

AN INSTITUTIONAL APPROACH
TO THE
RESPONSIBILITY
TO PROTECT

EDITED BY GENTIAN ZYBERI



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The Human Rights Council

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Introduction

Developed first by the Canadian-sponsored International Commission on Intervention and State Sovereignty (ICISS), and further elaborated by the United Nation's High-Level Panel on Threats, Challenges and Change and in a number of UN instruments, the 'responsibility to protect' has attracted much attention over the past several years from UN bodies, governments, think-tanks and scholars. This idea seems to offer a fresh perspective on how the State, international collective security frameworks and other actors should prevent, halt and react to genocide, war crimes and crimes against humanity. The concept did not, however, emerge from the settled jurisprudence of courts or tribunals, or from institutional practice. It was articulated mainly by a small group of experts and many of its key elements remain unclear or controversial.¹

This chapter identifies and evaluates the Human Rights Council's current and possible future role in operationalising the 'responsibility to protect'. Accordingly, the present chapter first considers briefly whether the responsibility to protect adds anything valuable to international law and practice, and if so, what its added value might be. Second, it reviews pertinent Human Rights Council resolutions and

I would like to thank Dr Ilaria Bottigliero, Director of Research and Policy, International Development Law Organization, Rome, for her many valuable comments on drafts of this chapter.

¹ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001). This study, commissioned by the government of Canada, was published in response to Secretary-General Kofi Annan's challenge to the General Assembly to reflect upon humanitarian intervention to protect civilians from 'wholesale slaughter'. See UN press release, 'Secretary-General presents his annual report to the General Assembly', UN Doc. SG/SM/7136-GA/9596, 20 September 1999.

reports to check on usages of the term. Third, it explores the Human Rights Council's role in advancing the practical application of the 'responsibility to protect' with regard to specific country situations that seem to involve genocide, war crimes or crimes against humanity. The chapter concludes with some observations and practical recommendations geared towards improving the work of the Human Rights Council concerning the responsibility to protect.

As for terminology, the present chapter refers to the responsibility to protect as an 'idea', 'concept', 'notion', 'perspective' or 'approach', rather than as a fully-fledged 'doctrine', or even less, a 'norm', 'legal norm' or 'principle', because the latter terms might be taken to imply that the idea has achieved some sort of normative status already which, depending on the particular interpretation of the responsibility to protect, might not be correct.

What does the responsibility to protect add to international law?

As a political body established and operating under the authority of the UN General Assembly, the Human Rights Council does not function in isolation. Before exploring the Human Rights Council's present and future role in implementing the responsibility to protect, it is necessary to take account of the wider debate surrounding the concept. In December 2001, ICISS put forward a conceptual framework to view State sovereignty less as a set of rights of the State, and more as the source of the State's responsibility to protect its citizens. The ICISS emphasised that where a State was unwilling or unable to fulfil its own responsibility to halt or avert serious harm in the case of 'internal war, insurgency, repression or state failure', and 'the principle of non-intervention yields to the international responsibility to protect'. This shift in emphasis from a traditional State-centric focus towards a residual general 'international responsibility to protect', which kicks into action once the State fails to fulfil its protection responsibilities, entails a responsibility to prevent, to react, to respond and to rebuild.² Moreover, the ICISS contended that, in extreme cases, the responsibility to protect encompassed even a responsibility on the part of States to undertake unilateral or joint military intervention in the territory of another State to protect people from the latter State's inability or unwillingness to halt or prevent mass atrocities.³ The 2001 report went on to

² ICISS, *Responsibility to Protect*, p. xi, synopsis. ³ *Ibid.*, para. 4.1.

posit a number of precautionary principles to define the conditions under which resort to military intervention for humanitarian ends might be permissible, or even legally obligatory.⁴

Developing the ICISS proposals further, the 2004 report of the Secretary-General's High-Level Panel on Threats, Challenges and Change recommended reform of the UN collective security system to serve better the international responsibility to protect. Part IX of the report endorsed 'the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent'⁵ and it spelled out five criteria to guide Security Council intervention.⁶ However, the Panel dropped the ICISS report's explicit endorsement of unilateral or joint military intervention beyond Security Council authorisation, bringing the responsibility to protect back squarely within the parameters of the UN Charter.

In mid-September 2005, the historic three-day UN World Summit, attended by 150 Heads of State or Government, embraced the responsibility to protect as laid down in the 'World Summit Outcome Document'.⁷ According to this resolution, 'Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing⁸ and crimes against humanity' including through preventive measures. The

⁴ The precautionary principles involve: (1) right intention; (2) last resort; (3) proportional means; and (4) reasonable prospects of success (*ibid.*).

⁵ UN Secretary-General, *A More Secure World: Our Shared Responsibility* (New York: United Nations, 2004), p. 66, para. 203.

⁶ See *ibid.*, part 3, 'Collective Security and the Use of Force'.

⁷ '2005 World Summit Outcome', UN Doc. A/RES/60/1, 24 October 2005.

⁸ Since its usage in the early 1990s in connection with genocidal policies carried out during the war in the former Yugoslavia (which the *Encyclopaedia Britannica* notes is a translation from the Serbo-Croat term 'etničko čišćenje'), the term 'ethnic cleansing' has been used to refer to the systematic, forcible displacement of a targeted ethnic population from its territorial home, through intimidation, killings, mass rape, summary executions or other serious violations of human rights or humanitarian law. However, it does not appear either in the Rome Statute of the International Criminal Court, nor in multilateral conventions on human rights, humanitarian law or international criminal law. It would be more precise to refer instead to 'genocide', 'war crimes' and 'crimes against humanity' which have been defined in the Rome Statute for the purposes of criminal prosecution and which in any case cover the kinds of acts commonly understood as acts of 'ethnic cleansing'. See *Encyclopaedia Britannica*, 'Ethnic Cleansing', at www.britannica.com/EBchecked/topic/194242/ethnic-cleansing.

Summit declared for good measure that, 'We accept that responsibility and will act in accordance with it' and it invited the international community to 'encourage and help States to exercise this responsibility'.⁹ At the same time, the Summit also recognised the international community's responsibility, through the United Nations, 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.¹⁰ The Security Council echoed the concept in a number of important resolutions, as for example Resolution 1325 which 'emphasizes the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls'.¹¹ Security Council Resolutions 1674 and 1894 on the Protection of Civilians in Armed Conflict also reaffirmed the Outcome Document and the Council's strong opposition to impunity for 'serious violations of human rights and humanitarian law'.¹² In July 2009, the General Assembly held a two-day debate on the responsibility to protect during which more than ninety Member States affirmed their interest in and commitment to the concept. This was followed by the adoption of Resolution 308 on the responsibility to protect in September 2009 in which the Assembly took note of the Secretary-General's report¹³ and its own debate, and decided to continue its consideration of the issue.¹⁴

These auspicious events led a good number of commentators to proclaim the responsibility to protect as a new, or at least emerging, norm of international law.¹⁵ On the other hand, since the responsibility to protect did not arise from one of the recognised sources of international law outlined in

⁹ '2005 World Summit Outcome', para. 138. ¹⁰ *Ibid.*, para. 139.

¹¹ UN Security Council Res. 1325, UN Doc. S/RES/1325, 31 October 2000, para. 11.

¹² See respectively the Security Council resolutions on the Protection of Civilians in Armed Conflict. UNSC Res. 1674, UN Doc. S/RES/1674, 28 April 2006, para. 4; *ibid.*, pmbll., para. 3; and UNSC Res. 1894, UN Doc. S/RES/1894, 11 November 2009.

¹³ UNSG, 'Implementing the Responsibility to Protect', UN Doc. A/63/677, 12 January 2009.

¹⁴ UN General Assembly Res. 63/308, UN Doc. A/RES/63/308, 7 October 2009.

¹⁵ See for example Louise Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice', *Review of International Studies*, 24 (2008), 445-58; Alex Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Cambridge, UK: Polity Press, 2009); Richard Cooper and Juliette Voïnov Kohler (eds.), *Responsibility to Protect: The Global Moral Compact for the 21st Century* (New York: Palgrave Macmillan, 2009); Cristina Badescu, *Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights* (New York: Routledge, 2010); Frank Chalk, Kyle Mathews and Karla Barqueiro, *Mobilizing the Will to Intervene: Leadership to Prevent Mass Atrocities* (Quebec: McGill-Queen's University Press,

Article 38(1) of the Statute of the International Court of Justice, but rather from the proposals of a small number of experts, others expressed their scepticism over its content and purported legal status.¹⁶ First, despite strong endorsement of the responsibility to protect from 150 governments at the World Summit, serious disagreement persists over its scope and application.¹⁷ UN Member States' support for the responsibility to protect may not be as solid as it appeared to have been at the World Summit, especially with regard to the ICISS 2001 report's consideration of the possible legality of humanitarian intervention outside UN and regional collective security frameworks.¹⁸ Second, the harmful consequences of military invasion very

2010); Sara Davies and Luke Glanville (eds.), *Protecting the Displaced: Deepening the Responsibility to Protect* (Leiden: Martinus Nijhoff, 2010); Thomas Weiss, *Military-Civilian Interactions: Humanitarian Crises and the Responsibility to Protect: Second Edition* (Lanham, MD: Rowman & Littlefield, 2004); Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge University Press, 2006); Thomas Weiss, *Humanitarian Intervention: War and Conflict in the Modern World* (Cambridge, UK: Polity Press, 2007). There is also a journal *Global Responsibility to Protect*, published by Brill, and many articles in scholarly journals on international law, international relations, ethics, political science and other fields, devoted to the responsibility to protect.

¹⁶ Stephanie Carvin, 'A Responsibility to Reality: A Reply to Louise Arbour', *Review of International Studies*, 36 (2010), 47-54; Carsten Stahn, 'Responsibility to Protect: Rhetoric or Emerging Legal Norm?', *American Journal of International Law*, 101 (2007), 99-120; Roberto Belloni, 'The Tragedy of Darfur and the Limits of the "Responsibility to Protect"', *Ethnopolitics*, 5 (2006), 327-46; Alex de Waal, 'Darfur and the Failure of the Responsibility to Protect', *International Affairs*, 83 (2007), 1039-54; Dan Bulley, 'The Politics of Ethical Foreign Policy: A Responsibility to Protect Whom?', *European Journal of International Relations*, 16 (2010), 441-61.

¹⁷ Even Gareth Evans, who co-chaired the ICISS with Mohamed Sahnoun, and has been one of its strongest proponents, conceded that many governments backed away from their earlier expressions of support for the concept. See Evans, 'The Responsibility to Protect: An Idea Whose Time Has Come and Gone?', *International Relations*, 22 (2008), 283-98, at 288.

¹⁸ A plain reading of Article 2(4) of the UN Charter seems to rule out such military adventures and does not seem to admit any lawful exception beyond the customary right of self-defence or Security Council authority under Chapter VII in regard to the threat or breach of international peace and security. Moreover, actual historical practice involving the very few candidates that might reasonably be considered to exemplify humanitarian intervention, namely, Indian intervention in East Pakistan (1971), Tanzanian intervention in Uganda (1979) and Vietnamese intervention in Cambodia (1979), have all involved palpable political and military self-interests on the part of the intervening States. Tellingly, none of these instances which some have claimed to have been humanitarian interventions, were even claimed as such by the intervening States themselves. For a more detailed discussion, see Lyal S. Sunga, 'The Role of Humanitarian Intervention in International Peace and Security: Guarantee or Threat?', in Hans Kochler (ed.), *The Use of Force in International Relations: Challenges to Collective Security* (Vienna: International Progress Organisation, 2006), pp. 41-82.

often seem to be seriously underestimated, at least by the intervening State or States such that the costs of humanitarian intervention, particularly to the local population, are often ignored. Third, as Belloni has argued, the responsibility to protect might actually encourage a greater incidence of political violence because certain rebel leaders may conclude that it is worth raising the level of violence in order to attract international support, including military intervention from other States.¹⁹ Fourth, it is not clear, where the Security Council remains deadlocked in the face of ongoing atrocities, whether the responsibility should then devolve to a regional peace and security organisation such as NATO or the African Union,²⁰ or further to a group of States, or even to a single State. Fifth, if one takes the High-Level Panel vision of the responsibility to protect which dropped the ICISS idea that humanitarian intervention could legitimately be undertaken without Security Council authorisation, then we are brought right back to the classical notion of sovereignty as responsibility dating back to the time of Grotius and the rise of modern Westphalian international law itself. In that case, one has to wonder whether the High-Level Panel's version of the responsibility to protect really adds anything at all to international law. Sixth, the notion of legal responsibility implies legal liability to be sanctioned for breach of that responsibility, as well as a duty to make reparation, but as Stahn has pointed out, 'it is difficult to imagine what legal consequences non-compliance by a political body like the Security Council should entail.'²¹

In sum, the ICISS's formulation of the responsibility to protect remains unclear as regards content and legal status. On the other hand, responsibility to protect, in its diluted variants as expressed in the High-Level Panel report and paragraphs 138 and 139 of the World Summit Outcome Document are far less controversial, but seem to add little to existing international law. Thus, depending on which version one is talking about, the responsibility to protect seems either too vague on key points, or devoid of added value to the existing corpus of international law.

¹⁹ See Belloni, 'The Tragedy of Darfur'.

²⁰ The constituent instrument of the African Union authorises humanitarian intervention to halt or prevent genocide, war crimes or crimes against humanity: see Constitutive Act of the African Union, adopted 11 July 2000 and entered into force 26 May 2001, 2158 UNTS 3. For a comprehensive and in-depth study on the scope and limits of Article 4(h) of the AU Constitutive Act, see Dan Kuwali, *The Responsibility to Protect: Implementation of Article 4(h) Intervention* (Leiden: Martinus Nijhoff, 2011) and Dersso, Chapter 10 in this book.

²¹ Stahn, 'Responsibility to Protect', 118.

The concept's currently weak claim to the status of a principle or rule of international law does not mean that it could not acquire prescriptive force in the future. The responsibility to protect could eventually acquire legally binding force if:

- (1) its content eventually becomes articulated in sufficiently clear and precise terms as to prescribe specific acts either on a mandatory or permissive basis;
- (2) legal consequences can be shown to accrue from a breach of the responsibility to protect (such as the duty to make reparations to the injured party or parties or to restore the status quo ante the breach); and
- (3) it becomes validated through one of the recognised sources of international law as enunciated in Article 38(1) of the Statute of the International Court of Justice.

Even if the responsibility to protect were never to become recognised as an international legal norm or principle, it could still play a useful role in international relations.

This ongoing debate probably has limited the extent to which the Human Rights Council has called upon the responsibility to protect in explicit terms to respond to situations involving serious violations of international human rights and humanitarian law. As argued in the next section, however, the practice of the Human Rights Council seems to offer greater promise than either the Security Council or the General Assembly as regards the international responsibility to protect in relation to situations involving genocide, war crimes or crimes against humanity.

Scattered Human Rights Commission/Council references to the responsibility to protect

For the sake of completeness, it is useful to note that the phrase 'responsibility to protect' has percolated up here and there in various studies and reports of the Human Rights Commission, and its successor, the Human Rights Council. Vladimir Kartashkin's 2006 working paper entitled 'Human Rights and State Sovereignty' for the Sub-Commission on the Promotion and Protection of Human Rights for example touches on issues relating to the use of force for humanitarian purposes in relation to State sovereignty.²² The 2006 report of the High Commissioner for

²² See Vladimir Kartashkin, 'Administration of Justice, Rule of Law and Democracy: Human Rights and State Sovereignty', working paper, UN Commission on Human

Human Rights on systematic rape, sexual slavery and slavery-like practices during armed conflict underlined the need for victims of violence to obtain justice, and the international community's duty to take measures in that regard. The report considered that the World Summit Outcome constituted 'a real breakthrough' in this connection, but without elaborating the point further.²³

During the transition phase from Commission to Council, the Human Rights Council considered the possible contribution of special procedures to the practical implementation of the responsibility to protect in 2006. Certain States expressed their view that special procedures country mandates should be abolished altogether. Other States insisted that the Council must be in a position to investigate situations urgently on a country basis, particularly since thematic mandates, which were mandated to look into the situation in any country, were often stretched too thin to study, monitor and report on particular situations in depth or to accord them sufficient attention or follow up over time. The Human Rights Council did eventually agree to retain country mandates, and this has allowed it to focus on the situations involving issues of genocide, war crimes or crimes against humanity, discussed below.²⁴ When these issues were still under discussion, a Group of Experts met in May 2007 to discuss current issues and challenges facing the UN human rights special procedures system and the institution of UN human rights mandate-holders. The group adopted the 'Lund Statement to the United Nations Human Rights Council on the Human Rights Special Procedures' which was transmitted to the President of the UN Human Rights Council and ultimately tabled before the Council as document HRC/5/18 of 13 June 2007. The Lund Statement on the Human Rights Council's Special Procedures, underlined the role of special procedures 'as an early warning mechanism' which formed 'an intrinsic part of the efforts of the UN and the international community to give effect to the responsibility to protect human rights and to maintain a global watch over human security' and that 'the General Assembly and the Security Council's

Rights, UN Doc. E/CN.4/Sub.2/2006/7, 5 May 2006, paras. 31-5, which discuss the responsibility to protect.

²³ UN High Commissioner for Human Rights, 'Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflicts', UN Doc. A/HRC/Sub.1/58/23, 11 July 2006, para. 47.

²⁴ UN Human Rights Council, 'Intersessional Open-ended Intergovernmental Working Group on the Implementation of Operative Paragraph 6 of General Assembly Resolution 60/251: Preliminary Conclusions, by the Facilitator on the Review of Mandates, Mr Tomas Husak', UN Doc. A/HRC/3/4, 30 November 2006, para. 14.

commitment to act on the responsibility to protect, particularly as regards genocide, war crimes and crimes against humanity, needs to be noted in this regard'.²⁵

A number of Commission on Human Rights/Human Rights Council special rapporteurs have referred pointedly in relation to their mandates to a particular government's responsibility to protect. In her report on her Mission to the Sudan (1–13 June 2004), the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Asma Jahangir reminded the government of the Sudan that it had 'a responsibility to protect the lives of the internally displaced persons as well as others affected by the conflict and will ultimately be responsible for their deaths'.²⁶ The Special Representative of the Secretary-General on the Situation of Human Rights Defenders, Hina Jilani, in her 2008 Indonesia Mission report, welcomed the adoption of a new law accepting the government's responsibility to protect all human rights and reminded the government of its responsibility to protect citizens against the harmful activities of non-State actors as well.²⁷ Similarly, the Special Rapporteur on Adequate Housing referred to the government's responsibility to protect all human rights and to 'establish appropriate legal and procedural framework to guarantee that private entities, including sponsors . . . do not infringe upon the right to adequate housing of the local population'.²⁸ The report of the Working Group on Mercenaries also referred to the responsibility to protect the right to life.²⁹ In his

²⁵ See UNHRC, 'Letter Dated 18 May 2007 Addressed by the Rector of the United Nations University to the President of the Human Rights Council', UN Doc. A/HRC/5/18, 13 June 2007, annex, para. 34. See further Lyal S. Sunga, 'Introduction to the "Lund Statement to the United Nations Human Rights Council on the Human Rights Special Procedures"', *Nordic Journal of International Law*, 76 (2007), 281–300.

²⁶ UNHCR, 'Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur, Ms. Asma Jahangir, Addendum, Mission to the Sudan', UN Doc. E/CN.4/2005/7/Add.2, 6 August 2004, para. 3.

²⁷ UNHRC, 'Report of the Special Representative of the Secretary-General on the Situation of Human Rights Defenders, Ms. Hina Jilani, Addendum, Mission to Indonesia', UN Doc. A/HRC/7/28/Add.2, 28 January 2008, paras. 7 and 67.

²⁸ UNHRC, 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, Raquel Rolnik', UN Doc. A/HRC/13/20, 18 December 2009, paras. 66–7.

²⁹ UNHRC, 'Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Addendum, Regional Consultation for Africa on the Activities of Mercenaries and Private Military and Security Companies: Regulation and Monitoring 3–4 March 2010', UN Doc. A/HRC/15/25/Add.5, 2 June 2005, para. 25, mentioned a government's responsibility to protect the right to life.

report of February 2008, the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, Vitit Muntarbhorn, underlined 'the need to assist all victims of the human rights situation in the country in a sustained and comprehensive manner, bearing in mind the physical, psychological and other damage incurred, and to offer redress based upon the responsibility to protect people from human rights violations, bolstered by international solidarity to ensure such responsibility'.³⁰ More explicit reference to the responsibility to protect in relation to genocide, war crimes and crimes against humanity is found in the March 2010 report of the Special Rapporteur on Racism, Githu Muigai, which identifies racism as a trigger for the outbreak of violence under certain circumstances.³¹ The Council also referred generally to the primary responsibility of governments to protect their citizens in relation to inter-ethnic violence that took place in Kyrgyzstan and Afghanistan in 2010.³² The 2010 report of the Independent Expert on Minority Issues recalled the World Summit Outcome formulation of the responsibility to protect to emphasise a need to develop the UN's early warning capacity with regard to threats to the rights of minorities.³³ While many of these references to the responsibility to protect did not relate directly to genocide, war crimes, ethnic cleansing or crimes against humanity, they emphasise the importance of the Human Rights Council's role in drawing the international community's attention to situations that appeared to be seriously degrading.

Using the responsibility to protect to spearhead investigations into serious violations of human rights and humanitarian law

The Human Rights Council has made more deliberate use of the concept of the responsibility to protect to spearhead investigations into serious violations of human rights and humanitarian law in Darfur (Sudan),

³⁰ UNHRC, 'Report of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea, Vitit Muntarbhorn', UN Doc. A/HRC/7/20, 15 February 2008, para. 69.

³¹ UNHRC, 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Githu Muigai', UN Doc. A/HRC/14/43, 30 March 2010, paras. 2 and 63–4.

³² See respectively UNHRC Res. 14/14, UN Doc. A/HRC/RES/14/14, 23 June 2010 and UNHRC Res. 14/15, UN Doc. A/HRC/RES/14/15, 23 June 2010.

³³ UNHRC, 'Report of the Independent Expert on Minority Issues, Gay McDougall', UN Doc. A/HRC/16/45, 16 December 2010, para. 68.

Israeli Occupied Palestinian Territories, Côte d'Ivoire, Libya and Syria. In these instances, the Council has invoked the concept to signal to the government, territorial authorities and international community at large, the existence of reasonable grounds to infer that:

- serious violations of human rights (and/or humanitarian law) have been or are being committed;
- such violations might qualify as genocide, war crimes or crimes against humanity;
- the government and/or territorial authorities have failed or are failing to fulfil their responsibility to protect people from genocide, war crimes or crimes against humanity; and
- if the government or territorial authority continued to show little or no immediate and credible prospect of meeting their responsibility to protect, then the UN Security Council or competent regional collective security arrangement could take concrete action through the range of available multilateral institutions. Such action would seek to address the root causes of the conflict, prevent and react to violations, even through the use of coercive measures such as sanctions and international criminal prosecutions, and to assist recovery, reconstruction and reconciliation.

These instances, which are explored in more detail below, seem to point the way for the more concrete operationalisation of the responsibility to protect through the Human Rights Council.

Darfur

A major step to halt and prevent genocide, war crimes and crimes against humanity in Darfur was taken by the Security Council in adopting Resolution 1564 under Chapter VII of the UN Charter, on 18 September 2004. Resolution 1564 reminded the government of the Sudan of its primary responsibility to abide by its international human rights and humanitarian law obligations. This resolution also established an International Commission of Inquiry on Darfur to determine whether or not acts of genocide had been perpetrated and to identify the perpetrators. In December 2006, the Secretary-General's Special Adviser on the Prevention of Genocide addressed a letter to the Human Rights Council urging it to take measures to protect

civilians in Darfur and to support the work of the International Criminal Court (ICC).³⁴

The High-Level Mission's report of 9 March 2007 is heavily based on the responsibility to protect. The report devotes four pages first to discussing the concept and then goes on to analyse the main political obstacles to peace in Part II entitled 'The Darfur Peace Agreement, the Ensuing Violence and the Responsibility to Protect'. Part III is entitled 'Sudan's Action regarding the Responsibility to Protect' and Chapter V is 'The International Community's Responsibility to Protect'.³⁵ Part C of Chapter V considers 'The Responsibility of the International Community to Protect the People of Darfur: Current Status'. The Mission found that the 'justice system as a whole was unable or unwilling to pursue justice or prevent attacks'. This statement pertained directly to a key element relating to the complementary operation of the ICC as foreseen in Article 17 of the Rome Statute: the ICC can only exercise jurisdiction over a situation where the territorial government is itself unwilling or unable to prosecute genocide, war crimes or crimes against humanity perpetrated in its territory or by its nationals. The Mission recommended that the Human Rights Council express its regret over the 'Government's manifest failure in its responsibility to protect civilians, condemn the continuing violations, and call for effective protection for civilians, accountability for perpetrators (including through action by the ICC) and compensation and redress for victims'.³⁶ Unfortunately, the government of the Sudan stalled the High-Level Mission's access to the Sudan including Darfur, effectively preventing the Mission from carrying out any first-hand human rights fact-finding and investigation.

The experience of the High-Level Mission offers some important lessons. First, whether the High-Level Mission had any effect on the human rights situation in Darfur remains doubtful. Invoking the responsibility to protect is no magic wand. Merely calling on the notion did not secure the government's cooperation to allow fact-finding and investigation. On the other hand, the Mission evidently felt that the responsibility to protect was a valuable rallying cry for action on the human rights situation in Darfur. Perhaps more important, the Mission's report

³⁴ UNHRC, 'Letter Dated 8 December 2006 from Mr Juan E. Méndez, Special Adviser to the Secretary-General on the Prevention of Genocide, addressed to the President of the Human Rights Council', UN Doc. A/HRC/S-4/3, 11 December 2006.

³⁵ UNHRC, 'Report of the High-Level Mission on the Situation of Human Rights in Darfur Pursuant to Human Rights Council Decision S-4/101', UN Doc. A/HRC/4/80, 9 March 2007.

³⁶ *Ibid.*

provides a schema for the Human Rights Council to apply the responsibility to protect more practically to situations that seem to involve genocide, war crimes or crimes against humanity. In other words, Human Rights Council commissions of inquiry and other human rights investigators could find the concept to be a useful way of structuring their reports and recommendations more coherently in terms of the linkage between serious violations of human rights or humanitarian law and criminal responsibility for genocide, war crimes or crimes against humanity. This in itself would represent an advance over classical human rights monitoring and investigation which tend to paint a general picture of the human rights situation and States' responsibility for violations in broad strokes, without sufficient detail or precision as to implicate specific individuals in international criminal responsibility.³⁷

Israeli Occupied Palestinian Territories

Fact-finding missions into Israeli abuses in Palestinian territories have cited the failure to fulfil the responsibility to protect. In Resolution S-3/1 of 15 November 2006, the Human Rights Council expressed its concern that Israeli military incursions carried out in Beit Hanoun, Gaza on 8 November 2006 constituted a form of 'collective punishment of the civilians therein and exacerbate[d] the severe humanitarian crisis in the Occupied Palestinian Territory'. The resolution called 'for immediate protection of the Palestinian civilians in the Occupied Palestinian Territory in compliance with human rights law and international humanitarian law' and the urgent dispatch of a high-level fact-finding mission – to be appointed by the Council's president – to Beit Hanoun in order to assess the situation of victims, the needs of survivors and to recommend ways and means to protect Palestinian civilians against any further Israeli assaults.³⁸ After several failed attempts to obtain Israel's cooperation to facilitate safe transit through Israel, the fact-finding mission finally was able to visit Beit Hanoun in May 2008. The Mission's fact-finding report underlines the government of Israel's responsibility to protect Palestinian civilians in territories

³⁷ For a comparison of human rights and criminal law investigation procedures, see Sunga, 'How Can UN Human Rights Special Procedures Sharpen ICC Fact-Finding?', *International Journal of Human Rights*, 15 (2011), 187–204.

³⁸ UNHRC Res. S-3/1, UN Doc. A/HRC/RES/S-3/1, pmb., paras. 5 and 7.

under its effective control in line with established international human rights law.³⁹

On 27 December 2008, Israel launched a large-scale aerial and naval offensive in the Gaza Strip code-named 'Operation Cast Lead'. This was followed by a major ground offensive on 3 January 2009 with coordinated air and naval attacks that culminated in Israeli ground forces entering Beit Hanoun in the early hours of 4 January 2009. Israel stated that it was responding to the firing of rockets into Israel by Palestinian militants. On 20 January, Israeli forces withdrew their troops from the Gaza Strip. The Secretary-General underlined that:

While States have a primary responsibility to protect all persons under their jurisdiction or control from war crimes, crimes against humanity, genocide and ethnic cleansing, under the doctrine reaffirmed in the 2005 World Summit Outcome, the international community in its entirety shares the responsibility for protecting civilians, in particular where and when the authorities concerned are unable or unwilling to do so.

The Secretary-General's report went on to remind the international community of the various options available to ensure accountability.⁴⁰ In his 2010 report, Professor Richard Falk reiterated that Israel's blockade of Gaza was 'a continuing and massive form of collective punishment' and that it represented 'a fundamental violation of Israel's responsibility to protect the civilian population of the occupied Gaza Strip'.⁴¹

On 3 April 2009, the President of the Human Rights Council established the Fact Finding Mission on the Gaza Conflict with a mandate 'to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after'.⁴² In its report, the Mission urged the Palestinian

³⁹ UNHRC, 'Report of the High-Level Fact-Finding Mission to Beit Hanoun Established under Council Resolution S-3/1', UN Doc. A/HRC/9/26, 1 September 2008, para. 12.

⁴⁰ UNHRC, 'Follow-up on the Implementation of the Recommendations Contained in the Report of the High-Level Fact-Finding Mission to Beit Hanoun Established under Human Rights Council Resolution S-3/1', UN Doc. A/HRC/10/27, 6 March 2009, para. 18.

⁴¹ UNHRC, 'Report of the Special Rapporteur, on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, Richard Falk', UN Doc. A/HRC/13/53/Rev.1, 7 June 2010, para. 32.

⁴² UNHRC, 'Report of the United Nations Fact Finding Mission on the Gaza Conflict', UN Doc. A/HRC/12/48, 15 September 2009, para. 1.

Authority (PA) to take effective measures to ensure meaningful accountability for perpetrators of serious violations of international law and 'that the responsibility to protect the rights of the people inherent in the authority assumed by the PA must be fulfilled with greater commitment'.⁴³ The fact-finding mission further underlined both the international community's and the State of Israel's responsibility to protect victims of violations⁴⁴ and referred to the responsibility to protect, including the World Summit Outcome Document.⁴⁵ The report otherwise makes scant mention of the responsibility to protect, and only indirectly, for example, to point out that the Secretary-General's report, 'Implementing the Responsibility to Protect' indicated that the concept did not diminish the legal obligations arising from international humanitarian law, international human rights law, refugee law and international criminal law.

Côte d'Ivoire

The Human Rights Council's reaction to the post-election violence in Côte d'Ivoire arising from incumbent President Laurent Gbagbo's refusal to recognise the democratic electoral victory of Alassane Dramane Ouattara embraced the main elements of the responsibility-to-protect notion, but without employing the exact phrase. Human Rights Council Resolution S-14/1 of 28 December 2010 on the situation in Côte d'Ivoire urged defence and security forces to refrain from violence, respect human rights and 'assume their responsibilities for the protection of the civilian population'.⁴⁶ This resolution also called upon UN Member States to assist the country to build up its capacity and underlined 'that the legitimate Government of Côte d'Ivoire has the primary responsibility to make every effort to strengthen the protection of the civilian population and to investigate and bring to justice perpetrators of violations of human rights and of international humanitarian law'. Further, the resolution called upon the international community to support the government's efforts to stabilise the situation in the country. The resolution also requested the High Commissioner for Human Rights to report to the Council on violations in relation to the election.⁴⁷ The

⁴³ *Ibid.*, para. 126. ⁴⁴ *Ibid.*, para. 1672. ⁴⁵ *Ibid.*, para. 1710.

⁴⁶ UNHRC Res. S-14/1, UN Doc. A/HRC/RES/S-14/1, 23 December 2010, para. 3. The resolution was adopted without a vote.

⁴⁷ *Ibid.*, para. 12.

High Commissioner's report of February 2011 reminded Gbagbo that his military and law enforcement officials had an ongoing responsibility to protect civilians and to prevent serious human rights violations committed by security forces as well as to prosecute perpetrators of such violations.⁴⁸

The Human Rights Council then initiated more concrete action to assist in the enforcement of individual responsibility for crimes under international law with the adoption of Resolution 16/25 which reaffirmed the 'responsibility of Côte d'Ivoire to promote and protect all human rights and fundamental freedoms, to investigate alleged violations of human rights and international law and to bring to justice the perpetrators of such acts, who are answerable for their deeds before the judicial process'.⁴⁹ In Resolution 16/25, the Human Rights Council also decided to send an independent, international commission of inquiry to investigate serious human rights violations committed in Côte d'Ivoire following the election, to identify individuals responsible for such acts with a view to bringing them to justice, and to report back to the Council at its next session.⁵⁰ In its report of June 2011, the Commission of Inquiry laid the blame for the serious violations of human rights and humanitarian law squarely on Gbagbo's rejection of the election results, and it indicated that some of the violations might amount to war crimes and crimes against humanity.⁵¹

Libya

On 25 February 2011, the Human Rights Council strongly condemned gross and systematic human rights violations being committed in Libya that included indiscriminate armed attacks against civilians, extrajudicial killings, arbitrary arrests, detention and torture of peaceful demonstrators and it indicated that these violations could amount to crimes against humanity. It strongly called upon 'the Government of Libya to meet its responsibility to protect its population, to immediately put an end to all human rights violations, to stop any attacks against civilians,

⁴⁸ UNHRC, 'Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Côte d'Ivoire', UN Doc. A/HRC/16/79, 25 February 2011, para. 42.

⁴⁹ UNHRC Res. 16/25, UN Doc. A/HRC/RES/16/25, 13 April 2011, pmbll., para. 9.

⁵⁰ *Ibid.*, para. 10.

⁵¹ UNHRC, 'Rapport de la Commission d'Enquête Internationale Indépendante sur la Côte d'Ivoire', UN Doc. A/HRC/17/48, 14 June 2011, para. 91.

and to fully respect all human rights and fundamental freedoms, including freedom of expression and freedom of assembly'.⁵² In the same resolution, the Human Rights Council decided to establish an international commission of inquiry to investigate the violations, to make recommendations on accountability measures and to report back to the Council at its next session.⁵³

The same day, a cross-regional group of governments calling itself the 'Group of Friends on Responsibility to Protect on the Situation in the Libyan Arab Jamahiriya' issued a statement referring to paragraphs 138 and 139 of the World Summit Outcome Document and expressing its concern over the violations as possible crimes against humanity. The statement called upon the government of Libya 'to meet its Responsibility to Protect its population and put an immediate end to all human rights violations and ensure the full respect of human rights and fundamental freedoms'. It also called upon 'all the relevant bodies of the United Nations to take urgent and appropriate measures to put into practice the commitment of the international community to the Responsibility to Protect'.⁵⁴

The following day, the Security Council adopted Resolution 1970 reiterating the Libyan government's 'responsibility to protect its population'.⁵⁵ Strikingly, Resolution 1970 referred the situation to the International Criminal Court,⁵⁶ enforced an arms embargo upon all UN Member States on direct or indirect supply of arms to Libya,⁵⁷ put in place a travel ban on sixteen members of the Gaddafi family and persons close to the regime⁵⁸ as well as an assets freeze on six Gaddafi family members.⁵⁹ It also established a Sanctions Committee as well as criteria for designating individuals involved or complicit in ordering, controlling or otherwise directing, the commission of serious human rights abuses.⁶⁰ It called upon all UN Member States to facilitate humanitarian assistance and indicated the Council's decision to remain seized of the matter.

⁵² UNHRC Res. S-15/1, UN Doc. A/HRC/RES/S-15/1, 3 March 2011, paras. 1 and 2.

⁵³ *Ibid.*, para. 11.

⁵⁴ See Group of Friends on Responsibility to Protect, 'Statement of the Group of Friends on Responsibility to Protect on the Situation in the Libyan Arab Jamahiriya', 1 March 2011, available at www.missionfnnewyork.um.dk.

⁵⁵ UN Security Council Res. 1970, UN Doc. S/RES/1970, 26 February 2011, pmbll., para. 10.

⁵⁶ *Ibid.*, paras. 4–8. ⁵⁷ *Ibid.*, paras. 9–14.

⁵⁸ *Ibid.*, paras. 15–6. See also *ibid.*, annex I.

⁵⁹ *Ibid.*, paras. 17–21. See also *ibid.*, annex II. ⁶⁰ *Ibid.*, paras. 22–5.

Syria

By 1 October 2011, the Human Rights Council had held a second special session on the human rights situation in Syria and adopted a resolution in which the Council referred to the government's responsibility to protect its population. By late August 2011, the Human Rights Council had decided to dispatch an international commission of inquiry to investigate serious human rights violations being perpetrated in Syria.⁶¹ Addressing the opening of the 18th regular session of the Human Rights Council on 12 September 2011, Navi Pillay, the High Commissioner for Human Rights, stated that more than 2,600 people had been killed in Syria since the outbreak of violence in mid-March of 2011.⁶² In October 2011, China and Russia vetoed a draft Security Council resolution to place sanctions on Bashar al-Assad's regime.⁶³ In a press statement on 14 October 2011, the High Commissioner revised the number killed to 3,000, noted that the government of Syria had 'manifestly failed to protect its population' and failed to cooperate with international investigations.⁶⁴ Around 187 children were reported to have been killed since the start of the violence and more than 100 people killed in the period 4–14 October 2011 alone.

On 23 February 2012, former UN Secretary-General Kofi Annan was appointed as a joint envoy of the UN and League of Arab States and on 16 March 2012, he unveiled a 'six point plan' to reduce hostilities and encourage the opposing parties to enter into a process of political dialogue. On 12 April 2012, a ceasefire was announced and the UN Supervision Mission in Syria (UNSMIS) was established.

The Chair of the Commission of Inquiry on Syria was permitted by the government to visit Damascus from 23–25 June 2012 to explain the Commission's mandate and methods to government officials. In an Oral Update to the Human Rights Council, the Commission of Inquiry

⁶¹ See OHCHR press release, 'Human Rights Council decides to dispatch a commission of inquiry to investigate human rights violations in the Syrian Arab Republic', 23 August 2011, available at www.ohchr.org.

⁶² See UN High Commissioner for Human Rights, Navi Pillay, 'Opening statement', speech delivered at 18th Session of the Human Rights Council, Geneva, 12 September 2011, available at www.ohchr.org.

⁶³ See Jonathan Marcus, 'Why China and Russia rebuffed the West on Syria', BBC, 5 October 2011, at www.bbc.co.uk/news/world-middle-east-15180732.

⁶⁴ See OHCHR press release, 'Pillay urges United International action to protect Syrians', 14 October 2011, available at www.ohchr.org.

reported that the government had informed it that by the end of April 2012, around 6,143 Syrian citizens had been killed which included:

3211 civilians, 478 public order officers, 2088 military personnel, 204 women and 56 children. Another 106 people were assassinated according to the Government. The Syrian Government supplemented these figures, according to which 804 persons were killed (both armed forces and civilians) in the period between 7 May and 4 June 2012.⁶⁵

The Commission's report noted that reports from certain other entities, mainly non-governmental organisations, reckoned that the total number of persons killed since the onset of hostilities had reached somewhere between 13,000 and 17,000, but the Commission cautioned that it could not confirm these figures.⁶⁶

Discernible shift from rhetoric to action in Human Rights Council practice on the responsibility to protect

On 23 March 2011, the government of Australia made a statement on behalf of 56 countries on the responsibility to protect which reaffirmed paragraphs 138 and 139 of the 2005 World Summit Outcome and resolved how the Human Rights Council should operationalise the responsibility to protect:

We must work with the High Commissioner [for Human Rights], to support long-term measures that help states exercise their responsibility to protect, such as institution building, strengthening the rule of law, and technical cooperation to promote respect for human rights and to prevent and address human rights violations. The Council also has a role in working with states to help build capacities and share best practices that reduce social tensions and contribute to conflict prevention.⁶⁷

⁶⁵ See UNHRC, 'Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic', UN Doc. A/HRC/20/CRP.1, 26 June 2012, para. 21.

⁶⁶ *Ibid.*, para. 22.

⁶⁷ 'Joint Statement on the Responsibility to Protect, Human Rights Council 16th Session', 23 March 2011, at www.geneva.mission.gov.au/gene/Statement189.html. The fifty-six countries were: Albania, Armenia, Australia, Austria, Belgium, Bulgaria, Canada, Colombia, Costa Rica, Cote d'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Monaco, Montenegro, the Netherlands, New Zealand, Nigeria, Norway, Panama, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Slovakia, Slovenia, Somalia, Spain, Sweden, Switzerland, Tanzania, Thailand, United Kingdom of Great Britain and Northern Ireland, Ukraine, United States of America and Zambia.

While short on conceptual content, the government of Australia's statement above signifies a discernible shift in the Human Rights Council from rhetoric to more practical action, because it garnered the support of fifty-six UN Member States in:

- identifying the Human Rights Council as an important institutional actor to operationalise the responsibility to protect;
- indicating how the responsibility to protect can be mainstreamed and operationalised within the UN human rights programme; and
- charting a way for the Human Rights Council to use the responsibility to protect to orient its investigations into serious violations of human rights and humanitarian law towards eventual international criminal law enforcement.

With these elements in mind, it is useful next to consider the outlook for future Human Rights Council implementation of the responsibility to protect.

Prospects for the Human Rights Council's future role in operationalising the responsibility to protect

If the international community at large fully supported the responsibility to protect, then arguably we should have seen the phrase employed more systematically in recent Human Rights Council resolutions and reports, and many more than 56 of the 193 UN Member States support the government of Australia's statement with regard to serious violations. Many African and Asian countries remain wary that the responsibility to protect is little more than a ploy for more powerful countries to cover their unwarranted military interventions in other States. The Human Rights Council's practice over the next few years could indicate whether the responsibility to protect perspective will revert to its more rhetorical role, or whether it will figure more as a prescriptive norm, if not of legal import, perhaps as useful guidance for more systematic implementation of a more coherent UN system-wide response to complex situations involving genocide, war crimes and crimes against humanity.

Indeed, sustained political support for the responsibility to protect in the Human Rights Council to address urgent situations involving serious human rights and humanitarian law violations in terms of the responsibility to protect, together with the involvement and support of the Security Council, the General Assembly, the International Criminal Court and other bodies, brightens prospects for the Human Rights

Council's future role in operationalising the responsibility to protect. The fact that practice has been galloping ahead even before the responsibility to protect has been fully defined, shows that many governments and the UN consider that the concept serves an important purpose.

Human Rights Council action has drawn heavily on the responsibility-to-protect perspective to address the situations in Darfur, the Israeli Occupied Palestinian Territories, Côte d'Ivoire, Libya and Syria, because this concept helps to:

- identify clearly human rights violations as a threat to international peace and security;
- remind the State concerned of its responsibility to protect people under its jurisdiction, particularly in time of severe political instability and armed conflict; and
- encourage a 'One UN' approach to address genocide, war crimes and crimes against humanity by mainstreaming international criminal law solutions as part of broader efforts to counter impunity with regard to serious violations of human rights and humanitarian law.

Because the Human Rights Council has been mandated first and foremost to address urgent situations involving the risk or actual occurrence of genocide, war crimes or crimes against humanity, it is the natural institutional home for the 'responsibility to protect' to mature and develop with the support of the Security Council, the General Assembly and other UN organs, as well as of regional peace and security organisations and governments.

Recommendations for operationalising the 'responsibility to protect'

The above discussion implies that the Human Rights Council should adopt or maintain certain policies with regard to: investigations and early warning; capacity-building; and the generation and sharing of knowledge on the responsibility to protect within the UN system. These policy recommendations are set forth below.

With regard to investigations and early warning, the Human Rights Council should continue fielding missions of inquiry to investigate situations at risk from imminent or actual serious violations of international human rights or humanitarian law. Where the government or territorial authority fails to cooperate adequately with the Human Rights Council or its investigative mission, the Council should remind the

government or territorial authority of the possibility of a Security Council referral of the situation to the International Criminal Court, and/or of other possible action such as blockades, or military action through UN Charter Chapter VII authority. Second, the Human Rights Council should maintain full support for the work of UN human rights special procedures mechanisms and mandate-holders to enhance their early warning capacity. Third, the Council should also stay alert to emerging patterns of gross and systematic violations of human rights and consider possible preventive measures to be taken at an early stage. Fourth, the Human Rights Council should make full use of the Universal Periodic Review process to bring to light worrying trends in countries under review, specifically with an eye to detection and prevention of serious human rights and humanitarian law violations. Fifth, the Human Rights Council should support OHCHR's Rapid Response Unit to strengthen the UN Secretariat's capacity to undertake timely human rights assessment missions in the field and to take other appropriate measures.

With regard to capacity-building elsewhere within the UN and regional organisations, the Human Rights Council should support the training of peacekeepers, peace operations officials, military observers, military police and UN civilian police, to assist them to recognise serious violations of human rights and humanitarian law and to channel information on their occurrence confidentially to the appropriate human rights mechanism and OHCHR. Second, the Council should also help to mainstream human rights more systematically throughout peacekeeping operations and contribute to ensuring a coordinated 'One UN' response to conflict situations, for example, through the placing of experienced human rights officers in peacekeeping operations who are trained in the fundamentals of human rights, humanitarian law and international criminal law. Third, the Council should support the training of UN humanitarian personnel to identify vulnerable groups at particular risk of genocide, war crimes or crimes against humanity. Fourth, it should work in closer cooperation with regional and sub-regional collective security frameworks to coordinate preventive, diplomatic and reactive action in case situations degrade, or appear likely to degrade, to the point of widespread, serious or systematic violations of human rights and humanitarian law.

With regard to generation and sharing of knowledge on the practical implementation of the 'responsibility to protect', the Human Rights Council should distil best practices from its recent actions relating to

the 'responsibility to protect', for example, on Darfur, the Israeli Occupied Palestinian Territories, Côte d'Ivoire, Libya, Syria and other situations as they may arise. This could help to identify key operational elements of the concept of the 'responsibility to protect' and support its place in international law and practice, as well as the Council's role in implementing it.