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Yes we can?

Options and barriers to broadening the scope of the Responsibility to Protect to include cases of economic, social and cultural rights abuse

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The One World Trust promotes education and research into changes required in global governance to achieve the eradication of poverty, injustice, environmental degradation and war. We develop recommendations on practical ways to make powerful organisations more accountable to the people they affect now and in the future, and how the rule of law can be applied to all. We educate political leaders, decision makers and opinion-formers about the findings of our research.

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International Law & Regulation

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In March 2009 the United Nations General Assembly is set to engage, for the first time since the 2005 World Summit, with the Responsibility to Protect (R2P) doctrine. Endorsed by all member states of the UN the R2P language had found its way onto the international policy and legal scene: a remarkable achievement for a concept which in this form had in fact only very recently emerged from the human security debates of the 1990s.

Yet since 2005 the R2P doctrine has been on a bumpy road, challenged for its meaning and realistic chances for use in situations such as Darfur, Zimbabwe, and Burma. The fact that the comparably limited scope of violence in the context of the Kenya elections in early 2008 proved to be the first time that the R2P language was used largely unchallenged in a specific case, is illustrative of the political resistance that still exists to moving the R2P forward as a developing concept in international policy.

This report explores the environment of human rights standards from which the R2P has in part emerged, and which are necessary to understand its potential of development. It assesses opportunities and obstacles to the broadening of its scope, including to situations such as gross and systematic violations of economic, social and cultural rights (ESCR). To do this the text first analyses the nature and role played by standards of due diligence in widening the level of responsibilities of the state to respect, protect and fulfil human rights. It then examines the current definition of Crimes against Humanity (CAH) which is increasingly dissociated from circumstances of armed conflict, and the options for enlarging the scope of the R2P beyond the use in the context of armed conflict.

The report concludes that an outright rejection of the use of the R2P doctrine in cases beyond armed conflict is inconsistent with the wider relevant developments in international law. In particular when looking at the R2P from the angle of standards of due diligence the doctrine has strong potentials to serve as a basis for the international community to address cases of systematic and widespread neglect of duty of care by governments, not as a challenge to their sovereignty but as a complementing element in the chain of responsibilities of a global governance system that seeks to be accountable to people for the delivery of public goods, access and enjoyment of human rights, both civil and political, and economic, social and cultural.

Importantly, however, given the strong concerns that some states have with respect to the question of the use of force under the doctrine, the report re-emphasises that any decisions about the use of force under the doctrine should always remain a matter of last resort, decided upon by due process, and heavily context specific.

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Introduction

Reconnecting the R2P with its context

In March 2009 the United Nations General Assembly is set to engage, for the first time since the 2005 World Summit, with the Responsibility to Protect (R2P) doctrine. Hailed as important and irreversible progress at the time, the World Summit Outcome Document (WSOD) included positive commitments to the principles of the Responsibility to Protect.¹ Endorsed by all member states of the UN the R2P language had found its way into international policy and arguably 'soft law': a remarkable achievement for a concept which in this form had in fact only very recently emerged from the human security debates of the 1990s. While the WSOD carefully circumscribes in its field of application with a focus on War Crimes, Crimes against Humanity (CAH), Genocide and Ethnic Cleansing, the doctrine of the R2P still follows largely the lead provided by the seminal 2001 ICISS report.²

Yet since 2005 the R2P doctrine has been on a bumpy road, challenged for its meaning and realistic chances for use in situations such as Darfur, Zimbabwe, and Burma. The fact that the comparably limited scope of violence in the context of the Kenya elections in early 2008 proved to be the first time that the R2P language was used largely unchallenged in a specific case, says a lot about the political resistances that still exist to moving the R2P forward as a developing concept in international policy on a wider scale.

The reasons for this resistance are clear, the potential and arguably the purpose of the R2P doctrine is literally explosive: challenging existing concepts of state sovereignty built on a hierarchical relationship between the state, conveniently equated by some of those in power with 'government', and the people as subjects, who, together with national territory and all resources contained therein are seen as items under state control.

Targeting the gravest crimes under international law the R2P puts this Westphalian understanding of state sovereignty up for review, and establishes a relationship between state and people which is in many ways the reverse of the old concept: a relationship built on notions of citizenship and the state as a duty-bearer towards individuals and communities endowed with inalienable rights.

Crucially though the R2P does not extend this challenge without context, but rather as part of a wider movement within the formulation and interpretation of international law, in particular in international human rights standards.

The roots of the R2P debate in the human security discourse, writ large, for instance indicate a strong connection to the drive to realise economic, social and cultural Rights (ESCR), the invocation of genocide and ethnic cleansing as triggering elements for the R2P suggest a relationship with the concept of discrimination in international human rights law, the duty to react under the R2P is linked to the question of protection of civilians in armed conflict, and the mention of crimes against humanity results in inevitable conceptual bridges to the debate about their definition and whether or not they are necessarily linked to armed conflict. Yet often the discussions about the R2P seem to be happening in a strange void, entirely detached from developments in international human rights law that also in many other ways shapes our understanding of state sovereignty, duty bearers and responsibilities for human rights abuse even if not committed by agents of the state.

Political and practical obstacles

The political arguments for limiting the scope of the R2P are threefold:

- the first is that to prevent a roll-back on the commitments made by the UN members states in 2005, concerns from critics of the doctrine have to be placated;
- the second is that with a broadening scope, the R2P will face insurmountable obstacles to being put into practice;
- and the third is that the trigger elements invoked in the 2005 WSOD (war crimes, crimes against humanity, genocide and ethnic cleansing) are necessarily linked to armed conflict.

Indeed, some of these arguments are valid. On the second also the One World Trust has elsewhere argued for instance that the UN Department for Peacekeeping Operations (DPKO), concerned with the most resource demanding part of the doctrine, potential use of force under the duty to react and Chapter VII of the UN Charter, is already under-resourced.³ Also in case of burden sharing with regional organisations under Chapter VIII of the UN Charter we have raised the concern that there are no clear protocols of accountability that would ensure both adherence to mandate and standards of UN missions, and explored starting points to establish them.⁴

The third challenge also has some merits, especially as we explore in this report with regard to the practice of prosecution of the gravest crimes. So far nobody has been taken to task at international level for crimes committed outside armed conflict. Yet the evolution of the understanding of Crimes against Humanity, as we will show in this report as well, points towards a dissociation of this crime and armed conflict. There is also growing body of evidence that gross abuses of ESC Rights, including and especially when understood to be the result of deliberate neglect of duties of care of the state towards its citizens, can be tantamount to Crimes against Humanity. Building on an initial exploration of the issue in two previous papers⁵, we look in this report more in depth at the question of how the concept of standards of due diligence can help to define grave abuses of human rights and how this connects with the R2P doctrine.

It is the first point which is the most difficult to deal with. It is understandable that some states, especially those who have only won independence from colonial powers less than five or even fewer decades ago, are cautious about the impact of the doctrine on their right to self-determination, which in itself is enshrined in international law under common Article 1 of the Covenants on Civil and Political and Economic, Social and Cultural Rights. Also, informed citizenship of people, and accountability of power to them can only be realised in global governance today, and in the future on the basis of subsidiarity, i.e. retention of relevant decision-making powers at the lowest level possible. The nation state and its structures are thus an inherent part of an equitable global governance system. Yet the focus on accountability in governance also reveals the importance of understanding what happens when primary duty bearers do not live up to their responsibilities: the assumption that there are no consequences except in very limited and ex post cases of prosecution under international criminal law is not acceptable if the human rights of individuals are taken seriously as a global obligation. This is exactly why Kofi Annan, the then United Nations Secretary General called on the international community to agree on a new way to solve these issues: "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 affect every precept of our common humanity?"⁶

Structure of the report

In this report we explore the environment of human rights standards in which the R2P has to be situated in order to assess opportunities and obstacles to the broadening of its scope, including to situations such as gross and systematic violations of economic, social and cultural rights. To do this, we will first elaborate on the standards of due diligence that have been first developed to widen the level of responsibilities of the state to respect, protect and fulfil human rights, and have proved extraordinarily powerful in advancing the justiciability of ESCR and human rights abuses committed in the context of structural discrimination, such as violence against women.

Then, we will examine the current definition of crimes against humanity, and the growing dissociation of such crimes from the condition of being committed in connection with armed conflict. This in turn enables us to analyse whether widespread or systematic violations of ESCR could constitute a crimes against humanity, opening up the possibility to understand also the widespread and systematic abuse of such rights as a potential case of application of the R2P. We will argue that the development of standards of due diligence to encompass all ESCR and the evolution of the definition of crimes against humanity over the years could indeed support such a widening of a potential use of the R2P principle for other situations, including serious violations of ESCR.

Importantly, any decisions about the use of force under the doctrine should always remain a matter of last resort, decided upon by due process, and heavily context specific. Yet the evidence presented in the report demonstrates that an outright rejection of its use in cases beyond armed conflict is inconsistent with the wider developments in international law. Accepting further need for research and debate we come to the conclusion that the political argument for accepting a limited scope of the R2P at this point in time should not hide the importance to continuing to challenge those most reluctant to engage with the R2P on their understanding of relationships between state and citizens.

Reconnecting the Responsibility to Protect with framing developments in international human rights law

The development of the principle of the Responsibility to Protect

The principle of the Responsibility to Protect (R2P) was developed by the International Commission on Intervention and State Sovereignty (ICISS) in 2001. The report of the ICISS⁷ states that the goal of international action should be the protection of civilians from gross and systematic abuse when the state is unable or unwilling to end the harm or is itself the perpetrator.⁸ In this regard, the Commission identified three elements that constitute the R2P: the responsibility to prevent (to address the roots and direct causes of the conflict and man-made catastrophes); the responsibility to react (to respond to situations of compelling human need with appropriate coercive measures short of military action and in extreme cases the resort to force) and the responsibility to rebuild (to provide complete assistance especially after military intervention to address the causes of the harm the intervention was designed to halt or avert).⁹ The report elaborates on the circumstances for military intervention¹⁰ to be carried out under the responsibility to react element, i. e. “to stop or avert 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 large scale “ethnic cleansing,” actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.”¹¹ The Commission specifies the type of situations that should be covered¹² and they include “overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened.” This latter condition would have fitted

perfectly when the Burmese government refused humanitarian aid in the aftermath of cyclone Nargis that hit the Irrawaddy delta early May 2008. However, as the report shows, this circumstance is not among those formally endorsed by states in 2005.

In 2004, the report of the Secretary General's High-level Panel on Threat, Challenges and Change reaffirmed the Responsibility to Protect (R2P) principle of "every State when it comes to people suffering from avoidable catastrophe — mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease."¹³ However, the panel formally endorsed this principle only in cases 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."¹⁴ This paved the way for the formal endorsement of the R2P and of the circumstances that trigger this concept the following year. In the Outcome Document of the 2005 World Summit, states then formally endorsed the R2P principle.¹⁵ In this document, the scope of application of the R2P is narrowed down in comparison to the suggestions of the ICISS. States commit themselves to use the responsibility to protect principle only in cases of genocide, war crimes, ethnic cleansing and crimes against humanity.¹⁶

Standards of due diligence

Under international law, when states sign and ratify a treaty, they agree to three types of obligations regarding the rights enshrined in the treaty: the obligation to respect (states have to refrain from interfering or curtailing the enjoyment of rights), the obligation to protect (states are required to protect people against human rights abuses by state authorities and non-state actors) and the obligation to fulfil¹⁷ (states have to take active steps to enable people to enjoy their rights). These obligations include to act with due diligence.¹⁸ In recent years, standards of due diligence have been increasingly applied to a wide range of human rights issues such as ESCR, women's rights and minority rights.

Economic, social and cultural rights

Unlike the International Covenant on Civil and Political Rights (ICCPR) where obligations are immediate, obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) are mainly progressive.¹⁹ However, the Committee on Economic, Social and Cultural Rights declared that certain obligations such as exercising the rights established in the Covenant without discrimination and taking steps towards their full realisation are immediate.²⁰ This interpretation has been contested as Article (2) (1) of the Covenant only provides for a progressive implementation of the rights set forth in the ICESCR.²¹ However, in the same line of reasoning, the Committee went further and stated that minimum core obligations exist.²² When states do not comply with the minimum core obligations to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights, a violation of the Covenant occurs.²³ Indeed, these core obligations are non-derogable.²⁴ Violations of rights under ICESCR can arise through acts of commission and omission.²⁵ It is worth noting that in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights that reflect the evolution of international law since the 1986 Limburg Principles,²⁶ experts recognised that active denial of a right provided for in the ICESCR amounts to a violation.²⁷ The Committee on Economic, Social and Cultural Rights emphasised the importance of distinguishing between the inability and the unwillingness of a state party to comply with its obligations under the Covenant. Yet, non-realisation of rights cannot be solely justified by the lack of resources. In case a state is unable to fulfil its obligations under the Covenant, it has to prove that it has used all the available resources at its disposal.²⁸ Thus, standards of due diligence have helped to interpret the Covenant and determine the scope of the obligations of states in order to enable their people to access ESCR.

Women's human rights

In the area of violence against women, standards of due diligence are very well grounded. Article 4 (c) of the Declaration on the Elimination of Violence against Women²⁹ adopted by the General Assembly in 1994 called states to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons”. In this regard standards of due diligence serve to assess whether states comply or not with their obligations to combat violence against women. On the basis of this Declaration and of General Recommendation 19³⁰ of the Committee, the first Special Rapporteur on violence against women, Radikha Coomaraswamy,³¹ elaborated a list of criteria to assess the adherence of a state to due diligence standards. It includes the followings: ratification of international human rights instruments; constitutional guarantees of equality for women; the existence of national legislation and/or administrative sanctions providing adequate redress for women victims of violence; policies or plans of action that deal with the issue of violence against women; the gender-sensitivity of the criminal justice system and police; accessibility and availability of support services; the existence of measures to raise awareness and modify discriminatory policies in the field of education and the media, and the collection of data and statistics concerning violence against women. Yakin Ertürk, the current Special Rapporteur on violence against women declared that a rule of customary international law exists and obliges states to stop and react to acts of violence against women by applying due diligence.³² However, according to the Special Rapporteur, the scope and content of the concept of due diligence remain unclear.³³ The assertion regarding the existence of a rule of customary international law obliging states to act with due diligence in the area of violence against women is very encouraging for other fields where principles of due diligence apply. It may be a way to shape and put forward a broader rule of customary international law that would apply to several other international law areas.

Discrimination

Standards of due diligence are also used with regard to discrimination. The Committee on the Elimination of Discrimination against Women reminded that states parties to the Convention have to make sure women do not face discrimination, be it direct and indirect.³⁴ The latter type of discrimination may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women because they may perpetuate the consequences of past discrimination. Thus, they fail to take into account aspects of women's life experiences which may differ from those of men.³⁵ The Committee considers that achieving substantial equality, i.e. taking into account biological, social and cultural differences between women and men, is also an important tool in fighting against discrimination. Affirmative action is for instance a means to attain this goal.³⁶ The application of due diligence principles in the area of violence and discrimination against women is illustrated by the Concluding Observations of the Committee on the Elimination of Discrimination against Women. A few years ago, the Committee recommended to the Slovenian Government that laws take account of indirect and structural discrimination.³⁷ In the context of discrimination against women, the Committee reasserted that state responsibility may be invoked when the state fails to act with due diligence to prevent the commission of violations of rights or to investigate and punish such acts of violence, and to provide compensation.³⁸

In relation to protection minority rights standards of due diligence have equally been critical in advancing the debate. These are upheld in several international instruments: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and in Article 27 of the ICCPR. As provided by international law, states

have to apply standards of due diligence to protect this group in the same way that standards of due diligence are applicable to other area of human rights law. In *L.K v. The Netherlands*, the Committee on the Elimination of Racial Discrimination concluded that “when threats of racial violence are made, and especially when they are made in public and by a group, it is incumbent upon the state to investigate with due diligence and expedition.”³⁹

The use and development of the approach of standards of due diligence has thus had a significant impact on the understanding of human rights, the scope of their application as much as their justiciability. Exploring this helps to situate discussions around the Responsibility to Protect in the wider context of human rights discourse and the evolution of its norms. The following section explores another area which has been both critical for the development of international criminal law and the Responsibility to Protect itself as an instrument to prevent the gravest crimes.

Crimes against humanity

Towards dissociation from armed conflict - evolution of the CAH definition

The definition of crimes against humanity (CAH) has evolved over time since its introduction into positive international law by the 1945 Charter of the International Military Tribunal (also known as the London Charter or the Charter of the Nuremberg Tribunal).⁴⁰ Its Article 6 provides that CAH are “namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.” At the time, questions about the nexus to war were raised because of the expression “before or during war” placed before the semicolon.⁴¹ Therefore, a Protocol replacing the semicolon by a comma was adopted two months after the approval of the London Charter.⁴² Thus, it was clear that the crimes provided for in Article 6 had to be committed during wartime to be qualified as CAH and prosecuted. As other instruments passed afterwards show,⁴³ the nexus to armed conflict has evolved and nowadays, CAH can be committed outside armed conflicts. This trend is illustrated by Article 3 of the Statute of the International Tribunal for Rwanda (ICTR) that does not confine the jurisdiction of the Tribunal to armed conflicts.⁴⁴ In the *Akayesu* case, the ICTR confirmed that “crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character”.⁴⁵ Also Article 7 of the Statute of the International Criminal Court (ICC) does not require the nexus to armed conflicts either.⁴⁶ The best illustration is the presence of the crime of apartheid within the acts constituting a CAH.

Furthermore, the definition of CAH has evolved to include elements of crimes that were not contained in earlier documents. Currently, the fundamental criterion is a “widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁴⁷ Article 7 (2) (a) of the Rome Statute defines this term as a “course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack.”⁴⁸ It is understood that, in this case, a military attack is not required and that a failure by the state to take action can amount to a policy that deliberately encourages the attack.⁴⁹ However, as Judge Elizabeth Odio Benito specified, to draw an inference from inaction, it should have been proven that the state had the means to be aware of the crimes and that he could have taken normal steps to uphold the law and stop and punish the crimes but did not take any serious steps to do so.⁵⁰ The definition of CAH provided for by the Rome Statute is open-ended but specific.⁵¹ Therefore, other acts could be added up to the list, such as ESCR violations.⁵²

The above section shows that the definition of Crimes against Humanity has become increasingly dissociated from the condition of such abuses having to occur within armed conflicts. Indeed, as an ICTY ruling in the case against Dusko Tadic in 1995 asserts "...customary international law may not require a connection between crimes against humanity and any conflict at all.",⁵³ The dissociation can therefore be regarded as now forming part of international customary law.

Widespread and systematic violations of ESCR as crimes against humanity?

The extension of the understanding of CAH to include acts committed outside armed conflict is significant as it allows to focus inquiry on whether widespread and systematic violations of ESCR can constitute a CAH. In the following we analyse two ESCR that are very likely to be violated in situations outside of armed conflicts, including and especially in situations of large scale humanitarian emergencies, and on which the doctrine has widely focused on, namely the right to food and the right to housing, and whether their widespread and systematic violation could amount to CAH. This analysis is relevant independent of the fact that to date no cases have been brought against alleged perpetrators of CAH before international tribunals in the absence of any link with his acts and armed conflicts.⁵⁴ While in practice the international community has clearly prioritized criminal accountability for violations of civil and political rights, and indeed, most crimes referred to in the Rome Statute pertain to this category of rights, human rights are not only interrelated, but also recognised as interdependent and indivisible.

The denial of access to food

Starting with the right to food that is included in the right to an adequate standard of living conveyed in Article 11 of the ICESCR,⁵⁵ the Committee on Economic, Social and Cultural Rights describes the way this right can be violated in its General Comment 12.⁵⁶ It states that violations can occur by the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to food; denial of access to food to particular individuals or groups, whether the discrimination is based on legislation or is pro-active; the prevention of access to humanitarian food aid in internal conflicts or other emergency situations; adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to the right to food; and failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others, or the failure of a state to take into account its international legal obligations regarding the right to food when entering into agreements with other states or with international organizations.⁵⁷ Two of the cases listed above, namely the denial of access to food to particular individuals or groups and the prevention of access to humanitarian food aid in internal conflicts or other emergency situations, could likely fit the criteria for the CAH.⁵⁸ Historically, there have been few situations where the right to food was seriously violated in this way.⁵⁹ More recently, Burma was accused of blocking significant offers for humanitarian aid in the aftermath of cyclone Nargis that hit the Irrawaddy delta early May 2008. According to the United Nations the cyclone and delays in response had by late June left more than 130 000 people dead and more than 2.4 million people in need of shelter, food and medical aid.⁶⁰ This has led some commentators to argue that as Burmese people were dying in large number because of the inaction of the military junta, this could amount to crimes against humanity.⁶¹

Critical to the appreciation whether or not an act constitutes a crime against humanity is the question of both the nature of the act and intent, which in criminal law are described as the *actus reus* (the prohibited conduct) and the *mens rea* (the mental element). In the case of the right to food, the relevant provision is the open-ended Article 7 (1) (k) of the Rome Statute stating that in addition to acts specified, a CAH can also be "[an]other inhuman act of a

similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” (*actus reus*) as long as they are “part of a widespread or systematic attack directed against any civilian population, with knowledge⁶² of the attack” (*mens rea*).⁶³ Therefore, it could be argued that the government’s deliberate obstruction of food aid and it reaching people that were under immediate threat of starvation could fit the criteria of Article 7,⁶⁴ as the *actus reus* and *mens rea* requirements would be fulfilled. Therefore the conduct could be qualified a CAH. However, according to Davis Marcus, the fact that a government is indifferent to the fate of its population even if it possesses the means to respond to the famine, does not necessarily fulfil the *mens rea* requirement in itself, and that therefore, the government cannot be held criminally liable.⁶⁵ He points out however, that if a government implements policies that engender famine, and recklessly pursues them despite learning that they are causing mass starvation or if it uses famine as a tool of extermination, the *mens rea* element, respectively recklessness and knowledge, is fulfilled.⁶⁶ The Statute of the ICC provides that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person [...] for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.”⁶⁷ In international criminal law, omission may be considered as evidence of aiding and abetting. Ad hoc Tribunals have said that liability by omission was possible when the person aiding and abetting has a duty to act and fails to do so, irrespective of his/her presence or absence from the scene.

Forced evictions

The right to housing is included in the right to an adequate standard of living provided for by Article 11 of the ICESCR.⁶⁸ According to the Committee on Economic, Social and Cultural Rights, the right to an adequate standard of living should be understood broadly “as the right to live somewhere in security, peace and dignity,” and not merely as “having a roof over one’s head or views [which see] shelter exclusively as a commodity.”⁶⁹ It elaborated the following criteria to assess whether a certain shelter constitutes “adequate housing”: legal security of the tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.⁷⁰ In this regard, the Committee interpreted forced evictions that are an active denial of the right to housing, as “prima facie incompatible with the requirements of the Covenant” that can only be carried out in exceptional circumstances.⁷¹

In a submission to the 41st session of the African Commission on Human and People’s Rights in May 2007 concerning forced evictions in Zimbabwe, the Centre on Housing Rights and Evictions (COHRE) bases its reasoning on Article 7 (1) (d) referring to deportation and forcible transfer of population as constituting a crimes against humanity when they are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.⁷² Article 7 (2) (d) specifies that this relates to “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.” In the case of *Operation Murambatsvina*,⁷³ where expulsions took place on a large-scale, COHRE alleges that the actions of Zimbabwe gathered the criteria to be qualified as a CAH,⁷⁴ i.e. for the acts fulfilling both the *actus reus* and the *mens rea* requirements. COHRE argued that by virtue of the evictions being government driven, the *mens rea* (knowledge) element is already fulfilled, and that the *actus reus* (forcible transfer of a population from an area where it is lawfully present) requirement was also fulfilled as the people evicted were either lawfully in Zimbabwe, occupying lawfully the land or the house.⁷⁵ COHRE further points out that “informal occupation was tolerated, if not encouraged, for decades, and, the Republic of Zimbabwe had the burden in any case to prove such unlawful presence before

resorting to eviction.”⁷⁶ However, the UN Special Envoy on Human Settlements Issues in Zimbabwe, Mrs. Anna Kajumulo Tibaijuka, states in her report that “with available evidence it would be difficult to sustain that crimes against humanity were committed”.⁷⁷ One of the arguments she puts forward is that generally, the land occupations were illegal⁷⁸, although the UN report also recognised that certain persons holding a legal title were evicted too.⁷⁹ The UN Special Envoy also asserts that the criminal intent might be missing by highlighting that Zimbabwe told the ECOSOC in 1996 that it was facing a housing crisis and could not meet its obligations under international law unless assisted by the international community.⁸⁰ The UN Special Envoy sees these points as evidence for absence of *mens rea*.⁸¹

An assessment whether a violation of human rights, civil and political or economic, social and cultural, is tantamount to Crimes against Humanity is therefore not just dependant on its widespread and criminal nature (*actus reus*), but also on whether it is systematic in the sense of proven intent to be so (*mens rea*). Sigrun Skogly therefore reasons on the basis of Article 7 (1) (k) and concludes that whether forced evictions amount to “other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” will have to be determined on a case by case basis.⁸² In addition to this limitation of applicability of the CAH definitions, the case is further complicated by the fact that some of the countries more recently in the visor of the R2P debate such as Zimbabwe or Burma are not a party to the Statute of the ICC and any action would need a resolution of the Security Council.⁸³ So while there may be a situation in which rights are knowingly violated with the intent to bring about large-scale suffering, and the international community has a right and a duty to react⁸⁴, its ability to do so effectively are dependent on the achievement of political consensus in a forum which has been notoriously bad at doing just that.

Scoping the Responsibility to Protect in relation to ESCR

Negligence and duty of care and the Responsibility to Protect

The crisis in Zimbabwe due to the elections and the situation in Burma following the cyclone are the two most recent circumstances in which the idea has been put forward that the international community should intervene when the concerned government refuses to do so while its population seriously suffers. In general, the rights violated pertain to ESCR. However, the debate on this issue is still very limited. In the principles surrounding the ICESCR, it has been acknowledged that negligence in providing a right or its active denial amounts to a violation. The Committee on Economic, Social and Cultural Rights has made it clear that the failure of a state to take all necessary and feasible steps to meet its obligations under the ICESCR amounts to a violation of the right concerned.⁸⁵ In General Comment 14 on the right to health, the Committee stated that a state which is unwilling to use the maximum of its available resources for the realization of the right to health is in violation of its obligations under Article 12 of the Covenant.⁸⁶ This argument could be further drawn upon and used for gross violations of ESCR. However, the case of Burma is difficult because this country is a party to very few international human rights law instruments⁸⁷ and not the ICESCR. Nevertheless, rights that have been violated when Burma was blocking significant offers of humanitarian aid in May and June 2008 are conveyed in Article 25 (1) of the Universal Declaration of Human Rights.⁸⁸ This instrument forms part of customary international law and the rights provided for are therefore binding on every state. Moreover, the ICESCR is a codification of specific rights of the Universal Declaration of Human Rights. Thus, certain ESCR are customary international law and apply to all states, whether it is a party to the Covenant or not.⁸⁹ In this context, Burma was violating its obligations under international law and there could be a shift in the duty-bearer – from the state to the

international community. An expansion of the R2P principle could have been an additional means at the disposal of the international community to react effectively to the unwillingness of the military government and the suffering of Burmese people.

In the ICISS report, a large scale loss of life due to the negligence of a state counts among the conditions that need to be gathered for military intervention. This element is a good start to draw a parallel with negligence in domestic law. Indeed, negligence occurs when one's conduct departs from the conduct expected from a reasonable person (watchfulness, attention, caution, and prudence) acting under similar circumstances and thus fails to respect his/her the duty of care. In international law we have said earlier that the state is the primary duty-bearer to protect its citizens against human rights violations. The failure or the unwillingness of the state in question to stop the violations can be assimilated to a breach of the duty of care it owes to its citizens and therefore to a negligent conduct. With the R2P principle, if a state fails or is unwilling to stop the serious harm caused to its people, the international community has a duty to act to protect these people. It could thus be argued that the duty of care issue underpins the R2P.

Justiciability of economic, social and cultural rights

Independent of the question whether political consensus will be possible at some point to widen the scope of the R2P, the progress on the justiciability of ESCR is a useful guide to understanding which rights could come into consideration in the debate of the R2P. Some important progress has been made over the past decades.

According to the Committee on Economic, Social and Cultural Rights, ESCR are “legally binding, enforceable, remediable and justiciable.”⁹⁰ In several of its General comments the Committee stated that “any person or group victim of a violation of the right [in question] should have access to effective judicial or other appropriate remedies at both the national and the international levels. All victims of such violations should be entitled to adequate reparation [...]”⁹¹ Nevertheless, some do not agree with this approach and consider that the Committee is taking a revisionist view.⁹² They also believe that if an approach which focuses on the state as perpetrator of human rights violations is applied strictly and widely to the question of justiciability of ESCR violations, too many countries would be accused of failure to respect their ESCR obligations just because of bad policies or bad judgment. The risk of such controversies reviving a North-South divide in the debate around ESCR clearly has a political dimension.⁹³

This may one of the reasons why at the international level, all existing means to render ESCR violations justiciable rely primarily on complaints procedures or political negotiation mechanisms, rather than courts of law.

The **Human Rights Council** possesses a confidential complaint mechanism “to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.”⁹⁴

Furthermore, individuals suffering from specific human rights violations are able to lodge a complaint with the **Special Procedures** of the Human Rights Council.⁹⁵ Once the Special Procedure has examined the communication, the mandate-holder will send an urgent appeal or a letter of allegation to the state concerned in order to clarify the issue.⁹⁶ They request the state to reply to the allegations and to take corrective action.⁹⁷ The Special Procedures submit a report on their communications to the Human Rights Council.

A new step forward has been taken on 18 June 2008 when the Human Rights Council unanimously adopted the **Optional Protocol to the ICESCR** (OP-ICESCR) after more than 10 years of negotiations.⁹⁸ This Optional Protocol provides for an individual complaint mechanism for violations of ESCR, interim measures and an inquiry procedure. It therefore

puts ESCR at the same level as civil and political rights for which individual complaints were possible since 1966 under the Optional Protocol to the ICCPR.

However, as it is generally the case in international law, the lack of enforcement mechanisms is the real issue as far as the justiciability of ESCR is concerned.

Shifts in understandings of the duty-bearer

One of the main innovations of the R2P principle is the shift in the duty-bearer it entails, defining a responsibility for the international community to act above and beyond holding individual perpetrators to account under international criminal law. Traditionally, human rights pertained to the “reserved domain” of states because of a strict interpretation of the sovereignty principle. Thus, states were responsible to protect their own citizens against gross violations of their rights and no other state could intervene in their internal affairs, even if this entailed human rights abuses. This is well-illustrated by the following quote attributed by Gareth Evans to a scholar from China comparing the prerogatives of the state in the case of China and Burma: “China has used tanks to kill people on Tiananmen Square. It is Myanmar’s sovereign right to kill its own people, too.”⁹⁹

However, the current debate has clearly arrived at a different point since the statement of Boutros Boutros-Ghali who then Secretary General of the UN suggested in 1992: “The time for an absolute and exclusive sovereignty, however, has passed [...]”¹⁰⁰ Six years later, Secretary-General Kofi Annan reiterated this view and declared that “State frontiers should no longer be seen as a watertight protection for war criminals or mass murderers.”¹⁰¹

However, some countries especially in the developing world and amongst emerging economies saw this statement and the proposal for a new doctrine as an assault on sovereignty and on the norm of non-interference in the domestic affairs of states.¹⁰² The ICISS report specifies that “there is no transfer or dilution of state sovereignty. But there is a necessary re-characterization involved from sovereignty as control to sovereignty as responsibility in both international functions and external duties.”¹⁰³ According to the report, the debate is shifting from the “right to intervene” to “the responsibility to protect”.¹⁰⁴

The state is thus still the primary duty-bearer but if it is unable or unwilling to solve the serious issues going on within its boundaries, there is a shift in the duty-bearer. The international community becomes involved and has the duty to act. While some see this as a challenge to national sovereignty, it could be argued that it does in many ways the opposite by following a logic of subsidiarity: the R2P clarifies the primary duty of the state to uphold international human rights standards, but accepts that there is an ethical and institutional responsibility vested into the wider international community to ensure these duties are fulfilled. Such wider conceptions of the notion of sovereignty have been illustrated by the Constitutive Act of the African Union¹⁰⁵ for instance. Indeed, Article 4 (h) provides 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.” Member states cannot interfere in the domestic affairs of another¹⁰⁶ but under its Constitutive Act the African Union can do so in these exact three circumstances. It is worth noting that they correspond to the three of the four circumstances triggering the R2P that would be acknowledged in the 2005 Outcome Document of the World Summit.

Political issues in relation to an application beyond armed conflict

The possibility of widening the scope of the R2P is an idea that encounters great resistance. This is because, in general, when R2P is mentioned, it is often equated immediately with military intervention. However, as detailed in the ICISS report, military intervention is the last

resort and peaceful coercive measures have to be taken before, as well as preventive actions.

In response states have in 2005 agreed to a narrower reading in that only cases of genocide, war crimes, ethnic cleansing and crimes against humanity can trigger the R2P principle, certain authors have argued that if the scope of this doctrine was widened it would weaken and discredit it “by making it a coat for all seasons rather than a remedy against the worst of crimes as it was always intended to be.”¹⁰⁷ Similarly, the current UN Secretary General and the Special Adviser on R2P have recalled that they disagree with proposals to expand the R2P to cover other disastrous situations such as HIV/AIDS, climate change or response to natural disasters because it would “undermine the 2005 consensus and stretch the concept beyond recognition or operational utility.”¹⁰⁸ Indeed, if R2P would apply to the full range of human rights abuses by a government towards its people, creating and sustaining a consensus for action would be nigh to impossible¹⁰⁹, including because the interpretation of existing state-obligations under treaties and customary international law which underpin it, is not in all cases free from dispute. Institutionalising and operationalising a broad conception of the R2P thus currently appears not a feasible option.¹¹⁰

Yet do these current political obstacles constitute a full and conclusive reason not to explore the meaning of the shifts in the interpretation of international law that we have analysed in the previous sections, and the fundamental challenge the R2P poses to understandings of state sovereignty?

As stated above, the report of the ICISS includes “overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened” among the criteria for military intervention in the name of R2P. The fact that this criterion is mentioned in the Commission’s report could be a good basis to consider approaching a case using the R2P doctrine when the state concerned by the natural or environmental disaster is unwilling or unable to act; therefore justifying an obligation to respond in practice in international law. Indeed, following Lloyd Axworthy’s argumentation, the international community should make no moral difference between a large number of civilians being killed by arms or being killed by hunger or disease because the government blocks the delivery of humanitarian aid.¹¹¹

Yet on a practical level the political case for application may not be so clear cut. Under Secretary-General for Humanitarian Affairs John Holmes argued that military intervention in these circumstances would be inefficient and counterproductive.¹¹² Some humanitarian relief agencies supported the view that coercive landing of supplies or military air drops would be useless without any support from trained people in the field. They also emphasised that it could become dangerous if medicines were misused.¹¹³ This leads therefore to the view that the precautionary principles¹¹⁴ for military intervention established by the ICISS should be gathered, especially the one related to reasonable prospects of success. Others see the expansion of the R2P doctrine to situations outside armed conflicts as damaging state sovereignty and being a risk for a new form of colonialism.¹¹⁵

These views are echoed also by some civil society voices. The West Africa Civil Society Institute (WACSI) notes for instance the difficulties in the qualification of R2P situations especially since the debate generally focuses on the responsibility to react element and in particular military intervention. For the WACSI this creates confusion and fears for the people concerned and therefore, the meaning and the intention of the R2P principle need to be clarified and the awareness raised on the peaceful means available before military

intervention as a last resort. In their view efforts should also be made to emphasise the responsibility to prevent element that includes among others the promotion of good governance and democratisation. For the WACSI it would be important to involve local stakeholders and generally favours a regional response to mitigate the impact of blockages at the UN level, such as in the case for Darfur. As regional organisations had credibility on the ground, WACSI asserts that their involvement would clear up fears of new colonialism.¹¹⁶

In South East Asia, following a conference on Asian perspectives on R2P, NGOs have also reiterated the need to highlight the responsibility to prevent element because it is “the most effective life saving and least costly way to address atrocity crimes.”¹¹⁷ They also insisted on the importance of the involvement of a civil society network to promote the R2P to all stakeholders but also to protect its integrity and monitor the compliance of governments with their obligations to protect their population from large-scale killings.

Clearly, an expansion of the R2P would thus only be helpful to those affected by state neglect of duty to protect their rights if the political will of the international community can be mustered to act, either regionally nor internationally. Thus, in addition to the questions surrounding the applicability of the R2P in itself, an important challenge remains how the accountability of the international community, embodied in the United Nations and other key global governance institutions, can be strengthened to ensure that it is responsive to rights and needs of citizens and answerable to them for successes and failures to protect them.

In order to continue the work on the R2P and generate greater buy-in for the doctrine the UN Secretary General Ban Ki-Moon has appointed a Special Adviser on the Responsibility to Protect, Ed Luck, was appointed in February 2008. His mandate is to help the UN Secretary General to “develop proposals through a broad consultative process, to be considered by the UN membership.”¹¹⁸ In a new report the UN Secretary General on the R2P¹¹⁹ puts forward several suggestions to address some of the currently most difficult points such as

- for the General Assembly to define more precisely the process for its ‘continuing consideration’ of the issue and oversight of the UN secretariats work on the R2P
- the question of relation- and partnerships between state and the international community, including at regional level
- establishing a periodic review of members in relation to their work to implement the R2P.

Conclusion

The research presented in this report demonstrates that thinking about the scope of the R2P is an ongoing challenge, taking place in a field of tension of practical, political, ethical and legal considerations. Clearly, the R2P cannot be detached from developments in international human rights law which have enabled greater understanding and the advancement of justiciability of civil and political rights, including freedom from discrimination, and access to economic, social and cultural rights, in spite of great and continuing political resistance. In the same way our review of the role standards of diligence in the above mentioned areas of law, and the evolution of the concept of Crimes against Humanity shows that the tangible reticence to engage with the R2P and its implications cannot be a reason to stop thinking about its wider value and meaning for the relationship between citizens and state beyond situations of armed conflict. The report shows that the doctrine has the potential to be conceptually applied in cases of deliberate, widespread and systematic state neglect of duty to protect citizens against abuse of their economic, social and cultural rights, independent of the question what caused this abuse in the first place.

Importantly, however, any decisions about the use of force under the doctrine, which to many of its critics is the greatest challenge to their understanding of state sovereignty, should always remain a matter of last resort, decided upon by due process, and heavily context specific. Multiple obstacles have to be overcome before the international community will reach consensus on this question.

Yet the evidence presented in the report demonstrates that an outright rejection of its use in cases beyond armed conflict is inconsistent with the wider developments in international law. Accepting further need for research and debate we come to the conclusion that the political argument for accepting a limited scope of the R2P at this point in time should not hide the importance to continue challenging those most reluctant to engage with the R2P on their understanding of relationships between state and citizens.

Notes and References

¹ “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. [...]” Ibid, para. 138.

² ICISS, “The Responsibility to Protect”, December 2001, available at: <http://www.iciss.ca/pdf/Commission-Report.pdf>.

³ Herman, Lyndall (2007): Too Quiet on the Western Front. Why failing to find political solutions to overstretch in UN peacekeeping could scupper the realisation of the Responsibility to Protect, One World Trust Briefing Paper No. 105, One World Trust, London

⁴ Bateman, Maeve; Hammer, Michael (2007): Don’t call me, I’ll call you? Challenges and opportunities to realising the Responsibility to Protect in regional peacekeeping, One World Trust Briefing Paper No. 107, One World Trust, London

⁵ Hammer, Michael (2008): Oversight and accountability in peace and security governance, Paper presented at the Stiftung Entwicklung und Frieden Conference on the shared Responsibility to Protect in Africa, Berlin 4 April 2008; and Hammer, Michael, Battini, Marie; Snow Chris (2008): Keeping the stable doors open before the horse bolts. Using standards of due diligence, working through regional institutions and conducting a less doctrinal debate at the time of crisis will help to apply the Responsibility to Protect in cases such as Burma and Zimbabwe, One World Trust Briefing Paper No 111, One World Trust, London

⁶ Kofi Annan, “We the Peoples: The Role of the UN in the 21st Century”, United Nations Department of Public Information (2000), p. 48.

⁷ December 2001, available at: <http://www.iciss.ca/pdf/Commission-Report.pdf>.

⁸ Ibid, para. 1.22 and 2.25.

⁹ Ibid, xi.

¹⁰ The ICISS reckons that there are six criteria for military intervention: right authority, just cause, rights intention, last resort, proportional means and reasonable prospect. Ibid, para. 4.16.

¹¹ Ibid, para. 4.19.

¹² “those actions defined by the framework of the 1948 Genocide Convention that involve large scale threatened or actual loss of life; the threat or occurrence of large scale loss of life, whether the product of genocidal intent or not, and whether or not involving State action; different manifestations of “ethnic cleansing,” including the systematic killing of members of a particular group in order to diminish or

eliminate their presence in a particular area; the systematic physical removal of members of a particular group from a particular geographical area; acts of terror designed to force people to flee; and the systematic rape for political purposes of women of a particular group (either as another form of terrorism, or as a means of changing the ethnic composition of that group); those crimes against humanity and violations of the laws of war, as defined in the Geneva Conventions and Additional Protocols and elsewhere, which involve large scale killing or ethnic cleansing; situations of State collapse and the resultant exposure of the population to mass starvation and/or civil war; [...]”, Ibid, para. 4.20.

¹³ A/59/565, 2 December 2004, para. 201. Available at: <http://www.un.org/secureworld/report.pdf> .

¹⁴ Ibid, para. 203.

¹⁵ A/60/L. 1, 15 September 2005. Available at: <http://www.who.int/hiv/universalaccess2010/worldsummit.pdf>

¹⁶ “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. [...]” Ibid, para. 138.

¹⁷ The obligation to fulfil also incorporates an obligation to facilitate and an obligation to provide. See Committee on Economic, Social and Cultural Rights, General Comment 12 “The right to adequate food”, 12 May 1999, para. 15.

¹⁸ Human Rights Committee, General Comment No. 31, CCPR/C/74/CRP.4/Rev.6, para. 8; Committee on the Rights of the Child, General Comment No. 5, CRC/GC/2003/5, 27 November 2003, para. 1; Committee on Economic, Social and Cultural Rights, General Comment No. 14, E/C.12/2000/4 (2000), para. 33.

¹⁹ Article 2.1, International Covenant on Economic, Social and Cultural Rights (ICESCR), 3 January 1976.

²⁰ Committee on Economic, Social and Cultural Rights, General Comment 3 “The nature of States parties obligations”, 14 December 1990, paras. 1& 2.

²¹ Michael J. Dennis and David P. Stewart, “Justiciability of economic, social and cultural rights: should there be an International complaints mechanism to adjudicate the rights to food, water, housing and health?”, (2004), *The American Journal of International Law*, Vol. 98, No. 3, p. 491.

²² Ibid p. 492;

²³ Committee on Economic, Social and Cultural Rights, General Comment 3 “The nature of States parties obligations”, 14 December 1990, para. 10.

²⁴ Committee on Economic, Social and Cultural Rights, General Comment 15 “The right to water”, 20 January 2003, para. 40.

²⁵ See Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 22-26 January 1997, paras. 14 &15. Available at: http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425803 and Committee on Economic, Social and Cultural Rights, General Comment 14 “The right to the highest attainable standard of health”, 11 August 2000, para. 49.

²⁶ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 2-6 June 1986. Available at: <http://www.fao.org/righttofood/KC/downloads/vl/docs/Limburg%20principle.doc>. They have been drafted to consider the nature and scope of the obligations of State parties to the ICESCR

²⁷ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 22-26 January 1997, para. 14 (b).

²⁸ Committee on Economic, Social and Cultural Rights, General Comment 14 “The right to the highest attainable standard of health”, 11 August 200, para. 47.

²⁹ A/RES/48/104, 23 February 1994.

³⁰ General Recommendation No. 19 (11th session, 1992) on violence against women.

³¹ Radikha Coomaraswamy, Special Rapporteur on violence against women, “Integration of the human rights of women and gender perspective”, E/CN.4/1999/68, 10 March 1999, para. 25.

³² Yakin Ertürk, Special Rapporteur on violence against women, “The due diligence standard as a tool for the elimination of violence against women”, E/CN.4/2006/61, 20 January 2006, para. 28

³³ *Ibid* para. 14.

³⁴ Committee on the Elimination of Discrimination against Women, General Recommendation No. 25 (30th session, 2004) on temporary special measures, para. 7.

³⁵ *Ibid*.

³⁶ *Ibid* para. 8.

³⁷ Committee on the Elimination of Discrimination against Women, Concluding Observations: Slovenia, A/52/38, 1997, para. 108.

³⁸ See Office of the High Commissioner for Human Rights, fact sheet No. 22, Discrimination against Women. Available at: <http://www.unhcr.ch/html/menu6/2/fs22.htm>

³⁹ Committee on the Elimination of Racial Discrimination, Communication No. 4/1991, UN Doc. CERD/C/42/D/4/1991, para. 6.6. Available at:

<http://www.unhcr.ch/tbs/doc.nsf/0/ec0884e5a47c1a1480256714005f6000?OpenDocument>.

⁴⁰ Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945.

⁴¹ Prof. Dr. Yoram Dinstein, “Crimes against humanity and the Rome Statute of the International Criminal Court”, 27 November 2005. Available at:

http://www.wz.nrw.de/GIC/Doku_Menschenrechte/DINSTEIN%20FORMATIERT.pdf.

⁴² *Ibid*.

⁴³ Control Council Law No. 10; conclusions of the United Nations War crimes Commission; the International Law Commission’s formulation of the Principles of International Law Recognized in the Charter of Nuremberg Tribunal and in the Judgment of the Tribunal; Article 1 of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. See Vincent Sautenet, “Crimes against humanity and the principles of legality: what could the potential offender expect?”, Murdoch University Electronic Journal of Law, Vol. 7, No 1, March 2000. Available at: <http://www.murdoch.edu.au/elaw/issues/v7n1/sautenet71.html>.

⁴⁴ “The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: a) Murder; b) Extermination; c) Enslavement; d) Deportation; e) Imprisonment; f) Torture; g) Rape; h) Persecutions on political, racial and religious grounds; i) Other inhumane acts.” Note that Article 1 limits the jurisdiction of the ICTR to “serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States.”

⁴⁵ Prosecutor v. Akayesu, Judgment, No. ICTR-96-4-T, 2 September 1998, para. 565.

⁴⁶ 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.

2. For the purpose of paragraph 1: (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack; (b) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population; (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children; (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law; (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions; (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy; (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity; (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime; (i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

⁴⁷ Note that the same problematic in defining a "conflict decision" and its thresholds exists in the UK over the Draft Constitutional Renewal Bill. The Joint Committee created to examine and report on this Bill advised the Government to propose a more effective and specific definition (Chapter 7 of the report). The report is available at:

<http://www.publications.parliament.uk/pa/jt200708/jtselect/jtconren/166/16602.htm>.

⁴⁸ Note that the

⁴⁹ Judge Elizabeth Odio Benito, "Common elements of crimes under the Rome Statute of the International Criminal Court", 17 March 2005, para. 2.1 (c). Available at: <http://www.europarl.europa.eu/compar/libe/elsj/events/hearings/20050317/contr-odiobenito.pdf>.

⁵⁰ Ibid, para. 2.2.2 (d).

⁵¹ See Article 7 (1) (k) of the Rome Statute.

⁵² Jenny Edkins, "Mass starvations and the limitations of famine theorising", IDS Bulletin, Vol. 33, No. 4, 1 October 2002, p. 16.

⁵³ “It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all.” Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Dusko Tadic, ICTY case No. IT-94-1-AR72, 2 October 1995, para. 141.

⁵⁴ Prof. Dr. Yoram Dinstein, “Crimes against humanity and the Rome Statute of the International Criminal Court”, 27 November 2005. Available at: http://www.wz.nrw.de/GIC/Doku_Menschenrechte/DINSTEIN%20FORMATIERT.pdf.

⁵⁵ “1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.”

⁵⁶ Committee on Economic, Social and Cultural Rights, General Comment 12: “The right to adequate food”, 12 May 1999, E/C.12/1999/5.

⁵⁷ Ibid, para. 19.

⁵⁸ Sigrun I. Skogly, “Crimes against humanity – revisited: is there a role for economic and social rights?”, The International Journal of Human Rights, Vol. 5, No. 1 (Spring 2001), p. 69.

⁵⁹ According to Alex de Waal, the situation in Sudan in the 1980s could match these criteria because the government and the local militia “raided livestock, destroyed villages, poisoned wells and forced people to sell their cattle for a cheap price while preventing humanitarian aid to reach the internally displaced persons.” See Ibid, p.70.

⁶⁰ United Nations Office for the Coordination of Humanitarian Affairs: Myanmar Cyclone Nargis, OCHA Situation Report No. 34, 23 June 2008, <http://myanmar.humanitarianinfo.org/coordination/Situation%20Reports/OCHA%20Myanmar%20SitRep%20No.34.pdf>

⁶¹ Peter McKenna in W. Andy Knight and Vasselin Popovski, “Putting people ahead of protocol”, 4 June 2008 and Roberta Cohen, “The Burma cyclone and the responsibility to protect”, Brookings, 21 July 2008.

⁶² Art 30 (3) of the Rome Statute defines “knowledge” as the “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”

⁶³ Article 7 (1) of the ICC Statute.

⁶⁴ Sigrun I. Skogly, “Crimes against humanity – revisited: is there a role for economic and social rights?”, The International Journal of Human Rights, Vol. 5, No. 1 (Spring 2001), p. 71.

⁶⁵ David Marcus, “Famine crimes in international law”, American Journal of International Law, 2003, 97:245, p. 247.

⁶⁶ Ibid.

⁶⁷ Article 25 (3) (c).

⁶⁸ See footnote 55 above.

⁶⁹ Committee on Economic, Social and Cultural Rights, General Comment 4 “The right to adequate housing”, 13 December 1991, para. 7.

⁷⁰ Ibid, para. 8.

⁷¹ Ibid, para. 18.

⁷² Centre on Housing Rights and Evictions (COHRE), “Operation Murambatsvina: Unlawful forced evictions; crimes against humanity; and cruel inhuman or degrading treatment of the poorest of the poor”, submission to the 41st session of the African Commission on Human and People’s Rights, May 2007, para. 21. Available at:

<http://www.cohre.org/store/attachments/COHRE%20Shadow%20Report%20on%20Zimbabwe.pdf>.

⁷³ *Operation Murambatsvina* started in 2005 as part of a campaign of the Zimbabwean government to clean up the city from slums and to secure people’s long-term interests, in order to fulfill the aims of the Millenium Declaration. This operation was implemented in a disorganised and over-zealous way by the police and the military left 700 000 persons without a place to live.

⁷⁴ Centre on Housing Rights and Evictions (COHRE), “Operation Murambatsvina: Unlawful forced evictions; crimes against humanity; and cruel inhuman or degrading treatment of the poorest of the poor”, submission to the 41st session of the African Commission on Human and People’s Rights, May 2007, para. 21; Zimbabwe lawyers for Human Rights press release “Report of the United Nations Special Envoy welcomed”, 27 July 2005. Available at:

http://www.zlhr.org.zw/media/releases/jul_27_05.htm.

⁷⁵ Centre on Housing Rights and Evictions (COHRE), “Operation Murambatsvina: Unlawful forced evictions; crimes against humanity; and cruel inhuman or degrading treatment of the poorest of the poor”, submission to the 41st session of the African Commission on Human and People’s Rights, May 2007, para. 21.

⁷⁶ Centre on Housing Rights and Evictions (COHRE), “Operation Murambatsvina: Unlawful forced evictions; crimes against humanity; and cruel inhuman or degrading treatment of the poorest of the poor”, submission to the 41st session of the African Commission on Human and People’s Rights, May 2007, para. 21.

⁷⁷ UN Special Envoy on Human Settlements Issues in Zimbabwe, Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina, 18 July 2005, para. 6.7.

⁷⁸ Ibid, para. 6.7.

⁷⁹ UN Special Envoy on Human Settlements Issues in Zimbabwe, Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina, 18 July 2005. Available at: http://www.un.org/News/dh/infocus/zimbabwe/zimbabwe_rpt.pdf

⁸⁰ Zimbabwe 1995 Report to ECOSOC on it progress in implementing the Covenant on Economic, Social and Cultural Rights, E/1990/5/Add.28.

⁸¹ UN Special Envoy on Human Settlements Issues in Zimbabwe, Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina, 18 July 2005, para. 6.7.

⁸² Sigrun I. Skogly, “Crimes against humanity – revisited: is there a role for economic and social rights?”, *The International Journal of Human Rights*, Vol. 5, No. 1 (Spring 2001), p. 73.

⁸³ Article 13 (b) of the Rome Statute.

⁸⁴ Sigrun I. Skogly, “Crimes against humanity – revisited: is there a role for economic and social rights?”, *The International Journal of Human Rights*, Vol. 5, No. 1 (Spring 2001), p. 74.

⁸⁵ Michael J. Dennis and David P. Stewart, “Justiciability of economic, social and cultural rights: should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health?”, (2004), *The American Journal of International Law*, Vol. 98, No. 3, p. 492.

⁸⁶ Committee on Economic, Social and cultural Rights, General Comment 14 “The right to the highest attainable standard of health”, 11 August 2000, para. 47.

⁸⁷ Burma is a party to the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the Elimination of all forms of Discrimination against Women and the Convention on the Rights of the Child.

⁸⁸ “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

⁸⁹ “In some cases, the declaratory nature of the provisions [of treaties] produces a strong law-creating effect at least as great as the general practice considered sufficient to support a customary rule.” Ian Brownlie, “Principles of Public International Law”, (3rd edition, 1979), p. 12. Law-making treaties that translate the States’ perception of international law or “establish new rules which are to guide them for the future in their international conduct require the participation of a large number of States to emphasise this effect and may produce rules that will bind them all.” Malcolm Shaw, “International law”, (2nd edition, 1986), p. 79. Article 38 of the 1969 Vienna Convention on the law of treaties states that: “nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.” As of 05/01/2009, 140 States are party to the ICESCR. See: <http://www2.ohchr.org/english/bodies/ratification/3.htm>.

⁹⁰ Ibid footnote 105.

⁹¹ Committee on Economic, Social and Cultural Rights, General Comment 12 “The right to adequate food”, 12 May 1999, para. 32; Committee on Economic, Social and Cultural Rights, General Comment 14 “The right to the highest attainable standard of health”, 11 August 2000, para. 59; Committee on Economic, Social and Cultural Rights, General Comment 15 “The right to water”, 23 January 2003, para. 55.

⁹² Michael J. Dennis and David P. Stewart, “Justiciability of economic, social and cultural rights: should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health?”, (2004), *The American Journal of International Law*, Vol. 98, No. 3, p. 495.

⁹³ Ibid, p. 498.

⁹⁴ Human Rights Council Resolution 5/1, “Institution-building of the United Nations Human Rights Council”, 18 June 2007, A/HRC/RES/5/1, para. 85. Available at: http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_5_1.doc.

⁹⁵ The following Special Procedures have a thematic mandate relating to ESCR: the Special Rapporteur on the right to food; 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; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation and the Independent Expert on the question of human rights and extreme poverty.

⁹⁶ For more information on the Special Procedures, see the following section of the website of the Office of the High Commissioner for Human Rights (OHCHR): <http://www2.ohchr.org/english/bodies/chr/special/index.htm>.

⁹⁷ Meghna Abraham, “A new chapter for human rights – A handbook on issues of transition from the Commission on Human Rights to the Human Rights Council”, 2006, (International Service for Human Rights and Friedrich Ebert Stiftung), p. 35.

⁹⁸ Human Rights Council Resolution 8/2, 18 June 2008. Available at: http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_2.pdf. Adopted by the UN General Assembly on 10 December 2008, A/RES/63/117.

⁹⁹ Gareth Evans, “The responsibility to protect: meeting the challenges”, Lecture to the 10th Asia Pacific for Senior Military officers, 5 August 2008.

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- ¹⁰⁰ “An Agenda for peace”, UN Doc. A/47/277- S/2411, 17 June 1992, para. 17.
- ¹⁰¹ Kofi Annan, 35th Annual Ditchley foundation Lecture, 26 June 1998. Available at: <http://www.ditchley.co.uk/page/173/lecture-xxxv.htm>.
- ¹⁰² Global Centre for the Responsibility to Protect, “FAQ about the R2P”. Available at: <http://globalr2p.org/FAQ.html>.
- ¹⁰³ ICISS, “The Responsibility to Protect”, December 2001, para. 2.14.
- ¹⁰⁴ Ibid, para. 2.29.
- ¹⁰⁵ 11 July 2000. Available at: http://www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm.
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- ¹⁰⁷ In: Louise Arbour, “The responsibility to protect as a duty of care in international law and practice”, Review of International Studies (2008), p. 458.
- ¹⁰⁸ Ban Ki-moon, “Secretary General defends, clarifies “Responsibility to Protect” at Berlin event”, SG/SM/11701, 15 July 2008; a view also supported by Edward C. Luck, in: “The United Nations and the Responsibility to Protect”, The Stanley Foundation, August 2008, p. 8. Available at: <http://www.stanleyfoundation.org/publications/pab/LuckPAB808.pdf>.
- ¹⁰⁹ Gareth Evans, “The limits of State Sovereignty: The Responsibility to Protect in the 21st Century”, 29 July 2007.
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- ¹¹¹ Lloyd Axworthy, “It’s time to intervene”, Citizen Special, 13 May 2008. Available at: <http://www.canada.com/ottawacitizen/news/opinion/story.html?id=6e73a06d-f95e-40e4-8eca-28a039e1f99a> and Ramesh Thakur, “Macho move would make Burma’s plight even worse”, The Japan Times, 2 June 2008. Available at: <http://search.japantimes.co.jp/cgi-bin/eo20080602rt.html>.
- ¹¹² In Roberta Cohen, “The Burma cyclone and the responsibility to protect”, Brookings, 21 July 2008. Available at: http://www.brookings.edu/speeches/2008/0721_myanmar_cohen.aspx.
- ¹¹³ In Gareth Evans, Burma/Myanmar: “Facing Up to Our Responsibilities”, The Guardian, 12 May 2008.
- ¹¹⁴ Right intention; last resort; proportional means and reasonable prospects. For more details, see ICISS report, p. 35-36.
- ¹¹⁵ Lloyd Axworthy, “It’s time to intervene”, Citizen Special, 13 May 2008. Available at: <http://www.canada.com/ottawacitizen/news/opinion/story.html?id=6e73a06d-f95e-40e4-8eca-28a039e1f99a>.
- ¹¹⁶ Thelma Ekiyor, Executive Director of the West Africa Civil Society Institute, “The R2P: a way forward or rather part of the problem?”, Foreign Voices No. 1, February 2008, p. 2-5, the Development and Peace Foundation. Available at: http://www.sef-bonn.org/download/publikationen/foreign_voices/foreign-voices-1-2008.pdf.
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Global and regional organisations are together with individual states increasingly being called upon to respond to widespread and systematic human rights abuses resulting from armed conflicts and other humanitarian emergencies. The One World Trust explores with a set of briefing papers and reports the options and constraints faced by multilateral institutions and states when seeking to translate the doctrine of the Responsibility to Protect, unanimously approved by the UN member states in 2005, into legitimate and practical steps towards ending and preventing violence and large scale human rights abuse. With this work the One World Trust aims in particular to support parliamentarians and others in the policy community in their task to contribute to an emerging framework for global governance and conflict prevention.
