Summit, which achieved fairly unspectacular results in many areas, such as Security Council reform, the member states did manage to reach agreement on R2P. This was not an easy task, as several non-aligned countries, as well as the United States (through its Permanent Representative, Ambassador John Bolton), were highly critical of the concept, due in part to fears that it would lead to unwanted encroachments on national sovereignty. The support of Southern countries like Argentina, Chile, Mexico, Rwanda and South Africa was vital for the adoption of R2P. Proposals to simultaneously establish guidelines/criteria for those exceptional cases in which military intervention would be justified (as listed in the ICISS report) proved to be too far-reaching and ultimately did not make it into the Outcome document.

### I.2 Developments since 2005

Advocates of R2P regarded its acceptance at the 2005 UN World Summit as a remarkable achievement that was indicative of a new approach to the relationship between sovereignty and human rights. They noted that international law increasingly recognises that the protection of human and peoples' rights imposes limits and conditions on state sovereignty. They also regarded R2P as part of a wider transformation of international law from a system focusing on the state and governing elites to a normative framework focusing on the protection of individual and common interests, i.e. a humanisation of the international legal order in which citizens rather than states take centre stage.

Since 2005, modest progress has been made in the field of R2P. The Security Council upheld the concept in Security Council resolution 1674 (on the protection of civilians in armed conflict)[6] and referred to it in Security Council resolution 1706 (authorising the deployment of UN troops to Darfur).[7] In its most recent resolution on the protection of civilians in armed conflicts of November 2009, the Security Council reaffirmed the World Summit's conclusions on R2P.[8] In addition, on assuming office, current UN Secretary-General Ban Ki-moon identified the implementation of R2P as a priority and appointed Francis Deng as his Special Adviser on the Prevention of Genocide and Edward Luck as

4 UN High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (New York: United Nations, 2004).

5 Report of the Secretary-General, 'In Larger Freedom: Towards Development, Security and Human Rights for All', UN Doc. A/59/2005, 21 March 2005.

6 S/RES/1674, 28 April 2006.

7 S/RES/1706, 31 August 2006.

8 S/RES/1894, 11 November 2009.

his Special Adviser with a focus on the Responsibility to Protect. Dr Luck's appointment was controversial, however, as not all member states welcomed the creation of his post. As yet, the Fifth Committee of the UN General Assembly has not approved a budget for Dr Luck, who is therefore operating without financial resources.

On a more practical level, the events in Kenya in 2007-2008 are often cited as an R2P situation in which the international community acted swiftly and effectively, thus preventing 'something worse'. At the end of 2007, following national elections, large-scale ethnic violence erupted in Kenya. Within a few weeks, there were more than 1,000 casualties and 300,000 people had fled. The violence ended after a team of negotiators led by Kofi Annan managed to broker a political accord. At the time, Archbishop Desmond Tutu noted in an opinion piece that '[w]hat we are seeing in Kenya is action on a fundamental principle – the Responsibility to Protect'.[9]

This does not change the fact that even supporters of the concept acknowledge that there is still a long way to go. There is no international consensus on the exact meaning or scope of R2P. It is also difficult to put into practice, as has become apparent in recent years, for example, from the situations in Darfur, Burma and Sri Lanka. This is due, among other reasons, to the lack of international support for R2P. Despite the consensus reached on this issue in 2005, it appears that certain countries and blocs have only embraced the concept to a limited extent. One of the reasons for this is that several of them, including Russia, China and various members of the Non-Aligned Movement (NAM), continue to regard the entire concept as a potential violation of their sovereignty. Some countries also fear that powerful states might use R2P as a pretext for the unauthorised use of military force to safeguard their own interests. It has also been argued that R2P is a typically Western concern that devotes too little attention to protection from poverty, hunger and the lack of socioeconomic services – issues that, from a developing country perspective, are equally important and may even form a root cause of crimes falling under R2P. Finally, the role of the Security Council (and other UN organs like the General Assembly, the Secretary-General and the new Peacebuilding Commission) in R2P is controversial.

For these reasons, attempts to invoke the R2P principle in specific cases have often met with resistance at the UN. One example was the negotiations on a resolution on the causes of conflict in Africa, which foundered in the spring of 2009. This was due in part to a disagreement between the G77 and NAM, on the one hand, and the European Union (EU), on the other, about including an explicit reference to R2P.

### I.3 Report of the UN Secretary-General and the General Assembly debate

On 12 January 2009, the UN Secretary-General published an initial report on R2P. It is a carefully worded document that clearly takes account of the political sensitivities mentioned above. The report does not detract from the 2005 acquis and refers to the three distinct aspects of R2P (prevention, reaction and rebuilding). With a view to making the concept operational, however, the Secretary-General relies on a new structure consisting of three pillars: the primary responsibility of the state to protect its own population (pillar I); the commitment of the international community to assist in meeting

9 Desmond Tutu, 'Responsibility to Protect', *International Herald Tribune*, 19 February 2008. See also Elisabeth Lindenmayer and Josie Lianna Kaye, 'A Choice for Peace? The Story of Forty-One Days of Mediation in Kenya', International Peace Institute, 2009.

this obligation (pillar II); and the responsibility of the international community to respond adequately if a state fails to protect its population (pillar III). The role of the Security Council is one of many delicate topics discussed in the report. The Secretary-General confirms that the UN Charter gives the Security Council the exclusive right to authorise the use of force. It is therefore vital that the Security Council take responsibility when the occasion arises. However, the Secretary-General also makes several proposals for dealing with situations in which the Security Council is divided and unable to take action, such as voluntary relinquishment of the right of veto by the five permanent members or placement of the issues concerned on the agenda of the UN General Assembly (by analogy with the Uniting for Peace resolution of 1950).

In general, the Secretary-General's report received a fairly positive welcome, as confirmed in a General Assembly debate that took place between 23 and 28 July 2009. The debate was repeatedly postponed, and there were fears that critical member states might seize the opportunity to challenge the consensus reached in 2005. However, this did not happen. General Assembly President Miguel d'Escoto Brockmann of Nicaragua did try to lend a critical tone to the debate, and this struck a chord with certain states. Critical member states including Bolivia, Chile, Egypt (on behalf of the NAM), Nicaragua, Pakistan and Venezuela expressed concern about the infringement of sovereignty and the potential abuse of the concept by stronger states at the expense of weaker ones. However, the statements of the 90 member states that actively participated in the debate (including the Netherlands) where generally constructive. The member states generally endorsed the Secretary-General's report and supported the need to put R2P into practice. As expected, the third pillar was regarded as the most controversial aspect of the report, and much of the debate focused on the role of the Security Council and the right of veto.

While the 2005 consensus was not undermined, neither did the General Assembly debate conclude with a resolution that provided a stronger basis for R2P or for the allocation of resources in the Fifth Committee. With some difficulty, however, the General Assembly managed to adopt a short procedural resolution a few weeks after the debate, in which it took note of the Secretary-General's report and decided to continue its consideration of the issue. This resolution,[10] which was initiated by Guatemala, was adopted without a vote. This did not prevent several member states (Bolivia, Cuba, Ecuador, Iran, Nicaragua, Sudan, Syria and Venezuela) from reiterating in explanations of their votes their concerns regarding the potential abuse of R2P and emphasising that there was still no agreement on the definition or implementation of the concept.

10 UN Doc. A/RES/63/308, 7 October 2009 (the resolution was adopted on 14 September).

# II The significance of the Responsibility to Protect: substance, status and scope

## II.1 General

As noted in the previous chapter, R2P has only been invoked on a modest scale since 2005 and has emerged as a source of occasionally heated discussions during negotiations on UN resolutions or funding issues. One example was the debate in the Fifth Committee of the UN General Assembly on the funding of the Office of the Special Adviser with a focus on the Responsibility to Protect, which has so far not produced any result.

As relatively little tangible progress appears to have been made in applying R2P in the five years since its official acceptance, advocates of the concept are now focusing on urging that it be put into practice. In this connection, chapter III examines several practical issues relating to R2P.

However, the AIV believes that it is also important to clarify the normative significance of R2P. In our view, establishing clarity and promoting agreement on conceptual issues is key to increasing the political support that is needed to make R2P operational. This chapter therefore first examines several important conceptual issues.

## II.2 Existing and innovative elements of R2P

Part of the debate on R2P relates to whether, on closer inspection, the concept is actually all that new. Opinions vary, even among legal experts, as to whether the relevant passages in the 2005 Outcome document can in fact be traced back directly to existing principles and obligations under international law. Although some observers claim that in practice R2P does not contain much that is new, and therefore question whether it has any rationale as an independent concept, others argue that the principle is so new that it will be difficult to implement.[11]

In the AIV's view, R2P is not a brand new, separate concept that was only embraced by heads of state and government in 2005, but rather the culmination of an extended process of development. The protection of human rights was already an important issue at the time of their inclusion in the UN Charter in 1945. The 1948 Universal Declaration of Human Rights gave clear expression to the idea that universal human values and rights need to be protected. This idea later gave rise to a large number of international agreements. Major milestones include the conclusion of the Genocide Convention in 1948, the conclusion of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) in 1966 and the adoption of the Rome Statute of the International Criminal Court in 1998.

11 Regarding the divergent views on R2P, Carsten Stahn notes as follows in an article examining whether R2P is an example of political rhetoric or a legal norm: '… paragraphs 138 and 139 of the Outcome document represent a rather curious mixture of political and legal considerations, which reflects the continuing division and confusion about the meaning of the concept'. Stahn, 'The Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', *The American Journal of International Law* 101.1 (2007), pp. 99-120 at p. 108.

The fact that certain elements of R2P already had a basis in international law is particularly true as regards the obligation of states to protect all persons within their jurisdiction. Thus, for example, the principle that states are obliged to protect persons from genocide, war crimes, ethnic cleansing and crimes against humanity has been enshrined in various universal and regional human rights instruments. It has also been included in the Rome Statute of the International Criminal Court and in the Geneva Conventions (1949) and Additional Protocols (1977) and is currently being strengthened by the growing commitment to criminalise genocide, crimes against humanity and war crimes in national law as well. The principle is so broadly accepted that states that do not put it into practice are generally unable to invoke their sovereignty as a defence against international intervention. The AIV believes that this principle has attained such significance that even states that are not bound by a specific agreement to protect persons within their jurisdiction against these crimes are nevertheless bound to do so on the basis of customary international law.[12]

The responsibilities of the international community also build on existing practice. Ever since the recognition of the universal human rights in 1945, as evident from the agreements mentioned above and the criminal tribunals established in recent decades, the realisation has slowly but surely grown that protecting these rights is the responsibility not just of the state concerned but also of the international community as a whole, as embodied by the UN. In practice, this has been reflected in several developments, such as the fact that from 1967 onwards the UN Commission on Human Rights dealt with many country situations and thematic issues on the basis of ECOSOC resolution 1235, using a wide range of instruments including reports, investigations and resolutions. The Vienna Declaration of the 1993 World Conference on Human Rights accordingly described the promotion and protection of human rights as 'a legitimate concern of the international community'.[13] It thus explicitly recognised that UN involvement in the human rights situation in a particular country (e.g. by means of a resolution or a statement from a country or thematic rapporteur) would not be regarded as an unauthorised interference in the internal affairs of that state. In addition, various UN human rights agreements contain direct references to the need for and obligation of international cooperation and to the specific need to help developing countries implement them.[14]

Recent developments regarding universal jurisdiction also indicate that third-country responses are considered legitimate in the case of grave human rights violations. Against the background of the Geneva Conventions and Additional Protocols and the 1982 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982), a small number of criminal prosecutions have been carried out

12 See e.g. Christian Tomuschat, 'Obligations Arising for States Without or Against their Will', in *Recueil des Cours* 241 (1993), p. 260.

13 Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights, A/CONF.157/24, 25 June 1993, para. 4.

14 See, for example, arts. 2(1) and 11(1) of the ICESCR; arts. 4, 23, 24 and 28 of the UN Convention on the Rights of the Child; and arts. 4 and 32 of the UN Convention on the Rights of Persons with Disabilities.

on the basis of universal jurisdiction under customary and national law.[15]

There is also a direct link between R2P and the rapid development of international criminal law in recent decades. The creation of international and mixed tribunals in the 1990s and the establishment of the International Criminal Court in 1998 have made it clear to states that the perpetrators of serious international crimes must not go unpunished.[16] In a sense, the consensus reached in 2005 on R2P is a continuation of this trend. After it was established that there had to be a way to prosecute the perpetrators of serious international crimes, it was also accepted that governments have a responsibility to prevent or stop such crimes.[17]

On the basis of the developments of the past 60 years, which are characterised by the international community's ever-increasing role in the protection of human rights, the official acceptance of R2P in 2005 can be regarded as the latest link in a long chain. The AIV believes that it is an important link, encompassing as it does an *explicit acknowledgement by heads of state and government* that protection against large-scale human rights violations is in part the responsibility of the international community, as embodied in the UN, which should therefore act accordingly. This recognition of the *complementary* responsibility of all states can be regarded as the most significant aspect of R2P, which goes a step beyond the idea that promoting and protecting human rights are a legitimate *concern* of the international community.

Up to a point, this collective complementary responsibility has a basis in international law. The mutual responsibilities of states in relation to fundamental human rights are enshrined in articles 55 and 56 of the UN Charter and in obligations *erga omnes* ('towards all') as recognised, for example, by the International Court of Justice.[18] These rights are so fundamental that all states are obliged to enforce and protect them. The same idea is at the root of states' right of petition, which has been enshrined in various human rights instruments. This right is not based as such on the petitioning state's own interests but on the collective responsibility of all states parties. Common Article 1 of the Geneva Conventions implicitly refers to the same collective responsibility by stipulating that the states parties 'undertake to respect and *to ensure respect for*' the substance of the conventions.

15 Examples include the conviction in Belgium in 2001 of several Rwandan nuns for complicity in genocide and the conviction in the Netherlands in 2004 of a Congolese commander for committing torture in Congo – then Zaïre – in 1996.

16 In this regard, see also AIV, 'Transitional Justice: Justice and Peace in Situations of Transition', advisory report no. 65, The Hague, April 2009.

17 Regarding this development, Samantha Powers notes: 'In a remarkably short time, influential UN member states went from ignoring mass atrocities altogether to setting up international tribunals to punish them, to accepting that they had a responsibility to prevent or stop them.' Foreword to Richard H. Cooper and Juliette Voïnov Kohler (eds.), *Responsibility to Protect: The Global Moral Compact for the 21st Century* (New York: Palgrave Macmillan, 2009), p. iix.

18 ICJ, *Barcelona Traction* (*Belgium* v. *Spain*), ICJ Reports 1970, para. 34. The International Criminal Tribunal for the former Yugoslavia also recognised the principle of *erga omnes* obligations in the *Furundzija* case: see ICTY, *Prosecutor versus Furundzija*, case no. IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, para. 151.

A legal basis for the collective responsibility to act in the face of large-scale human rights violations can also be found in the International Law Commission's articles on state responsibility, in particular articles 40 and 41, which relate to serious breaches of obligations arising under peremptory norms of international law (*jus cogens*).[19] Similar provisions have been included in articles 40 and 41 of the draft articles on the Responsibility of International Organisations.[20] These provisions bind states and international organisations to respond to serious breaches of *jus cogens*, for example by cooperating to put an end to them. Although the four crimes against which R2P aims to offer protection do not necessarily fall under *jus cogens* in all their forms and in their full magnitude, they at least broadly fall under the category of peremptory norms to which the relevant ILC articles apply.[21]

Furthermore, the International Court of Justice has held that, at least in the case of genocide, there is an existing legal obligation of prevention. In its judgment in the case of Bosnia and Herzegovina versus the Republic of Serbia (formerly Serbia and Montenegro), the Court held that Serbia had violated article 1 of the Genocide Convention, in that it had not done everything in its power to prevent genocide, not on its own territory but on the territory of another, neighbouring state.[22]

In this connection, it is also worth noting the broad interpretation that the Security Council has given to article 39 of the UN Charter in recent decades by regarding internal conflicts with far-reaching humanitarian implications as threats to regional or international peace and security.[23] In doing so, the Security Council has effectively assumed collective responsibility to take action against large-scale human rights violations and civil wars.

On the basis of the above analysis, the AIV concludes that R2P comprises several different elements that are enshrined in international law to varying degrees. The solidity of each element's legal basis is a factor in the level of international support it enjoys.

The responsibility of states to protect persons within their jurisdiction is clearly rooted in existing international law. As noted above, the role of third states and the international community as a whole has a weaker legal basis and also encounters greater resistance. The wording of paragraphs 138 and 139 of the Outcome document suggests that, as an idea, the responsibility to respond enjoys at least some acceptance insofar as it relates to means that do not involve the use of force. Moreover, the acceptance of the ILC's articles on the obligation of states and international organisations to respond to serious

19 Articles on Responsibility of States for Internationally Wrongful Acts, A/Res/56/83, Annex, adopted by the ILC in 2001.

20 See: <untreaty.un.org/ilc/reports/2009/2009report.htm>.

21 By the same token, it is conceivable that certain mass violations of human rights will not necessarily take the form of one of these four crimes.

22 ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, General List, no. 91, 26 February 2007.

23 See, for example, UN Security Council resolutions 688 (1991) concerning Iraq, 794 (1992) concerning Somalia, 929 (1994) concerning Rwanda and 940 (1994) concerning Haiti.

breaches of *jus cogens* limits the scope for political disagreements in this area. However, the Outcome document is clearly more reticent regarding collective action by the Security Council under Chapter VII of the UN Charter. 'Preparedness to take action' seems to imply voluntary involvement rather than a legally binding obligation. The document accordingly refers to taking action 'on a case-by-case basis'.

The most delicate question is whether the international community has an *obligation* to act. Apart from the ILC's articles and a modest amount of Security Council practice, there is hardly any practice in this area, and there is accordingly little consensus on who should take responsibility if a state fails to fulfil its primary responsibility to protect. Military intervention should be carried out through the Security Council, but it is unclear what should be done if the international community does not succeed in assuming responsibility through the Council. Does the responsibility subsequently fall to individual states or regional organisations? This question will be discussed in chapter III.

In conclusion, the AIV notes that R2P combines existing elements of international law (in particular as regards the obligations of the state) with complementary and innovative principles (primarily with regard to the responsibility of the international community). It is understandable that this combination may lead to confusion, the more so because, under international law, the state's obligation to protect covers many more areas than the four crimes falling under R2P. In this respect, R2P is thus more limited than existing human rights instruments.[24]

All this brings the AIV to the conclusion that R2P should be regarded as an innovative, overarching concept of which both new and existing elements are integral parts. The new elements are more controversial, and the compromise formulations used in the Outcome document leave room for the further interpretation and elaboration of precisely these elements. With a view to making R2P operational, attention should be given to this issue in the coming period. In view of the international political situation, however, the question must be considered whether there are sufficient opportunities to make some progress in this area at intergovernmental level.

The comprehensive approach embodied by R2P is one of its main added values. R2P encompasses prevention, reaction and rebuilding and concerns the role of the state *and* the international community. The UN Secretary-General emphasised this in his report by describing R2P as consisting of three equally important pillars. This comprehensive approach is relatively new and is one of the features that distinguish R2P from other approaches to large-scale human rights violations, such as humanitarian intervention. This issue is discussed in greater detail in section II.4. In a sense, R2P dovetails with the comprehensive approach to crisis management operations, a comparable method under which diplomatic, defence and development instruments are used in a coherent manner.

24 In this regard, former UN High Commissioner for Human Rights Louise Arbour noted, 'In short, if the responsibility to protect were primarily designed to assert the responsibility of States *vis-à-vis* their own people, then it would be too narrowly framed and essentially do no more than replicate existing international law. In my view, it was instead primarily meant to address the responsibility of the larger international community. In that, its scope is probably just right, for now.' Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice', *Review of International Studies* 34 (2008), pp. 445-58.

### II.3 Concept, principle or norm?

R2P is described in various ways in the literature and in the international debate. The question whether it should be regarded as a concept, a principle or a norm – emerging or otherwise – is not without importance, as each term is closely linked to its status and expected practical impact. It is therefore desirable to work towards a clear – and agreed – classification of R2P.

The ICISS report states that there is not a sufficiently strong basis to classify R2P as a new principle of customary international law but that it can be described as an 'emerging guiding principle'.[25] Since the publication of the ICISS report in 2001, R2P has been frequently discussed and commented on in legal circles and international forums. In its 2004 report, the High-Level Panel on Threats, Challenge and Change speaks of an 'emerging norm',[26] and the Secretary-General also used this term in his report 'In Larger Freedom'.[27] The Outcome document of the 2005 UN World Summit does not define R2P as such, simply noting that states 'are prepared to take collective action…'.

At present, R2P is often referred to as a 'norm' in UN circles, while many states still continue to describe it as a 'concept' after the adoption of the 2005 Outcome document. The Netherlands speaks of both a 'concept' and a 'principle'.[28] International legal experts approach the term from different angles. Experts who believe that R2P can be classified as a legal term describe it as a 'norm', while others, who believe that it is more of a political term, refer to it as a 'concept', 'doctrine' or 'political catchword'. Louise Arbour, for example, notes as follows:

> I wish to state very clearly my view that the responsibility to protect norm is not, as some have suggested, a leap into wishful thinking. Rather, it is anchored in existing law, in institutions and in lessons learned from practice.[29]

An opposing view is that

> at present, many of the propositions of this concept remain uncertain from a normative point of view or lack support. Responsibility to protect is thus in many ways still a political catchword rather than a legal norm.[30]

The AIV believes that the term 'concept' refers to an idea or abstract notion that requires further discussion and elaboration before it can serve as a basis for concrete action. It is a term that is particularly useful in the academic world but is not much used

25 ICISS report, *supra* n. 3, paras. 2.24 and 6.17.

26 UN High-Level Panel on Threats, Challenges and Change, *supra* n. 4, para. 203.

27 Secretary-General, 'In Larger Freedom', *supra* n. 5, para. 135.

28 The term 'concept' is frequently used, but the government's 2007 policy memorandum on the legal basis and mandate of missions involving Dutch military units refers to a 'principle'. See the letter to parliament of 22 June 2007, Parliamentary Papers 2006-2007, 29 321, no. 41.

29 Arbour, *supra* n. 24, pp. 447-48.

30 Stahn, *supra* n. 11, p. 120.

to describe a normative principle. R2P could be regarded as a 'concept' in the period prior to the 2005 UN World Summit, given that there was no international consensus on it at that time, despite its discussion in international forums and its promotion by various committees.

Following the World Summit, however, the term 'concept' no longer seems appropriate. The Outcome document does not refer to it as such, and the way in which it is formulated implies that it is more than an idea that still requires elaboration. States have clearly committed themselves to R2P and – along with regional organisations and the UN – have started putting it into practice, albeit on a modest scale. Since its adoption in 2005, the AIV therefore regards R2P as a principle. States have agreed that R2P will constitute a basis for action, although they still need to work out how this will happen. When there is a broad consensus in the international community on the way in which the principle should be applied and that consensus is acted on, it will be possible to speak of an established international norm.

Views differ as to whether R2P can already be regarded as a principle of international law. It is clear that the duty of states to protect persons within their jurisdiction really is a consequence of their obligations under international law. As explained in the previous section, however, the AIV believes that the law on the responsibility to protect persons located in the jurisdiction of other states is still under development. R2P has not yet been explicitly incorporated into legally binding documents as an overarching concept, nor can it be regarded at present as a principle of customary international law. However, it is clear that the R2P principle is already a growing source of inspiration and guidance in interpreting applicable international law on sovereignty, human rights and peace and security. At this stage, the AIV would therefore refer to R2P as an emerging principle of international law. In a sense, it is an overarching principle that defines the entire fabric of legal, moral and political obligations and responsibilities of states and the international community in the case of specific, actual or imminent, large-scale human rights violations. This is because R2P – as adopted in 2005 and used ever since – also encompasses elements of a political and moral nature, which means it cannot be described in purely legal terms. In saying this, the AIV certainly does not wish to imply that R2P could never develop into an independent principle of international law.[31] In fact, it believes that the Netherlands should promote this where possible.

In its response to the AIV's advisory report 'Transitional Justice: Justice and Peace in Situations of Transition', the Dutch government states that R2P is a political and moral best-efforts obligation that does not entail a legal obligation to achieve a result.[32] The AIV believes that this approach does not do sufficient justice to the R2P principle, which unites various responsibilities and obligations, both legal and otherwise. As explained above, the best-efforts obligation discussed in the government's response does actually have legal ramifications.

31 The applicable principles of international law have been articulated, in particular, in article 2 of the UN Charter and in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625, 24 October 1970.

32 Government response to AIV advisory report on 'Transitional Justice: Justice and Peace in Situations of Transition', letter of 15 December 2009, Parliamentary Papers 2009-2010, 32 123-V, no. 60.

### II.4 Relationship with humanitarian intervention

The term humanitarian intervention is generally understood to mean the use or threat of force by one or more states, or an international organisation, against another state, without the consent of its government, to prevent or end grave, large-scale violations of fundamental human rights, with or without a mandate based on Chapter VII of the UN Charter.[33] As discussed in this section, the relationship between R2P and humanitarian intervention often gives rise to debate and misunderstanding.

The paragraphs on R2P in the 2005 Outcome document can be regarded as an – indirect – result of the ICISS report in 2001. This international commission, established by Canada with the support of the then UN Secretary-General, Kofi Annan, examined how the international community could take effective action in the face of humanitarian crises of the kind that had occurred in Rwanda and Kosovo. It observed:

> External military intervention for human protection purposes has been controversial both when it has happened – as in Somalia, Bosnia and Kosovo – and when it has failed to happen, as in Rwanda.[34]

ICISS was meant to formulate an effective and politically acceptable response to large-scale human rights violations.

At the time of its establishment, the then Canadian Minister of Foreign Affairs, Lloyd Axworthy, expressed the hope that the Brundtland Commission, which had coined the term 'sustainable development' at the end of the 1980s, would serve as an example for ICISS. The Brundtland Commission had successfully reconciled the apparently irreconcilable principles of development and environmental protection. This time, the challenge was to find an approach that could bridge the gap between state sovereignty and intervention.[35] ICISS defined intervention as 'action taken against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective'. This included both military and non-military measures (including sanctions and criminal prosecution).

The concept of humanitarian intervention initially played a key role in the Commission's work. The problematic nature of this term became apparent during discussions with non-governmental organisations (NGOs), that objected to the conflation of the terms 'humanitarian' (which was associated with politically neutral action aimed at saving lives) and 'intervention' (which implied the use of military force). It also emerged that many states were strongly opposed to the concept. As noted by one of its members,

33 This definition is taken from the government's policy memorandum on humanitarian intervention, letter of 30 October 2001, Parliamentary Papers 2001-2002, 27 742, no. 5. It is also based on the definition used by the AIV/CAVV in their advisory report on humanitarian intervention, *supra* n. 1, pp. 6-7.

34 ICISS report, *supra* n. 3, p. vii.

35 For a description of this process, see Alex Bellamy, *A Responsibility to Protect*: *The Global Effort to End Mass Atrocities* (Cambridge: Polity Press, 2009), pp. 37 ff.

Ramesh Thakur, the Commission therefore concluded relatively quickly that

> the weight of historical baggage is too strong for a new consensus to be formed around the concept of humanitarian intervention. If major powers wish to help victims instead of helping themselves, they would do well to abandon the talk of 'humanitarian intervention'.[36]

Gareth Evans, one of the Co-Chairs of ICISS, subsequently proposed shifting the focus of the debate to R2P. This would help solve four problems encountered by the Commission. First, the exclusive focus on military intervention was too limited; international human rights protection requires a much broader range of activities. Second, the resistance to humanitarian intervention was based on legitimate historical sensitivities about colonialism and self-determination. Third, the search for new legal rules on intervention was not likely to bear fruit: the possibility of reaching consensus was slim and such rules would not guarantee protection. Finally, more attention should be devoted to the responsibilities of different actors.[37]

The new concept of R2P developed gradually and gained such widespread support that it ultimately became a key premise of the ICISS report. There was also criticism, especially from those who claimed that the change in terminology could not hide the fact that the problems essentially remained the same and – worse still – that choosing a different term was a way of circumventing the key issues. However, this does too little justice to the fact that, in choosing this new term, ICISS had genuinely opted for a different approach. Although the issues confronting the commission were far from new, its proposed response was.

The R2P principle that was finally adopted four years later by the international community was not identical to the concept proposed by ICISS, but it basically encompassed the same idea and bore the same relation to the concept of humanitarian intervention.

The central idea of R2P, as adopted in 2005, is not that states have a right to intervene in certain circumstances.[38] Even more than humanitarian intervention does, it focuses on the perspective and primary interests of the endangered population, thus abandoning the classic state-centred approach that places state security above all else. Instead, it focuses on the safety of the inhabitants of the state concerned. R2P defines an obligation to protect individuals and population groups at all times. This obligation, which derives from sovereignty, should be fulfilled, first and foremost, by the state concerned, in line with existing human rights instruments and humanitarian law. The international community, as embodied by the UN, has a complementary responsibility in this regard.

As described in the Outcome document, R2P – in contrast to humanitarian intervention – encompasses a continuum of prevention, reaction and rebuilding, with measures ranging

36 Ibid., p. 42.

37 Ibid., p. 43.

38 See also the UN High-Level Panel on Threats, Challenges, and Change, *supra* n. 4, para. 201: '… the issue is not the "right to intervene" of any State, but the "responsibility to protect" of *every* state when it comes to people suffering from avoidable catastrophe…'.

from early warning mechanisms to diplomatic pressure, coercive measures, holding perpetrators accountable and international assistance. Since this is a continuous process, the consequences of action (or inaction) should always be carefully considered. Moreover, because R2P relates to a continuum, military resources can also be deployed during the preventive phase without necessarily leading to the use of force.

Insofar as humanitarian intervention refers to the use of force for humanitarian ends *with* a Security Council mandate, there is a big difference between R2P and humanitarian intervention, since R2P is a much broader concept, as described above. Insofar as humanitarian intervention refers to the use of force *without* a Security Council mandate, as is often the case in practice,[39] it is incompatible with R2P as it was accepted in 2005. This is because the Outcome document explicitly states that R2P may mean taking 'collective action… through the Security Council, in accordance with the Charter… should peaceful means be inadequate and national authorities are manifestly failing to protect their populations.' Military intervention on the basis of R2P thus requires Security Council authorisation. The Outcome document is silent regarding what should happen if the Security Council is unable to take action. This question is nevertheless still pertinent and will be discussed in greater detail elsewhere in this report. At this point, however, it is sufficient to note that R2P, as described in the Outcome document, requires Security Council authorisation, which is often not regarded as a prerequisite for humanitarian intervention.

In short, R2P is a response to problems that have existed for a long time, but a response that is substantially different from – or even incompatible with – humanitarian intervention. The two concepts should not be confused with one another.

### II.5 R2P and sovereignty: problems and issues

The R2P principle is based on the idea that sovereignty and human rights are two sides of the same coin and thus not mutually exclusive. The idea that sovereignty includes certain responsibilities is not new in itself. In the past, sovereignty has rarely been regarded as being entirely unqualified. The Act of Abjuration, which was signed in The Hague in 1581, states:

> … that God did not create the subjects for the benefit of the Prince … but rather the Prince for the sake of the subjects, without whom he would not be a Prince, to govern them justly and wisely, to support and love them as a father does his children and a shepherd his flock, and even to protect them at the risk of his own life and limb.[40]

39 Strictly speaking, the term 'humanitarian intervention' is used only in this sense. See also the AIV/CAVV's advisory report on humanitarian intervention, *supra* n. 1, p. 7.

40 See the Act of Abjuration, the declaration in which several Dutch provinces rejected King Philip II of Spain as their sovereign, signed in The Hague on 26 July 1581, in accordance with the decision of the States General of the Netherlands of 22 July 1581. The passage in question is followed by this one: 'And when he does not behave thus, but instead of protecting his subjects seeks to oppress them, to harass them, to take away their ancient freedoms, privileges and customs and to rule and use them as slaves, then he should no longer be considered a prince but a tyrant. His subjects may then at the very least, especially in consultation with the States of the land, justifiably cease to regard him as a Prince, abandon him and legally appoint another in his stead to protect them.'

In the US Declaration of Independence of 1776, Thomas Jefferson also referred to the government's responsibility to serve its subjects and safeguard their rights. Similarly, the legal theories of Hugo Grotius were based on the assumption that the rules governing the conduct of states ultimately owed their existence to the fact that the subjects of the state – the individual citizens – had an interest in those rules.[41]

The principle of state sovereignty, which served as a basic premise in drafting the UN Charter, has played a key role in the development of international law. At the same time, the UN Charter reflects the idea that sovereignty also gives rise to duties at international level. The Charter is partly based on the idea that promoting peace and security, development and human rights are closely connected, and it contains several explicit references to promoting human rights (see, e.g., articles 1(3), 13 and 55). Ever since the Charter's adoption, the international community's role in the area of human rights protection has continued to grow, as described above. In contrast, the concept of sovereignty has actually become less absolute, due in part to the many legally binding agreements that states have concluded among themselves (not only on human rights but also, for example, on peace and security, trade and the environment). These agreements have partly curtailed the freedom of action that absolute sovereignty entails.

Historically speaking, the idea that sovereignty is a responsibility that entails national and international obligations is thus not new, although it has not always been described as such. In the 1990s, in his capacity as the UN Secretary-General's Special Representative on Internally Displaced Persons, Francis Deng did actually use these terms. He argued that sovereignty entailed a responsibility to safeguard individual human rights and that international cooperation could bolster national efforts in this area.

Former UN Secretary-General Kofi Annan adopted the term at the end of the 1990s. In a speech to the British Ditchley Foundation, he stated:

> In reality, this old orthodoxy was never absolute. The Charter, after all, was issued in the name of the peoples, not the governments, of the United Nations. Its aim is not only to preserve international peace – vitally important though that is – but also to reaffirm faith in fundamental human rights, in the dignity and worth of the human person. The Charter protects the sovereignty of peoples. It was never meant as a licence for governments to trample on human rights and human dignity. Sovereignty implies responsibility, not just power.[42]

Sovereignty as responsibility became the core principle of ICISS and also forms the basis of R2P. In theory, it could be argued that in accepting the concept in 2005 the UN member states essentially endorsed both the idea of sovereignty as responsibility and the way in which they and the international community should implement this idea according to the definition in the Outcome document. As noted by the Secretary-General in his report in January 2009:

41 In this regard, see also Stahn, *supra* n. 11, p. 111.

42 Kofi Annan, 'Intervention', Ditchley Foundation Lecture, 26 June 1998, as cited in Bellamy, *supra* n. 35, p. 28.

> As the assembled Heads of State and Government made absolutely clear, the responsibility to protect is an ally of sovereignty, not an adversary. It grows from the positive and affirmative notion of sovereignty as responsibility, rather than from the narrower idea of humanitarian intervention.[43]

States seem rarely to dispute their responsibility to protect their own peoples from large-scale human rights violations in the course of debates in the UN General Assembly, Security Council or Human Rights Council (HRC). As already noted, this is probably due to the fact that this responsibility is firmly enshrined in existing international law.

As regards the role of the international community, however, there are constant indications that the consensus reached in 2005 is fragile. For example, in an open debate in the Security Council on 22 June 2007, Mexico stated:

> [d]espite the consensus reached in 2005, we cannot deny that an atmosphere of mistrust prevails over that subject. While some States see in the new principle the mere continuance of interventionist policies aimed at destabilizing political regimes, others promote its application in a selective manner, limiting its scope to cases significant for their foreign policy interests.[44]

Furthermore, in the General Assembly debate in July 2009 on the Secretary-General's report on R2P, concerns were expressed that powerful states might abuse R2P to protect their own interests at the expense of weaker states and might violate state sovereignty for this purpose.

Such arguments could be invoked to prevent international action in cases in which large-scale human rights violations are actually taking place. This would be at odds with the R2P principle. However, the AIV believes that it would be wrong to assume in advance that all member states that express concerns in this area necessarily wish to avoid any application of R2P. In general, states strongly condemn the four crimes to which the principle applies and support their prevention and people's protection from them. A number of member states – mostly Southern states that only gained independence in the second half of the 20th century – appear to have genuine concerns about the implementation of R2P, especially as regards the role of the international community and the possibility of armed intervention.

The AIV believes that the concerns of these states need to be taken seriously if progress is to be made towards making R2P operational, all the more so because, historically speaking, they are not entirely in the wrong. Humanitarian motives have indeed been advanced as cover for interventions with an entirely different objective. Examples of this include the Japanese attack on Manchuria (1931), the Italian invasion of Abyssinia (1935) and the German occupation of the Sudetenland in Czechoslovakia (1938). The invasion of Iraq is often cited as a recent example, as humanitarian motives were advanced in this case too, after the event.

43 Secretary-General, 'Implementing the Responsibility to Protect', UN Doc. A/63/677, 12 January 2009, para. 10.

44 Carlo Focarelli, 'The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine', *Journal of Conflict and Security Law* 13.2 (2008) pp. 191-213 at p. 207.

Various authors who have intervened in this debate share these concerns. In 1977, for example, Michael Walzer noted:[45]

> Clear examples of what is called 'humanitarian interventions' are very rare. Indeed, I have not found any, but only mixed cases where the humanitarian motive was one among several. States don't send their soldiers into other states, it seems, only in order to save lives.[46]

Closer analysis of the concerns of the above-mentioned UN member states about the abuse of R2P can contribute to a better understanding of their position and help begin developing a satisfactory response to the concerns they have raised.[47] In many cases, these countries' position is based on their perception that R2P legitimises the existing balance of power by allowing stronger states to intervene in the affairs of weaker ones. This perception is strengthened by their assumption that the states with the power to do so will implement R2P selectively and inconsistently. In this context, reference is often made to the Security Council's inability to take action against Israel's occupation of the Palestinian territories.

Another criticism is that international involvement in reconstruction processes (the responsibility to rebuild) and the underlying theories on development give powerful states permission to 'reform' other states to fit the economic and political model of their choice. A comparison is often drawn with the *missions civilisatrices* that colonial powers historically used as a pretext for subjugating countries in other parts of the world. According to this view, terms like 'human rights violator' and 'authoritarian regime' are used in a similar way to identify states as 'savage' or 'uncivilised', just as they were in the past.

It is understandable that many developing countries are apprehensive about military or other forms of intervention and that they therefore attach great importance to international legal safeguards against the use of force. Given the colonial history, the relatively recent independence and the limited military capacity of many of these countries, it is not surprising that they are uneasy at the prospect of international action that might threaten their relatively new sovereign status. As for objections to the

45 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), p. 101.

46 More recently, Noam Chomsky struck a very critical note in a roundtable discussion prior to the UN General Assembly debate in July 2009. He argued that there are three key principles of international affairs that have proved their force again and again: 'the strong do as they wish, while the weak suffer as they must'; the decision-makers make sure that their own interests are attended to however grievous the effects on others; and virtually every use of force in international affairs has been justified on the grounds of 'suffering populations', while there has been too little humanitarian intervention in cases where it was really needed. Chomsky argued that the selectivity of interventions confirms with painful precision that stronger states do as they wish at the expense of weaker nations. He illustrated this point by referring to several situations in which he believed that R2P was (or is) applicable but was not invoked: the oil-for-food programme in Iraq and the situations in Gaza and Eastern Congo.

47 A good analysis, which was used in preparing this advisory report, appears in Sue Robertson, 'Beseeching Dominance: Critical Thoughts on the Responsibility to Protect Doctrine', *Australian International Law Journal* 33 (2005), pp. 33-55.

responsibility to rebuild, it should be noted that although the ICISS report rejects regime change and occupation, it does state that in practice 'disabling a regime's capacity to harm its people may be essential to discharging the mandate of protection'.[48]

However, there are also several arguments that can be used to counter these objections. First, ICISS has done its best to limit the possibilities for imperialistic adventures and Western 'vigilante justice'[49] by emphasising the primacy of prevention, by treating the use of force as a last resort and by deriving legitimacy from multilateral action and Security Council authorisation. All these elements are included in the R2P principle that was adopted in 2005. In addition, the main focus is on the governments of individual states: the responsibility to comply with human rights obligations lies first and foremost with the state concerned; the international community only plays a complementary role.

Second, the assumption that intervention for humanitarian reasons is 'suspect' by definition and that it provides a vehicle for the neocolonial or imperialist ambitions of powerful states appears to oversimplify matters. What is at stake is often a more complex combination of motives of which some are idealistic and others are inspired by self-interest. Martha Finnemore, a professor of political science at George Washington University, has done extensive research into the role of humanitarian norms in military operations during the past 180 years. She notes that, since the end of the Cold War, a relatively large number of interventions have taken place in countries that were of limited obvious geostrategic or economic importance to the intervening countries. She refers to several countries as examples, including Bosnia, Cambodia, Kosovo and Somalia. Finnemore maintains that the main objective of these interventions was not territorial or strategic, but humanitarian. She contrasts these recent interventions with ones that took place during the 19th century and the first half of the 20th century, in which clear strategic motives, based on 'shared fears and perceived threats', did play a key role.[50]

Third, it is difficult to argue that the growth of multilateralism has chiefly reflected the self-interest of powerful states. The costs are too high, the coordination problems too complicated and the political risks too great for this to be plausible. In other words, '[i]f the Responsibility to Protect is a neocolonial imposition, it is not one that States are rushing to implement…'.[51] In fact, the opposite is true: powerful countries like the United States are reluctant to embrace the principle because they fear that it might

48 ICISS report, *supra* n. 3, para. 4.33.

49 Abdullah An-Na'im, 'NATO on Kosovo is Bad for Human Rights', *Netherlands Quarterly of Human Rights* 17.3 (1999), p. 230.

50 Martha Finnemore, *The Purpose of Intervention: Changing Beliefs about the Use of Force* (Ithaca and London: Cornell University Press, 2003). See in particular chapter 3: 'Changing Norms of Humanitarian Intervention' (pp. 52-84). Finnemore claims (p. 53) that the shift that she identifies in the patterns of humanitarian interventions can be explained by a change in the normative context: the thinking on who is 'human' and therefore requires protection is different from two centuries ago; how we intervene has changed – interventions must now be multilateral in order to be acceptable and legitimate; and the military goals and definitions of a successful operation have changed – in the past new governments were 'installed', now electoral processes are installed.

51 Robertson, *supra* n. 47, p. 48.

ultimately give rise to a positive obligation to act.[52]

None of this changes the fact that the fears of many developing countries regarding the risk of selective action are entirely realistic, especially in the case of military intervention. This is partly due to the composition and functioning of the Security Council. It is also questionable whether there is enough capacity in all cases to intervene if necessary. In general, ICISS observes:

> [T]he reality that interventions may not be able to be mounted in every case where there is justification for doing so, is no reason for them not to be mounted in any case.[53]

However, many states do not automatically accept this line of reasoning, which in the AIV's opinion is also too simplistic. Selectivity should be prevented as much as possible, as it undermines the credibility of the R2P principle.

It remains to be seen whether the ongoing negotiations on Security Council reform will actually bear fruit, but the fact remains that such reforms could significantly increase R2P's chances of success as an overarching principle, as pointed out on several occasions by former UN Secretary-General Kofi Annan. However, selectivity could also be limited by other means, for example by drafting criteria for armed intervention on the basis of R2P. This could also help to limit the abuse of humanitarian motives in the case of unilateral interventions, which is what happened in the past. This issue is examined in more detail in the next chapter.

In conclusion, it is advisable to take seriously the objections of states that believe that R2P could be abused, since these objections are based – at least in part – on genuine concerns, rooted in historical experience, regarding the implementation of R2P. Analysing these objections can contribute to better mutual understanding and may also help in moving towards a response that would counter several arguments. Other concerns – especially about the possible selectivity of collective action – are very real. In this case, the most appropriate response is to acknowledge these concerns and be prepared to keep looking for ways to allay them.

When seeking a dialogue with the states that have concerns, it is important to remember that different views on R2P often exist within the same region. For example, it is often assumed that the Asia-Pacific region is very reluctant to embrace R2P. However, closer analysis reveals that that only two states in the region are directly opposed to the principle (Myanmar and North Korea), while the others can be classified as 'R2P engaged', or 'fence-sitters'.[54] Strategies aimed at promoting R2P would benefit from a

52 Thus, for example, the US Permanent Representative to the United Nations, Ambassador John Bolton, stated in a letter of 30 August 2005 that the United States would not accept '… that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law.' Letter from Ambassador Bolton to UN Member States Conveying U.S. Amendments to the Draft Outcome document (30 August 2005), as cited in Stahn, *supra* n. 11, p. 108.

53 ICISS report, *supra* n. 3, para. 4.42.

54 See Alex J. Bellamy and Sara E. Davies, 'The Responsibility to Protect in the Asia-Pacific Region', *Security Dialogue* 40.6 (December 2009), pp. 547-69.

good understanding of the regional balance of forces. Regional states that are relatively favourable to R2P can play a key role in obtaining broader support for the principle in the region as a whole.

Finally, the AIV notes that the sovereignty debate is largely dominated by the possibility of using military force. It is important to bear in mind that this does not necessarily represent the core of R2P but merely one aspect, which should be regarded as a last resort and should only be considered as an option if all other measures, including political and economic sanctions, have failed. As the Secretary-General noted in his report on R2P with regard to the events in Kenya in 2008:

> … if the international community acts early enough, the choice need not be a stark one between doing nothing or using force.[55]

In this context too, the AIV therefore wishes to re-emphasise that a great deal of attention should be devoted to prevention, particularly in the policies of the West and the international community as a whole. If the right conditions are created for the peaceful political, social and economic development of a society and conflicts can be prevented from escalating (pillars I and II in the Secretary-General's report), there will ultimately be less need to intervene. Long-term international cooperation – not only between states but also between civil society organisations – is very important in this context. It can also help to accommodate the more development-oriented priorities of states that are less enthusiastic about other aspects of R2P.[56] In the long run, this may help to secure broader support for the principle.

### II.6 Scope of R2P

Part of the controversy surrounding R2P can be traced to a lack of clarity concerning its scope, in terms both of the situations in which the principle may be deemed applicable and of the measures that should be taken in such situations. In order to implement the principle, international agreement on the situations covered by R2P is essential.[57]

It is sometimes argued that the responsibilities of states and the international community under R2P should extend to all dangers from which people may reasonably be assumed to require protection, ranging from underdevelopment and the spread of HIV/AIDS to the proliferation of weapons of mass destruction and the risks associated with climate change. According to a slightly more limited approach, R2P should cover protection against all possible forms of conflict and human rights violations. From a moral, political or legal perspective, it can certainly be argued that the responsibility of states and the international community to protect populations covers all forms of

55 Secretary-General, 'Implementing the Responsibility to Protect', *supra* n. 43, para. 11(c).

56 See also Bellamy and Davies, *supra* n. 54, p. 567: 'While deepening consensus is possible in the Asia-Pacific region, advocates need to pay careful attention to process. Policies that may be popular in the West because they speak to a security-focused agenda – such as early warning, sanctions and intervention – should not be privileged over other equally effective programmes that are longer-term and more development-focused.'

57 See also Susan E. Mayer, 'In our Interest', in *Responsibility to Protect*, *supra* n. 17, p. 59, n. 1: 'International agreement about what forms of violence are covered is essential to implementation of R2P.'

human rights violations. However, the AIV notes that the R2P concept, as accepted in 2005, is limited to the crimes of genocide, war crimes, ethnic cleansing and crimes against humanity, which all involve the widespread human suffering caused by the most flagrant and large-scale atrocities and violations of human rights. Moreover, it is equally important to emphasise that R2P includes measures directed towards prevention, reaction and rebuilding.

For practical and other reasons, it is best to insist on limiting the scope of R2P. If the principle were deemed to apply to a wide range of humanitarian emergencies, there would be a substantial risk of its being diluted and losing its power. As Gareth Evans put it:

> … if R2P is to be about protecting everybody from everything, it will end up protecting nobody from anything.[58]

Interpreting R2P as a principle that facilitates armed intervention – as a last resort – in a wide range of situations would also reinforce the distrust of states that are already anxious about its possible abuse by stronger states at the expense of weaker ones. To ensure the principle's viability, it is therefore important to have a definition with clear limits.

However, this definition creates a need for further specification. It is not always immediately apparent whether the crimes in question are occurring or imminent. The definitions of genocide, war crimes and crimes against humanity, as laid down in the Genocide Convention and the Rome Statute (see annexe II), leave some room for interpretation. It is also worth noting that these definitions can evolve: rape, for example, was only recently recognised as a crime against humanity (see article 7(1)(g) of the Rome Statute). In addition, there is no internationally accepted legal definition of ethnic cleansing, which can take many different forms, including murder, expulsion, terrorisation and rape, and in effect falls under the category of war crimes or crimes against humanity.[59] As an isolated concept, however, it is difficult to apply.

As already noted, R2P is an attempt, in a certain sense, to close the gap between the increasing options for international criminal prosecution for large-scale atrocities and the inability of the international community to prevent or respond effectively to such acts.[60] However, the fact that R2P focuses on genocide, war crimes, ethnic cleansing and crimes against humanity does not mean that the principle only applies when the legal criteria for prosecution of these crimes have been satisfied. Although the definitions of these crimes may sometimes be based on criminal law, an approach based on criminal law is not expedient in the context of R2P, because a determination of criminal liability depends on establishing individual involvement in these offences. R2P is based on

58 Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington, D.C.: Brookings Institution, 2008), p. 65.

59 On this issue, the UN Secretary-General also notes: 'Ethnic cleansing is not a crime in its own right under international law, but acts of ethnic cleansing may constitute one of the other three crimes.' See Secretary-General, 'Implementing the Responsibility to Protect', *supra* n. 43, para. 3; see also Evans, *supra* n. 58, pp. 12-13.

60 See also David Scheffer, 'Atrocity Crimes', in *Responsibility to Protect*, *supra* n. 17, pp. 80-81.

the obligations and responsibilities of individual states and international organisations with regard to these four crimes. The nature and substance of these obligations and responsibilities are less clearly defined than the obligations of individuals. More detailed criteria need to be formulated to determine whether an R2P situation is occurring or imminent. These issues should also be taken into account in the development of early warning mechanisms (see section III.2).

Another factor that should be taken into account in defining R2P is the occurrence of events that do not in themselves constitute one of the four crimes but could lead to their commission. Examples include gross violations of economic or social human rights, such as indirect starvation or diversion of the water supply, which in some situations could be regarded as instruments of genocide or ethnic cleansing. Another example is the case of Cyclone Nargis, which caused great devastation in Myanmar in May 2008, including over 130,000 direct fatalities and potentially thousands more as a result of hunger, disease and hardship. The Burmese military regime's refusal to accept international aid prompted some observers, in particular French Minister of Foreign Affairs Bernard Kouchner, to invoke R2P and propose that the Security Council adopt a resolution authorising foreign intervention. This provoked a storm of protest,[61] clearly indicating that opinions on the scope of R2P are sharply divided.

The AIV takes the position that violations of economic or social rights and events like natural disasters do not generally fall under R2P, but that the possibility cannot be ruled out that they might ultimately lead to situations that can be classified as such. If such an event threatens to cause – or actually causes – widespread suffering that can be classified as genocide, war crimes, ethnic cleansing or crimes against humanity, and if it is clear that the state concerned is unable or unwilling to comply with its duty to protect its population, the international community has a responsibility to act.

Another complicating factor in defining R2P is that the causes of large-scale human rights violations are often of a social, economic and/or political nature. The Outcome document explicitly states that 'development, peace and security and human rights are interlinked and mutually reinforcing'.[62] In the interests of preventing conflicts and mass atrocities, it is clearly desirable to reduce poverty and decrease income disparities both between countries and within individual developing countries. In this context, achieving the Millennium Development Goals can also be regarded as a security objective. The same applies to removing imbalances in the global trading system. Given that prevention is a core element of R2P, these issues must not be ignored. Former UN Secretary-General Kofi Annan has emphasised on more than one occasion that the real challenge is to *prevent* crises. To this end, member states should cooperate with the UN as much as possible to tackle the underlying causes of humanitarian crises.

Finally, it is crucial to recall that under international law states are equally obliged to protect their populations from violations of economic, social and cultural rights, discrimination and violations of civil and political rights. The duty of states to protect their own populations thus goes further than R2P. However, this does not apply in equal

61 See e.g. James Blitz, 'Western Diplomats Assess Risks of Unilateral Intervention', *Financial Times*, 8 May 2008; 'To Protect Sovereignty or to Protect Lives?', *The Economist*, 15 May 2008; Timothy Garton Ash, 'We Have a Responsibility to Protect the People of Burma. But How?', *The Guardian*, 22 May 2008.

62 UN General Assembly, 'World Summit Outcome 2005', A/RES/60/1, 14-16 September 2005, para. 9.

measure to the responsibilities of states towards the peoples of other states. Not all human rights violations require action by third parties. This is not to say that the international community should be indifferent to systematic human rights violations that fall outside the scope of R2P. In fact, the AIV can conceive that extension of the principle may eventually be appropriate, but this will necessarily be a gradual process based on the development of international law.

The AIV concludes that it is important to limit the scope of R2P to the four core crimes in order to ensure its viability, but that setting clear boundaries will not always be a simple matter. This is because it is not always immediately apparent whether one of the four crimes is occurring or imminent, and because certain events that cannot be described as genocide, war crimes, ethnic cleansing or crimes against humanity as such may nevertheless result in their commission. It is also important to bear in mind that social, economic and political factors often play a role in large-scale human rights violations. All this militates in favour of limiting the scope of R2P while employing a wide range of instruments, especially in the area of prevention. As the Secretary-General put in his report on R2P in January 2009:

> While the scope should be kept narrow, the response ought to be deep, employing the wide array of prevention and protection instruments available to Member States, the United Nations system, regional and subregional organizations and their civil society partners.[63]

The next chapter examines the instruments and actors that can make R2P operational.

63 Secretary-General, 'Implementing the Responsibility to Protect', *supra* n. 43, para. 10(c).

# III Implementing the Responsibility to Protect: instruments and actors

## III.1 General

Due to the polarised nature of the UN debate on R2P, some observers have argued that it currently makes little sense to pursue further agreement on normative issues and that it would be more useful to put the principle into practice and elaborate it in the process. The AIV partly endorses this position. As already noted, it believes that it is important to clarify the conceptual aspects of R2P, among other reasons to facilitate progress on the operational front. However, since obtaining broader support for the further elaboration of the principle's normative aspects is a long-term process, the AIV shares the view that progress must be made towards putting R2P into practice at the same time as its meaning is being clarified.

This part of the advisory report focuses on the instruments that are important in putting R2P into practice and on how to promote their actual use. This will provide insight into the true possibilities for putting R2P into practice in the current international climate.

## III.2 Overview of instruments

As already noted, the instruments that can be employed to implement R2P encompass a wide range of activities. This is illustrated by the 'mass atrocity toolboxes' developed by Gareth Evans (see annexe 3). The instruments listed in these toolboxes focus mainly on the international community's responsibilities and are arranged by phase: prevention, reaction and rebuilding. In each phase, Evans distinguishes between political and diplomatic instruments, economic and social instruments, constitutional and legal instruments, and instruments from the security sector.

In the *prevention* phase, Evans distinguishes between structural (long-term) and direct (short-term) instruments. In general, the structural instruments fall mostly under the foreign and development policies of many Western countries and international organisations like the UN. They focus on such objectives as promoting good governance, economic development, human rights and the rule of law; security sector reform; and compliance with arms export, disarmament and non-proliferation regimes, including limitations on small arms and light weapons. The direct instruments are more geared to imminent R2P situations: preventive diplomacy, the threat of political or economic sanctions or international criminal prosecution, preventive military deployment and the threat of arms embargoes or of ending military cooperation.

The instruments in the *reaction* phase also focus on actual or imminent R2P situations. They include diplomatic mediation, political and economic sanctions, criminal prosecution, peacekeeping, arms embargoes and the threat or use of military force.

All the instruments in the *rebuilding* phase are regarded as structural instruments. They include rebuilding of governance institutions; support for economic and social programmes; rebuilding of the legal system; guidance of transitional justice processes; peacekeeping; disarmament, demobilisation and reintegration; and security sector reform. In general, these activities often fall under the policies of international organisations and many Western countries, including the Netherlands, on fragile states, i.e. countries

seeking to make the transition to a functioning state governed by the rule of law, following a period of repression or armed conflict.[64]

In summary, Evans's toolboxes contain a large number of instruments, some of which are tailored specifically for R2P situations and others less so. What they all have in common is that they apply primarily to the international community's responsibilities. One of the virtues of this overview is that it shows that, as an overarching principle, R2P demands efforts in a wide range of areas and that these efforts should reinforce and complement each other. This confirms the earlier observation that one of R2P's main added values is that it represents a comprehensive approach. However, the AIV notes that the division into phases is convenient but also somewhat artificial. In practice, it is not always so easy to distinguish between the phases of prevention, reaction and rebuilding. Moreover, there is a certain amount of overlap between the measures taken. This applies in particular to the phases of prevention and rebuilding.

In his report 'Implementing the Responsibility to Protect' of January 2009, the UN Secretary-General opts for a different approach.[65] His structure, which relies on three pillars, makes a clear distinction between the responsibilities of the state (pillar I) and the responsibilities of the international community, which in practice are split between prevention (pillar II) – in the form of international assistance and capacity-building – and reaction (pillar III). The report devotes less attention to the rebuilding phase.

Under each pillar, the Secretary-General makes several proposals and recommendations for making R2P operational. Some of these are fairly general and dovetail with existing practice, while others focus more specifically on R2P. The advantage of the pillar structure is that it emphasises the state's primary responsibility to protect (pillar I), which is an inherent part of R2P. The AIV notes that the recommendations under pillar I are fairly general and dovetail with existing practice (e.g. the call on states to become party to the relevant human rights instruments). This is to be expected, given that the duty of the state to protect persons within its jurisdiction is an existing legal principle that enjoys general support.

For the purpose of this advisory report, the AIV has chosen to examine several measures and instruments that, if developed and fleshed out, could in its opinion make a key contribution to putting R2P into practice. When selecting these measures and instruments, the AIV took into account whether the Netherlands would be able to play a role in their advancement and development. This chapter accordingly examines the following issues: strengthening UN instruments, promoting regional cooperation, making the best possible use of non-military forms of pressure, developing different forms of military action and ensuring the availability of civilian and military capacity. Where possible, the AIV relates its recommendations to those in the UN Secretary-General's report.

64 The AIV examines Dutch policy on this issue at length in its advisory report on transitional justice, *supra* n. 16. On the nature of reconstruction processes, see also Joris Voorhoeve, *From War to the Rule of Law* (Amsterdam: Amsterdam University Press, 2007). Also relevant in this context is AIV, 'Crisis Management Operations in Fragile States', advisory report no. 64, The Hague, March 2009.

65 Secretary-General, 'Implementing the Responsibility to Protect', *supra* n. 43.

In general, this chapter focuses on the role of states and international organisations in implementing R2P. At the same time, the AIV notes that non-state actors, such as NGOs, labour unions, women's organisations and other civil society organisations and social movements, can also play a key role in this area. Generally speaking, four types of NGOs are active in the field of crisis prevention and conflict management: think-tanks, research institutes and policy forums; movements and organisations that focus on campaigning and raising awareness in order to influence policy (advocacy); operational organisations that work towards peace and security in the field; and humanitarian aid organisations.[66] When it comes to putting R2P into practice, NGOs can contribute in various ways, for example by urging UN bodies to better integrate R2P into their mandates, challenging governments over situations in which R2P should be invoked, and contributing to a better understanding of and greater support for R2P among the wider public, the media and policymakers.[67] The New York-based Global Centre for the Responsibility to Protect, an umbrella NGO established in 2008 by a coalition of international NGOs, devotes itself to carrying out a combination of these tasks.[68]

### III.3 Strengthening UN instruments

The R2P advocates emphasise again and again that the core element of the principle is prevention. The AIV endorses this view and observes that prevention can take many forms, as noted in the previous section. It attaches great importance to structural prevention, which includes measures stimulating economic development, the rule of law and good governance. However, this section, which focuses on strengthening UN R2P instruments, mainly considers more direct forms of prevention. This involves questions like: where is information on situations of concern collected; what criteria are employed in analysing information; is gender a factor in the analysis; how is information channelled; and is there an institutional framework for decision-making on the basis of the information collected?

*Early warning: information gathering and analysis*
Information on actual or potential areas of conflict and on states where tension might lead to an R2P situation is gathered in a variety of ways. Governments, intergovernmental organisations and civil society organisations are all active in this area. Examples of information gathering include the reports of the International Crisis Group, which focus on identifying actual or potential crisis situations, and reports by organisations like Human Rights Watch and Amnesty International.

However, to assess the risk that an actual or potential conflict will escalate and possibly result in genocide or one of the other crimes covered by R2P, the collected information must be placed and analysed in its proper context. A wide range of models is available for this purpose. The European Commission, for example, has developed a Checklist

66 Some NGOs combine these different tasks. See Evans, *supra* n. 58, p. 198.

67 For a detailed discussion of the different ways that NGOs can help to put R2P into practice, especially at the UN, see William Pace, Nicole Deller and Sapna Chhatpar, 'Realizing the Responsibility to Protect in Emerging and Acute Crises: A Civil Society Proposal for the United Nations', in *Responsibility to Protect*, *supra* n. 17, pp. 219-41.

68 For more information on the activities of the Global Centre for the Responsibility to Protect, see: <http://www.globalr2p.org>.

for Root Causes of Conflict, which uses eight early warning indicators (ranging from the legitimacy of the government and respect for human rights to economic policy and conflict management mechanisms) to determine which situations give rise to the greatest concern.[69] Drawing on his own experience, Gareth Evans lists five factors that play a key role in determining – on the basis of the current situation in a given country – whether large-scale human rights violations are imminent:[70]

- Does the country in question have a past history of mass atrocities perpetrated by the government or different groups within the population against each other?
- Do the tensions that gave rise to conflict in the past still exist?
- How strong are the country's coping mechanisms for resolving grievances and tensions?
- How receptive is the country to external influence?
- Does the country have effective leadership?

UN bodies will also have to take these factors – or variants on them – into account in analysing and interpreting information on the situation in a given country. The previous chapter noted that the crimes that fall under R2P were originally defined in international criminal law but that an approach based on criminal law is not sufficient for implementing R2P. More detailed criteria need to be formulated to determine whether an R2P situation is either occurring or imminent, and should be included in any thorough early warning system. Based on these criteria, it should be possible to analyse troubling situations in a way that allows a realistic assessment of the threat of genocide, war crimes, ethnic cleansing or crimes against humanity. Such an analysis should also give a good picture of the impact of such situations on specific groups (e.g. women, children or indigenous peoples).

In addition, the AIV would underline the need to dispatch UN fact-finding missions in a timely manner. In situations that are developing in an alarming direction, such missions can serve various purposes. In addition to gathering information on the situation in the field, they may also have a preventive effect when the state in question knows that the eyes of the world are focused on it. It goes without saying that the permission of the state concerned is generally required, and this will not always be forthcoming.[71] Nevertheless, the UN should make maximum use of its powers to undertake such missions, for example under the auspices of the Secretary-General, the Security Council, the Office of the High Commissioner for Human Rights (OHCHR) or the Human Rights Council (HRC).

However, the collection and analysis of information as such appear to raise fewer problems than the question of what happens with this information afterwards and how it can contribute to decision-making at international level. Experience shows that in many cases of genocide the problem is not so much a lack of warning signs as an

69 See: Javier Niño Pérez, 'Conflict Indicators Developed by the Commission – the Check-List for Root Causes of Conflict/Early Warning Indicators', in Vincent Kronenberger and Jan Wouters (eds.), *The European Union and Conflict Prevention: Policy and Legal Aspects* (Cambridge: Cambridge University Press, 2004).

70 Evans, *supra* n. 58, pp. 74-75.

71 Specific permission is not required, for example, when the state concerned has already granted permission in a general sense under an international agreement.

inability or unwillingness to take decisions or action on the basis of those signs.[72] One of the main objectives of R2P should be to help bridge the gap in the future between gathering information and taking action. The UN can take various measures to achieve this objective, which are discussed below. However, the AIV believes that it would also be a good idea to establish an international advisory body of independent eminent persons to identify high-risk situations as early as possible. The aim of this advisory body would not be to duplicate the work of existing international organisations but to draw attention to situations that threaten to escalate but have been neglected by the media or have not received the attention they deserve for diplomatic reasons. In order to carry out this task, a body of this kind should be composed of independent eminent individuals. They could benefit from the work of NGOs like the International Crisis Group, Amnesty International and Human Rights Watch and by NGOs that focus specifically on the prevention of armed conflict, like the Global Partnership for the Prevention of Armed Conflict. The AIV recommends that the possibility of establishing such an advisory body be examined as soon as possible.

*Structure of the relevant UN bodies*

Such an advisory body could play an important role for the UN in particular by identifying and placing on the agenda situations that might otherwise be neglected for various reasons.

To ensure that the UN acts more effectively in the future on the basis of the information that it has at its disposal, the Secretary-General's report offers a number of suggestions. For example, it examines the potential role of the Human Rights Council (HRC) in this area. The Secretary-General suggests that in the future the HRC should be regarded more as a forum for urging states to comply with their R2P obligations and responsibilities and for monitoring their performance.

In line with this suggestion, the AIV would urge that the HRC's monitoring of R2P obligations be based in part on the special procedures (rapporteurs and working groups) that can be described as the Council's eyes and ears and can play a key role in prevention. The OHCHR, which has over 50 offices worldwide, the UN High Commissioner for Refugees (UNHCR) and the Office for the Coordination of Humanitarian Affairs (OCHA) are well equipped to provide the HRC with information on situations that threaten to degenerate into violence and large-scale human rights violations. In addition, the AIV believes that the UN treaty bodies can play a useful role in early warning and in identifying problematic situations that could give rise to crimes falling under R2P. The practice of the Committee on the Elimination of Racial Discrimination (CERD) is relevant as well; one of the permanent points on its agenda is 'prevention of racial discrimination, including early warning and urgent action procedures'.

Another point that emerges clearly from the Secretary-General's report is that the lessons of the humanitarian crises in Rwanda and Srebrenica have not produced the necessary changes. Referring to the Independent Inquiry into the Actions of the United Nations during the Genocide in 1994 in Rwanda and the Secretary-General's report on 'The Fall of Srebrenica', the Secretary-General notes:

72 This observation also appears in Secretary-General, 'Implementing the Responsibility to Protect', *supra* n. 43, para. 6. For specific examples, see Samantha Power, *'A Problem from Hell': America and the Age of Genocide* (New York: Basic Books, 2002).

> Nine years after those sobering reports, many of their institutional recommendations, including on early warning, analysis and training, have not been fully implemented, despite efforts to improve the prevention capacities of the Organization. The United Nations and its Member States remain underprepared to meet their most fundamental prevention and protection responsibilities.[73]

The AIV feels that this observation is worrying, if hardly surprising, and therefore believes that the Secretary-General's recommendations in this area deserve to be given priority. Integrating R2P considerations into the work of existing departments of the UN Secretariat (including the planned Gender Unit) in aid of system-wide coherence is especially important. The Secretary-General's recommendation to make greater use of UN organisations to promote capacity building for the purpose of complying with R2P obligations also merits support. For example, with its worldwide network of offices, the OHCHR is a global source of assistance to countries in such areas as compliance with human rights obligations, monitoring, advocacy and education.

Another key proposal by the Secretary-General concerns the plan to establish a joint office of the Special Adviser on the Prevention of Genocide and the Special Adviser with a focus on the Responsibility to Protect. The AIV believes that, once submitted, this proposal deserves active support. The responsibilities of the Special Adviser on the Prevention of Genocide encompass precisely those elements that would make possible a bridge between the UN and non-UN bodies that have the information and the bodies where decisions can be taken. His responsibilities include: collecting information on large-scale human rights violations; acting as a mechanism of early warning to the Secretary-General and through him to the Security Council; and making recommendations to the Security Council through the Secretary-General.[74]

In his report, the Secretary-General intimates that he will submit proposals for establishing such a joint office to the General Assembly at a later juncture. It is not yet clear when this will happen. The Secretary-General mentioned this issue in his presentation of priorities for 2010, but it is possible that he will wait to submit concrete proposals until they enjoy greater support at the UN, thus avoiding the series of intense and ultimately fruitless debates in the Fifth Committee that earlier proposals in this area gave rise to. This polarisation is regrettable, since establishing such a body is very important, especially as the international community's R2P efforts must be channelled through the UN. As a matter of interest, it is worth noting that paragraph 138 of the Outcome document expresses explicit support for the establishment of an early warning capability.

As a logical extension of its early warning capability, the UN could also devote more attention to the potential mediating role of the Secretary-General's special representatives and envoys. In recent decades, the Secretary-General has appointed special representatives in a wide range of situations, ranging from Afghanistan and Angola to East Timor, El Salvador, the former Yugoslavia, Kosovo, Liberia and Sierra Leone. The special representatives' mandates can vary, but they usually involve mediation during or immediately after conflicts, peacekeeping and reconstruction. Until now, the UN has made little use of special representatives prior to the outbreak

73 Secretary-General, 'Implementing the Responsibility to Protect', *supra* n. 43, para. 6.

74 Ibid., p. 32.

of conflicts, during the preventive phase. The AIV believes that it would be advisable in the coming period to expand their ability to act prior to a crisis.[75] This applies not only to capacity but also to the quality of the men and women who become special representatives, given that their personalities and skills are often of vital importance to a mission's success. This requires a rigorous selection process (at present representatives are often appointed on an ad hoc basis), training and effective support. The UN has already made some progress in this area. For example, the UN Institute for Training and Research (UNITAR) has developed a dedicated training programme for special representatives; the Department of Political Affairs established the Mediation Support Unit in 2005 with a view to creating a centre of expertise, best practices and knowledge management regarding mediation activities around the world; and the Departments of Peacekeeping Operations (DPKO) and Field Support (DFS) have developed a system for exchanging lessons learned and best practices. The member states should support and promote these activities as much as possible. In addition, it goes without saying that they should impose high quality standards on nominees for special representative posts.

*The International Criminal Court*

International criminal prosecution, and the International Criminal Court (ICC) in particular, are often described as instruments for helping to put R2P into practice. It is clear that they can play a role in the reaction and rebuilding phases (see also the list of toolboxes in annexe 3), but the extent to which national and international criminal prosecution may have a preventive effect is a much more controversial issue.[76] In this regard, the Secretary-General notes:

> By seeking to end impunity, the International Criminal Court and the United Nations-assisted tribunals have added an essential tool for implementing the responsibility to protect, one that is already reinforcing efforts at dissuasion and deterrence.[77]

On the basis of past experience, however, it is difficult to come to any firm conclusions on this issue. This is due partly to the fact that in the past the international community often neglected the crimes to which R2P applies, that knowledge of the parties' motives is patchy, and that the threat of prosecution was not very great. It is also worth noting that in many cases criminal prosecution appears to have had little deterrent effect on those guilty of committing mass atrocities.

There is some cause to believe that this is changing. The idea that the parties to a conflict may be deterred by the prospect of national or international criminal prosecution assumes that they are rational actors. Generally speaking, it is doubtful whether this is the case: criminal conduct of this kind is often carried out on impulse with little thought to the long-term consequences. However, a certain amount of calculation is often involved in committing mass atrocities, given that crimes of this magnitude require systematic planning and implementation (as in Rwanda and Darfur). In such cases, the advantages of the criminal acts and practices are deemed to outweigh the potential disadvantages and the risk of national or international prosecution.

75 See also Evans, *supra* n. 58, p. 201.

76 On this issue, see also the AIV's advisory report on transitional justice, *supra* n. 16.

77 Secretary-General, 'Implementing the Responsibility to Protect', *supra* n. 43, para. 18.

Until a few years ago, government leaders could take it for granted that the risk of prosecution and trial was in practice low. As a result of the proceedings instituted against Augusto Pinochet (Chile), Hassan Habré (Chad), Slobodan Milošević (Serbia), Charles Taylor (Liberia) and President Omar al-Bashir (Sudan), it is now becoming more difficult for heads of government to ignore the fact that they could face prosecution if they commit mass atrocities.[78]

Nevertheless, doubts regarding the deterrent effect of criminal prosecution on potential new conflict situations remain. One reason is that there have not been enough prosecutions to convince potential perpetrators that impunity for mass atrocities is truly a thing of the past. In this regard, the cooperation of national authorities with the ICC in locating and arresting persons suspected of crimes falling under R2P is very important.

In the case of existing conflicts, in which the atrocities have already been committed, fear of prosecution might prolong the conflict, instead of leading to a reduction in the hostilities and related human rights violations. This is because leaders who are threatened with prosecution may seek to ensure that they do not end up before the ICC (and mobilise national and regional support for this purpose). Robert Mugabe (Zimbabwe) and Omar al-Bashir could be seen as examples of such leaders.

In summary, it is debatable whether the threat of criminal prosecution actually has a genuine preventive effect. Nevertheless, it appears that increased decisiveness and effectiveness on the part of the ICC – which national governments and others could contribute to – are important in enhancing the potential preventive and conditioning effects of international criminal law.

*The Peacebuilding Commission*

The Peacebuilding Commission (PBC) was established in 2005, in follow-up to the UN World Summit, as a subsidiary body of the General Assembly and Security Council. The purpose of this intergovernmental advisory body, which comprises 31 member states (including the permanent members of the Security Council), is to promote reconstruction processes in post-conflict situations. Experience teaches that in many cases the involvement of the international community and donor countries subsides after hostilities have ended. The PBC is meant to play a key role precisely during this period. In the first years of its existence, however, it lost a great deal of time to difficult negotiations on procedures and membership, and the Peacebuilding Support Office within the UN Secretariat barely functioned. More recently, the PBC appears to have

78 The fact that such proceedings have a certain impact is apparent, for example, from Libyan President Muammar al-Qadhafi's response to the transfer of Charles Taylor to the Special Tribunal for Sierra Leone in 2006: 'It sets a serious precedent. This means that every head of state could meet a similar fate.' In addition, Robert Mugabe (Zimbabwe) and the leader of the Lord's Resistance Army, Joseph Koney, have both referred to the example of Taylor to indicate that they fear international prosecution. See the speech delivered by Nick Grono, Deputy President of the International Crisis Group, on 9 December 2008 at a conference at Wilton Park entitled 'Pursuing Justice in Ongoing Conflicts', available at: <http://www.crisisgroup.org/en/publication-type/speeches/2008/looking-to-the-future-what-role-can-international-justice-pay-in-preventing-future-conflicts.aspx>. Another example concerns the fact that, in 2004, the Ivorian government immediately put an end to the dissemination of hate speech after the UN Secretary-General's Special Adviser on the Prevention of Genocide, Juan Méndez, issued a statement indicating that such conduct was potentially subject to prosecution by the International Criminal Court. See Evans, *supra* n. 58, p. 85.

gained in strength, and it has achieved some fairly positive if modest results in Burundi and Sierra Leone, the first two countries in which it has been active.

In order to become a key player in reconstruction processes, the PBC should take up more situations – and at an earlier stage. The fact that the PBC's mandate is still limited to post-conflict situations and encompasses neither prevention nor the conflict phase itself remains a serious design flaw. Moreover, the PBC should develop its capability to make a meaningful contribution in difficult cases like Afghanistan and Iraq. The effectiveness of its internal procedures also needs to be improved. However, a recent study carried out at the behest of the Danish government indicates that, alongside several flaws, the PBC has a strategic advantage in two areas: the combination of political, security and economic tasks in a single body, and a balanced membership.[79] If the PBC is able to exploit these advantages, it could play a greater role in transition and reconstruction processes in the future. The review of the PBC, which is taking place in 2010, presents an opportunity to reflect on the role it has played so far and to take measures to increase its impact.

This section has largely ignored the role of the General Assembly and Security Council in implementing R2P. This will be discussed in greater detail in sections III.5 and III.6.

### III.4 Promoting regional cooperation

The Outcome document explicitly mentions regional organisations in paragraph 139, as instruments for taking collective action through the Security Council in accordance with the UN Charter, including Chapter VII. However, the AIV believes that the role of regional organisations and regional cooperation should certainly not be limited to this. In its view, the future of R2P lies largely at regional level. In this context, the AIV fully endorses the Secretary-General's basic premise:

> Global-regional collaboration is a key plank of our strategy for operationalizing the responsibility to protect, including for establishing the early warning capacity … and it deserves our full and unambiguous support.[80]

Due to greater proximity to the local area, it can be more effective to take measures, including preventive measures, at regional than at global level. Furthermore, a stronger sense of ownership can relieve certain measures of their controversial nature. However, it should be noted that a certain degree of global accountability is also desirable, since it is not always easy to take the necessary measures at regional level, as is apparent from the situation in Darfur. Issues like capacity problems and the lack of a shared vision can stand in the way of effective regional action. Furthermore, a regional approach sometimes entails a risk of violating international accepted obligations and norms. As noted by the Secretary-General, among others, regional cooperation that is linked to global cooperation therefore offers the best prospects. Where possible, the

79 See the study prepared by the NYU Center on International Cooperation (CIC) and the International Peace Institute (IPI), 'Taking Stock, Looking Forward: A Strategic Review of the Peacebuilding Commission', New York, April 2008, available at <http://www.ipinst.org/publication/policy-papers/detail/103-taking-stock-looking-forward-a-strategic-review-of-the-peacebuilding-commission.html>.

80 Secretary-General, 'Implementing the Responsibility to Protect', *supra* n. 43, para. 65.

relationships and communication between the UN and regional actors should therefore be strengthened.

Regional organisations that can play a role in R2P include the African Union (AU) and its subregional partners – especially the Economic Community of West African States (ECOWAS), but also the Intergovernmental Authority for Development (IGAD) in the Horn of Africa and the Southern African Development Community (SADC) – the EU, and the Organisation for Security and Cooperation in Europe (OSCE). There are also several other regional organisations that focus primarily on economic development or political cooperation in the region and that could therefore play an important role in implementing R2P in the preventive phase. Examples of such organisations include the League of Arab States (LAS), the Organization of American States (OAS) and the Association of Southeast Asian Nations (ASEAN).

On the subject of regional cooperation, reference should also be made to NATO, although the organisation defines itself primarily as a 'collective self-defence pact' and not so much as a regional organisation within the meaning of Chapter VIII of the UN Charter. On the other hand, NATO has explicitly shifted its focus from collective defence to collective security, including a willingness to take expeditionary action outside the NATO area. The role of NATO is examined later in this chapter.

As regards the AU, the AIV notes that in 2000 the organisation included an article in its Constitutive Act providing for 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity' (article 4(h)).[81] As the Secretary-General aptly noted, this constituted a transition from non-intervention – which had been a key principle of the Organisation of African Unity – to the principle of non-indifference.[82] However, the Constitutive Act makes a clear distinction between member states, which should not intervene in the internal affairs of another state, and the AU as an organisation, which may do so in the grave circumstances referred to in article 4(h).

The EU is often described as an organisation that could potentially make a substantial contribution to putting R2P into practice. Gareth Evans notes, for example:

> Of all regional organizations capable of helping make R2P a reality, the twenty-seven-member EU brings by far the greatest potential strengths.[83]

One of the EU's strengths is the range of internal and external instruments that it has developed to help prevent violent conflict and promote the rule of law and human rights. On the one hand, the EU has managed to achieve a high level of prosperity and stability in its own region, so that it can serve as a successful model of conflict prevention for

81 This right to intervene is more far-reaching than the one under R2P, given that under the Constitutive Act such intervention could also be carried out without prior Security Council authorisation. This puts the Constitutive Act at odds with article 53 of the UN Charter, which provides: '… But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council…'

82 Secretary-General, 'Implementing the Responsibility to Protect', *supra* n. 43, para. 8.

83 Evans, *supra* n. 58, p. 183.

other regions. Chris Patten with reason referred to the enlargement process in 2003 as 'the Union's most successful foreign policy instrument'. On the other hand, as a global actor the EU has a wide range of policy instruments at its disposal in the areas of soft power and – to a lesser extent – hard power, which can facilitate the implementation of R2P in other regions. Examples include development and humanitarian aid, trade policy and foreign policy instruments.

Although its political weight is not commensurate with its economic weight, the EU has managed to create an increasingly distinctive foreign policy profile for itself since establishing the Common Foreign and Security Policy (CFSP) in 1992 and the European Security and Defence Policy (ESDP) in 1999. This was reflected in various new provisions in the Lisbon Treaty on the aims of the Union's external action.[84] The EU's rising foreign policy profile is also apparent in the actions of the High Representative for the CFSP, an increasing willingness to impose sanctions (with a preference for smart sanctions) and the – limited – use of military resources, including the monitoring mission in Aceh, the preventive deployment of troops in Macedonia in 2003 and Bosnia in 2004, the fairly sizeable civilian mission in Eastern Congo in 2003, and similar civilian and stabilisation missions in Chad and the Central African Republic in 2008. In addition, the EU has now developed a rapid reaction capability in the form of several battlegroups, each consisting of approximately 1,500 troops, that should be able to achieve operational status within 15 days.

In 2001, the European Council adopted the EU Programme for the Prevention of Violent Conflicts, which lays down several specific objectives in the field of conflict prevention.[85] The programme's basic premise is that 'the international community has a political and moral responsibility to act to avoid the human suffering and the destruction of resources caused by violent conflicts', which is clearly related to the R2P principle. In the programme, the EU states that it will set clear political priorities for preventive actions; improve its early warning capacity and policy coherence; enhance its instruments for short- and long-term prevention; and build effective partnerships for prevention. The European Commission and the member states are responsible for implementing the programme, which is tracked by means of regular reports from the rotating Presidency. As already noted, to facilitate early warning the Commission has developed a Checklist for Root Causes of Conflict. Countries that are given a high score on this list are brought to the attention of the Ministers of Foreign Affairs in the Foreign Affairs Council (formerly the General Affairs and External Relations Council). The European Parliament can also play a role in the field of early warning by making use of its global network of contacts and the possibility of carrying out fact-finding missions. The Lisbon Treaty, which recently entered into force, deals in greater detail than previous treaties with the range of military tasks that the EU can perform, including post-conflict stabilisation, and the need for member states to make sufficient capacity available.[86] In addition, the EU's arsenal of diplomatic instruments will eventually increase as a result of the creation of the European External Action Service (EEAS).

84 See article 21 of the Treaty on European Union, as amended by the Treaty of Lisbon. The term ESDP has now been replaced by CESDP (Common European Security and Defence Policy).

85 Gothenburg European Council of June 2001, 'EU Programme for the Prevention of Violent Conflicts', see: <http://www.consilium.europa.eu/ueDocs/cms–Data/docs/pressdata/en/misc/09537-r1.en1.html>.

86 See also Antonio Missiroli, 'The Impact of the Lisbon Treaty on ESDP', briefing paper prepared at the request of the European Parliament's Subcommittee on Security and Defence, January 2008.

With a view to promoting regional cooperation in support of R2P, the Secretary-General makes several concrete recommendations in his report. The AIV believes that these recommendations are important for making R2P operational and that the Netherlands should therefore support them. The main recommendations are:

- State-to-state learning processes should be promoted with a view to the transfer of best practices, as done, for example, through the African Peer Review Mechanism and during the EU accession process. In those regional arrangements and processes, consideration should be given to including criteria relating to R2P. International organisations like the Red Cross can provide assistance in this area.
- In the OSCE region, demand for the services of the OSCE's High Commissioner on National Minorities is high. Other regional and subregional bodies could establish similar posts. This demonstrates that region-to-region learning processes can potentially be very valuable as well. With the help of donor countries, the UN and regional organisations could establish more region-to-region learning programmes and lessons-learned processes in the area of R2P.
- There should be more investment in civilian capacity building in regional and subregional organisations for the purpose of preventing crimes and violations related to R2P. Helping states to help themselves is closely connected to civilian expertise and presence.
- Cooperation between the UN and regional and subregional organisations should be promoted, especially by sharing capacity. The African Union-United Nations Ten-Year Capacity Building Programme is particularly important in this regard.

The potential role of regional organisations in taking military action is discussed in greater depth in sections III.6 and III.7.

### III.5 Non-military pressure

The use of military force should be regarded as a last resort for preventing or ending large-scale human rights violations. In escalating situations, or situations that threaten to escalate, the possibility of using non-military forms of pressure, such as financial or economic sanctions, arms embargoes or political sanctions, should be considered first. For the purpose of putting R2P into practice, it is important to consider how these measures can best be deployed.

On the subject of sanctions, the Secretary-General notes as follows in his report:

> While sanctions may be inadequate to stop abuse by a determined authoritarian regime, if applied sufficiently early they can demonstrate the international community's commitment to meeting its collective responsibilities under paragraph 139 of the Summit Outcome and serve as a warning of possibly tougher measures if the violence against a population persists.[87]

During the Cold War, the Security Council imposed sanctions on only two occasions: against the apartheid regimes in Rhodesia (1966-1979) and South Africa (1977-1994). Since 1989, it has used sanctions – in various forms – much more frequently, for example against Iraq, Yugoslavia, Haiti, Libya, UNITA/Angola and Rwanda.

87 Secretary-General, 'Implementing the Responsibility to Protect', *supra* n. 43, para. 57.

The sanctions regime against South Africa in the 1980s is often cited to highlight the positive effect of sanctions. Under this regime, for example, the South African government and local South African companies were refused loans or only granted limited loans. Following the end of apartheid, various South African politicians – including the former Minister of Finance – and other officials openly conceded that the sanctions had ultimately helped to force the South African apartheid regime to the negotiating table.[88] It should nonetheless be noted that the positive effect of the sanctions regime against South Africa was partly due to the special circumstances of the case: namely that the South African opposition (the ANC) had itself called for sanctions, thus lending them greater legitimacy and – probably – greater effectiveness.

In many cases, the effects of sanctions are disputed. One of the clearest examples of this is the sanctions regime that applied to Iraq until 2003. Sanctions are less costly and less risky than military action but provide only indirect protection. Moreover, it can take years to achieve the desired effect. Another issue is that sanctions that are effective and contribute, for example, to the willingness of government leaders to negotiate may also have very negative humanitarian and social consequences. Studies show that the success rate of general sanctions is approximately 25% – sometimes more, sometimes less – depending on the study, the type of sanctions and the regime against which they are imposed.[89]

In his Millennium Report of 2000, former UN Secretary-General Kofi Annan notes:

> When robust and comprehensive economic sanctions are directed against authoritarian regimes, a different problem is encountered. Then it is usually the people who suffer, not the political elites whose behaviour triggered the sanctions in the first place.[90]

That same year, a paper drafted on behalf of the UN Commission on Human Rights argued that general economic sanctions lead to human rights violations.[91]

In spite of the above, observers continue to endorse the need for an instrument 'between words and war'.[92] This explains the focus in recent years on targeted sanctions or smart sanctions, i.e. sanctions aimed at specific political leaders or members of their regime whose actions are a threat to peace and security. Such sanctions are meant to avoid the unintended consequences of broad economic

88 For a description of this process, see Evans, *supra* n. 58, p. 113.

89 See e.g., Robert A. Pape, 'Why Economic Sanctions Do Not Work', *International Security*, vol. 22, no. 2 (1997), pp. 90-136; Thomas G. Weiss, 'Sanctions as a Foreign Policy Tool: Weighing Humanitarian Impulses', *Journal of Peace Research*, vol. 36, no. 5 (1999), pp. 499-509.

90 Secretary-General, 'We, the Peoples', *supra* n. 2, p. 50.

91 Marc Bossuyt, 'The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights', UN Human Rights Commission working paper, UN Doc. E/CN.4/Sub.2/2000/33, 21 June 2000, paras. 41-47.

92 Peter Wällensteen, Carina Staibano and Mikael Erikson (eds.), *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options* (Uppsala: Uppsala University, 2003), p. viii.

sanctions and instead focus pressure on specific groups or persons within the regime in question. Examples include imposing flight and travel bans, refusing to grant visas and freezing bank accounts.

The development of smart sanctions has been promoted, respectively, through the Interlaken Process (1998-1999), which was funded by Switzerland, the Bonn-Berlin Process (1999-2000), which was funded by Germany, and the Special Program on the Implementation of Targeted Sanctions (SPITS or Stockholm Process), which was funded by Sweden and presented its report in 2003. The Interlaken Process focused chiefly on improving sanctions targeting the financial sector, while the Bonn-Berlin Process concentrated mainly on improving the effectiveness of arms embargoes and travel restrictions. It emerged, for example, that in many cases arms embargoes were ultimately inadequate due to a lack of effective implementation: the UN lacked the institutional capacity to properly monitor them. Although the Security Council's sanctions committees were charged with monitoring these measures' realisation, their work was seriously hampered by the fact that they had little administrative support and lacked the capacity to mount independent fact-finding missions. One of the proposed solutions was to make a specific unit at the UN responsible for the implementation of all UN arms embargoes. The Netherlands actively supported this proposal during the Dutch presidency of the Security Council in September 1999 but was ultimately unable to mobilise enough support within the Council. However, the Council did agree to work on improving the effectiveness of arms embargoes.

A few years later, in 2003, most members of the Security Council warmly welcomed the report of the Stockholm Process. The report included several concrete recommendations for improving the effectiveness of targeted sanctions, such as: tailoring Security Council decisions more closely to the laws and regulations of member states; establishing effective monitoring mechanisms in member states; developing ways to deal with reprisals by the regime in question; strengthening the sanctions work of the UN Secretariat, for example by appointing a UN sanctions coordinator; setting up training programmes for member states; and encouraging adequate reporting on sanctions implementation.

Since 1994, the Security Council has not imposed any new general sanctions, instead opting for smart sanctions. This development appears to be related to the processes discussed above. The fact that targeted sanctions are more effective than general sanctions is apparent, for example, from the succession of sanctions imposed on UNITA/Angola over the years. An arms embargo imposed in 1993 proved largely ineffective, but travel bans and embargoes imposed in 1997 on the sale and export of diamonds were effective, thanks in part to the supplementary measures taken to implement and monitor them.[93] Similar measures accompanied the sanctions against the RUF in Sierra Leone and against Côte d'Ivoire.

The lessons that can be drawn from the above-mentioned examples and the recommendations of the Stockholm Process are slowly being institutionalised. In 2006, the Security Council published a report on improving the effectiveness of sanctions regimes that included proposals for strengthening the capacity of the UN Secretariat (a consequence of discussions on this issue during the Dutch presidency of the Security

93 For a more detailed description of the effect of these sanctions and the supplementary measures that were taken, see Bellamy, *supra* n. 35, pp. 144-45.

Council in 1999). At present, however, the system still retains its ad hoc nature. There are also no clear guidelines on UN sanctions specifically targeting individuals.

In general, the problem with regard to R2P situations remains that sanctions provide only indirect protection and that they are often more effective when coupled with UN peace operations, as in Sierra Leone and Côte d'Ivoire. As the situation in Darfur has shown, moreover, it is far from easy to achieve agreement in the Security Council on imposing a sanctions regime.

The question thus arises of whether bodies other than the Security Council can play a role in this area. In line with what the UN Secretary-General has advocated, the AIV believes that the UN General Assembly can also make a useful contribution in this area.[94] The procedure laid down in the 'Uniting for Peace' resolution of 1950 may provide a basis for General Assembly action.[95] If the Security Council is unable to exercise its primary responsibility to maintain international peace and security, the General Assembly – acting by a two-thirds majority – may call on member states to take collective measures. Such measures would not have the same legal force as a binding decision of the Security Council, but, if the Council is unable to reach agreement, a General Assembly decision can at least help to confer collective legitimacy on sanctions and increase the pressure on the Security Council to impose them in due course.[96] An interesting example is provided by various General Assembly resolutions adopted in the 1970s that branded South Africa's apartheid regime as a 'threat to international peace and security' and called for sanctions, such as an investment freeze and a ban on the sale of Krugerrands, while the Security Council was unable to do so due to the opposition of its Western permanent members.[97] In 1977, the Security Council finally imposed limited sanctions in the form of an arms embargo.[98]

It is important to note, however, that sanctions must be based on a Security Council decision (under article 41, Chapter VII of the UN Charter) if they are to be binding on the international community as a whole. General Assembly resolutions are not binding

94 Secretary-General, 'Implementing the Responsibility to Protect', *supra* n. 43, para. 57.

95 General Assembly resolution 377(V) of 3 November 1950. The key passage from the resolution reads as follows: 'The General Assembly … resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.'

96 On the basis of article 14 of the UN Charter, the General Assembly can only recommend measures; it can adopt binding decisions exclusively with regard to internal matters (see, for example, articles 17 and 22 of the Charter).

97 See Nico J. Schrijver, 'The Use of Economic Sanctions by the UN Security Council: An International Law Perspective', in Harry H.G. Post (ed.), *International Economic Law and Armed Conflict* (Dordrecht: Martinus Nijhoff, 1994) pp. 123-61, at pp. 131-32.

98 See S/RES/418 of 4 November 1977.

on UN member states and may therefore evoke less general compliance and be less effective. In addition, if sanctions have been imposed on the basis of a General Assembly resolution, it is possible – depending on the nature of those sanctions – that they will be regarded as a violation of the rights of the state concerned. The lawfulness of such sanctions is disputed.[99] The EU does impose sanctions under certain circumstances, but they do not meet with global acceptance (some states believe that the risk of arbitrariness and abuse of power is too high). The AIV views the EU's approach to this issue positively, but also believes that, in the interests of international acceptance, it should try to mobilise support for its approach in the General Assembly.

### III.6 Forms of military action

*Preventive action and consent-based peacekeeping*

When the issue of military action arises, thoughts often automatically turn to armed intervention on the basis of Chapter VII of the UN Charter. The AIV is keen to emphasise here once more that the presence of well-equipped international troops can also play an important role during the preventive and post-conflict phases. In his report, the Secretary-General notes that collective international military assistance may sometimes be the surest way to support a state in meeting its R2P obligations and, in extreme cases, in restoring its effective sovereignty (e.g. in cases where non-state actors commit crimes falling under R2P). Such assistance includes the early, targeted and restrained use of military resources, a presence in the form of preventive deployment and consent-based peacekeeping as carried out in Macedonia, Burundi, Sierra Leone and the Democratic Republic of the Congo.[100]

In these types of missions, the tasks of the military cover a wide range of activities: from maintaining order, self-defence and protection to security sector reform and training local armed forces. The very presence of international troops can also have a significant preventive effect, since it reduces the risk that the parties to a conflict will resort (or revert) to violence.

However, when distinguishing between traditional peacekeeping missions and full-scale, robust peace enforcement missions, it is important to bear in mind that they are separated by a grey area, namely cases that fall short of full-scale war but require more than observation, reporting and assistance. It is precisely in actual or imminent cases of genocide, war crimes, ethnic cleansing and crimes against humanity that such grey areas may emerge.

After the Cold War, a growing number of UN peace missions were undertaken in situations in which there was considerable pressure to actively protect the population. At the same time, however, it was unclear whether the missions' mandates were sufficient for this purpose, and the necessary military resources were clearly lacking. The catastrophes in Rwanda and Srebrenica were the most shocking outcomes of such situations. In the course of the 1990s, it became increasingly clear that the traditional neutral stance towards warring parties could not be maintained and that missions had to be given the means to deal with subversive elements. The 2000 Brahimi Report was

99 This is apparent from the wording of article 54 of the Articles on Responsibility of States for Internationally Wrongful Acts, *supra* n. 19.

100 Secretary-General, 'Implementing the Responsibility to Protect', *supra* n. 43, para. 40.

the first to devote systematic attention to this issue, stating that:

> No failure did more to damage the standing and credibility of United Nations peacekeeping in the 1990s than its reluctance to distinguish victim from aggressor…. United Nations military units must be capable of defending themselves, other mission components and the mission's mandate. Rules of engagement should be sufficiently robust and not force United Nations contingents to cede the initiative to their attackers. This means, in turn, that the Secretariat must not apply best-case planning assumptions to situations where the local actors have historically exhibited worst-case behaviour. It means that mandates should specify an operation's authority to use force. It means bigger forces, better equipped and more costly but able to be a credible deterrent.[101]

The Brahimi Report was the catalyst for major change in the approach to UN peace missions. As a result of the hard lessons learned in such places as Somalia, Rwanda and Srebrenica during the 1990s, it recognised that such missions often play a role in protecting the civilian population. This requires more than the traditional self-defence capacity that such missions had usually been given. Environments that at first sight appear to be benign may contain elements that threaten civilian populations and undermine peace agreements. Sending missions with weak mandates into such situations has proved to be irresponsible as well as life-threatening.

This insight has led to the realisation – in the AIV's view vital – that even 'peace missions' should have the mandate and the capacity to use force if necessary. As a result, the Security Council now generally grants such missions a mandate under Chapter VII. They are still predominantly regarded as peacekeeping missions (the terms 'peacekeeping plus' or 'complex peacekeeping' are also used), because they are mounted on the assumption that there will be little or no need to use force. However, if the need to use force arises, at least the mission is authorised and suitably equipped to do so.[102]

Another key issue is that the operational consequences of a mandate to protect civilians should be clear. In practice, this is often not the case. This issue is considered in greater detail below.

As noted by the Secretary-General, a general condition for implementing protection mandates is that the member states must make military equipment and troops available in a timely manner if the UN is granted a mandate for a peace mission to assist a state in fulfilling its R2P obligations.

101 Report of the Panel on United Nations Peace Operations, UN Doc. A/55/305, 21 August 2000, Executive Summary, pp. ix-x.

102 Experience of international operations over the last 10-15 years teaches that it is not always possible to clearly differentiate between peacekeeping and peace enforcing operations, since they often overlap. In addition, the security situation can change drastically from one moment to the next, and the situation in one part of a country or region can differ drastically from the situation in another part. The nature of an operation is therefore sometimes determined by reference to the different conflict phases (prevention, intervention, stabilisation and normalisation).

*Action involving the use of military force*

A qualitatively different kind of military action is that involving the use of force, sometimes called a 'coercive protective mission', which also needs to be authorised by the Security Council under Chapter VII of the UN Charter but is often only used after the preventive phase has passed. As noted several times earlier in this report and as stated explicitly in paragraph 139 of the Outcome document, such action should be regarded as a last resort, after it has become clear that the state concerned is unwilling or unable to protect its population and if all peaceful means, including the sanctions discussed above, have failed.

The first important step in the Security Council's decision-making process for collective action involving the use of force is to put the situation on the Council's agenda as early as possible. Given that this usually concerns an escalating conflict situation, it will often not be the first time that the Security Council discusses the issue in question, especially if the early warning mechanisms discussed above are functioning properly. In this connection, the AIV notes that under article 99 of the UN Charter the Secretary-General may also take responsibility for putting the situation on the Security Council's agenda, although little use has so far been made of this possibility. The Secretary-General's comment in his report that he has an obligation to tell the Security Council what it *needs* to know, not what it *wants* to hear, can be understood in this light, although he does not actually refer to article 99 of the Charter.[103] Once established, the joint office of the Special Adviser on the Prevention of Genocide and the Special Adviser with a focus on the Responsibility to Protect will play a key role in this process, given that reporting to the Security Council (through the Secretary-General) is a key element of the mandate of the Special Adviser on the Prevention of Genocide.

Over the years, various proposals have been made to facilitate decision-making on the use of military force in the case of actual or imminent R2P situations. The Secretary-General discusses several of them in his report on R2P:

- The five permanent members of the Security Council should refrain from employing or threatening to employ their veto in situations of manifest failure to meet R2P obligations – and should reach a mutual understanding to that effect.
- Member states should consider the principles, rules and doctrines that guide the use of armed force in extreme situations on the basis of R2P.
- Collective measures within the meaning of paragraph 139 of the Outcome document can be authorised not only by the Security Council (under article 41 or 42 of the UN Charter) but also by the General Assembly (using the 'Uniting for Peace' procedure, if the Security Council fails to reach a decision) or regional or subregional organisations (under article 53 of the Charter, with the prior authorisation of the Security Council). However, measures under resolution 337 (V), 'Uniting for Peace', are not legally binding.

In practice, the AIV does not expect much from the Secretary-General's proposed alternatives to Security Council authorisation for the use of force. Ultimately, the best solution is for the Security Council to function more effectively.[104] Regarding the role of

103 Secretary-General, 'Implementing the Responsibility to Protect', *supra* n. 43, para. 61.

104 In his report 'In Larger Freedom' former UN Secretary-General Kofi Annan came to the same conclusion (*supra* n. 5, para. 126), which is similar to the observations on this issue in the report of the UN High-Level Panel on Threats, Challenges and Change, *supra* n. 4, para. 198.

regional organisations, the AIV notes that, pursuant to article 53 of the UN Charter, they may only take collective action involving the use of force with the prior authorisation of the Security Council. The AIV also considers an authorisation by the General Assembly to use force, under the 'Uniting for Peace' procedure discussed above in section III.5, to be both unlikely and inadvisable. The Secretary-General maintains that this procedure could provide a solution in cases where the Security Council is unable to reach a decision on military intervention involving the use of force.[105] However, the AIV notes that, although it has proved useful in the past for other purposes, the 'Uniting for Peace' procedure has so far never been invoked to authorise the use of force.[106] Furthermore, this does not seem to be a very realistic scenario, for several reasons. First of all, the UN Charter distinguishes between the powers of the General Assembly and the Security Council, conferring primary responsibility for maintaining or restoring peace and security on the Security Council (article 24 of the UN Charter). Second, General Assembly decisions in this area cannot be considered legally binding. This means that any potential mandate would lack a sound legal basis, while especially the decision to use military force, which is both a last resort and the most far-reaching instrument that can be used to implement R2P, should rest on a firm and proper mandate under international law. Finally, the fact that this procedure requires a two-thirds majority in the General Assembly will probably entail as many, if not more, problems than decision-making in the Security Council.

In the case of actual or imminent large-scale human rights violations and an escalating R2P situation, there must be a capacity to take swift and decisive action. Effective decision-making procedures and the timely deployment of military units – preventive or otherwise – are manifestly of great importance. The AIV believes that every option for improving the Council's decision-making should therefore receive serious consideration. For political reasons, the proposal that the five permanent members of the Security Council voluntarily refrain from using their veto in humanitarian emergencies seems unlikely to succeed, but should not be rejected out of hand.

The same applies to drafting criteria for the use of force in the event of genocide, war crimes, ethnic cleansing and crimes against humanity. In line with the ICISS report and the Secretary-General's 2005 report 'In Larger Freedom', despite the fact that agreement could not be reached on this issue in 2005, the Secretary-General once again proposed drafting such criteria in 2009. The AIV believes that this proposal deserves support. As indicated in the previous chapter, the credibility and impact of the UN in implementing R2P largely depend on the consistency with which the principle can be applied and the extent to which arbitrariness can be avoided. It would not be realistic to assume that arbitrariness can be ruled out entirely, but as Kofi Annan put it:

> By undertaking to make the case for military action in this way, the Council would add transparency to its deliberations and make its decisions more likely to be respected, by both governments and world public opinion.[107]

105 Secretary-General, 'Implementing the Responsibility to Protect', *supra* n. 43, para. 62.

106 See Nico J. Schrijver, 'Article 2, paragraphe 4', in Jean-Pierre Cot, Alain Pellet (eds.), *La Charte des Nations Unies: Commentaire par article*, vol. I, 3rd edn. (Paris: Economica, 2005) pp. 437-67, pp. 447-48.

107 Secretary-General, 'In Larger Freedom', *supra* n. 5, para. 126.

In the current international climate, it is unlikely that the international community will agree on criteria for the use of force in the foreseeable future. It would nevertheless be a good idea to continue developing such criteria, if possible in a smaller international forum (such as the EU). These criteria could serve as guidelines for Dutch policy and stimulate the international debate on this issue.

The list of criteria drawn up by ICISS (and adopted by Kofi Annan) can serve as a guideline for this purpose. The list focuses on: (a) just cause; (b) right intention; (c) last resort; (d) proportional means; and (e) reasonable prospects (see annexe IV).

In a situation where the conditions for R2P have been fulfilled but the Security Council is unable or unwilling to reach a decision, it follows that the international community, as embodied by the UN, has not managed to take responsibility and, strictly speaking, that the R2P principle has failed. The resulting situation can be described as a choice between the devil and the deep blue sea. Either states or groups of states bypass the Security Council to take action on their own authority, thereby undermining the international order and creating tension and uncertainty, or the same international order is undermined by the tolerance of genocide and flagrant human rights violations, resulting in widespread human suffering and injustice. The AIV/CAVV's advisory report on humanitarian intervention of April 2000 discusses this dilemma in greater depth. It concludes that:

> current international law does not provide sufficient legal basis for unauthorised humanitarian intervention. Nor, according to the currently prevailing interpretation, can the existing customary law grounds of 'state of necessity' or 'distress' be invoked to justify such intervention.... Nevertheless, the CAVV and the AIV believe there are sufficient reasons, pending further development of a justification based on customary law, to consider humanitarian intervention admissible in extreme cases and as an 'emergency exit'.[108]

The AIV/CAVV's advisory report on failing states of May 2004 takes a slightly different approach to the same issue:

> 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.[109]

The government based its policy memorandum on the legal basis and mandate of missions involving Dutch military units, which it presented to parliament on 22 June 2007, on the premise that states should use force or deploy troops only in accordance with international law.[110] At the same time, the government remarked,

108 AIV/CAVV, 'Humanitarian Intervention', *supra* n. 1, pp. 20 and 27.

109 AIV/CAVV, 'Failing States: A Global Responsibility', advisory report no. 35, The Hague, May 2004, p. 62.

110 Letter of 22 June 2007, Parliamentary Papers 2006-2007, 29 521, no. 41, p. 3.

> However, situations may arise where no agreement can be reached on a Security Council resolution, but where a broad section of the international community feels that military action is legitimate. An example would be the threat of a humanitarian emergency without the Security Council being able to implement the Responsibility to Protect principle.... The absence of a clear legal basis does not alter the fact that humanitarian intervention may be permissible in exceptional cases, under strict conditions and as a last resort.... The government would observe that in such a situation the discussion should take account of the risks of ineffective action or no action at all.... The government would emphasise that its political assessment of such action will take account of the fact that it should be limited to exceptional circumstances, given the risk of abuse, erosion of the prohibition on the use of force and undermining the UN Security Council's position.

On the same issue, the Dutch Committee of Inquiry on Iraq recently noted:

> If the Security Council does not act in a timely and decisive manner, the Responsibility to Protect is invoked to legitimise the right – if not the duty – of third states to mount a military intervention in a humanitarian emergency in order to prevent genocide, crimes against humanity and serious war crimes, if the government of the country in question is unable or unwilling to provide such protection to its civilian population. However, this remains a controversial issue for which no general rules exist at present.[111]

The AIV wishes to emphasise here once again that using force in R2P situations without Security Council authorisation is prohibited under existing international law. Partly in the light of recent developments, the AIV advocates a high level of restraint in this area. In the absence of a Security Council mandate, such intervention could be legitimised on the grounds of an exceptional humanitarian emergency, but this should never be treated as a licence for unauthorised action by third parties.

The AIV would add that it would be better for such interventions ultimately to be given a status under international law. According to the International Law Commission (ILC), a state of necessity does not constitute a ground of justification, since it cannot be invoked to justify violations of peremptory rules of international law (*jus cogens*), such as the prohibition on the use or threat of force.[112] The AIV considers this approach too one-sided. On the one hand, it is far from certain that every use or threat of military force, apart from aggression, is prohibited by *jus cogens*. On the other hand, the obligation to prevent genocide should also be regarded as a peremptory rule of international law, which could serve as a justification for invoking a state of necessity. The AIV favours developing a less restrictive interpretation of the state of necessity, which would help to make room within international law for using force in R2P situations in the case of exceptional emergencies, even in the absence of a Security Council mandate. This could eventually relieve the tensions that are now emerging between legality and legitimacy, which the AIV regards as undesirable in principle.

111 *Rapport Commissie van Onderzoek Besluitvorming Irak* (Report of the Committee of Inquiry on Iraq) (Amsterdam: Boom Publishers, 2010), p. 269.

112 AIV/CAVV, 'Humanitarian Intervention', *supra* n. 1, pp. 19-20.

In this connection, the AIV would also refer to the assessment framework developed in the AIV/CAVV's advisory report of 2000 on humanitarian intervention,[113] which should serve as a guide to the minimum preconditions for interventions that have not been authorised by the Security Council. The assessment framework covers the following issues: which states should be allowed to engage in humanitarian intervention; when they should be allowed to do so; what conditions they should satisfy during the intervention; and when and in what way they should end their intervention. The AIV still believes that such an assessment framework should be applied in exceptional cases of military intervention without a Security Council mandate.

### III.7 Civilian and military capacity

*Civilian capacity*

Gareth Evans aptly articulates the international community's position on the availability of civilian capacity in crisis management operations:

> Some lessons take a long time to sink in. One it seems to have taken the international community forever to absorb is that when any international peace operation is mounted requiring the deployment of forces in the context of postconflict peacebuilding or nation building, the civilian components – covering everything from policing and human rights protection, to rehabilitation and repatriation, to election administration and specialist civil administration – are at least as important, if not more so, than the military.[114]

Almost all post-conflict situations are characterised by a public security vacuum in which the rule of law and all related institutions have been dismantled or seriously undermined. Restoring them requires assistance in rebuilding a police force, the judiciary and public institutions. In this phase, the presence of a modest international military force will generally be required, although its activities will focus primarily on training the country's military and advising the civilian authorities on the structure and responsibilities of the Ministry of Defence. In addition, reforming and rebuilding a state founded on the rule of law will require the support of police officers, judges, public prosecutors and advisers on public administration, as well as civilian organisations that specialise in such fields as dealing with trauma, preventing sexual violence and rehabilitating young people.

UN and other peace operations nowadays include a civilian component. Of the 124,000 persons currently participating in UN peace missions, 13,000 are police personnel, 5,800 are international civilian staff and almost 14,000 are local civilian staff.[115]

The international community is also taking steps to improve civilian standby capacity. The EU has set targets for five categories of civilian rapid reaction capacity, including the availability for deployment of 6,000 police personnel (of whom 1,400 within 30 days), 600 rule of law experts (within 30 days) and a team of approximately 600 rapidly deployable governance experts. Moreover, the EU Civilian Headline Goal 2010 aims to

113 Ibid., pp. 28-32.

114 Evans, *supra* n. 58, p. 208.

115 Based on information from March 2010, available at: <http://www.un.org/en/peacekeeping/documents/factsheet.pdf>.

increase the quality and availability of civilian capacity.[116] At the end of 2010, the EU will take stock and determine how much civilian and military capacity is available for the ESDP. Several EU member states, including the United Kingdom, have already set national standby targets.

In addition, the UN has launched a modest Standing Police Capacity (which it deployed for the first time in Chad in 2007), the OSCE has had several Rapid Expert Assistance and Cooperation Teams (REACT) at its disposal for the past few years, and the AU is in the process of establishing an African Standby Force (ASF).

Experience teaches that states do not always honour their commitments in this area. There are also several problems with the standby system as it currently operates: states retain and make frequent use of the right to refuse to contribute to specific missions; commitments frequently overlap (the same personnel are listed in various databases and are therefore not always available when called on); maintaining databases and finding suitable standby personnel is very time-consuming; and the funds needed to establish and support a rapidly deployable civilian capacity are often lacking. (Individual states often cover their own costs, but this is not a long-term solution.) In addition, it is not always guaranteed that the individuals being deployed have the right training, experience and qualifications and that they will operate collectively in effectively functioning teams. Finally, it is often difficult to coordinate civilian and military efforts.[117]

The current fragmented system thus needs to be improved and strengthened. This view enjoys widespread support, and some progress is being made in this area, but it is a slow process. These problems were discussed in a Security Council debate on post-conflict peacebuilding that took place in May 2008 at the initiative of the then UK Prime Minister, Gordon Brown. On this occasion, the UN Secretary-General stated that 'we remain desperately short of judges, prison wardens, state administrators and managers' and ultimately 'all this requires early and flexible funding'. In a concept paper drafted specifically for this debate, the United Kingdom argued in favour of enhancing the UN's capacity to deploy civilian experts and setting up a pool of rapidly deployable and skilled civilian capacity.[118] However, these proposals met with reluctance from several states (especially from the NAM) that had doubts about the organisation, funding and deployability of such a pool, its relationship to national efforts and the role of the UN. The Council nevertheless called on the Secretary-General to issue a report on ways to promote durable peace in post-conflict situations and to involve the Peacebuilding Commission (PBC) in its preparation.

In July 2009, the Security Council met in open session to discuss the Secretary-General's ensuing report, which focused on the national ownership of reconstruction

116 This document was adopted by the ministerial Civilian Capabilities Improvement Conference in 2007; the EU Ministers of Foreign Affairs took note of it at the meeting of the General Affairs and External Relations Council of 19 November 2007.

117 Evans, *supra* n. 58, pp. 211-13.

118 Letter dated 2 May 2008 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations, addressed to the President of the Security Council, UN Doc. S/2008/291.

processes and the desirability of drawing on regional expertise.[119] Among other measures, the Secretary-General proposed to improve UN country teams, cooperate with UN member states on faster and more flexible funding and strengthen the PBC's role. He also proposed to strengthen the international pool of civilian experts. In a presidential statement issued after the debate, the Security Council welcomed these proposals and asked the Secretary-General to report to it again in 12 months' time.

Given the large number of UN peace missions with a civilian component, the UN must continue in the coming years to devote unflagging attention to improving the system for civilian standby capacity. The same applies to other global and regional intergovernmental organisations and member states that participate in peace operations.

*Military capacity*

The debate on military action in the context of R2P often focuses on the question whether and under what circumstances such action is desirable and legitimate, and devotes much less attention to practical issues such as which troops will be deployed, the aim and doctrine of the mission and the nature of the preparations.[120] This applies to both preventive, consent-based military action (peacekeeping) and military intervention involving the use of force (coercive protection).

The question of where the military capacity needed for R2P will come from is connected to the long-standing debate on the development of a rapid reaction capability within the UN. On this issue, the Secretary-General has commented:

> Despite years of study and public discussion, the United Nations is still far from developing the kind of rapid-response military capacity most needed to handle the sort of rapidly unfolding atrocity crimes referred to in paragraph 139 of the Summit Outcome. I appreciate the efforts by a number of Member States to consider the components of such a capacity, including doctrine, training and command-and-control issues. Much more needs to be done, however, to internationalize such efforts and put them in the larger context of finding better ways to protect civilians.[121]

In recent decades, one of the main proponents of a UN military force was former UN Under-Secretary-General Sir Brian Urquhart. In 1993, he argued for a 5,000-strong light infantry volunteer force, under the direction of the Security Council, that would be able and willing to forcibly intervene 'to break the cycle of violence at an early stage in low-level but dangerous conflicts'.[122] A year later, Canadian Lieutenant-General Roméo Dallaire claimed that a skilled, rapidly deployable military force of this size could have prevented the genocide in Rwanda. Other military experts have supported this view.

119 Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict, UN Doc. A/63/881, 11 June 2009.

120 Doctrine refers to the way in which a broad concept – for example, coercive protection missions aimed at protecting civilians – is translated into strategy, tactics and operational guidelines.

121 Secretary-General, 'Implementing the Right to Protect', *supra* n. 43, para. 64.

122 See also Evans, *supra* n. 58, p. 215.

Since then, various advocates have defended the proposal to establish a rapidly deployable UN reaction force, which has been elaborated in various ways. In 1995, the Dutch government devoted a study to the idea, entitled: 'A UN Rapid Deployment Brigade – A Preliminary Study' (The Hague, 1995). It noted that there was a critical vacuum in the UN system. To prevent crises from degenerating into widespread violence, immediately deployable, specially trained military units needed to be on standby. These international 'fire brigades' were meant to complement existing elements of the UN peacekeeping system and be able to take preventive action in the period between the adoption of a Security Council decision and the arrival of an international peace mission.

However, as became apparent in the 1990s from discussions prompted by the Dutch study, there is little international support for the development of such a UN standing reaction force. More recently, in 2008, the UN Special Committee on Peacekeeping Operations decided to reconvene the informal open-ended working group on enhanced rapidly deployable capacities with the aim of identifying viable options for enhancing the rapidly deployable capacity available to UN peacekeeping missions in crisis. However, the working group concluded that 'the concept is currently not viable, given the lack of appropriate financial arrangements and support from Member States for this purpose'.[123] The Special Committee has now asked the UN Secretariat to explore other options for making the necessary capacity available to UN peacekeeping missions.

At present, it appears that the only viable way of providing the necessary military capacity is to ensure that there are adequate standby arrangements. Since the 1990s, the UN has developed several initiatives, such as the UN Standby Arrangements System (UNSAS), a database of personnel and military equipment that member states could make available for peacekeeping operations. Between 2000 and 2009, a Danish-led Multinational Standby High Readiness Brigade (SHIRBRIG) carried out less demanding peacekeeping missions under Chapter VI of the UN Charter. The aim of SHIRBRIG, which has now been disbanded, was to provide the UN within 15 to 30 days with a 4,000 to 5,000-strong military force for a period of up to six months.

Given that arrangements of this kind only enjoy limited international support and carry relatively little weight, other standby arrangements will be necessary, namely military capacity that can be made available at short notice by the UN, regional organisations or individual member states. The question is which organisations have the power to deploy troops and to what extent are they actually willing and able to do so. This depends in part on the size of the available standby capacity as well as on the deployability and preparation (doctrine and training) of the troops concerned.

Only a limited number of organisations have the power to organise peacekeeping missions and deploy troops for purposes other than self-defence: the UN, the EU, the AU, ECOWAS and NATO.[124] Annexe V provides an overview of the capacity these organisations have at their disposal, the amount of time it takes to deploy the troops concerned and the situations in which they are authorised to operate. Since 2004, the EU has employed the battlegroup concept, which provides for the establishment of

123 UN Report of the Special Committee on Peacekeeping Operations and its Working Group, 2009 substantive session (23 February-20 March 2009), UN Doc. A/63/19, para. 77.

124 See Victoria K. Holt and Tobias C. Berkman, *The Impossible Mandate? Military Preparedness, the Responsibility to Protect, and Modern Peace Operations* (Washington, DC: Henry L. Stimson Center, 2006) pp. 57 ff.

several multinational battlegroups, each consisting of a 1,500-strong rapidly deployable battalion that focuses on crisis management and can be deployed outside the EU within 10 days. A few battlegroups are already operational, but for the time being EU missions – like UN missions – are still primarily geared to action at the low end of the spectrum of force. At present, the AU's African Standby Force (ASF) and the ECOWAS Standby Force (ESF) still lack the capacity and strength anticipated when they were launched, but with international support they can achieve them in the future. With its 25,000-strong NATO Response Force (NRF), whose first components can be deployed anywhere in the world within five days, NATO has the greatest capacity to take effective action at short notice in emergency situations at the high end of the spectrum of force.

In addition to the organisations mentioned above, ad hoc coalitions can also take action. Compared to multinational organisations, such coalitions have practical advantages and disadvantages. Given that they are usually led by an influential country, their command and control arrangements may be more straightforward and it may be easier to generate the necessary capacity and financial resources. On the other hand, because they are based on ad hoc arrangements, such missions often have no shared doctrine, training, equipment or communications systems. Another key disadvantage of such missions is that they lack the legitimacy of missions authorised and carried out by multinational organisations. Then again, ad hoc coalitions make it possible to take swift and decisive action at short notice.[125]

In order to take effective action in cases of genocide, war crimes, ethnic cleansing or crimes against humanity, it is important not only that the necessary competence and capacity are available but also that it is clear what is expected of the troops that will be deployed in those situations. In other words, 'what might a force designed to stop mass killing *look* like?'[126] In this context, it is a problem that there is hardly any military doctrine on civilian protection or even protection as such. Troops on peace missions often operate in a context in which one of their objectives is to protect the population without having a clear understanding of the concept and objectives of the mission concerned or the guidelines they should be following, and without receiving adequate preparation and training. This does not serve the interests of the local population, the participants in the mission or the international community as a whole.[127]

As apparent from the opening debate of the annual session of the Special Committee on Peacekeeping Operations on 22 February 2010, in which this issue featured prominently in many interventions, the UN member states and the UN Secretariat recognise the need for a better practical elaboration of mandates to protect civilian populations. On this occasion, Under-Secretary-General for Peacekeeping Operations Alain Le Roy noted: 'It is critical that we provide our peacekeepers in the field with the critical resources, training and guidance that they require to implement this extremely complex mandated task.'[128]

125 Ibid., p. 70. The authors state that, in order to be successful, ad hoc coalitions must work in concert with other international efforts and transfer leadership of follow-up activities in the area of peacebuilding to a capable organisation once the immediate crisis has passed.

126 Ibid., p. 71.

127 Ibid., p. 182.

128 See the report of this meeting of the UN Special Committee on Peacekeeping Operations on 22 February 2010, available at: <http://www.un.org/News/Press/docs/2010/gapk203.doc.htm>.

In resolution 1894 of 11 November 2009 on the protection of civilians in armed conflict, the Security Council also explicitly recognised the need to develop operational guidelines for the protection of civilians and requested the Secretary-General to develop an operational concept in consultation with troop-contributing countries and other relevant actors.[129] Based in part on a study on the protection of civilians in UN peacekeeping operations published in November 2009,[130] DPKO and DFS have now drafted an Operational Concept on Protection of Civilians in UN Peacekeeping Operations, which they presented in February 2010 and will continue developing during the course of 2010. This concept aims to provide a general framework for the protection of civilians in UN peacekeeping operations. It focuses on operations that take place with the authorisation of the host country. DPKO and DFS are developing a draft concept note on robust peacekeeping that will supplement certain aspects of the Operational Concept, such as issues relating to the use of force. As they continue their work on the Concept, DPKO and DFS will also have to take account of Security Council resolution 1325[131] and subsequent resolutions (such as Security Council resolutions 1820 and 1888) concerning the position of women and girls in armed conflicts and protection against sexual violence and rape as a method of warfare.

At present, none of the organisations mentioned above has adopted a clear institutional concept of civilian protection for their military missions.[132] In the vast majority of cases, there is no doctrine and training specifically geared to protecting civilians against the mass atrocities discussed in this report. It is vital to clarify the objectives of missions in which protecting civilians is a goal or even the key goal. This can serve as a basis for developing strategy, adopting clear mandates and rules of engagement, and discussing such issues as the size of the required force, the risk of escalation, when action should or should not be taken, and who should be protected and where.

Incidentally, these observations concerning international organisations also apply to individual states. The United Kingdom and Canada have identified the protection of civilians as a potential objective of military operations but have not translated this into specific operational guidelines. Countries like the United States and the Netherlands do not refer directly to the concept of civilian protection except in the context of other operations. Their doctrine offers less guidance for operations that focus specifically on providing physical protection to civilians.[133] The next chapter, which discusses the Netherlands' role in putting R2P into practice, examines this issue in greater depth.

129 S/RES/1894 (2009), para. 22.

130 Victoria K. Holt and Glyn Taylor, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges* (New York: United Nations, 2009). This study was commissioned by DPKO and OCHA and funded by Austria, Canada, France, Germany, Switzerland and the United Kingdom.

131 Security Council resolution 1325 of 31 October 2000 includes specific passages on the protection of women and girls in conflict situations and the importance of establishing proper training programmes in this area for both military and civilian personnel (for example in paragraphs 6, 7, 9 and 10).

132 Holt and Berkman, *supra* n. 124, p. 183.

133 Ibid., p. 188.

In conclusion, the AIV notes that a limited number of international organisations have both the competence and the capacity, up to a point, to take military action in the case of genocide, war crimes, ethnic cleansing and crimes against humanity, namely the UN, the EU, the AU, ECOWAS and NATO. In line with its promotion of regional cooperation earlier in this report, the AIV recommends that support for regional capacity building in the framework of the ASF and the ESF continue where possible, so that they can take effective action to implement R2P in their own regions.

For now, NATO and ad hoc coalitions are still the best option when there is a need for urgent and immediate intervention involving a large number of troops at the high end of the spectrum of force.[134] There are other problems with such action, however, lack of acceptance by the local population being a significant example. Nevertheless, the AIV believes that NATO must be able to act in such emergency situations, although its actions should be based on a mandate – and preferably an explicit request – from the Security Council.[135]

As regards the practical implementation of protection mandates, the AIV concludes that in general there is a lack of doctrine and training geared specifically to protecting civilians directly threatened by violence. In other words, 'multilateral organizations and nations offer little evidence of preparing their forces to intervene in genocide or stop mass violence as part of a stability or peace operation'.[136] The UN has recognised this problem and is currently working on an operational concept that is meant to provide a strategic framework for protecting civilians during UN peace operations. Given that other organisations and individual states also regularly review their policies on peace and stabilisation operations, there will likely be opportunities to rectify the shortcomings identified in this report in the near future. For example, the review of NATO's Strategic Concept presents just such an opportunity.

*Coordinating civilian and military capacity*

Cooperation and coordination between the civilian and military components of missions focusing on civilian protection are obviously very important. Although this need is recognised both nationally and internationally (e.g. in the 3D approach: diplomacy, defence and development), in practice there is still much room for improvement in this area. For relevant recommendations, the AIV refers to its recently published advisory report on crisis management operations in fragile states, which considers these issues at length.[137]

134 On NATO, Gareth Evans comments: 'So on the face of it … the NRF appears to be exactly the kind of "highly mobile, self-sustaining rapid reaction force … uniquely prepared to respond to a fast moving genocide, such as occurred in Rwanda in 1994."' See Evans, *supra* n. 58, p. 191.

135 This is in line with the AIV's observations in its advisory report on NATO's new Strategic Concept. The first criterion for NATO expeditionary operations outside the Treaty area is the existence of a demonstrable relationship with the security or vital interests of NATO member states, except where NATO military forces are deployed in humanitarian emergencies. See AIV, 'NATO's New Strategic Concept', advisory report no. 67, The Hague, January 2010, p. 33.

136 Holt and Berkman, *supra* n. 124, p. 193.

137 AIV, 'Crisis Management Operations in Fragile States', *supra* n. 64.

# IV The role of the Netherlands

## IV.1 General

Prior to the 2005 UN World Summit as well as afterwards, the Netherlands has shown itself to be a keen advocate of R2P. It played an active role in the negotiations on the Outcome document in 2005 and has since been participating in the informal consultations of the Group of Friends of the Responsibility to Protect in New York. The Netherlands currently co-chairs the group, a position held until recently by Canada. In addition, since 2005, it has on several occasions organised a ministerial-level meeting on R2P during the annual opening session of the UN General Assembly each autumn. In recent years the Netherlands has also supported the Global Centre for the Responsibility to Protect.

The question that now arises, however, and which has provided a major focus for this report, is whether and how the Netherlands can contribute effectively in the future to further developing R2P and putting it into practice, and which forums and actors it could or should target for this purpose.

Before addressing these issues, the AIV briefly considers whether the Netherlands should continue its efforts in support of R2P. Doubts are sometimes expressed about the viability of the principle, due to the resistance that it continues to provoke in certain circles. This is partly because R2P is regarded as an extension of the debate on humanitarian intervention without a Security Council mandate.

However, the AIV believes that it would be wrong to conclude on this basis that the principle is a dead letter or that it is destined to die a slow death. First of all, as apparent for example from the Secretary-General's report of 2009 and the discussions it provoked, the principle is very much alive among states, even if it gives rise to different responses. Secondly, the AIV believes that R2P should be seen in the wider historical context of the development of international law on human rights, as noted in chapter II. Based on the developments of the last 60 years, which attest to the international community's ever-increasing role in human rights protection, the acceptance of R2P in 2005 can be regarded as a vital link in a long-term process. Enshrining R2P in international law, developing it and making it operational all require time, commitment and constant attention. At the same time, or perhaps slightly in advance of this process, the principle will slowly but surely have to take shape as it is being implemented.

These processes require a number of driving forces, whether they are individual states, groups of states, parts of the UN system, research institutes, NGOs or individuals. The AIV believes that the Netherlands could put itself forward as one of these forces. This is in keeping with the importance that it attaches to the international promotion and protection of human rights and with its duty under article 90 of the Dutch Constitution to promote the development of the international legal order. On this basis, the AIV concludes that the Netherlands should give the further development and implementation of R2P a role in its foreign and defence policy, in the wider context of promoting and protecting human rights. In the following sections, the AIV makes several recommendations as to how specifically this could be done. In the interests of an effective analysis of the Netherlands' role, the AIV distinguishes between the national dimension – where the focus is on how the Netherlands can implement R2P in its own policies and institutions

– and the international dimension – where the focus is on the potential approach and priorities of the Netherlands at international level. In practice, however, these two dimensions are obviously closely connected.

## IV.2 Dutch policymaking and organisational structure

*Conceptual issues*
To help develop R2P and put it into practice, it is crucial to clarify the concept's substance. The AIV examined several key conceptual issues relating to R2P in chapter II of this report, and it advises the government to form a clear picture of these issues in so far as it has not already done so. Our views on R2P in this report can serve as a starting point. This picture can then serve as a guideline for Dutch policy and as a basis for the Netherlands' position in international forums.

*Practical issues*
If the Netherlands truly wishes to contribute to realising R2P, its policies and government institutions need to be properly equipped for this task. Given that prevention is a core element of R2P, the AIV advises the government to examine – and where necessary strengthen – the preventive instruments it has at its disposal. As noted in chapter III, many of the structural instruments in the mass atrocity toolboxes (see annexe III) form part of the foreign and development policies of several Western countries. The same is true of the Netherlands; with regard to promoting development, human rights, the rule of law and security sector reform, the Netherlands is active in all these areas. The AIV strongly advises the government to pursue its efforts in these areas, so that it can rightly claim that it attaches great importance to the practicability and implementation of R2P. The AIV is therefore in favour of maintaining long-term international cooperation at current levels.

However, providing assistance is not in itself enough for an effective contribution to R2P.[138] Governments also need well-equipped focal points for data collection, analysis and early warning and for mobilising and coordinating effective action in different conflict phases. Several governments – including those of Canada, the United Kingdom and the United States – are attempting to organise their institutions in this way.[139] The AIV advises the government to examine its own organisational machinery to determine whether it is adequately equipped to act decisively in future R2P situations. When doing so, the government should also consider how it can make the best possible use of the diplomatic tools that it has at its disposal. Measures such as preventive diplomacy (silent or public), mediation efforts, political pressure and the threat of sanctions will usually take shape at EU or UN level, but the Netherlands can also contribute to them bilaterally.

As explained in chapter III, it is also important to have the necessary civilian and military capacity to take action, with or without the use of force, to safeguard R2P where necessary. This implies, at the very least, the need for armed forces that are suited to this task.

138 Samantha Power has commented on this subject: 'The world as it is also includes countries that offer ostentatious support for the norm, hailing it at international conferences and boasting about their role in its formulation, and yet risking little to ensure that the norm is enforced.' Foreword to Responsibility to Protect, *supra* n. 17, p. xiii.

139 Evans, *supra* n. 58, p. 197.

As regards the availability of deployable operational civilian capacity in the Netherlands, the AIV refers to its observations on this issue in its advisory report on crisis management in fragile states.[140] This report noted that the Netherlands has almost no such capacity and that there is often not enough capacity at its diplomatic missions either. The AIV argued that, first and foremost, better use should be made of the expertise and capacity of the Ministry of Foreign Affairs. In addition, it advised the government to decide as soon as possible on the establishment of a pool of rapidly deployable civilian experts from various backgrounds, who play a key role in crisis management situations, and to send the House of Representatives a concrete proposal in this regard. In its response to the advisory report, the government indicated that it intended to present new proposals for the establishment of such an expert pool in the near future.[141] On other occasions, it has reiterated that, in principle, it is willing to establish such a pool.[142] The AIV recommends that the decision-making proceed as rapidly as possible.

Military action in R2P situations – whether in the form of preventive measures, military intervention involving the use of force or something in between – requires the armed forces to perform specific tasks. Only a few states have taken due account of the fact that R2P and civilian protection place specific demands on the doctrine, strategy, preparation and training of the armed forces. The AIV recommends that the Netherlands incorporate and/or elaborate R2P and the concept of civilian protection when formulating strategic visions and doctrines for the Dutch armed forces. R2P should also be a focus of policy development in multilateral organisations of which the Netherlands is a member (such as the EU and NATO).

In a similar vein, the AIV believes that the government should consider how the Dutch contribution to military action in an R2P context (as part of UN, EU or NATO operations or ad hoc coalitions) can be most effective and under what conditions it would be willing to provide troops, in compliance with the existing Terms of Reference for decision-making on the deployment of Dutch military units abroad. As an active proponent of R2P, the Netherlands should in principle express willingness – when the need arises – to participate in military action, whether preventive or otherwise, to avert or put an end to large-scale human rights violations. (For a discussion of the mandate of such missions, see section III.5.)

In light of the above as well as other factors, the AIV considers it advisable that the Netherlands participate in the further development of criteria for the use of force in the context of R2P (i.e. *with* a Security Council mandate), if possible in a restricted international group (e.g. the EU or the Group of Friends of the Responsibility to Protect). These criteria can serve as guidelines for Dutch policy and stimulate the international debate on this issue. The list of criteria drawn up by ICISS can serve as a guideline for

140 AIV, 'Crisis Management Operations in Fragile States', *supra* n. 64, p. 65.

141 Government response to the AIV advisory report on crisis management operations in fragile states, letter of 27 August 2009, Parliamentary Papers 2008-2009, 31 787, no. 6.

142 See, e.g., the report of the parliamentary committee meeting on security and development in fragile states of 8 October 2009, in which Minister of Foreign Affairs Maxime Verhagen stated that the government had the will to create a central government-wide pool of experts but that various legal issues and issues pertaining to employment law needed to be resolved before this mechanism could start operating across government, Parliamentary Papers, 2008-2009, 31 787, no. 7.

this purpose. The list focuses on: (a) just cause; (b) right intention; (c) last resort; (d) proportional means; and (e) reasonable prospects (see annexe IV).

In this connection, the AIV would also refer to the assessment framework developed in the AIV/CAVV's advisory report of 2000 on humanitarian intervention,[143] which should serve as a guide for the minimum preconditions for interventions that have not been authorised by the Security Council. The AIV still believes that such an assessment framework should be applied in exceptional cases of military intervention without a Security Council mandate.

### IV.3 Dutch participation in international action

*Conceptual issues*

As noted earlier, the AIV believes that efforts to apply or even invoke R2P are complicated in part by the lack of conceptual clarity surrounding the concept. The previous section argued in favour of formulating a clear Dutch position on the main conceptual issues, which could serve as a guideline for national policy-making and participation in international action. Given the current political climate in New York, it is clear that there is currently little scope for a normative debate at the UN on the further interpretation and definition of R2P. Forcing such a debate could even turn out to be counterproductive. However, the AIV would advise the government to seek to conduct or facilitate the debate on conceptual issues on a smaller scale. Initially, the focus could be on group of like-minded states, such as the EU or the Group of Friends of the Responsibility to Protect, although the basis for cooperation would probably be more fragile here.

The AIV further believes that it would be advisable to seek dialogue with countries that are less enthusiastic about R2P in order to bring a common position on the substance of R2P a step closer. As noted in chapter II, the AIV believes that it would be wrong to assume in advance that all member states that express concerns about the abuse of R2P wish to avoid any application of it. In general, states condemn the four crimes to which the principle applies and support their prevention and people's protection from them. A number of member states – and it should come as no surprise that these are mostly Southern states that only gained independence in the second half of the 20th century – appear to have genuine concerns about the implementation of R2P, especially as regards the role of the international community and the possibility of armed intervention.

The AIV believes that the concerns of these states demand serious attention and, where necessary and appropriate, accommodation, if progress is to be made towards making R2P operational – all the more so because, historically speaking, they are not entirely in the wrong. Analysing their objections can contribute to a better understanding of these concerns and may also help to begin developing a satisfactory response to several of their arguments. Other concerns – such as the possible selectivity of collective action – are very real. In this case, the most appropriate response is to acknowledge these concerns and be prepared to keep looking for ways to allay them.

The AIV recommends that the Netherlands strive – where possible and appropriate together with like-minded countries – to act as a bridge-builder and to approach the relevant countries either bilaterally or through regional forums. In doing so, it is

143 AIV/CAVV, 'Humanitarian Intervention', *supra* n. 1, pp. 28-32.

important to adopt a balanced approach that focuses on seeking dialogue, showing sympathy for the other party's position and a willingness to search for joint solutions. When seeking a dialogue with the relevant states, it is important to remember that different views on R2P often exist within the same region. Strategies aimed at promoting R2P would benefit from a good understanding of the regional balance of forces. Regional states that are relatively favourable to R2P can play a key role in obtaining broader support for the principle in the region as a whole.

Attention should also be devoted to the concerns of states regarding the origins of conflicts that degenerate, or threaten to degenerate, into genocide, war crimes, ethnic cleansing or crimes against humanity. If the right conditions are created for the peaceful political, social and economic development of society and conflicts can be prevented from escalating, there will ultimately be less need to intervene. In this context too, the AIV wishes to re-emphasise that a great deal of attention should be devoted to prevention, particularly in the policies of Western countries and the international community as a whole. Long-term international cooperation is very important in this context. It can also help to accommodate the more development-oriented priorities of states that are less enthusiastic about other aspects of R2P. In the long run, this may help to secure broader support for the principle.

*Practical issues*

At international level, in addition to long-term international cooperation (including development assistance), there are various possible ways for the Netherlands to promote the implementation of R2P. In chapter III, the AIV noted that the following measures, in particular, can contribute to putting R2P into practice: strengthening UN instruments, promoting regional cooperation, making the best possible use of non-military forms of pressure, developing different forms of military action and increasing the availability of civilian and military capacity.

As regards UN instruments, it is clearly important to expand the UN's early warning capability. As part of this process, the UN will have to develop more detailed criteria for determining whether an R2P situation is either occurring or imminent. The AIV advises the government to contribute to the development of these criteria, for example by carrying out or commissioning an in-depth study of this issue or by organising an expert meeting. During its EU Presidency in the second half of 2009, Sweden identified the development of specific R2P indicators as an EU priority as well.[144] This means that activities relating to early warning can also be developed within the EU.

As proposed by the UN Secretary-General, the Human Rights Council (HRC) could play a greater role in urging states to comply with their R2P obligations and monitoring their performance. The Netherlands can advocate this – preferably together with its EU partners – during the upcoming review of the HRC. At the same time, it could point out that HRC monitoring can also be carried out on the basis of the special procedures.

UN treaty bodies can also play a useful role in early warning and identifying problematic situations. The possibility of carrying out fact-finding missions authorised by the Secretary-General, Security Council, HRC, OHCHR or UNHCR should be exploited where possible. The Netherlands can advocate these options in the appropriate forums. In

144 This was laid down in an informal paper drafted during Sweden's EU Presidency (July-December 2009), on 'The Responsibility to Protect: State of play of discussions and the way forward'.

addition, the Secretary-General's proposal to establish a joint office of the Special Adviser on the Prevention of Genocide and the Special Adviser with a focus on the Responsibility to Protect, which may be submitted during the course of the year, merit the Netherlands' full support.

As a logical extension of its early warning capability, the UN should also devote more attention to the potential mediating role of the Secretary-General's special representatives and envoys. Where possible, their selection, training and preparation should be improved; the member states, including the Netherlands, can contribute to this.

As already noted, the future of R2P lies largely at regional level. The AIV thus advises the government to promote regional cooperation in support of R2P as much as possible. The Netherlands should support and, where possible, facilitate the Secretary-General's proposals in this area, which appear in his report on R2P. For example, the Netherlands could organise or co-organise or finance meetings aimed at promoting interregional learning processes, such as the exchange of experiences relating to the activities of the OSCE's High Commissioner on National Minorities, a model that is often held up as an example for other regions. EU experience with conflict prevention could also be shared in this way. This applies, for example, to the way in which the EU has developed into a successful model of regional conflict prevention, in part through its enlargement and neighbourhood policies. As regards external action by the EU, the implementation of the 2001 EU Programme for the Prevention of Violent Conflict is particularly relevant. In general, the AIV believes that the EU should adopt a common position on the entire issue of R2P. In the second half of 2009 the Swedish Presidency took the first step in this direction, which can be developed further.

As part of putting R2P into practice, it is important to consider how non-military forms of pressure, such as financial or economic sanctions, arms embargoes and political sanctions, can be used to maximum effort. The AIV believes that the UN General Assembly should play a role in this area, especially due to the legitimacy that its decisions have. Given its earlier efforts in 1999 to improve the effectiveness of UN monitoring of the implementation of sanctions, it is also logical for the Netherlands to push for a strong follow-up to the Special Program on the Implementation of Targeted Sanctions (Stockholm Process) and the implementation of the proposals contained in the Security Council's 2006 report on improving the effectiveness of sanctions regimes. One related issue that could be explored in greater depth is the relationship of smart sanctions to R2P.

As regards military action, the AIV considers it advisable, as noted above, that the Netherlands participate in the development of criteria for the use of force in the context of R2P, using the list of criteria drawn up by ICISS as a guideline. It appears unlikely that the international debate on this issue can be taken much further. In 2005, the inclusion of these criteria in the Outcome document proved to be a bridge too far, and the international political climate has not improved very much since then. In the AIV's opinion, this does not alter the fact that, where possible, the Netherlands should seek to ensure that progress is made in this area, since such criteria could help to counter the risk of selective action, which is feared by many developing countries. The Secretary-General also adopted a clear stance on this issue in his 2009 report. The AIV believes that the Netherlands should definitely exploit any opportunities that arise to stimulate the debate on this issue and generate broader support for such criteria.

As regards the available capacity for military action on the basis of R2P (in the form of either peacekeeping or coercive protection), the AIV once again highlights the importance of regional cooperation. Along these lines, the AIV advises the government (bilaterally or through the EU) to start – or continue – supporting capacity building in support of regional organisations like the AU and ECOWAS. It is also important to promote cooperation and communication between regional actors and the UN. The AIV believes that the Netherlands can play a role in this area by promoting information exchange, facilitating workshops or providing financial support to the actors concerned.

The AIV believes that NATO action should be possible when there is a need for immediate intervention involving a large number of troops at the high end of the spectrum of force, provided that it is based on a mandate – and preferably an explicit request – from the Security Council. The AIV advises the government to put forward this position in the debate on NATO's future tasks, for example in the review of NATO's Strategic Concept.

As regards the practical implementation of protection mandates, the AIV has observed that in general there is a lack of doctrine and training geared specifically to protecting civilians directly threatened by violence. The UN has recognised this problem and is currently working on an Operational Concept that is meant to provide a strategic framework for the protection of civilians during UN peace operations. The AIV recommends that the Netherlands actively promote, where possible, the further elaboration of this Operational Concept and do its best to persuade other relevant organisations, such as the AU, ECOWAS and NATO, to devote the necessary attention to this issue. After all, the implementation of civilian protection mandates is of obvious importance to putting R2P into practice.

# V Summary and conclusions

Against the background of the questions formulated as the basis for this AIV advisory report, it seeks to contribute to a better understanding of the substance, status and scope of the Responsibility to Protect. It also examines several instruments that can help to put Responsibility to Protect into practice. Finally, it discusses the role of the Netherlands in developing the Responsibility to Protect and putting it into practice.

## V.1 The significance of the Responsibility to Protect

*A comprehensive approach*

In the AIV's view, R2P is not a brand new, separate concept that was only embraced by heads of state in 2005, but rather the culmination of an extended process of development. Placing R2P in its historical context, the AIV observes that it combines existing elements of international law (in particular as regards the obligations of the state) with complementary and innovative principles (primarily with regard to the responsibility of the international community). In general, the AIV believes that the comprehensive approach embodied by R2P is one of its main added values. R2P encompasses prevention, reaction and rebuilding and concerns the role of the state *and* the international community. This comprehensive approach is relatively new and is one of the features that distinguishes R2P from other approaches to large-scale human rights violations. Broadly speaking, R2P dovetails with the comprehensive approach to crisis management operations, a comparable method under which diplomatic, defence and development instruments are used in a coherent manner.

*An emerging principle of international law*

The AIV believes that, since its adoption in 2005, R2P should be regarded as a principle. States have agreed that R2P will constitute a basis for action, although they still need to work out how this will happen. However, it is clear that the R2P principle is already a growing source of inspiration and guidance in interpreting applicable international law on sovereignty, human rights and peace and security. At this stage, the AIV would therefore refer to R2P as an emerging principle of international law. In a sense, it is an overarching principle that defines the entire fabric of legal, moral and political obligations and responsibilities of states and the international community in the case of specific, actual or imminent, large-scale human rights violations.

*Difference from humanitarian intervention*

R2P differs significantly from – and is sometimes incompatible with – what is understood by humanitarian intervention, and the AIV believes that the two should not be confused with each other. R2P places a stronger emphasis on the perspective and primary interests of the threatened population. As described in the Outcome document of the UN World Summit, the Responsibility to Protect, in contrast to humanitarian intervention, encompasses a continuum of prevention, reaction and rebuilding, with measures ranging from early warning mechanisms to diplomatic pressure, coercive measures, holding perpetrators accountable and international assistance. Because R2P relates to a continuum, military resources can also be deployed during the preventive phase without necessarily leading to the use of force. Moreover, as described in the Outcome document, R2P is based on the premise that military intervention takes place *with* Security Council authorisation. Such authorisation is often not regarded as a prerequisite for humanitarian intervention.

*Sovereignty and human rights*
The R2P principle is based on the idea that sovereignty and human rights are two sides of the same coin and thus not mutually exclusive. Historically speaking, the idea that sovereignty is a responsibility that entails national and international obligations is not new, although it has not always been described as such.

The responsibility of states to protect persons within their jurisdictions against large-scale human rights violations is rarely disputed anymore, but the consensus on the role of the international community is fragile. Several member states appear to have genuine concerns about implementing R2P, especially as regards the role of the international community and the possibility of armed intervention. The AIV believes that the concerns of these states demand serious attention and, where necessary and appropriate, accommodation, if we are to make progress towards putting R2P into practice.

In general, the sovereignty debate is largely dominated by the possibility of using military force, either selectively or otherwise. However, this is ultimately only one aspect of R2P, which should in any case be regarded as a last resort.

*Scope*
To ensure the viability of R2P, the AIV believes that it is important to limit the principle to the four crimes mentioned in the Outcome document of the UN World Summit (genocide, war crimes, ethnic cleansing and crimes against humanity). At the same time, it is important to note that the duty of states to protect their own populations goes further than R2P. This is not to say that the international community should be indifferent to systematic human rights violations that fall outside the scope of R2P. In fact, the AIV foresees that extension of the principle may eventually be appropriate; but this will necessarily be a gradual process based on the development of international law.

### V.2 Implementing the Responsibility to Protect

The AIV considers it important to clarify the conceptual aspects of R2P, among other reasons to facilitate progress on the operational front. However, since obtaining broader support for the further elaboration of the principle's normative aspects is a long-term process, the AIV believes that progress must be made towards putting R2P into practice at the same time as its meaning is being clarified.

*Instruments*
The instruments that can be employed to implement R2P encompass a wide range of activities. There are instruments that aim to achieve long-term effects (such as promoting economic development, human rights and good governance) as well as instruments aimed at having an immediate effect (such as preventive diplomacy and the use or threat of sanctions and international criminal prosecution). For the purpose of this advisory report, the AIV has examined several of the instruments that, if developed and fleshed out, could make a key contribution to putting R2P into practice. When selecting these instruments, the AIV took into account whether the Netherlands would be able to play a role in their advancement and development. This report focuses on the role of states and international organisations in implementing R2P. However, the AIV also notes that non-state actors, such as NGOs, often play a major role.

*UN instruments*
With regard to UN instruments, the AIV concludes, among other things, that the early warning system needs to be improved. This will require measures including the

development of criteria for determining whether an R2P situation is either occurring or imminent. Based on these criteria, it should be possible to analyse troubling situations in a way that allows a realistic assessment of the threat of genocide, war crimes, ethnic cleansing or crimes against humanity. It is also important to monitor the impact on specific groups (e.g. women, children and indigenous peoples).

The Human Rights Council, the High Commissioner for Human Rights, the High Commissioner for Refugees, and the Office for the Coordination of Humanitarian Affairs can all play a greater role in collecting and analysing data. However, the collection and analysis of data as such appear to raise fewer problems than the question what happens with this information afterwards and how it can contribute to decision-making at international level. The AIV believes that one of the main objectives of R2P should be to help bridge the gap in the future between gathering information and taking action. To this end, it is vital to improve the UN's early warning capability. The AIV believes that it would also be a good idea to establish an international advisory body of independent eminent persons to identify high-risk situations as early as possible, and recommends that the possibility of establishing such a body be examined as soon as possible.

The AIV notes that, in order to become a key player in reconstruction, the Peacebuilding Commission (PBC) established in 2005 should take up more situations – and at an earlier stage. The fact that the PBC's mandate is still limited to post-conflict situations and encompasses neither prevention nor the conflict phase itself remains a serious design flaw. Moreover, the PBC should also develop its capability to make a meaningful contribution in difficult cases like Afghanistan and Iraq.

*Regional cooperation*

The AIV believes that the future of R2P lies largely at regional level. Due to greater proximity to the local area, it can be more effective to take measures, including preventive measures, at regional than at global level. Furthermore, a stronger sense of ownership can relieve certain measures of their controversial nature. However, it should be noted that a certain degree of global accountability is also desirable. Regional cooperation that is linked to global cooperation offers the best prospects. Where possible, the relationships and communication between the UN and regional actors should therefore be strengthened. The AIV also advocates supporting regional capacity building and the inter-regional exchange of best practices. The EU can play a key role in this regard; one of its strengths is the range of internal and external instruments that it has developed to help prevent violent conflict and promote the rule of law and human rights.

*Non-military pressure*

In escalating situations, or situations that threaten to escalate, the possibility of using non-military forms of pressure, such as financial or economic sanctions, arms embargoes or political sanctions, should be considered first. In such situations, the focus should be on targeted sanctions or smart sanctions, i.e. sanctions aimed at specific political leaders or members of their regime whose actions are a threat to peace and security. More attention should be devoted to the implications for R2P of the Stockholm Process (the Special Program on the Implementation of Targeted Sanctions) and, in particular, of its detailed recommendations on increasing the effectiveness of smart sanctions. It should also be borne in mind that the preventive deployment of military units can play a vital role in raising the effectiveness of non-military forms of pressure.

Furthermore, in line with what the UN Secretary-General has advocated, the AIV believes that the UN General Assembly can also make a useful contribution in this area, due to

the legitimacy that its decisions have. The procedure laid down in the Uniting for Peace resolution of 1950 may provide a basis for General Assembly action.

*Forms of military action*

The AIV is keen to emphasise that the presence of well-equipped international troops can also play an important role during the preventive and post-conflict phases. Military action involving the use of force, sometimes called coercive protection missions, should be regarded as a last resort, after it has become clear that the state concerned is unable or unwilling to protect its population and if all peaceful means have failed.

The credibility and impact of the UN in implementing R2P largely depend on the consistency with which the principle can be applied and the extent to which arbitrariness can be avoided. With this in mind, the AIV supports the formulation of criteria for the use of force in a R2P framework. The list of criteria drawn up by the International Commission on Intervention and State Sovereignty can serve as a guideline. It focuses on: (a) just cause; (b) right intention; (c) last resort; (d) proportional means; and (e) reasonable prospects.

In a situation where the conditions for R2P have been satisfied but the Security Council is unable or unwilling to reach a decision, it follows that the international community, as embodied by the UN, has not managed to take responsibility and, strictly speaking, that the R2P principle has failed. The AIV wishes to emphasise that using force in R2P situations without Security Council authorisation is prohibited under existing international law. Partly in the light of recent developments, the AIV advocates a high level of restraint in this area. In the absence of a Security Council mandate, such intervention could be legitimised on the grounds of an exceptional humanitarian emergency, but this should never be treated as a licence for unauthorised action by third parties.

The AIV believes that such interventions should ultimately be given a status under international law. To this end room should be made within international law for using force in R2P situations in the case of exceptional emergencies, even in the absence of a Security Council mandate. This could eventually relieve the tensions that are now emerging between legality and legitimacy, which the AIV regards as undesirable in principle.

*Civilian and military capacity*

Almost all post-conflict situations are characterised by a public security vacuum in which the rule of law and all related institutions have been dismantled or seriously undermined. Restoring them requires assistance in several areas, such as rebuilding a police force, the judiciary and public institutions. In this phase, the presence of a modest international military force will generally be required, but there will also be a need for police officers, judges, public prosecutors and advisors on public administration, as well as civilian organisations that specialise in such fields as dealing with trauma, preventing sexual violence and rehabilitating young people.

UN and other peace operations nowadays include a civilian component, but the fragmented system that currently exists needs to be improved and strengthened. Given the large number of UN peace missions with a civilian component, the UN must continue in the coming years to devote unflagging attention to improving the system for civilian standby capacity. The same applies to other global and regional intergovernmental organisations and member states that participate in peace operations.

As regards military capacity, the AIV has noted that there is little support for the development of a rapid reaction capability (a standing force) within the UN. At present, it appears that the only viable way of providing the necessary military capacity is to ensure that the UN, regional organisations and individual member states have adequate standby arrangements.

A limited number of international organisations have both the competence and the capacity, up to a point, to take military action in the case of genocide, war crimes, ethnic cleansing and crimes against humanity, namely the UN, the EU, the AU, ECOWAS and NATO. The AIV recommends that support for regional capacity building in the framework of the ASF and the ESF should continue where possible. For now, NATO and ad hoc coalitions are still the best option when there is a need for urgent and immediate intervention involving a large number of troops at the high end of the spectrum of force.

Both international organisations and individual states appear to have hardly any doctrine and training that are specifically tailored to protecting civilians against the mass atrocities discussed in this report. The UN is currently working on an operational concept that is meant to provide a strategic framework for protecting civilians during UN peace operations. The AIV believes that other organisations and individual states should focus more on civilian protection when reviewing their policies on peace and stabilisation operations. The review of NATO's Strategic Concept, for example, provides an opportunity to take up this issue.

### V.3 The role of the Netherlands

Enshrining R2P in international law, developing it and making it operational all require time, commitment and constant attention. At the same time, or perhaps slightly in advance of the process, the principle will slowly but surely have to take shape as it is being implemented.

The AIV believes that these processes require a number of driving forces and that the Netherlands could put itself forward as one of these. This is consistent with the active role that the Netherlands has played so far with regard to R2P. It would also be in keeping with the importance that the Netherlands attaches to the international promotion and protection of human rights and with its duty under article 90 of the Dutch Constitution to promote the development of the international legal order. On this basis, the AIV concludes that the Netherlands should give the further development and implementation of R2P a role in its foreign and defence policy, in the wider context of promoting and protecting human rights. The AIV would make several recommendations as to how this could be done.

*Dutch policymaking and organisational structure*
In so far as the government's own policymaking and organisational structure are concerned, the AIV advises it to form a clear picture of the substance, status and scope of R2P in so far as it has not already done so.

As regards the practical side of R2P, the AIV advises the government to examine the instruments it has at its disposal in order to assess their adequacy in responding to an actual or imminent R2P crisis. We advise the government to pursue its long-term efforts to promote development, human rights, the rule of law and security sector reform, so that the Netherlands can rightly claim that it attaches great importance to the practicability and implementation of R2P. We also advise the government to organise its

own machinery in such a way that it is able to act decisively in different conflict phases. Finally, the government should consider how it can make the best possible use of the diplomatic tools that it has at its disposal.

As regards the availability of civilian capacity in the Netherlands, the AIV advises the government to decide as soon as possible on the establishment of a pool of rapidly deployable civilian experts from various backgrounds, who play a key role in crisis management situations (in line with previous advisory reports on this issue).

The AIV advises the government to incorporate and/or elaborate R2P and the concept of civilian protection when formulating strategic visions and doctrines for the Dutch armed forces. R2P should also be a focus in policy development in multilateral organisations of which the Netherlands is a member.

In a similar vein, the AIV believes that the government should consider how the Dutch contribution to military action in an R2P context (as part of UN, EU or NATO operations or ad hoc coalitions) can be most effective and under what conditions it would be willing to provide troops, in compliance with the existing Terms of Reference for decision-making on the deployment of Dutch military units abroad. At the least, application of the R2P principle requires clear mandates and rules of engagement for the troops that are to be deployed. The operational requirements for the successful military implementation of R2P should be worked out in greater detail prior to deployment.

The AIV considers it desirable for the Netherlands to participate in the further development of criteria for the use of force in the context of R2P, if possible in a restricted international group (e.g. the EU or the Group of Friends of the Responsibility to Protect). These criteria can serve as guidelines for Dutch policy and stimulate the international debate on this issue.

*Dutch participation in international action*

Although it is clear that there is currently little scope in New York for a normative debate on the further interpretation and definition of R2P, the AIV advises the government to make an effort to conduct or facilitate the debate on conceptual issues on a smaller scale. We also advise the government to seek dialogue with countries that are less enthusiastic about R2P in order to bring a common position on the substance of R2P a step closer. The Netherlands could act as a bridge-builder and approach the countries concerned – where possible and appropriate together with like-minded countries – either bilaterally or through regional forums. When doing so, the government should focus on the more development-oriented priorities of states that are less enthusiastic about other aspects of R2P.

The AIV advises the government, where possible, to help strengthen the UN's R2P instruments, especially those relating to the preventive phase. For example, the Netherlands could (perhaps together with its EU partners) help to develop more detailed criteria for determining whether an R2P situation is either occurring or imminent. It could also push for a larger role for the Human Rights Council, for the deployment of fact-finding missions, and for timely mediation activities by specially selected and trained Special Representatives of the UN Secretary-General.

The AIV advises the government to promote regional cooperation and inter-regional learning processes as much as possible, either financially or otherwise. The way in which the EU has developed into a successful model of regional cooperation can serve as

an example. We attach great importance to promoting cooperation and communication between regional actors and the UN. We accordingly advise the government to do its utmost to ensure that the EU adopts a common position on the entire issue of R2P.

In the AIV's opinion, it is also logical for the Netherlands to push for a strong follow-up to the Stockholm Process and for the implementation of proposals to increase the effectiveness of sanction regimes. At the same time, the government could examine more closely how smart sanctions might be applied in the context of R2P.

As regards military action, the AIV believes that the Netherlands should seek to ensure that progress is made in formulating criteria for the use of force (*with* a Security Council mandate) in the context of R2P, even if there is currently little scope for this effort. We also advise the government (bilaterally or through the EU) to start – or continue – supporting capacity building in support of regional organisations like the African Union and ECOWAS. In the debate on NATO's future tasks, the Netherlands should take the position that NATO action in actual or imminent R2P situations should be possible, provided that it is based on a mandate – and preferably an explicit request – from the Security Council.

Finally, the AIV advises the government to play an active role, within the UN and other organisations that have both the competence and the capacity to take military action, in making mandates to protect civilians operational.

### V.4 In conclusion

The AIV wishes to conclude this advisory report with two general observations.

Firstly, the AIV notes that the Responsibility to Protect represents a significant shift in the thinking on the principle of non-intervention, as laid down in Article 2(7) of the UN Charter. This principle originally focused broadly on intervention in the domestic affairs of states (with the exception of Security Council measures under Chapter VII). As described in this advisory report, there are now various areas in which external interference is increasingly allowed (not only in the area of human rights but also, for example, in the areas of trade and the environment). The Responsibility to Protect goes a step further. As a principle, it does not just permit intervention but actually creates an international responsibility to take action in certain cases. The original prohibition on intervention, a negative obligation, has thus been replaced by a responsibility or positive obligation to take action in situations where civilian lives are at stake. This development is linked to the humanisation of the international legal order. In the AIV's view, it is of great general importance. It shows that states see ensuring the lasting protection of human rights by the international community as a shared responsibility. This may also be increasingly true for other areas, like the environment.

Secondly, it is appropriate to close this advisory report on preventing large-scale human rights violations with a comment on the importance of the political will to act. In drafting this advisory report, the AIV set itself the goal of examining how the development and implementation of the Responsibility to Protect can be promoted and what the Netherlands can contribute. We are aware that it takes more to avert an actual or imminent genocide than formulating a normative framework for action and preparing the right instruments for use. As already noted, one of the key objectives of the Responsibility to Protect is to bridge the gap between gathering information and taking action in the future. In this context, a political will to act at national and international

level is of overriding importance. The question how such political will can be mobilised falls outside the scope of this advisory report. However, the AIV wishes to make the following general observation on this issue. The fact that there is a normative framework based on a common responsibility to protect and that the necessary instruments are available does not mean that action by the international community, as embodied by the UN, can be guaranteed. However, states will find it increasingly hard to justify a lack of political will to take action against genocide, war crimes, ethnic cleansing and crimes against humanity – whether actual or imminent – to the media, civil society, the general public and, especially, the civilians whose rights and lives are at stake.

# Annexes

**Annexe I**

**Paragraphs 138 and 139 of the Outcome document of the 2005 UN World Summit**
(UN General Assembly, World Summit Outcome 2005, A/RES/60/1, 24 October 2005)

**Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity**

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

**Annexe II**

## Definitions of genocide, crimes against humanity and war crimes, as included in the Rome Statute of the International Criminal Court

(Adopted in Rome on July 17, 1998, and entered into force on July 1, 2002. As of April 2010, the Rome Statute of the ICC has 139 Signatories and 111 Ratifications.)

### Article 6: Genocide

For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

### Article 7: Crimes against humanity

#### Paragraph 1

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

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

## Article 8: War crimes

### Paragraph 2

2. For the purpose of this Statute, 'war crimes' means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
   (i) Wilful killing;
   (ii) Torture or inhuman treatment, including biological experiments;
   (iii) Wilfully causing great suffering, or serious injury to body or health;
   (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
   (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
   (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
   (vii) Unlawful deportation or transfer or unlawful confinement;
   (viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
   (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
   (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
   (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
   (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
   (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
   (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
   (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
   (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
   (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
(xii) Declaring that no quarter will be given;
(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
(xvi) Pillaging a town or place, even when taken by assault;
(xvii) Employing poison or poisoned weapons;
(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
(iii) Taking of hostages;
(iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
(v) Pillaging a town or place, even when taken by assault;
(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
(ix) Killing or wounding treacherously a combatant adversary;
(x) Declaring that no quarter will be given;
(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

**The Mass Atrocity Toolboxes: Prevention, Reaction and Rebuilding**
(from: Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes once and for all*, Washington, D.C.: Brookings Institution Press, 2008, pp. 252-53)

| | PREVENTION | REACTION | REBUILDING |
|---|---|---|---|
| **Political and Diplomatic** | | | |
| **Structural** | Promote good governance<br>Promote membership in international organizations | | Rebuilding governance institutions<br>Maximizing local ownership |
| **Direct** | Preventive diplomacy<br>Threat of political sanctions | Diplomatic peacemaking<br>Political sanctions and incentives | |
| **Economic and Social** | | | |
| **Structural** | Support economic development<br>Support education for tolerance<br>Community peacebuilding | | Support economic development<br>Social programs for sustainable peace |
| **Direct** | Aid conditionality<br>Threat of economic sanctions<br>Economic incentives | Application of economic sanctions<br>Economic incentives | |
| **Constitutional and Legal** | | | |
| **Structural** | Promote fair constitutional structures<br>Promote human rights<br>Promote rule of law<br>Fight corruption | | Rebuilding criminal justice<br>Managing transitional justice<br>Supporting traditional justice<br>Managing refugee returns |
| **Direct** | Legal dispute resolution<br>Threat of international criminal prosecution | Criminal prosecution | |
| **Security Sector** | | | |
| **Structural** | Security sector reform<br>Military to civilian governance<br>Confidence-building measures<br>Small arms and light weapons | | Peacekeeping in support of nation building<br>Disarmament, demobilization, and reintegration<br>Security sector reform |
| **Direct** | Preventive deployment<br>Nonterritorial show of force<br>Threat of arms embargo or end of military cooperation programs | Peacekeeping for civilian protection<br>Safe havens and no-fly zones<br>Arms embargoes<br>Jamming of radio frequencies<br>Threat of use of military force | |

**The Responsibility to Protect: Principles for Military Intervention**
(from: Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, Ottawa, International Development Research Centre, 2001)

### (1) The Just Cause Threshold

Military intervention for human protection purposes is an exceptional and extraordinary measure. To be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind:

A. **large scale loss of life,** actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or

B. **large scale 'ethnic cleansing'**, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

### (2) The Precautionary Principles

C. **Right intention:** The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned.

D. **Last resort:** Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded.

E. **Proportional means:** The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective.

F. **Reasonable prospects:** There must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction.

### (3) Right Authority

A. There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.

B. Security Council authorization should in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention should formally request such authorization, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter.

C. The Security Council should deal promptly with any request for authority to intervene where there are allegations of large scale loss of human life or ethnic cleansing. It should in this context seek adequate verification of facts or conditions on the ground that might support a military intervention.

D. The Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.

E. If the Security Council rejects a proposal or fails to deal with it in a reasonable time, alternative options are:

   I. consideration of the matter by the General Assembly in Emergency Special Session under the "Uniting for Peace" procedure; and

   II. action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorization from the Security Council.

F. The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation - and that the stature and credibility of the United Nations may suffer thereby.

**(4) Operational Principles**

A. Clear objectives; clear and unambiguous mandate at all times; and resources to match.

B. Common military approach among involved partners; unity of command; clear and unequivocal communications and chain of command.

C. Acceptance of limitations, incrementalism and gradualism in the application of force, the objective being protection of a population, not defeat of a state.

D. Rules of engagement which fit the operational concept; are precise; reflect the principle of proportionality; and involve total adherence to international humanitarian law.

E. Acceptance that force protection cannot become the principal objective.

F. Maximum possible coordination with humanitarian organizations.

## Annexe V

### Overview of available military capacity for missions with a protection mandate (both peacekeeping missions and coercive protection missions)

*United Nations (UN)*

The UN authorises and leads peace operations and can also authorise peace operations led by individual countries, coalitions of countries or regional organisations. The UN currently supports 15 peace missions worldwide and provides logistical, administrative and management support to 14 special political missions.[1] The UN often does not take the lead in robust peace enforcement operations, and it is questionable whether this would even be desirable. The UN aims to deploy a military force within 30-90 days of the decision authorising it; this is too long for acute, escalating crisis situations. UN peace missions often take place in relatively benign environments rather than situations requiring action at the high end of the spectrum of force. When such situations arise, and this is not impossible in the case of civilian protection, many states will be even more reluctant to contribute to such missions than they are now.

The aim of the Standby Arrangement System (UNSAS) is to provide the UN with information on the military resources that member states could potentially provide to peace operations. Many member states participate in the system, but only Jordan and Uruguay have signed memorandums of understanding and committed to provide troops within an agreed time frame. A small number of developing countries, including Bangladesh, India, Jordan, Nepal and Pakistan, often provide the most troops for UN missions.

*European Union (EU)*

Since the introduction of the ESDP in 1999, the EU has expanded its responsibilities in the field of conflict prevention and crisis management and increased its military capacity to respond to crisis situations, in line with the EU Military Headline Goal 2010. To date, the EU has carried out more than ten missions, although only a few involved the deployment of a significant number of troops (e.g. Operation Artemis in the eastern Congo and Operation Althea in Bosnia). The majority of missions were of a civilian nature (e.g. Operation Proxima in Macedonia and the EU Police Missions in Bosnia). In 2004, in the framework of the Headline Goal, the EU adopted the battlegroup concept, which provides for the establishment of several battlegroups consisting of 1,500-strong rapidly deployable battalions that focus on crisis management and can be deployed outside the EU within 10 days for a period of up to six months. A few battlegroups are already operational, but this does not change the fact that, relative to its economic weight, the EU remains a relatively minor player in military terms.[2]

1 See presentation by Susana Malcorra, Under-Secretary-General for Field Support, at the opening meeting of the Special Committee on Peacekeeping Operations on 22 February 2010, available at: <http://www.un.org/News/Press/docs/2010/gapk203.doc.htm>.

2 See also Holt and Berkman, *supra* n. 124, p. 67.

*African Union (AU)*

In its Constitutive Act, the AU explicitly provided for the possibility of intervening in a member state in the event of war crimes, genocide or crimes against humanity. In 2003, it reached agreement on creating an African Standby Force (ASF). The ASF should eventually be able to carry out such interventions, but the AU depends on its member states for this purpose, since it does not have any troops of its own or any standby troops at its disposal that can be deployed swiftly and effectively. The ASF is meant to be operational in 2010. In recent years, the international community has devoted much attention to supporting the ASF and building African capacity in the field of conflict management. Capacity building in African-led peace operations has advanced relatively quickly as a result of partnerships in support of AMIS in Darfur, notably between the AU and the EU, the G8 and individual states. However, as apparent from a recent high-level retreat on making the ASF operational,[3] it still needs to make much more progress on mandates and coordination, capacity building and financing in order to actually meet the targets set in 2003.

*Economic Community of West African States (ECOWAS)*

ECOWAS operates on the basis of the 1999 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, the aims of which include resolving internal and inter-state conflicts, supporting conflict prevention and strengthening the deployment of peace operations and humanitarian missions. In practice, the protocol reflects the operational policies of the preceding decade. ECOWAS stationed troops in Liberia (1990-1997), Sierra Leone (1997-2000) and Guinea-Bissau (1998). Operations followed in Côte d'Ivoire in 2002 and Liberia (again) in 2003. ECOWAS is also in the process of developing the ECOWAS Standby Force (ESF). The ESF concept, which was approved in 2004, provides for a 6,500-strong regional force, consisting of a 1,500-strong military task force and a 5,000-strong brigade. The task force is meant to be deployable within 30 days, followed by the brigade within 90 days. The ESF is part of a continent-wide plan to establish an African Standby Force (ASF). Financing and logistical requirements, in particular, present significant challenges to the ESF's development. Nevertheless, ECOWAS aims to be able to carry out an effective complex peace operation before the end of 2010 (in line with the targets for the ASF).

*North Atlantic Treaty Organisation (NATO)*

When NATO reviewed and updated its Strategic Concept in 1999, NATO members committed themselves to defending not only other members but also peace and security in the NATO region and along its periphery. This enabled the alliance to take on 'non-article 5 crisis response operations', including peace operations. In line with this development, NATO decided at a conference in Prague in 2002 that troops could be deployed 'wherever they are needed', thus abandoning the restriction of acting in defence of the treaty area alone.[4] Since 2006, NATO has at its disposal a 25,000-strong NATO Response Force (NRF), whose first units can be deployed anywhere in the world within five days. Thus far the NRF has been deployed, for example, to

3 See the report of this retreat on 18-19 May 2009, which was organised by the AU, the UN and the International Peace Institute (IPI) and financed by the Danish government: 'Operationalizing the African Standby Force', IPI, 29 January 2010.

4 Evans, *supra* n. 58, p. 191.

provide humanitarian assistance in the aftermath of Hurricane Katrina and the 2005 earthquake in Pakistan. According to NATO, NRF missions can include humanitarian and crisis response missions, including peace enforcement, counterterrorism and embargo operations.[5] The use of force to end a genocide or mass murder could also be included in this range of potential activities. The latest version of NATO's Strategic Concept, which is being negotiated this year, can be expected to devote more detailed attention to the 'out of area' tasks that NATO could take on and the conditions under which it could do so.

5 NATO, 'Improving Capabilities to Meet New Threats', NATO Briefing, December 2004.

## List of abbreviations

| | |
|---|---|
| **AIV** | Advisory Council on International Affairs |
| **AMIS** | African Union Mission in Sudan |
| **ANC** | African National Congress |
| **ASEAN** | Association of Southeast Asian Nations |
| **ASF** | African Standby Force |
| **AU** | African Union |
| **CAVV** | Advisory Committee on Issues of Public International Law |
| **CFSP** | Common Foreign and Security Policy |
| **CIC** | NYU Center on International Cooperation |
| **DFS** | Department of Field Support (UN) |
| **DPKO** | Department of Peacekeeping Operations (UN) |
| **ECOSOC** | Economic and Social Council (UN) |
| **ECOWAS** | Economic Community of West African States |
| **EEAS** | European External Action Service |
| **EP** | European Parliament |
| **ESDP** | European Security and Defence Policy |
| **ESF** | ECOWAS Standby Force |
| **EU** | European Union |
| **G77** | Group of 77 |
| **HRC** | Human Rights Council (UN) |
| **ICC** | International Criminal Court |
| **ICCPR** | International Covenant on Civil and Political Rights |
| **ICESCR** | International Covenant on Economic, Social and Cultural Rights |
| **ICISS** | International Commission on Intervention and State Sovereignty |
| **ICJ** | International Court of Justice |
| **ICTY** | International Criminal Tribunal for the Former Yugoslavia |
| **IGAD** | Intergovernmental Authority for Development |
| **ILC** | International Law Commission |
| **IPI** | International Peace Institute |
| **LAS** | League of Arab States |
| **NAM** | Non-Aligned Movement |
| **NATO** | North Atlantic Treaty Organization |
| **NGO** | non-governmental organisation |
| **NRF** | NATO Response Force |
| **OAS** | Organization of American States |
| **OCHA** | Office for the Coordination of Humanitarian Affairs (UN) |
| **OHCHR** | Office of the High Commissioner for Human Rights (UN) |

| | |
|---|---|
| **OSCE** | Organisation for Security and Cooperation in Europe |
| **PBC** | Peacebuilding Commission (UN) |
| **R2P** | Responsibility to Protect |
| **REACT** | Rapid Expert Assistance and Cooperation Teams (OSCE) |
| **RUF** | Revolutionary United Front |
| **SADC** | Southern African Development Community |
| **SHIRBRIG** | Multinational Standby High Readiness Brigade |
| **SPITS** | Special Program on the Implementation of Targeted Sanctions (Stockholm Process) |
| **UN** | United Nations |
| **UNHCR** | United Nations High Commissioner for Refugees |
| **UNITA** | União Nacional para a Independência Total de Angola (National Union for the Total Independence of Angola) |
| **UNITAR** | United Nations Institute for Training and Research |
| **UNSAS** | United Nations Standby Arrangement System |

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14 Advisory letter CLIMATE CHANGE AND SECURITY, *January 2009*
15 Advisory letter THE EASTERN PARTNERSHIP, *February 2009*
16 Advisory letter DEVELOPMENT COOPERATION, The benefit of and need for public support, *May 2009*
17 Advisory letter OPEN LETTER TO A NEW DUTCH GOVERNMENT, *June 2010*

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** Joint report by the Advisory Council on International Affairs (AIV) and the General Energy Council.

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