



FACULTY OF LAW  
Lund University

Mesganaw Mulugeta Assefa

A Dead End or a New Beginning?  
The Place of Economic, Social  
and Cultural Rights in the  
Responsibility to Protect Doctrine

Master thesis  
30 credits

Supervisor:  
Diana Amnéus

Master's Programme in International Human Rights Law

Spring, 2011

# Contents

<b>SUMMARY</b>	<b>4</b>
<b>ACKNOWLEDGMENT</b>	<b>5</b>
<b>ABBREVIATIONS</b>	<b>6</b>
<b>1 INTRODUCTION</b>	<b>7</b>
1.1. Background	7
1.2. Statement of the problem and Research questions	8
1.3. Methodology	9
1.4. Delimitation	10
1.5. Introduction	10
<b>2 THE RESPONSIBILITY TO PROTECT (R2P) - AN OVERVIEW</b>	<b>15</b>
2.1. Putting R2P in context	15
2.1.1. <i>Humanitarian intervention, sovereignty and R2P</i>	15
2.1.2. <i>R2P and human security</i>	18
2.2. R2P, a moral or a legal responsibility?	19
2.3. Setting R2P in motion - the actors and their responsibilities	23
2.4. The scope of R2P	26
2.4.1. <i>Threshold atrocity crimes</i>	26
2.4.2. <i>The rationale behind limiting the scope of R2P</i>	28
<b>3 OBLIGATIONS OF STATES UNDER ECONOMIC, SOCIAL AND CULTURAL RIGHTS</b>	<b>30</b>
3.1. The nature of economic social and cultural rights	30
3.2. Obligations of states under economic social and cultural rights	33
3.2.1. <i>Protect, respect and fulfill</i>	34
3.2.2. <i>Obligation to act with due diligence</i>	36
3.3. Violations of state obligations under specific rights	38
3.3.1. <i>The right to food</i>	38
3.3.2. <i>The right to housing</i>	40
<b>4 CRIMES AGAINST HUMANITY UNDER INTERNATIONAL CRIMINAL LAW</b>	<b>42</b>
4.1. Features of crimes against humanity	42
4.2. Criteria of crimes against humanity	43

4.2.1.	<i>Chapeau criteria</i>	44
4.2.2.	<i>The Mens rea</i>	49
4.3.	Constituent offences under crimes against humanity	51
<b>5</b>	<b>GROSS VIOLATIONS OF ECONOMIC SOCIAL AND CULTURAL RIGHTS AS AN R2P CASE</b>	<b>56</b>
5.1.	Violations of ESC rights as crimes against humanity	56
5.1.1.	<i>Gross violations of the right to housing as a crime against humanity</i>	59
5.1.2.	<i>Gross violations of the right to food as a crime against humanity</i>	61
5.2.	Applying R2P to gross violations of ESC rights	62
5.2.1.	<i>Does it indicate a dead end? Rejecting the application of R2P in situations such as Zimbabwe and Burma</i>	63
5.2.2.	<i>Re-discovering the place of gross violations of ESC rights in the R2P doctrine</i>	66
<b>6</b>	<b>CONCLUSION</b>	<b>69</b>
	<b>BIBLIOGRAPHY</b>	<b>71</b>
	<b>TABLE OF CASES</b>	<b>78</b>

# Summary

As endorsed by states in the 2005 World Summit, the R2P doctrine primarily reaffirms the responsibility of states to protect their population from genocide, war crimes, ethnic cleansing and crimes against humanity. Secondary responsibility is on the international community to encourage and help States to exercise this responsibility and where states manifestly fail to protect their populations to take collective action, in a timely and decisive manner, through the Security Council, to protect populations.

This thesis will try to address the question of whether or not R2P, could be invoked when gross violations of ESC rights that could amount to crimes against humanity are committed by active commission or deliberate omissions of states. It would argue a case for the application of R2P for such cases by using Ronald Dworkin's constructive method of interpretation.

To qualify as crimes against humanity, gross violations of ESC rights must be committed as part of a widespread or systematic attack on the civilian population. Attack includes any mistreatment and is not limited to military attack. Such attack could be undertaken through active commissions or through deliberate omissions aimed at encouraging the attack. The *mens rea* required is satisfied by direct intention or indirect intension where the perpetrator knows such violations would bring about serious harm on the victim, even without desiring the result. Widespread or systematic forced evictions as gross violations of the right to adequate housing could constitute crimes against humanity. 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 also fit the criteria for crimes against humanity.

This thesis acknowledges the validity of practical and political reasons for limiting the scope of R2P, but argues that gross violations of ESC rights that could amount to crimes against humanity should come within the reach of R2P. It shows that previous rejections of the application of R2P in connection to gross violations of ESC rights, particularly in Burma and Zimbabwe, do not indicate a dead end for such claim. It also argues that by their nature, these situations call for less than a full military response and therefore should not be rejected for fear that they would mean military intervention.

By making a case for the application of R2P for gross violations of ESC rights, it would enable it extend better protection, by affirming indivisibility of human rights and echoing the responsibility of the international community to intervene in circumstances resulting in the massive denial and violation of ESC rights when the state generally responsible could no longer provide such protection.

# Acknowledgment

I would like to take this opportunity to thank my supervisor, Diana Amnéus, for her close supervision; I sincerely appreciate her efforts and dedication in reading every single page of the manuscript of this thesis. I am indebted to the Faculty of Law of Lund University, for the opportunity and the Raoul Wallenberg Institute for the wonderful library.

My friends in Lund, Ethiopians or otherwise, thank you for making life easier for me, than it actually was.

Finally I want to express my deepest gratitude to my family for their constant love, support and encouragement and special thanks goes to my aunt Yodit, who takes most of the credit for my completion of the masters program. Once again I proved that Family matters!

Glory to the almighty God, who helped me in so many mysterious ways!!

Mesganaw Mulugeta A.

Lund, May 2011.

# Abbreviations

<b>Abbreviation</b>	<b>Explanation</b>
ESC	Economic, social and cultural rights
ICC	International Criminal Court
ICC	International criminal court
ICCPR	International covenant on civil and political rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International court of justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	The International Criminal Tribunal for the former Yugoslavia
NATO	North Atlantic Treaty Organization
R2P	Responsibility to protect
SCSL	Special Court for Sierra Leone
UDHR	Universal declaration of human rights
UN	United Nations
UNDP	United Nations development programme

# 1 Introduction

## 1.1. Background

In the aftermath of the Cold War, there appeared to be a growing support to the claim that, in cases where a state was carrying out or sanctioning mass atrocities, the international community has a right, or even a duty, to intervene in support of the victims.<sup>1</sup> In the 1990s with the breakup of various cold war structures and the removal of some superpower constraints conscious shocking situations repeatedly arose. Through the decade, nine significant military operations, including in Yugoslavia, that had an overt and credible humanitarian justifications were launched.<sup>2</sup> These interventions were not seen as legitimate by all. Advocates of traditional sovereignty tend to be either skeptical or hostile towards uninvited coercive interference pointing to the potential for abuse by the great powers.<sup>3</sup>

The then UN Secretary General, Kofi Annan troubled by the UNs failure to prevent or halt the bloodshed in Bosnia and Rwanda, was in search of finding a consensus on how to approach and respond to situations of massive violations of human rights and humanitarian law.<sup>4</sup> By propagating that sovereignty implies responsibility and not just power, he challenged world powers to “find common ground in upholding the principles of the Charter, and to act in defense of common humanity”.<sup>5</sup> The Canadian government took the challenge and sponsored the international Commission on Intervention and State Sovereignty (ICISS) which came up with a report entitled Responsibility to Protect (R2P).<sup>6</sup>

The ICISS in its report uphold a basic principle that stated that the primary responsibility for the protection of people lies within the state itself. However where a population is suffering from serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.<sup>7</sup> This principle was affirmed by UN member states in the 2005 World summit.

---

<sup>1</sup> Newman, M., *Revisiting the Responsibility to Protect*, The Political Quarterly, 80 (2009), p. 92.

<sup>2</sup> Evans, Gareth, *The responsibility to protect; ending mass atrocity crimes once and for all*, (Brookings institution press 2008), p. 25.

<sup>3</sup> Bellamy, Alex J. *Responsibility to protect*, (Polity press 2009), p. 18.

<sup>4</sup> *Ibid.* pp. 28, 32.

<sup>5</sup> ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001), para. 1.6.

<sup>6</sup> Evans, *supra* note 2, p. 38.

<sup>7</sup> ICISS report, *supra* note 5, Basic Principles, p. XI.

The 2005 World Summit determined what the doctrine of responsibility to protect encompasses, particularly the obligations it imposes upon states and the international community, the situations it is applicable to and the measures that can be taken when such situations arise. It was stipulated that each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>8</sup> The international community in addition to encouraging States to exercise this responsibility has, through the United Nations, a responsibility to use appropriate peaceful means to help protect populations from these crimes. Should peaceful means be inadequate and national authorities manifestly fail to protect their populations from these crimes, the international community should be prepared to take collective action, in a timely and decisive manner, through the Security Council.<sup>9</sup>

## **1.2. Statement of the problem and Research questions**

In May 2008, Burma was hit by cyclone Nargis that resulted in the deaths of 140,000 people and left further 800,000 homeless. Burma, with arguably the most controversial regime in the South East Asian region, certainly lacked the capability to prepare and respond to the disaster adequately.<sup>10</sup> The already dire situation deteriorated further as the Burmese regime trenchantly refused to allow a significant amount of foreign humanitarian relief to reach victims. While the international community stood ready and literally at Burma's doorstep to deliver aid, its hands were tied as long as the government exercised its sovereign right to refuse entry into its territory.<sup>11</sup>

The debate on whether or not the Burmese government policies in response to the cyclone constituted crimes against humanity entailing R2P action started immediately. The Foreign Minister of France, Bernard Kouchner, was one of the first to characterize the situation as an R2P case because the deliberate massive suffering and death caused could be defined as crimes against humanity, which R2P is supposed to address.<sup>12</sup> Those seeking to limit the application of R2P considered it inapplicable saying natural disasters are excluded as triggers for R2P. By pointing out that Burma has grossly violated the right to adequate food under the ICESCR in denying food aid, supporters of R2P called for the invocation of R2P to compel Burma to accept aid arguing that there is no meaningful distinction between the failure to protect following

---

<sup>8</sup> World Summit Outcome, GA Res. 60/1, (2005), para. 138.

<sup>9</sup> *Ibid*, para. 139.

<sup>10</sup> McLachlan B. Ashley and Langmore, John, *A Crime against Humanity? Implications and Prospects of the Responsibility to Protect in the Wake of Cyclone Nargis*, *Global Responsibility to Protect* 3 (2011), p. 38.

<sup>11</sup> Wong, Jarrod, *Reconstructing the Responsibility to Protect in the Wake of Cyclones and Separatism*, *Tulane Law Review*, Vol. 84, (2009), p. 221.

<sup>12</sup> Cohen, Roberta, *The Burma Cyclone and the Responsibility to Protect*, *Global Responsibility to Protect* 1 (2009), p. 254.

natural disasters and the failure to protect from manmade mass atrocity crimes.<sup>13</sup>

The dominating view at that time, especially by states, was the one disfavoring the application of R2P. France expressed support for the Security Council's application of R2P since the Security Council is the body that is supposed to decide R2P cases. But China, Russia, South Africa and others in the Council blocked such steps pointing out that R2P is designed to apply to mass atrocities not to natural disasters and claiming that extending the concept to a disaster like the Burma cyclone could weaken support for R2P.<sup>14</sup> Burma has trenchantly opposed any such application of R2P warning that it would set a 'dangerous precedent' noting that the doctrine was not aimed to be used in times of natural disasters.<sup>15</sup>

For supporters of the use of R2P, what happened in Burma has evidently shown that crimes which would amount to atrocity may be committed without armed conflict through gross violations of ESC rights by the acts or omissions of states. Is R2P going to offer no protection when government's violation of ESC rights constitutes one of the atrocity crimes it is meant to protect? Do gross violations of ESC rights, particularly violations of the rights to food and housing, committed through active commissions or deliberate omissions of states constitute crimes against humanity? Should R2P be always limited to an active commission of atrocity crimes or could a case be made for its application for cases of deliberate omissions that give rise to gross violations of ESC rights that amount to a protected atrocity crime? In addressing these research questions, this thesis aspires to make a case for the application of R2P to gross violations of ESC rights through constructive interpretation without necessarily broadening the scope of the R2P doctrine.

### **1.3. Methodology**

To address the research questions, I will employ Ronald Dworkin's constructive method of interpretation. According to Dworkin, the process of constructive interpretation is made up of three analytical stages: Pre-interpretive, interpretive and post-interpretive. In the pre-interpretive stage, the rules and standards that constitute the practice are identified. Then, in the interpretive stage, the interpreter settles on some general justification for those elements identified at the pre-interpretive stage in analysing how they function. At the post-interpretive stage, the interpreter adjusts his sense of what the practice really requires so as to better serve the justification he accepts at the interpretive stage.<sup>16</sup>

---

<sup>13</sup> Wong, *supra* note 11, p. 219.

<sup>14</sup> Cohen, *supra* note 12, p. 254.

<sup>15</sup> Wong, *supra* note 11, p. 245.

<sup>16</sup> Dworkin, Ronald, *Law as Integrity*, (Law's Empire 1986), p. 3.

Pre-interpretative and post interpretative analysis of rules and standards that regulate R2P, crimes against humanity and ESC rights will be made separately under chapters two, three and four. In the last chapter, post interpretative analysis will be made to re-discover the place of gross violations of ESC rights in the R2P doctrine through crimes against humanity and argue a case for the constructive interpretation of R2P to enable it apply to atrocities committed through gross violations of ESC rights through active commissions or deliberate omissions of states.

## **1.4. Delimitation**

As R2P is considered as an emerging norm in international law, not too much legal research exists on issues related to it. In particular, only few previous researches have been done connecting R2P to ESC rights and that can be regarded as one of the limitations of the thesis. Despite that, the thesis will show that the constructive interpretation of R2P will enable it to respond to human suffering whether it came from violations of civil and political rights or ESC rights. Also, given the limited space of the thesis, it is impossible to examine each ESC right and therefore selected ESC rights are examined which makes it difficult to reach a conclusion in general terms.

## **1.5. Introduction**

The formal endorsement of R2P did not stop the resistance to both its language and substance.<sup>17</sup> Despite its remarkable development within a short period of time, the doctrine is far from perfect and there are still debates among states, politicians and the academia about issues that arise about R2P. It is not the aim of this thesis to address all these issues. It will however, touch upon some of the relevant debates that are relevant to address the main research question. One of these debates concerns the nature of obligations R2P poses. Does it pose legal obligation under international law or is it just an expression of a moral obligation?

Alex J. Bellamy, stated that R2P is invariably referred to as a concept, a principle or a norm and decided to use the languages of concept and principle rather than norms claiming that such reference reflect the terms in which governments refer to it.<sup>18</sup> On the other hand, Gareth Evans argued that R2P can reasonably be described as a brand new international norm of really quite fundamental ethical importance and novelty in the international system. In his book he claimed that R2P is a broadly accepted international norm and even as

---

<sup>17</sup> Evans, *Supra* note 2, p. 50.

<sup>18</sup> Bellamy, *supra* note 3, p. 7.

one with the potential to evolve further into a fully fledged rule of customary international law.<sup>19</sup>

R2P is triggered only when atrocity crimes particularly genocide, war crimes, ethnic cleansing, and crimes against humanity are committed. It is not designed to respond to, other grave human rights abuses or acts of international terrorism even if they are found to be threats to international peace and security, absent atrocity crimes.<sup>20</sup> As such, R2P is not limited to violations of humanitarian law. Armed conflict is not a threshold for R2P. Except in cases of war crimes, that need to be committed in connection with an armed conflict, ethnic cleansing, genocide and crimes against humanity can be committed with or without armed conflict.

Both practical and political justifications exist for limiting the scope of R2P to the four atrocity crimes. If R2P is to be about protecting everybody from everything, it will end up protecting nobody from anything.<sup>21</sup> Therefore the scope of R2P is designed to be limited to atrocity crimes which in themselves are not defined under any of the R2P core documents. However these four categories of crimes have been extensively examined and defined by international criminal tribunals in their constitutional statutes and jurisprudence. The Rome Statute of the ICC, in particular, offers the most sophisticated definitions for atrocity crimes drawn from treaty law and customary international law.<sup>22</sup> The scope of R2P is as limited as, or as broad as the scope of the four crimes, whenever circumstances qualify as one of the four crimes they automatically come within the reach of the R2P doctrine and this does not necessarily mean the intended scope of R2P is extended. This thesis intends to argue that R2P should be invoked for gross violations of ESC rights that amount to crimes against humanity.

Obligations of states under the international ICESCR are progressive.<sup>23</sup> However while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect including the obligation to guarantee the exercise of rights without discrimination and to take steps towards their full realization.<sup>24</sup> States are in violation of their obligation when they actively deny ESC rights by commission or through omission and when they fail to eliminate discrimination by abolishing without delay any

---

<sup>19</sup> Evans, *supra* note 2, p. 52.

<sup>20</sup> Chandler, David, *R2P or Not R2P? More State Building, less Responsibility*, Global Responsibility to Protect 2 (2010), p. 78.

<sup>21</sup> Evans, *supra* note 2, p. 64.

<sup>22</sup> Chandler, *supra* note 20, p. 81.

<sup>23</sup> Article 2(1), *International covenant on Economic, Social and Cultural Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.

<sup>24</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: *The Nature of States Parties' Obligations* (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23, para. 1.

discriminatory laws, regulations and practices affecting the enjoyment of ESC rights.<sup>25</sup>

With a view to better understand the level of responsibility of states to respect, protect and fulfill these human rights, I will employ the standard of due diligence that has been increasingly applied to a wide range of human rights including women rights. The Declaration on the Elimination of Violence against Women adopted by the General Assembly in 1993 urges States, in Article 4 to exercise due diligence to prevent, investigate and punish acts of violence against women, whether those acts are perpetrated by the state or by private persons. The concept of due diligence provides a yardstick to determine whether a State has met or failed to meet its obligations in combating violence against women. By contextualizing it to obligations of states on ESC rights, I intend to clarify states obligations to protect, respect and fulfill these rights. It is relevant because, especially for violations of omission, it shows the levels of due diligence states are expected to show.

In the attempt to cover these situations of gross violations of ECSC rights, the appropriate point of entry to the R2P doctrine, among the four crimes that are covered, seems to be crimes against humanity. This is so because the crime covers a broad range of potential victims as it does not require a nexus to armed conflict.<sup>26</sup> Also the fact that it is unnecessary to show discriminatory intent to destroy, in whole or in part, a certain group of people makes it suitable to cover the alleged cases of violations.

This thesis will not argue that all violations of ESC rights should fall under the R2P doctrine. Yet, those that are widespread or systematic as to fall under the definition of crimes against humanity should well be covered under it. To limit crimes against humanity to violations of what are considered integrity rights, such as the right to life, to be free from torture and so on, is an arbitrary limitation that should be challenged. If malicious state leaders knew that they will be held responsible for massacring people, they may choose to starve them to death. I wish to argue that, as long as the concern is the kind of suffering and the result of the action, violations of ESC rights that can result in the same should be included.<sup>27</sup>

Crimes against humanity have been defined in various international instruments including the Rome statute which provides the most recent and broad definition. According to Article 7, 'crime against humanity' means any of the

---

<sup>25</sup> Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, (June 1986), para. 37.

<sup>26</sup> Triffterer, Otto (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (C.H:Beck, Hart, Nomos 2nd ed 2008), p. 181.

<sup>27</sup> Skogly, Sigrun I. "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.

enumerated acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: the enumerated acts include murder, extermination and others. In order for a crime against humanity to be committed the chapeau requirements have to be fulfilled and any of the acts enumerated must be committed.<sup>28</sup> As per Article 30 of the Rome statute, the required *mens rea* for crimes against humanity is that of intent and knowledge. Direct intention or at least *dolus eventualis* (indirect intention) where the perpetrator was aware that such the consequence will occur in the ordinary course of events is required.<sup>29</sup>

The term widespread generally connotes the large scale nature of the attack and the number of victims. Systematic refers to the degree of organization that features patterns, use of resources planning and political objective.<sup>30</sup> As different from isolated or sporadic events the practice of atrocities forms part of a governmental policy or are tolerated, condoned or acquiesced in by a government or a *de facto* authority.<sup>31</sup> Attack as criteria refers to a campaign or operation conducted against the civilian population. It does not need to involve military forces or any violent force at all. It can be any mistreatment of the civilian population.<sup>32</sup> Such mistreatment of the civilian population may result from violating their ESC rights by commission or deliberate omission.

In order to establish a valid claim that gross violations of ESC rights constitute crimes against humanity and under which conditions, a separate assessment should be made for a specific right. Since ESC rights cover a wide range of rights including, the right to food, health, property, housing, education and others, including self determination and cultural rights, it is necessary to select specific rights to examine. For the purpose of this thesis the rights to adequate food and housing, in connection to which R2P has already been invoked, will thoroughly be examined.

The thesis will show that gross violations of ESC rights could constitute crimes against humanity. Arguably, gross violations of ESC rights qualify as crimes against humanity would come within the reach of the R2P doctrine, by showing previous rejections of application of R2P, particularly in Zimbabwe and Burma, do not indicate a dead end for the application of R2P to gross violations of ESC rights as none of these cases have expressly ruled out its application but were rather denied due to other reasons, such as their connection with natural disasters. A case will be made for the constructive interpretation of R2P to enable it apply to crimes committed either by commission or deliberate

---

<sup>28</sup> Triffterer, *supra* note 26, p. 168.

<sup>29</sup> Cassese, A., Gaja, G., Kirsch, P., Pellet, A., and Swart, B., *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford University Press, 2002), p. 364.

<sup>30</sup> Cryer, R., Friman, H., Robinson, D., and Wilmschurst, E., *An introduction to international criminal law and procedure*, 2<sup>nd</sup> ed., (Cambridge University Press, 2010), p. 194-195.

<sup>31</sup> Cassese, Antonio, *International criminal law*, (Oxford University press 2<sup>nd</sup> ed. 2008), p. 98.

<sup>32</sup> Triffterer, *supra* note 26, p. 175.

omission of states through gross violations of ESC rights that reach the level of crime against humanity. By then R2P would offer protection to those it is meant to protect by affirming indivisibility of human rights and echoing the responsibility of the international community to intervene in circumstances resulting in the massive denial and violation of ESC rights when the state generally responsible for preventing such violations is no longer protecting its own population.<sup>33</sup>

---

<sup>33</sup> Leckie, Scott, “*Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights*”, *Human Rights Quarterly* 20.1 (1998), p. 116.

# **2 The Responsibility to Protect (R2P)**

## **- an overview**

In this chapter, I will try to give a brief overview on R2P. With the aim of understanding its development and point of departure I will start by putting R2P in context with the notions of humanitarian intervention and human security. Then, the nature of obligation that R2P possesses under international law will be discussed. International practice will be examined to support the conclusion that R2P is much more than a moral commitment. The types of responsibilities and the specific tasks of the actors thereof in implementing R2P will be explained. In discussing the scope of R2P, a brief description of the four atrocity crimes and the rationale for limiting R2P to them will be made.

### **2.1. Putting R2P in context**

Before R2P came in to being, other notions that purported to limit the principle of sovereignty were witnessed in international politics. The Westphalian view that what happens within the state's borders and its territory was no other state's business was challenged claiming that neither sovereignty nor the principle of non interference suggest that a state is free to do as it pleases within its borders or that sovereignty is absolute. These notions include humanitarian intervention and human security. Subsequently, R2P will be explained in the context of these notions.

#### **2.1.1. Humanitarian intervention, sovereignty and R2P**

Humanitarian intervention can be described as the threat or use of force by a state or states in order to stop or halt mass atrocity crimes in a third state.<sup>34</sup> In the 1990s after numerous armed conflicts in which civilian populations were deliberately targeted, the idea that the international community could intervene in a country or an internal conflict to protect innocent civilians gained widespread acceptability.<sup>35</sup> Humanitarian intervention has been controversial both when it happens and when it did not happen. In 1994 the Security Council refused to take the necessary action in Rwanda and was strongly criticized for its inaction. In 1999 in Kosovo, where NATO intervention took place, the

---

<sup>34</sup> Kuwali, Dan, *The responsibility to protect: implementation of Article 4(b) intervention*, (Martinus Nijhoff publishers 2011), p. 12.

<sup>35</sup> Western, Jon, *Humanitarian Intervention, American Public Opinion, and the Future of R2P*, *Global Responsibility to Protect*, Vol. 1, No. 3, (2009), p. 325.h

operation raised major questions about the legitimacy of military intervention in a sovereign state.<sup>36</sup>

The cornerstones of the international system are states and the principle of state sovereignty is a fundamental norm within the international order.<sup>37</sup> The conception of sovereignty, rooted in the treaties of Westphalia, asserted the equality of states and that they are not subject to the impositions of supranational authority and above all, should not interfere in each other's internal affairs.<sup>38</sup> These principles are also reflected under international law as a founding principle. Under the UN Charter it is declared that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".<sup>39</sup>

However established the principle of non intervention and sovereignty looked, military interventions mandated by the UN Security Council in Northern Iraq, Somalia, Haiti, Bosnia, and Kosovo in the 1990's suggest that the world was moving beyond a system based on sovereignty.<sup>40</sup> It however, generated a very fierce debate about humanitarian intervention. On the one hand, there were those, mostly in the north, who argued strongly for "the right to intervene"; on the other hand, claims were equally vehemently made mostly in the south, about the primacy and continued resonance of the concept of national sovereignty and the debate was intense and very bitter, but the 1990s finished with it utterly unresolved in the UN or anywhere else.<sup>41</sup>

Agitated by the profound failure of individual states to live up to their most basic compelling responsibilities and the failure of the international community to respond to that, evidenced by the massacres in Rwanda and Srebrenica, the then UN Secretary General Kofi Annan, took on the debate and asked world leaders "if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to Rwanda, to Srebrenica and to gross and systematic violations of human rights that offend every precept of our common humanity?".<sup>42</sup> Troubled by the disparities in international responses, the Canadian government commissioned the ICISS to examine the varied responses and to develop a strategy for a more robust framework to prevent and respond to mass violence against civilian populations.<sup>43</sup> The ICISS report brought about

---

<sup>36</sup> ICISS report, *supra* note 5, para. 1.2.

<sup>37</sup> Deng, Francis M., *From 'Sovereignty as Responsibility' to the 'Responsibility to Protect'*, Global Responsibility to Protect, Vol. 2, No. 4, (2010), p. 353.

<sup>38</sup> Cooper, Richard H. and Kohler, Juliette V. (Ed), *Responsibility to Protect: The Global Moral Compact for the 21st Century*, (Palgrave Macmillan 2009), p. 16.

<sup>39</sup> Article 2(4), *Charter of the United Nations*, (1945).

<sup>40</sup> Western, *supra* note 43, p. 325.

<sup>41</sup> Cooper and Kohler, *supra* note 38, p. 18.

<sup>42</sup> Kofi Annan, *Secretary-Generals annual report to the General Assembly*, (1999)

<sup>43</sup> Western, *supra* note 35, p. 325.

what proved to be, at last, a conceptual breakthrough in providing that framework and settle the debate and that marked the birth of R2P.<sup>44</sup>

Like humanitarian intervention, R2P has faced a challenge from the concept of sovereignty from its inception. There was a concern among many states that R2P principles might be misused by powerful states or groups of states to justify coercive interventions undertaken for other reasons particularly on the part of those who have been subject to colonialism.<sup>45</sup> The ICISS challenged the threat on R2P from sovereignty by insisted on conceptualizing sovereignty as a responsibility.<sup>46</sup>

The idea of sovereignty as responsibility is not totally new. Even Thomas Hobbes's seventeenth century masterpiece, *Leviathan*, often portrayed as the ultimate ode to absolute unadulterated sovereignty, recognized that the sovereign power had an obligation to protect the people under its rule.<sup>47</sup> The refiners of the notion of "sovereignty as responsibility" conceptualized it to entail two dimensions; One implies that sovereignty obliges the state to protect and assist its citizens if that state wishes to qualify as a legitimate and respected member of international society and the second entails accountability; if a state fails to discharge its responsibility for the welfare of its citizens because of a lack of political will or capacity, combined with a refusal to seek or at least accept international assistance, then the concerned international community, acting collectively or through coalitions, is obliged to find a way of intervening to provide the needed assistance.<sup>48</sup>

Thus R2P seeks to reinforce one of the essential elements of sovereignty; the protection of people. It does not, in fact, challenge the sovereign authority of states to do something that any of them would admit to wanting to do in the first place.<sup>49</sup> The best assurance for maintaining sovereignty is therefore to establish at least minimum standards of responsibility. The role of the international community is to render complementary protection and assistance to those in need and to hold governments accountable in the discharge of their national responsibilities.<sup>50</sup> It can be said that the notion of sovereignty as responsibility is affirmed by States as rendered in the 2005 world summit which viewed R2P as an ally of sovereignty, not an adversary. It described R2P as a notion that grows from the positive and affirmative notion of sovereignty as responsibility, rather than from the narrower idea of humanitarian

---

<sup>44</sup> Evans, *supra* note 2, p. 38.

<sup>45</sup> Luck, Edward C., *Sovereignty, Choice, and the Responsibility to Protect*, Vol. 1, No. 1, (2009), p. 17.

<sup>46</sup> Evans, *supra* note 2, p. 42.

<sup>47</sup> Luck, *supra* note 45, pp. 13-14.

<sup>48</sup> Deng, *supra* note 37, pp. 354-355.

<sup>49</sup> Luck, *supra* note 45, p. 14.

<sup>50</sup> Deng, *supra* note 37, p. 354.

intervention and will, by helping States to meet their core protection responsibilities, seek to strengthen sovereignty, not weaken it.<sup>51</sup>

As to the relationship between R2P and humanitarian intervention, the formulators of R2P, as Gareth Evans puts it, ‘tried hard to make it clear beyond argument that R2P was about much more than military intervention, it extended to a whole continuum of obligations; the responsibility to prevent mass atrocity situations, the responsibility to react to them when they did, with a whole graduated menu of responses from the persuasive top the coercive; and the responsibility to rebuild after any intrusive intervention.’<sup>52</sup> Humanitarian intervention posed a false choice between two extremes: either standing by in the face of mounting civilian deaths or deploying coercive military force to protect the vulnerable and threatened populations.<sup>53</sup> But R2P, as Jean Ping the then President of the General Assembly stated, “has stressed also in the whole panoply of “diplomatic, humanitarian and other peaceful means’s other than emphasizing in military intervention so that the international community is to “help,” “assist,” “support,” and “encourage” states in meeting their R2P obligations.<sup>54</sup> The basic deference, therefore, between humanitarian intervention and R2P is that while the former is about coercive military intervention for humanitarian purposes, the latter is about taking effective preventive action.<sup>55</sup>

### **2.1.2. R2P and human security**

The 1994 UNDP human development report described human security as having two main aspects: first it means safety from such chronic threats such as hunger, disease and repression referred to as freedom from want, and second it means protection from sudden and hurtful disruptions in the patterns of daily life referred to as freedom from fear.<sup>56</sup> The idea is that, whereas issues of state security had dominated international discourse in the past, what really ultimately mattered was how all this affected individuals’ lives.<sup>57</sup> Individuals can be affected and human security can be threatened in any of the seven interrelated dimensions of security that are economic security, food security, health security, environmental security, political security, community security and personal security.<sup>58</sup>

The concept of human security has fostered the development of R2P by contributing to the shift of focus from the security of states to the security of

---

<sup>51</sup> Report of the Secretary-General, *Implementing the responsibility to protect*: UN General Assembly, 12 January 2009, A/63/677, para. 10(a).

<sup>52</sup> Evans, *supra* note 2, pp. 42-43

<sup>53</sup> Report of the Secretary-General, *supra* note 51, para. 7.

<sup>54</sup> Luck, *supra* note 45, p. 18.

<sup>55</sup> Evans, *supra* note 2, p. 56.

<sup>56</sup> United Nations Development Programme (UNDP), *Human Development Report*, (1994), p. 23.

<sup>57</sup> Evans, *supra* note 2, p. 34.

<sup>58</sup> UNDP, *supra* note 56, p. 24.

people and by providing a conceptual framework for international action. It gave rise to a growing recognition worldwide that the protection of human security, including human rights and human dignity, must be one of the fundamental objectives of modern international cooperation.<sup>59</sup> In his address to the general assembly in 1999, the one that eventually led to the task of the ICISS and the birth of R2P, secretary general Kofi Annan speaking about the prospects for human security and intervention stated that

*“The State is now widely understood to be the servant of its people, and not vice versa. At the same time, individual sovereignty, and by this I mean the human rights and fundamental freedoms of each and every individual as enshrined in our Charter, has been enhanced by a renewed consciousness of the right of every individual to control his or her own destiny”.*<sup>60</sup>

Secretary General Ban ki-moon also related human security with R2P in his report on human security to the General Assembly in March 2010. In the report, it is stated that the purpose of human security is to enable all individuals to be free from fear and want, and to enjoy all their rights and fully develop their human potential and that the use of force is not envisaged in the application of the human security concept.<sup>61</sup> Meanwhile, R2P focuses on protecting populations from specific cases of genocide, war crimes, ethnic cleaning and crimes against humanity and what the international community must do to prevent and limit the escalation of these cases which are likely to result in large and complex humanitarian crises and concerns of human security.<sup>62</sup> R2P does not have as broad of an umbrella to cover cases of, for instance the ravages of HIV/AIDS or impacts of climate change as does human security.<sup>63</sup>

## **2.2. R2P, a moral or a legal responsibility?**

R2P invokes one of the most powerful moral and legal terms in contemporary international politics namely responsibility, but the status of R2P in international law remains contested.<sup>64</sup> Two levels of responsibility exist in the R2P framework, primary R2P which refers to the responsibility of individual states to protect their populations and secondary R2P which refers to the responsibility of the international community to protect populations from mass atrocity crimes.<sup>65</sup> Primary R2P, of states to protect their own population, is

---

<sup>59</sup> ICISS report, *supra* note 5, para.1.28.

<sup>60</sup> Kofi Annan, *supra* note 42.

<sup>61</sup> UNDP, *supra* note 56, para. 23.

<sup>62</sup> Report of the Secretary-General, *Human security*, UN General Assembly, 05/03/2010, A/64/701, para. 23-24.

<sup>63</sup> Evans, *supra* note 2, pp. 64-65.

<sup>64</sup> Welsh, Jennifer M.; Banda, Maria, *International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?* Global Responsibility to Protect, Vol. 2, No.3, (2010), p. 213.

<sup>65</sup> World summit outcome, *supra* note 8, para. 138- 139.

embedded in already existing international law, much of which is considered *jus cogens*.<sup>66</sup> This position was supported by the UN secretary General who noted that ‘under conventional and customary international law, States have obligations to prevent and punish genocide, war crimes and crimes against humanity.’<sup>67</sup>

Generally, under international human rights law, the obligations of states to respect and ensure the human rights of all individuals within their territory and subject to their jurisdiction, without distinction or discrimination, are spelled out in the UDHR and the two Covenants (ICCPR and ICESCR).<sup>68</sup> Particularly under Article 1 of the genocide convention, states have undertaken the obligation to prevent and to punish genocide.<sup>69</sup> This obligation, that is generally considered to be part of customary international law as *jus cogens*, was clarified by the ICJ in *Bosnia vs. Serbia* case as not only to mean that states should abstain from the commission of genocide but also to mean that they should employ all means which are reasonably available to them to prevent genocide by others.<sup>70</sup>

As per common Article 1 of the Geneva conventions states undertook an obligation to respect and to ensure respect for the conventions and so have positive duties that extend beyond the duty to refrain from committing war crimes.<sup>71</sup> The prohibition of ‘grave breaches’, including the commission of war crimes, under international humanitarian law is a peremptory rule with *jus cogens* status.<sup>72</sup> With regards to crimes against humanity there is a broad consensus that it is a core part of customary international law; however, because there is no specialized convention on crimes against humanity, it is difficult to determine specific duties of states beyond the duty to refrain from committing such crimes.<sup>73</sup>

On the other hand, the nature of responsibility under secondary R2P on the international community is rather unclear.<sup>74</sup> A number of academics and policy advisers have argued that R2P represents a new legal norm that provides a basis for legitimizing coercive interference in the domestic affairs of states which are

---

<sup>66</sup> Bellamy, Alex J., Reike, Ruben, *The Responsibility to Protect and International Law*, Global Responsibility to Protect, Vol. 2, No.3, (2010), p. 269. And *Jus cogens* or peremptory norms are norms accepted and recognized by the international community of states from which no derogation is permitted. (see Evans, Malcolm D. *International law*, 2<sup>nd</sup> ed. (oxford university press 2006), p. 164.

<sup>67</sup> Report of the Secretary-General, *supra* note 51, para. 3.

<sup>68</sup> Gierycz, Dorota, *The Responsibility to Protect: A Legal and Rights-based Perspective*, Global Responsibility to Protect, Vol. 2, No.3, (2010), p. 254.

<sup>69</sup> Article 1, *The Convention on the Prevention and Punishment of the Crime of Genocide* Adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948.

<sup>70</sup> Bellamy and Reike, *supra* note 66, p. 275- 276.

<sup>71</sup> Common Article 1, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* , Fourth Geneva Convention, 12 August 1949.

<sup>72</sup> Bellamy and Reike, *supra* note 66, p. 277-278.

<sup>73</sup> *Ibid.*

<sup>74</sup> Glanville, Luke, *The International Community's Responsibility to Protect*, Global Responsibility to Protect, Vol. 2, No.3, (2010), p. 298.

unable or unwilling to protect their populations from genocide or mass atrocities. However, other legal commentators dispute this saying that R2P is not yet an international legal norm because it lacks clarity and has not been appropriately legislated.<sup>75</sup> The discussion on the status of R2P under international law is relevant because determining its status as a legal responsibility will have a tremendous effect. Legal responsibilities, as opposed to moral responsibilities, have coercive powers to enforce them and they trigger specific remedies if they are not fulfilled, including, in some cases, the legal liability of the wrongful party.<sup>76</sup>

The UN General Assembly endorsed R2P, under paragraphs 138 and 139 of the 2005 world Summit Outcome Document. That showed a declared commitment on the part of states but the status of that statement as a legal instrument is contested, as the Assembly is not a law making body with powers under the Charter to pass legally binding rules.<sup>77</sup> These types of General assembly resolutions are regarded as soft laws that are not legally binding instruments.<sup>78</sup>

Gareth Evans argues that, and he is not alone, R2P is a broadly accepted international norm with the potential to evolve further into a fully fledged rule of customary international law.<sup>79</sup> This argument is based on the endorsement of R2P by states, UN organs and regional institutions. A consensus of the Assembly, as the world's most representative body, is seen as a reasonable proxy for the existence of the international *opinio juris* on a given issue and where accompanied by consistent state practice, the Assembly's pronouncements may reveal the existence, or the formation, of rules of customary international law<sup>80</sup>

Yet, R2P has resonance with a variety of states which oppose its crystallization into law for fear that it could erode sovereignty and permit excessive intervention.<sup>81</sup> These voices were heard even in the eve of the 2005 World Summit. John Bolton, US Permanent Representative to the UN at that time, was typically blunt and to the point. He pointed out that the obligation and responsibilities posited under R2P are 'not of a legal character' and 'we do not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law.'<sup>82</sup>

The Obama administration appears to have moved away from Bolton's cautious stance and its Ambassador to the UN, Susan Rice, has clearly acknowledged

---

<sup>75</sup> Bellamy and Reike, *supra* note 66, p. 268.

<sup>76</sup> Welsh and Banda, *supra* note 64, p. 228.

<sup>77</sup> *Ibid*, p. 229.

<sup>78</sup> Evans, *supra* note 2, p. 142.

<sup>79</sup> *Ibid*, p. 52.

<sup>80</sup> Welsh and Banda, *supra* note 64, p. 229.

<sup>81</sup> *Ibid*, p. 227.

<sup>82</sup> Luck, *supra* note 45, p. 19.

that the ‘international community’ does bear a ‘responsibility’ to take collective action if a state will not carry out its own responsibilities.<sup>83</sup> Also, in 2009 the UN General Assembly adopted its first UN Resolution on R2P by which States recalled their endorsement of R2P in the 2005 World Summit and decided to continue their consideration of R2P following the Secretary General’s report on implementing R2P.<sup>84</sup> Furthermore, evidencing the UN’s commitment to R2P, the Secretary General appointed a special adviser on matters relating to R2P.<sup>85</sup>

The first reference to R2P in the UN Security Council came in 2006 when the Council unanimously adopted Resolution 1674 on the Protection of Civilians in Armed Conflict reaffirming the provisions of paragraphs 138 and 139 of the World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>86</sup> The same reference was made in November 2009, during its 8<sup>th</sup> Debate on the Protection of Civilians in armed conflict, when Resolution 1894 was adopted unanimously.

What can be described as a major breakthrough on R2P in the UN Security Council came in early 2011 in relation to the situation in Libya which can be seen as an acknowledgment of the legal right to act by the Security Council but not the obligation to act. In Resolution 1970, following the gross and systematic violation of human rights, including the repression of peaceful demonstrators and the horrific violence perpetrated against civilians, the Security Council used the language of R2P reminding Libyan authorities’ of their responsibility to protect their population and authorized economic and smart sanctions including arms embargo, ICC referral, travel ban and asset freezes.<sup>87</sup> In the subsequent resolution 1973, noting the failure of the Libyan authorities to comply with resolution 1970, authorizes member States acting nationally or through regional organizations or arrangements, to take all necessary measures, including the use of force, to protect civilians and civilian populated areas under threat of attack.<sup>88</sup>

At regional level, Article 4(h) of the African Union (AU) constitutive act precedes the concept of R2P in giving the AU a right to intervene in a member state where mass atrocity crimes are committed.<sup>89</sup> Subsequent to the endorsement of R2P in the world summit, in the Ezulwini consensus the AU has endorsed R2P by accepting the responsibility of the international

---

<sup>83</sup> Glanville, *supra* note 74, p. 294.

<sup>84</sup> UNGA Resolution, *Responsibility to protect*, A/RES/63/308 (2009)

<sup>85</sup> Evans, *supra* note 2, p. 52.

<sup>86</sup> UN Security Council Resolution, *Protection of civilians in armed conflict*, S/RES/1676 (2006).

<sup>87</sup> UN Security Council Resolution, *The situation in Libya*, S/RES/1970 (2011).

<sup>88</sup> UN Security Council Resolution, *The situation in Libya*, S/RES/1973 (2011).

<sup>89</sup> Kuwali, *supra* note 34, p. 7.

community to protect.<sup>90</sup> Although Regional humanitarian interventions such as cases of NATO intervention in Kosovo hold the most developed customary process of an emerging norm of R2P, they lack consistency and uniformity to support the existence of a new legal norm.<sup>91</sup>

R2P is best understood, therefore, as a political commitment to act upon shared moral beliefs, much of which is embedded in already existing international law and the responsibility of the international community are much less well defined legally.<sup>92</sup> As only a duty of protection is asserted, but no corresponding liability for a failure to protect coupled with the absence of mechanisms for holding the international community accountable retrospectively for its failure to meet its responsibility.<sup>93</sup>

### **2.3. Setting R2P in motion - the actors and their responsibilities**

In the formulation of the ICISS, R2P embraces three specific responsibilities: the responsibility to prevent, that is to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk, the responsibility to react that is to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention, and the responsibility to rebuild that is to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.<sup>94</sup>

The UN secretary general report on implementing the responsibility in 2009 that was inspired by the need to move R2P ‘from promise to practice’ outlined a three-pillar strategy for advancing the R2P agenda.<sup>95</sup> It has done so in light of the actors involved in advancing R2P. Under pillar one, it discussed the protection responsibility of individual states, under pillar two it explained the responsibility of the international community on international assistance and capacity building, and under pillar three it outlined what the international community’s responsibility for a timely and decisive response entails.<sup>96</sup>

---

<sup>90</sup> The Ezulwini consensus, *common African position on the proposed reform of the UN*, AU executive council (2005), para. b(i).

<sup>91</sup> Amnéus, Diana, *Responsibility to protect by military means; emerging norms in humanitarian intervention?* (Stockholm university 2008) p. 511.

<sup>92</sup> Bellamy and Reike, *supra* note 66, p. 269.

<sup>93</sup> Welsh and Banda, *supra* note 64, p. 219.

<sup>94</sup> ICISS report, *supra* note 5, synopsis.

<sup>95</sup> Serrano, Mónica, *Implementing the Responsibility to Protect: The Power of R2P Talk*, Global Responsibility to Protect, Vol. 2, No. 1-2, (2010), p. 170.

<sup>96</sup> Report of the Secretary-General, *supra* note 51, para. 11.

Pillar one reaffirmed paragraph 138 of the outcome Document which was absolutely unambiguous about the responsibility of each individual state to protect its populations and to prevent the four crimes and their incitement.<sup>97</sup> The report stated that this responsibility is derived from both the nature of State sovereignty and from the pre-existing and continuing legal obligations of States, not just from the relatively recent enunciation and acceptance of R2P.<sup>98</sup> The purpose of R2P is not only to avoid inaction by the international community when genocidal acts or massive human rights violations are occurring inside the frontiers of a sovereign state, and the state in question is unable or unwilling to halt them, but also to remind states of the responsibilities they have for the safety and well-being of their citizens.<sup>99</sup>

To live up to their responsibility under pillar one, the report urged states to exercise responsible sovereignty. To be responsible, sovereign states need to move from identity based politics to the effective management, even encouragement, of diversity through the principle of non-discrimination and the equal enjoyment of rights as responsible sovereignty is based on the politics of inclusion, not exclusion. They are expected to become parties to the relevant international instruments on human rights, international humanitarian law and refugee law, as well as to the Rome Statute of the International Criminal Court and respect their obligations thereof.<sup>100</sup>

Pillar two comes into play when a State is unable to fully meet its responsibility, because of capacity deficits or lack of territorial control. In such cases even though the bedrock of R2P rests with the state, the international community should be prepared to support and assist it with the purpose of building responsible sovereignty, not to undermine it.<sup>101</sup> Prevention is at the heart of R2P and the international community should help countries to help themselves by encouraging and supporting them in their preventive response.<sup>102</sup>

In addition to encouraging States to meet their responsibilities, the international community should help them to build their capacity to protect by assisting States under stress before crises and conflicts break out.<sup>103</sup> One of the more innovative aspects of the report is that it recognized cases by which armed groups, not the government, have posed the chief R2P threat to the population and suggests that collective international military assistance be given to the government or international military intervention to suppress those committing

---

<sup>97</sup> World summit outcome, *supra* note 8, para. 138.

<sup>98</sup> Report of the Secretary-General, *supra* note 51, para. 11(b).

<sup>99</sup> *Ibid.*, para.11(b).

<sup>100</sup> *Ibid.*, para.14-27.

<sup>101</sup> *Ibid.*, para.13.

<sup>102</sup> Evans, *Supra* note 2, p. 56.

<sup>103</sup> Report of the Secretary-General, *supra* note 51, para. 28.

mass atrocities might be an appropriate step.<sup>104</sup> With the host Government's consent, military units might be employed either for a range of non-coercive purposes, such as prevention, protection, peacekeeping and disarmament, or to counter armed groups that could commit egregious crimes relating to R2P.<sup>105</sup>

The timely and decisive response by the international community under pillar 3 was underscored by the 2005 summit outcome document which stated that a wide range of collective actions, either peaceful or non-peaceful, could be invoked by the international community.<sup>106</sup> The peaceful actions might include diplomatic sanctions and targeted sanctions, such as on travel, financial transfers, luxury goods and arms, on a case-by-case basis and in cooperation with relevant regional organizations, as appropriate, to send the message that committing crimes and violations relating to R2P is unacceptable behavior for a United Nations Member State in the twenty-first century and demonstrate the international community's commitment to meeting its collective responsibilities under paragraph 139 of the Summit Outcome and serve as a warning of possibly tougher measures if the violence against a population persists.<sup>107</sup>

However, coercive military action is not excluded as a last option in extreme cases where it is the only possible way to stop a large scale killing and other atrocity crimes.<sup>108</sup> Military action could be invoked by the international community when these peaceful actions are inadequate and national authorities are manifestly failing to protect their populations from the four specified crimes.<sup>109</sup> The requirement of manifestly failing to protect illustrates the strong commitment that the primary responsibility in R2P rests with states.<sup>110</sup> These criteria could be met when for instance the political leadership of the State is determined to commit crimes and violations relating to R2P.<sup>111</sup>

Military actions under pillar 3 are to be undertaken through the Security Council, in accordance with the UN Charter.<sup>112</sup> Under chapter VII of the Charter the Security Council could authorize member States acting nationally or through regional organizations, to take all necessary measures, including the use of force as may be necessary, to maintain or restore international peace and security.<sup>113</sup> According to current international law, therefore, the Security Council has no general legal obligation to use force on states that manifestly

---

<sup>104</sup> Luck, *supra* note 53, p. 182.

<sup>105</sup> Report of the Secretary-General, *supra* note 51, para. 40.

<sup>106</sup> World summit outcome, *supra* note 8, para. 139.

<sup>107</sup> Report of the Secretary-General, *supra* note 51, para. 57.

<sup>108</sup> Evans, *supra* note 2, p. 58.

<sup>109</sup> World summit outcome, *supra* note 8, para. 139.

<sup>110</sup> Amnéus, *supra* note 91, p. 269.

<sup>111</sup> Report of the Secretary-General, *supra* note 51, para. 29.

<sup>112</sup> World summit outcome, *supra* note 8, para.139.

<sup>113</sup> Article 42-43, UN charter.

fail to meet their R2P responsibility unless the situation amounts to a threat to international peace and security.<sup>114</sup>

The practice of the Security Council after the cold war has taken an expansive view on what constitutes “international peace and security” from the traditional view that it concerns cross border aggression.<sup>115</sup> It has rendered that the failure of state to protect its population from atrocity crimes by violating international law in many cases creates a situation that threatens international peace and security as in Rwanda, Bosnia and Somalia.<sup>116</sup> This view was affirmed by the high level panel report on threats, challenges and changes that considered the use of force in the case of internal threats, which involve genocide and other large-scale killing, as legitimate.<sup>117</sup>

## 2.4. The scope of R2P

Human rights are indivisible and equally important. Yet, R2P only deals with mega violations when one of the threshold atrocity crimes is committed. Subsequently an attempt to describe what these threshold atrocity crimes are and what the rationale behind limiting the scope of R2P to these crimes is, will be made.

### 2.4.1. Threshold atrocity crimes

R2P applies only to the four legally defined atrocity crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>118</sup> The identification of these crimes as the premise for R2P derives much of its legitimacy from the jurisprudence and statutes of the international and hybrid criminal tribunals built during the 1990s, such as the ICTY, ICTR, SCSL and ICC.<sup>119</sup> The 2005 summit outcome document tied R2P to these norms that are widely considered to have *jus cogens* status.<sup>120</sup>

David Scheffer identified five common characteristics shared by these atrocity crimes. A crime considered as an atrocity crime must be of significant magnitude, meaning that its commission is widespread or systematic or occurs as part of a large-scale commission; the commission should have some organized character when committed both in time of peace or war; it must be identifiable in conventional international criminal law as genocide, war crime,

---

<sup>114</sup> Amnéus, *supra* note 91, p. 270.

<sup>115</sup> Evans, *supra* note 2, pp. 133-134.

<sup>116</sup> Amnéus, *supra* note 91, p. 270.

<sup>117</sup> Report of the High-level Panel on Threats, Challenges and Change, *A more secure world: Our shared responsibility*, United Nations (2004), para. 207.

<sup>118</sup> World summit outcome, *supra* note 8, para. 138-139.

<sup>119</sup> Cooper and Kohler, *supra* note 38, p. 80.

<sup>120</sup> Brunnée, Jutta and Toope, Stephen J. *The Responsibility to Protect and the Use of Force: Building Legality?* Global Responsibility to Protect, Vol. 2, No.3, (2010), p. 207.

ethnic cleansing or crimes against humanity; the crime must have been led, in its execution, by a ruling or otherwise powerful elite in society and the crime should entail individuals criminal liability for its commission.<sup>121</sup>

Genocide, according to the Rome statute, is the killing or the causing of serious bodily or mental harm, or the deliberate infliction of conditions of life calculated to bring about physical destruction in whole or in part or forcibly transferring children of one group to another group with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.<sup>122</sup> The statute reproduced the definition of the Genocide convention and the corresponding customary rule.<sup>123</sup>

War crimes include the grave breaches of the four Geneva Conventions and other serious violations of the laws and customs applicable in international or internal armed conflicts when committed as part of a plan or policy or as part of a large-scale commission of such crimes.<sup>124</sup> For a conduct to become a war crime there must exist an armed conflict and the laws of war, *jus in bello*, that offer protection to civilians or prisoners of war have been violated.<sup>125</sup>

Ethnic cleansing is not a crime in its own right under international law, but acts of ethnic cleansing may constitute one of the other three crimes.<sup>126</sup> It is an amalgamation of numerous crimes against humanity that has persecution at its core.<sup>127</sup> The Rome statute defines persecution as the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.<sup>128</sup> Ethnic cleansing is therefore, the discriminatory assault on an identifiable group within the civilian population for the purpose of removing that group permanently from territory sought by the perpetrators of the assault by using ways that could range across the entire spectrum of crimes against humanity.<sup>129</sup>

Crimes against humanity means any of the enumerated acts including murder, extermination and others, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.<sup>130</sup> They cover a broad range of potential victims as it does not require a nexus to armed conflict and does not have to be committed with a discriminatory intent, except for persecution.<sup>131</sup>

---

<sup>121</sup> Cooper and Kohler, *supra* note 38, p. 82-83.

<sup>122</sup> Article 6, *Rome Statute of the International Criminal Court*, entered in to force July 2002.

<sup>123</sup> Cassese, *supra* note 31, p. 146.

<sup>124</sup> Article 8, Rome statute.

<sup>125</sup> Triffterer, *supra* note 26, p. 284.

<sup>126</sup> Report of the Secretary-General, *supra* note 51, para. 3.

<sup>127</sup> Cooper and Kohler, *supra* note 38, p. 89.

<sup>128</sup> Article 8(2)(g), Rome statute.

<sup>129</sup> Cooper and Kohler, *supra* note 38, p. 89.

<sup>130</sup> Article 7, Rome statute.

<sup>131</sup> Triffterer, *supra* note 26, p. 181- 182.

R2P cannot possibly be a viable concept if it is used to react to speculative suggestion of some relatively minor and isolated threat of genocide, crimes against humanity, ethnic cleansing, or war crimes but the threat has to have some meaningful content and the speculation about it must be centered on the plausible possibility of a crime of some magnitude.<sup>132</sup> It assumes its larger importance and definitional character when an atrocity crime meeting the substantiality test occurs and compels a response.<sup>133</sup>

The use of explicit crimes as triggers may have narrowed the scope of the doctrine's application, but it made its application turn on an inherently legal concept. There are well-established legal rules that are applied regularly by international courts to determine whether a particular situation is a war crime, crime against humanity, or genocide and since the definitions of these crimes could evolve a reasoned argument can be made on the application of R2P as long as the legal criteria are fulfilled.<sup>134</sup> Also, even if the standard of proof required for convicting individuals accused of these crimes is a proof "beyond reasonable doubt", such standard is too high to require for triggering R2P.<sup>135</sup> But an approach based on criminal law is not expedient in the context of R2P because while establishing individual criminal liability is based on individual involvement in these offences, R2P is based on the obligations and responsibilities of individual states.<sup>136</sup>

#### **2.4.2. The rationale behind limiting the scope of R2P**

The 2005 world summit limited the scope of R2P to apply only to cases of genocide, war crimes, ethnic cleansing and crimes against humanity. Sincere advocates of the evolving principle of R2P seek to argue a broader mandate as a matter of policy, customary law, or morality claiming that the need for protection might arise absent atrocity crimes such as in cases of international terrorism, repressive or undemocratic governments or widespread human rights abuses.<sup>137</sup> However as UN Secretary General puts it in his 2009 report on the implementation of R2P it will only apply to the four specified crimes and violations until Member States decide otherwise.<sup>138</sup>

---

<sup>132</sup> Cooper and Kohler, *supra* note 38, p. 84.

<sup>133</sup> *Ibid*, p. 82.

<sup>134</sup> Ford, Stuart, *Is the failure to respond appropriately to a natural disaster a crime against humanity? R2P and individual criminal responsibility in the aftermath of cyclone Nargis*, Denv. j. Int'l l. & Pol'y Vol. 38 No. 2, (2010), p. 265.

<sup>135</sup> *Ibid*, p. 239.

<sup>136</sup> Advisory council on international affairs, *The Netherlands and R2P*, (2010), p. 27-28.

<sup>137</sup> Cooper and Kohler, *supra* note 38, p. 78- 81.

<sup>138</sup> Report of the Secretary-General, *supra* note 51, para. 10(b).

One of the reasons for such a limit was political. In the 2005 World summit negotiations, on the account of its association with humanitarian intervention R2P was viewed as an idea designed to legitimize western interference in the domestic affairs of developing states and support for it was possible by setting a high 'just cause' threshold.<sup>139</sup> Designing R2P as broad based doctrine will open up the possibility of military action in a whole variety of policy contexts and will give the concept especially by the global south a bad name and less acceptance.<sup>140</sup>

In order to generate an effective consensual response to extreme, conscious shocking cases, R2P has to preserve its focus and bite.<sup>141</sup> 'To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility'.<sup>142</sup>

A broader mandate for R2P in the immediate years ahead may burden it with so much political controversy and dissent among international lawyers that it would collapse as a declared commitment, even with respect to atrocity crimes, before it has an opportunity to be fully tested.<sup>143</sup> When it extends across the full range of human right violations by governments against their own people, it will be difficult to build, sustain and mobilize any kind international consensus for action and in cases where it is really needed.<sup>144</sup>

---

<sup>139</sup> Bellamy and Reike, *supra* note 66, p. 83-84.

<sup>140</sup> Evans, *supra* note 2, p. 65.

<sup>141</sup> *Ibid*, p. 65.

<sup>142</sup> Report of the Secretary-General, *supra* note 51, para. 10(b).

<sup>143</sup> Cooper and Kohler, *supra* note 38, p. 80.

<sup>144</sup> Evans, *supra* note 2, p. 68.

## 3 Obligations of states under economic, social and cultural rights

Human rights are not limited to civil and political rights, such as the right to life, freedom from torture, and freedom of expression, but also include ESC rights.<sup>145</sup> At the UN level, parallel to the ICCPR, the ICESCR was adopted in 1966 and came into effect ten years later. Even though the UDHR recognized all civil, political, economic and social rights together, the conventions that would be legally binding on states were separate mainly for reasons of difference in political ideology.<sup>146</sup> The UN has already taken the position that all human rights are universal, indivisible, interdependent and interrelated.<sup>147</sup>

ESC rights cover a wide range of rights including the rights to adequate standard of living, which requires that everyone has the right to enjoy adequate food and nutrition rights, clothing, housing and conditions of care, the rights of families to assistance and economic rights that include the right to property, the right to work and to social security.<sup>148</sup>

### 3.1. The nature of economic social and cultural rights

There has been a considerable debate about the nature of ESC rights, mainly as compared to civil and political rights, as some commentaries regard them as mere aspirations of society than enforceable human rights.<sup>149</sup> It is true that unlike civil and political rights which entail immediate obligations, many ESC rights are worded in vague and unclear terms and states mainly commit themselves to take necessary steps to progressively achieve their full realization.<sup>150</sup>

---

<sup>145</sup> Häusermann, Julia, *The realization and implementation of economic, social and cultural rights*, in Beddard, Ralph and Hill, Dilys M., (Eds) *Economic social and cultural rights; progress and achievement*, (Macmillan press ltd, 1992), p. 47-48.

<sup>146</sup> Chekwe, Chisangua P. and Flood, Nora, *From division to integration; economic social and cultural rights as basic human rights*, in Merali, I. and Oosterveld, V., *Giving meaning to economic social and cultural rights*, (University of Pennsylvania press, 2001), p. 40-41. They added “the existence of two separate covenants has contributed to the assumption that civil and political rights and ECS rights are different in nature and value. However the separation was motivated by political ideology where the soviet bloc championed ESC rights and western states viewed such rights with suspicion fearing these rights would intervene with individual liberty by promoting wealth distribution.”

<sup>147</sup> UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, para. 5.

<sup>148</sup> Eide, Asbjorn, *Economic social and cultural rights as human rights*, in Eide, A., Krause C. and Rosas, A., (Eds), *Economic social and cultural rights: a textbook second revised edition*, (Martinus Nijhoff publishers, 2001), p. 18.

<sup>149</sup> Häusermann, *supra* note 145, p. 49.

<sup>150</sup> Koch, Elisabeth I., *The Justiciability of Indivisible Rights*, Nordic journal of international law, Vol. 72, Issue 1, (2003), p. 5.

Traditionally ECS rights are conceptualized as positive rights where states are required to redistribute resources to achieve them.<sup>151</sup> These rights require active intervention on the part of governments and cannot be realized without such intervention because they are resource intensive and are not capable of immediate and full realization, as are civil and political rights which are considered to be negative rights.<sup>152</sup> Such characterization has been criticized by many on the ground that such dichotomy is superficial since both categories of rights encompass both positive and negative elements.<sup>153</sup>

Yet, due to the fact that different states have vastly different amounts of available resources, it is implicated that countries with more resources have a higher level of core content or immediate obligations under ESC rights than those with more limited resources.<sup>154</sup> The wording of the ICESCR acknowledges that the protection of ESC rights is contingent upon availability of sufficient resources. In the words of Article 2 it is stated that;

*“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”*<sup>155</sup>

As such, states are expected to progressively achieve ESC rights by adopting legislations and taking comprehensive administrative measures and social actions.<sup>156</sup> The UN Committee on ESC (hereafter referred to as the Committee), the body with the primary responsibility for monitoring the covenant rights, in its General Comment 3 on the nature of state obligations stated that the concept of progressive realization constitutes a recognition of the fact that full realization of all ESC rights will generally not be able to be achieved in a short period of time reflecting the realities of the real world and the difficulties involved for any country in ensuring the full realization of these rights.<sup>157</sup>

The justiciability, which refers to those matters which are appropriately resolved by the courts, of ESC rights has raised another debate on the nature of these rights. This issue has been raised because of the wordings of the provisions of the covenant and the relatively weak international monitoring

---

<sup>151</sup> Chekwe and Flood, *supra* note 146, p. 42.

<sup>152</sup> Koch, *supra* note 150, p. 4.

<sup>153</sup> *Ibid*, p. 6.

<sup>154</sup> Eide, *supra* note 148, p. 26-27.

<sup>155</sup> Article 2(1), ICESCR.

<sup>156</sup> Eide, *supra* note 148, p. 17.

<sup>157</sup> General Comment No. 3, *supra* note 24, para. 9.

mechanisms for implementing ESC rights.<sup>158</sup> Although the full realizations of the rights recognized in the Covenant are to be attained progressively, the application of some rights can be made justiciable immediately, while other rights can become justiciable over time.<sup>159</sup> Furthermore some ESC rights are as precise as most civil and political rights, and the Committee underlined that some of the provisions of the ICESCR are in fact justiciable.<sup>160</sup> In its General Comment 9 the Committee stressed that;

*“The doubt on justiciability of ESC rights is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions.”<sup>161</sup>*

To enable the committee to receive and consider individual communications by victims of violations of ESC rights, the UN General Assembly unanimously adopted an optional protocol that is open for signature and will come into force when enough states ratify it.<sup>162</sup> Therefore, until this new protocol is ratified and in force the UN system for the protection of human rights do not have the possibility to hear individual complaints in case of ESC rights.<sup>163</sup> However, the Committee has been publishing its interpretations on the provisions of the Covenant as General Comments and examining state party`s reports and giving its recommendations in the form of concluding observations.

The element of Article 2 (1), which requires states “to take steps, individually and through international assistance and cooperation, especially economic and technical ...” imposes an obligation of international assistance and cooperation among states parties to the covenant.<sup>164</sup> A state is expected to realize ESC rights to the maximum of its available resources that exist within a State and

---

<sup>158</sup> Scheinin, Martin, *Economic and social rights as legal rights*, in Eide, A., Krause C. and Rosas, A., (Eds), *Economic social and cultural rights: a textbook second revised edition*, ( Martinus Nijhoff publishers, 2001), p. 30.

<sup>159</sup> Limburg Principles, *supra* note 25, para. 8.

<sup>160</sup> Koch, *supra* note 6, p. 9.

<sup>161</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, para. 10.

<sup>162</sup> UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*: resolution adopted by the General Assembly, 5 March 2009, A/RES/63/117, preamble and Article 2.

<sup>163</sup> Scheinin, *supra* note 158, p. 31.

<sup>164</sup> Carmona, Magdalena S., *The obligations of ‘international assistance and cooperation’ under the International Covenant on Economic, Social and Cultural Rights. A possible entry point to a human rights based approach to Millennium Development Goal 8*, *The International Journal of Human Rights* Vol. 13, No. 1, (February 2009),p. 87.

those available from the international community through international cooperation and assistance.<sup>165</sup>

The Committee in General Comment 3 explained the international cooperation and assistance for the realization of ESC rights as a legal obligation of all states and is particularly incumbent upon those states which are in a position to assist others in this regard.<sup>166</sup> This international obligation also arises in case of disaster and humanitarian crisis when individuals or groups are unable, for reasons beyond their control, to realize the enjoyment of ESC rights themselves by the means at their disposal.<sup>167</sup> But the commitment to international cooperation and assistance contained in the Covenant can not accurately be characterized as a legally enforceable obligation upon any particular state to provide any particular form of assistance.<sup>168</sup>

### **3.2. Obligations of states under economic social and cultural rights**

Obligations of states under the ICESCR are progressive.<sup>169</sup> States are not required to guarantee the rights immediately, but rather implement them over time depending upon the availability of necessary resources.<sup>170</sup> In the Maastricht guidelines that are the outcome of the meeting of a group of experts who met in Maastricht to elaborate on the Limburg Principles as regards the nature and scope of violations of ESC rights and appropriate responses and remedies, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.<sup>171</sup> While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect including the obligation to guarantee the exercise of rights without discrimination and to take steps towards their full realization.<sup>172</sup> It is expressly stated in the covenant that state parties should guarantee ESC rights without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>173</sup>

---

<sup>165</sup> General Comment No. 3, *supra* note 24, para. 13.

<sup>166</sup> *Ibid*, para. 14.

<sup>167</sup> Carmona, *supra* note 164, p. 94.

<sup>168</sup> *Ibid*, p. 89.

<sup>169</sup> Article 2(1), ICESCR.

<sup>170</sup> Craven, Matthew, *The international covenant on economic social and cultural rights; a perspective on its development*, (Clarendon press, 1995), p. 106.

<sup>171</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, (*Jurists* 1997), Para. 10.

<sup>172</sup> General Comment No. 3, *supra* note 24, para. 1.

<sup>173</sup> Article 2(2), ICESCR.

The Covenant gives rise to both obligations of conduct and obligations of result.<sup>174</sup> States are obliged, under ‘obligation of conduct’ to undertake a specific course of conduct, whether through act or omission, which represents a goal in itself; under ‘obligation of result states are required to achieve a particular result through a course of conduct which can be commission or omission the form of which is left to the states discretion.<sup>175</sup> In other words, as an obligation of conduct states are expected to take actions towards the full realization of ESC rights by adopting all necessary means’s and their main obligations of result is the fullest possible realization of ESC rights that are guaranteed without discrimination of any kind.<sup>176</sup>

Under General Comment No. 20, on non discrimination, the Committee noted that discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.<sup>177</sup> Violations can occur through direct actions by states or when they fail to eliminate *de jure* discrimination by abolishing without delay any discriminatory laws, regulations and practices affecting the enjoyment of ESC rights.<sup>178</sup>

The rights under the covenant can be violated through action or omission of States parties, including through their institutions or agencies at the national and local level.<sup>179</sup> In determining which actions or omissions amount to a violation of an ESC rights, it is important to distinguish the inability of states from the unwillingness of a State to comply with its treaty obligations. The inability of states may be justified by lack of resources, but its unwillingness through active denial of the rights or through the omission or failure to take necessary measures is always a violation of its obligation.<sup>180</sup>

### **3.2.1. Protect, respect and fulfill**

Like any other human right, ESC rights impose three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfill.<sup>181</sup> Under General Comment 12, on the right to adequate food the Committee explained what these three obligations entail. The obligation to respect requires states to refrain from interfering with individual’s right, the obligation to protect requires states to prevent violations by third parties, and

---

<sup>174</sup> Craven, *supra* note 170, p. 108.

<sup>175</sup> *Ibid*, p. 107.

<sup>176</sup> *Ibid*, p. 108.

<sup>177</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights* (Art. 2, para. 2, of the ICESCR), 2 July 2009, E/C.12/GC/20, para. 7.

<sup>178</sup> Limburg Principles, *supra* note 25, para. 37.

<sup>179</sup> General comment No. 20, *supra* note 177, para. 14.

<sup>180</sup> Maastricht Guidelines, *supra* note 171, Para. 13- 15.

<sup>181</sup> Maastricht Guidelines, *supra* note 171, Para. 6.

the obligation to fulfill requires states to take appropriate measures (legislative, administrative, judicial, and budgetary, etc.) towards the full realization of the rights.<sup>182</sup>

The tripartite obligations imply that we no longer talk about civil versus social rights, but about respecting, protecting and fulfilling human rights as one entire category.<sup>183</sup> Also, to the extent that the tripartite obligations are to be found in greater or lesser extent in every human right and entail positive or negative characters, it is not possible to speak of ESC rights as being solely positive and civil and political rights as being solely negative.<sup>184</sup> For instance, the right to fair trial, which is regarded as part of civil and political rights, in addition to the obligations to respect and protect, encompasses positive resource demanding obligations such as establishing courts, under the obligation to fulfill.<sup>185</sup>

The obligations to respect protect and fulfill show that compliance with human rights – economic, social, cultural, civil and political – can require various measures from (passive) non-interference to (active) insurance of the satisfaction of individual needs.<sup>186</sup> But this does not mean that all human rights need equal level of each of the tripartite obligations from states. For instance the human right obligation for ECS rights is mainly focused on the obligation to fulfill.<sup>187</sup>

Under the obligation to respect states are required to abstain from acts which would serve to deprive individuals their rights and refrain from placing obstacles on the exercise of this rights.<sup>188</sup> When we talk about respecting a right the point of departure is that the individual in question is actually enjoying a certain right. What is at stake is not the establishment of a new position, but merely the guaranteeing of the continued existence of an already established position.<sup>189</sup>

The obligation to protect indicates that the obligation of states goes beyond the action of itself or its agents, to protecting individuals from third party interference.<sup>190</sup> States should adopt legislations to penalize abusive behaviors that may adversely affect the enjoyment of ESC rights, but they should not only

---

<sup>182</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: "The right to adequate food"* (Article 11 of the Covenant), 12 May 1999, E/C.12/1999/5, para. 15.

<sup>183</sup> Koch, *supra* note 150, p. 16.

<sup>184</sup> Craven, *supra* note 170, p. 110.

<sup>185</sup> Koch, *supra* note 150, p. 6.

<sup>186</sup> *Ibid*, p. 9.

<sup>187</sup> Chekwe and Flood, *supra* note 146, p. 42.

<sup>188</sup> Craven, *supra* note 170, p. 110.

<sup>189</sup> Koch, *supra* note 150, p. 12-13.

<sup>190</sup> Craven, *supra* note 170, p. 111.

adopt such legislation, but also take the necessary measures for its effective enforcement.<sup>191</sup>

The Committee has indicated that the obligation to fulfill includes the obligation to facilitate, that is to take positive measures aimed at enabling and assisting individuals to enjoy the rights, the obligation to provide, that is to provide a specific right when an individual is unable, for reasons beyond their control, to realize the right themselves and the obligation to promote that is to create awareness of the rights by individuals and authorities.<sup>192</sup>

The obligation to fulfill is at the center of realizing ESC rights but states are not required to immediately realize it.<sup>193</sup> Mainly because, while all three obligations – to respect, to protect and to fulfill – have budgetary implications, the obligation to fulfill tends to be the most resource demanding.<sup>194</sup> This obligation implies that state parties are under the obligation to consider what it takes to overcome obstacles for the full enjoyment of the right in question. The point of departure is no longer that the right was originally fully enjoyed, but rather that the right is not enjoyed for one reason or the other.<sup>195</sup>

### 3.2.2. Obligation to act with due diligence

The due diligence principle was historically developed to determine responsibility of states for acts or omissions of non-state actors that are generally not attributable to states but render the state responsibility if it fails to exercise due diligence in preventing or reacting to such acts or omissions.<sup>196</sup> In recent years, the principle has been increasingly applied to a wide range of human rights issues such as women's rights, minority rights and ESC rights.<sup>197</sup>

The positive obligations contained in human rights law to protect, promote and fulfill also include obligations to act with due diligence.<sup>198</sup> As explained by the UN Human Rights Committee in connection to civil and political rights, the due diligence principle arises because individuals are protected not just against violations by state agents, but also against acts committed by private persons or entities when a state is permitting or failing to take appropriate measures or to

---

<sup>191</sup> Sepúlveda, Magdalena, *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia, 2003), p. 223.

<sup>192</sup> *Ibid*, pp. 239-42.

<sup>193</sup> Craven, *supra* note 170, p. 114.

<sup>194</sup> Koch, *supra* note 150, p.12.

<sup>195</sup> *Ibid*, p.16.

<sup>196</sup> Hessbrügge, Jan A., *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, *Journal of international law and politics*, Vol. 36 (2004), p. 268.

<sup>197</sup> Aba, Elodie and Hammer, Michael, *Options and barriers to broadening the scope of the responsibility to protect to include cases of economic social and cultural rights abuse*, One world trust briefing number 116 (2009), p. 6.

<sup>198</sup> Ertürk, Yakin, 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, (2006), para. 25.

exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities entails state responsibility.<sup>199</sup>

The Inter-American Court of Human Rights, in the Velásquez Rodríguez case set the standard that “an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention”.<sup>200</sup> In the María da Penha Maia Fernandes case the Inter-American Commission of Human Rights found Brazil negligent for its lack of adequate protection to a victim of domestic violence stating that the case could be viewed as “part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors.”<sup>201</sup>

The European court of human rights in cases such as Bevacqua and S. v. Bulgaria and Opuz v. Turkey acknowledgement that there exists a rule of customary international law that obliges states to act with due diligence to prevent and respond to acts of violence against women.<sup>202</sup> In elaborating what acting with due diligence entails, in connection to violence against women, the Special Rapporteur on women stated that it requires states to ratify international human rights instruments; constitutionally guarantee rights; the existence of national legislation and/or administrative sanctions providing adequate redress; existence of policies or plans of action; accessibility and availability of support services and the existence of measures to raise awareness and modify discriminatory policies.<sup>203</sup>

In connection to ESC rights the Maastricht guidelines have clearly indicated that States are responsible for violations of ESC rights that result from their failure to exercise due diligence in controlling the behavior of non-State actors.<sup>204</sup> What the standard of due diligence adds to the existing obligation of states to respect, protect and fulfill is a high level of duty to care by states. It also means states cannot give a blind eye and omit to prevent or respond to violations beyond those that are attributable to them. As observed from the above analysis, the principle made it incumbent on states to prevent and responds with due diligence to violations that are not attributable to acts of the state. The failure or the unwillingness of states to stop or respond to the

---

<sup>199</sup> UN Human Rights Committee (HRC), *General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 8.

<sup>200</sup> Hasselbacher, Lee, *State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection*, Northwestern university journal of international human rights, Vol. 8, Issue 2, (2010), p. 193.

<sup>201</sup> *Ibid*, p. 196.

<sup>202</sup> *Ibid*, p. 197.

<sup>203</sup> Ertürk, *supra* note 198, para. 32.

<sup>204</sup> Maastricht Guidelines, *supra* note 171, Para. 18.

violations can be assimilated to a breach of the duty of care it owes to its citizens and therefore to a negligent conduct.<sup>205</sup>

### **3.3. Violations of state obligations under specific rights**

#### **3.3.1. The right to food**

In addition to the ICESCR, the right to food is guaranteed under other international human rights instruments such as the UDHR (Article 25), the ICESCR (Article 11), and the Convention on the rights of the child (Article 24), among others.<sup>206</sup> Under Article 11 of the ICESCR the right to food encompasses two norms; the right to adequate food and the fundamental right of everyone to be free from hunger.<sup>207</sup>

According to General Comment No. 12 on the right to adequate food the Committee has stated that the right is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.<sup>208</sup> The minimum core obligation of states is to guarantee the right to freedom from hunger which is the only right in the Covenant termed “fundamental”.<sup>209</sup>

Although the right to adequate food will have to be realized progressively, states are under an immediate obligation to ensure the minimum essential level required to be free from hunger and under an immediate and continuous obligation to move as expeditiously as possible towards the full realization of the right to food, particularly for the vulnerable population groups and individuals.<sup>210</sup>

The right to adequate food, like any other human right, imposes the obligations to respect, protect and fulfill. States are under obligation to respect the space available to everyone who are able to provide their own food by their own means and to protect, against third parties, individuals' entitlements or resource basis.<sup>211</sup> Whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal

---

<sup>205</sup> Aba and Hammer, *supra* note 197, p. 12.

<sup>206</sup> Kuennemann, Rolf, *The Extraterritorial Scope of the ICESCR*, FIAN International, (2004) p. 1.

<sup>207</sup> Article 11, ICESCR.

<sup>208</sup> General Comment No. 12, *supra* note 182, para. 6.

<sup>209</sup> Kuennemann, *supra* note 206, p. 3.

<sup>210</sup> Eide, Asbjørn, *The right to an adequate standard of living including the right to food*, in Eide, A., Krause C. and Rosas, A., (Eds), *Economic social and cultural rights: a textbook second revised edition*, (Martinus Nijhoff publishers, 2001), p. 139.

<sup>211</sup> *Ibid*, pp.142-43.

including those who are victims of natural or other disasters, states have the obligation to fulfill (provide) that right directly.<sup>212</sup>

When resource constraints make it impossible for a state to provide access to food for those who are unable by themselves to secure such access, and has made every effort to use all the resources at its disposal in an effort to satisfy those minimum obligations it can seek to obtain international support to ensure the availability and accessibility of the necessary food.<sup>213</sup> States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food.<sup>214</sup> The importance of international assistance and cooperation to progressively realize the right to food is recognized in Article 11 but it is stated to be based on free consent.<sup>215</sup>

Violations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States. These include: 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, 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.<sup>216</sup>

Any discrimination in access to food, whether is based on legislation or is proactive; as well as to means and entitlements for its procurement, on any of the prohibited grounds with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.<sup>217</sup> Protection against actions or inactions of governments that may result in extreme economic deprivation such as attempts to deny food to rebel or dissident groups within a country, or wasting resources on unnecessary armaments, constitute the sort of conduct that goes against the duty of the state to provide a minimum standard of living for all of its citizens.<sup>218</sup>

---

<sup>212</sup> General Comment No. 12, *supra* note 182, para.15.

<sup>213</sup> *Ibid*, para. 17.

<sup>214</sup> *Ibid*, para. 36.

<sup>215</sup> Alson, Philip, *International law and the human right to food*, in Alson, p. and Tomasevski k. (Eds), *The right to food*, (Martinus Nijhoff publishers, 1984), p. 40.

<sup>216</sup> General Comment No. 12, *supra* note 182, para. 19.

<sup>217</sup> *Ibid*, para. 18.

<sup>218</sup> Bard, Robert L., *The Right to Food*, *Lowa law review* (1985), p. 1279.

### 3.3.2. The right to housing

Housing rights are not created to ensure the right of everyone to inhabit a luxurious mansion surrounded by well sculpted gardens.<sup>219</sup> Article 11 of the ICESCR guarantees the right of everyone to an adequate standard of living, including adequate housing. The Committee in General Comment 4 related to adequate housing elaborated adequate housing to mean adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities all at a reasonable cost.<sup>220</sup>

A state in which any significant number of individuals is deprived of basic shelter and housing is *prima facie*, failing to discharge its obligations under the Covenant.<sup>221</sup> Many of the measures required to promote the right to housing would only require the abstention by the Government from certain practices.<sup>222</sup> The obligation to respect housing rights requires the state and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating or infringing upon the freedom of individuals to satisfy their housing needs.<sup>223</sup>

States are expected to ensure a degree of security by taking immediate measures aimed at conferring legal security of tenure upon those persons and households.<sup>224</sup> Particularly under the obligation to protect the state and its agents are required to take effective measures in protecting persons from threats such as forced evictions, racial or other forms of discriminations, harassments and other threats by other individuals or non state actors.<sup>225</sup> The obligation to fulfill comprises of those active measures by a government necessary for guaranteeing for each person under its jurisdiction opportunities to access the entitlements of housing rights which cannot be obtained or secured through exclusively personal efforts.<sup>226</sup>

The Committee considered instances of forced eviction as *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.<sup>227</sup> In response to the violations of states

---

<sup>219</sup> Leckie, Scott, *The human right to adequate housing*, in Eide, A., Krause C. and Rosas, A., (Eds), *Economic social and cultural rights: a textbook second revised edition*, ( Martinus Nijhoff publishers, 2001), p. 150.

<sup>220</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing* (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23, para. 7.

<sup>221</sup> General Comment No. 3, *supra* note 24, para. 10.

<sup>222</sup> General Comment No. 4, *supra* note 220, para. 10.

<sup>223</sup> Leckie, *supra* note 219, p. 156.

<sup>224</sup> General Comment No. 4, *supra* note 220, para. 8.

<sup>225</sup> Leckie, *supra* note 219, p. 157.

<sup>226</sup> *Ibid.*, p. 158.

<sup>227</sup> General Comment No. 4, *supra* note 220, para. 18.

obligations to respect housing rights, the ESC committee gave a separate General Comment number 7 on forced evictions. It explained forced evictions as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.<sup>228</sup> The State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions.<sup>229</sup>

It is recognized that some cases of evictions may be justified. The non-discrimination provisions of the Covenant impose an additional obligation upon Governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved.<sup>230</sup> Furthermore evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.<sup>231</sup>

---

<sup>228</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, 20 May 1997, E/1998/22, para. 3.

<sup>229</sup> *Ibid*, para. 8.

<sup>230</sup> *Ibid*, para. 10.

<sup>231</sup> *Ibid*, para. 16.

## 4 Crimes against humanity under international criminal law

Crimes against humanity are one of the four international atrocity crimes that trigger the application of R2P. Under international criminal law, these crimes are defined in different statutes, including in the statutes of Nuremberg, Tokyo, ICTY and ICTR, ICC and also have a meaning under customary international law. Crimes against humanity include two sub classes of crimes; crimes committed against civilians without discrimination as part of a widespread or systematic practice of gross violations of fundamental human rights and crimes of persecution against a particular group of persons in pursuance of a discriminatory policy or practice.<sup>232</sup>

The most recent and broad definition of crimes against humanity, given under Article 7 of the Rome statute, defines it as ‘any of the enumerated acts, such as murder, extermination, persecution, and others, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’. These crimes cover a broad range of potential victims, and are different from other atrocity crimes, because nexus to armed conflict is not required and the acts do not necessarily have to be committed with intent to discriminately destroy a population.<sup>233</sup> In this chapter a discussion on crimes against humanity will be made using the framework of their definition under the Rome statute with references to international customary law and the jurisprudence of the *ad hoc* tribunals.

### 4.1. Features of crimes against humanity

Crimes against humanity are odious offences that constitute a serious attack on human dignity or a grave humiliation or degradation of one or more persons.<sup>234</sup> These crimes involve the commission of one or more of the constituting offences, such as murder, torture, rape, slavery, persecutions and others when committed as part of widespread and systematic attack, which elevates them to an internationalized crime where they would otherwise be an ordinary crime falling under national jurisdiction.<sup>235</sup>

While war crimes are largely derived from, or are closely linked with international humanitarian law, crimes against humanity are to a great extent

---

<sup>232</sup> Cassese *et al.*, *supra* note 29, p. 361.

<sup>233</sup> Triffterer, *supra* note 26, pp. 181- 182.

<sup>234</sup> Cassese, *supra* note 31, p. 98.

<sup>235</sup> Cryer, *et al.*, *supra* note 30 p. 230.

predicated upon gross violations of international human rights law.<sup>236</sup> Crimes against humanity might be viewed as an implementation of human rights norms within international criminal law that focus on prosecuting the individuals who commit mass atrocities and other gross violations of human rights law.<sup>237</sup> To a large extent many concepts underlined in the category of crimes against humanity are derived from the provisions of international human rights instruments.<sup>238</sup>

At the wake of the Second World War, the drafters of the Nuremberg Charter were confronted with the question of how to respond to the crimes committed by the Nazi regime since the classic international definitions of war crimes did not include crimes committed by governments against its own people.<sup>239</sup> That led to the recognition of crimes against humanity in connection to armed conflicts, since the powers that won the war and established the tribunals would not have recognized the crime otherwise, because of the implications this might have in setting a precedent they would regret concerning the treatment of minorities within their own countries or their colonies.<sup>240</sup>

After 1945, the link between crimes against humanity and armed conflicts gradually disappeared evidenced by national laws and even treaties such as the Genocide Convention, and led to the conclusion that customary international law bans these crimes whether they are committed in time of war or peace.<sup>241</sup> But the ICTY statute in 1993 restrictively defined crimes against humanity to those acts committed in connection with armed conflicts; a requirement which does not exist in the ICTR statute.<sup>242</sup> In its jurisprudence, the ICTY Appeals Chamber admitted that the requirement is a deviation from customary international law by holding, in the Tadić case, that under customary international law it is already settled that crimes against humanity do not require a connection to armed conflict.<sup>243</sup> By its silence on the subject, the Rome statute excludes any nexus between crimes against humanity and armed conflicts.<sup>244</sup>

## 4.2. Criteria of crimes against humanity

The material elements for crimes against humanity, as stated under the chapeau and the listing of acts under Article 7 (1), require the commission of such acts

---

<sup>236</sup> Cassese, *supra* note 31, p. 99.

<sup>237</sup> Schabas, William A., *The International criminal court; a commentary on the Rome statute*, (Oxford University Press, 2010), p. 139.

<sup>238</sup> Cassese, *supra* note 31, p. 99.

<sup>239</sup> Cryer *et al.*, *supra* note 30, p. 231.

<sup>240</sup> Schabas, *supra* note 237, p. 145.

<sup>241</sup> Cassese *et al.*, *supra* note 29, p. 356.

<sup>242</sup> Cryer *et al.*, *supra* note 30, p. 235.

<sup>243</sup> Prosecutor vs Tadić, ICTY, (*Appeals chamber*), Judgment of 15 July 1999. para. 251.

<sup>244</sup> Schabas, *supra* note 237, p. 144.

as part of a widespread or systematic attack on civilian population. The *mens rea* required is intent and knowledge regarding the material elements of the crime.<sup>245</sup> Subsequently the chapeau and *mens rea* criteria will be discussed.

### 4.2.1. Chapeau criteria

The chapeau of Article 7 of the Rome statute captures the essence of crimes against humanity, namely that they are acts committed as part of a widespread or systematic attack on any civilian population in either times of war or peace.<sup>246</sup> Next, I will separately analyze the widespread or systematic criteria and the criteria of attack against the civilian population.

#### 4.2.1.1. Widespread or systematic

The widespread or systematic criterion is set to indicate the scope and magnitude of the crime and separate these crimes from ordinary crimes. Crimes against humanity involves multiplicity of victims and is committed as part of a plan, a policy, a conspiracy or a campaign rather than random, individual or isolated acts.<sup>247</sup> As different from common crimes, these crimes are crimes characterized either by their seriousness and their savagery, or by their magnitude, or by the fact that they were part of a system designed to spread terror, or that they were committed in a deliberately-pursued policy against certain groups of the population.<sup>248</sup>

In the Bemba case, the Pre Trial Chamber of the ICC hold that the term ‘widespread’ connotes the large-scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims.<sup>249</sup> It affirmed the ad hoc tribunal’s view that the term encompasses an attack carried out in a large geographical area or an attack on a small geographical area, but directed against a large number of civilians.<sup>250</sup>

It is a criteria that shows, by nature, these crimes should be large scale or massive and of extreme gravity and not sporadic events.<sup>251</sup> It might involve numerous acts and large number of victims or a single act, if a large number of civilians fall victim to it.<sup>252</sup> Therefore, while widespread typically refers to the cumulative effect of numerous inhumane acts, it could also be satisfied by a singular massive act of extraordinary magnitude.<sup>253</sup>

---

<sup>245</sup> Werle, Gerhard, *Principles of international criminal law*, 2<sup>nd</sup> ed. (T.M.C. Asser Press, 2009), p. 292.

<sup>246</sup> Triffterer, *supra* note 26, p. 168.

<sup>247</sup> Schabas, *supra* note 237, p. 141.

<sup>248</sup> Cassese *et al.*, *supra* note 29, p. 357.

<sup>249</sup> Bemba, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba*, (ICC-01/05-01/08), 15 June 2009, para. 83.

<sup>250</sup> Schabas, *supra* note 237, p. 148.

<sup>251</sup> Cassese, *supra* note 31, p. 100.

<sup>252</sup> Werle, *supra* note 245, p. 298.

<sup>253</sup> Cryer *et al.*, *supra* note 30, p. 236.

In the decisions of the *ad hoc* tribunals high threshold was set to determine ‘systematic’ attacks given that non widespread crimes should not lightly be labeled as crimes against humanity.<sup>254</sup> The ICC Pre Trial Chamber has ruled in the Bashir case that ‘systematic’ pertains to the organized nature of the acts of violence and to the improbability of their random occurrence.<sup>255</sup> The term ‘systematic’ has been understood to refer to an attack which follows a regular policy or pattern and results in a continuous commission of acts or patterns of crimes such that the crimes constitute a non accidental repetition of similar criminal conduct on a regular basis.<sup>256</sup>

The Rome statute had a disjunctive formulation of the ‘widespread’ or ‘systematic’ criteria. It even ruled, in the Bemba case, that it is satisfied if the attack is widespread without the need to consider if it was systematic.<sup>257</sup> However, this disjunctive formulation seems to be refuted by the policy or plan requirement under Article 7 (2(a)) that requires the attack to be pursuant to or in furtherance of a State or organizational policy. This would make the criteria of ‘widespread’ or ‘systematic’ to overlap as not only the number of victims and the nature of the acts should be considered but also the existence of a political objective and an acknowledged policy or plan or an ideology that contemplates the destruction, persecution or weakening of the community.<sup>258</sup>

There is a difference between the ICC and the *ad hoc* tribunals on whether or not a plan or a policy should exist for an attack to constitute crimes against humanity. In the ICC explanatory note on the elements of crimes it is stated that ‘policy to commit such attack’ requires the State or organization actively promote or encourage such an attack against a civilian population.<sup>259</sup> The policy could be implemented by State or organizational action and in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack, it cannot however, be inferred solely from the absence of governmental or organizational action.<sup>260</sup>

The ICC has already ruled that the requirement of ‘a State or organizational policy’ implies that the attack follows a regular pattern and such a policy could be made, not only by states, but also by groups of persons who govern a specific territory or by any organization with the capability to commit a

---

<sup>254</sup> *Ibid.*

<sup>255</sup> Bashir, *Warrant of Arrest for Omar Hassan Ahmad Al Bashir*, (ICC-02/05-01/09-1), 4 March 200, para. 81.

<sup>256</sup> Katanga et al, *Decision on the confirmation of charges*, (ICC-02/05-01/09), 30 September 2008. Paras. 397-398.

<sup>257</sup> Bemba, *supra* note 249, para. 82.

<sup>258</sup> Schabas, *supra* note 237, p. 149.

<sup>259</sup> Elements of crimes, *Crimes against humanity*, Introduction, para. 3.

<sup>260</sup> *Ibid.*

widespread or systematic attack against a civilian population.<sup>261</sup> State is understood in its functional sense and might include forces exercising a *defacto* government function. Organizations might include any group of people with the potential to commit a widespread or systematic attack including Para military and terrorist organizations.<sup>262</sup> Some commentators have pointed out the risk of such a broad interpretation by pointing to the dangers of an open ended approach which might unnecessarily stretch the ambit of crimes against humanity to encompass organized crime, gangs or even serial killers.<sup>263</sup> In its recent decision over situation in Kenya, the ICC Pre Trial Chamber ruled that a network of perpetrators that were under responsible command, had an established hierarchy, and utilized a considerable amount of capital, guns, crude weapons and manpower qualify as an 'organization' under the Rome statute.<sup>264</sup>

The requirement under the Rome statute for the attack to occur pursuant to or in furtherance of a policy is not consistent with the jurisprudence of the *ad hoc* tribunals since they have already settled the issue by saying that there is no requirement under customary international law to prove the existence of a policy or plan.<sup>265</sup> They ruled that a policy is not a separate element in the definition of the crime but is necessary to prove a 'systematic' attack.<sup>266</sup>

Triffterer agrees with the ICTY and argues that there is no requirement under customary international law that requires crimes against humanity to be committed in pursuant to a plan or policy citing the fact that no international instrument before or after the Rome statute has included such requirement.<sup>267</sup> Schabas disagrees and questions the explanation of the ICTY for the absence of a state policy requirement under customary international law as being based on selected unconvincing authorities and, moreover, not considering the strong policy concerns about an open ended definition that can extend to virtually everything except isolated crimes committed by individuals.<sup>268</sup>

The main indicators of customary international law are therefore divided, on the one hand the ICC statute indicates that policy is required and on the other hand,

---

<sup>261</sup> Bemba, *supra* note 249, para. 81.

<sup>262</sup> Werle, *supra* note 245, p. 301.

<sup>263</sup> Schabas, *supra* note 237, p. 151.

<sup>264</sup> Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, (ICC-01/09-01/11), 8 March 2011. para. 22-25. Judge Kaul dissented this decision holding that "...the planning and coordination of violence does not transform an ethnically-based gathering of perpetrators into a state-like 'organization'. See Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang" (ICC-01/09-01/11) 15 March 2011. para. 49.

<sup>265</sup> Triffterer, *supra* note 26, p. 236, noting that this view has been opposed by others.

<sup>266</sup> Werle, *supra* note 245, p. 300.

<sup>267</sup> Triffterer, *supra* note 26, p. 236.

<sup>268</sup> Schabas, *supra* note 237, p. 151.

the tribunal's jurisprudence rejects the policy element.<sup>269</sup> Werle, tried to reach at a rather modest compromise by arguing that the policy element does nothing more than to elaborate upon what is already included in the contextual element of the crime 'a systematic attack on a civilian population'.<sup>270</sup> The ICC has, both in the Harun and Kushayb case and the Bemba case affirmed that the policy element has no independent relevance as an element of the crime, but may serve as evidence of the systematic character of the attack by stating that 'the existence of a State or organizational policy is an element from which the systematic nature of an attack may be inferred'.<sup>271</sup>

In connection to the policy, both the ICC in the Bemba case and the ICTY in the Tadić case confirmed that it need not be formalized and can be deduced from the way in which the act occurs, if the acts occur on a widespread and systematic basis, whether formalized or not, it demonstrates the existence of a policy to commit those acts.<sup>272</sup> The presence of the policy element can be gathered from the totality of circumstances including actual events, political platforms or writings, public statements or propaganda programs and the creation of political or administrative structure.<sup>273</sup>

It is important to underline here that it is only the attack and not the individual acts being part of the attack that must be widespread or systematic.<sup>274</sup> In terms of establishing individual criminal responsibility, a person might be guilty even if he/she perpetrated one or two crimes as long as the acts are part of an overall policy or a consistent pattern of inhumanity.<sup>275</sup>

#### **4.2.1.2. Attack against any civilian population**

Article 7(2(a)) of the Rome statute states that 'attack directed against any civilian population' means a course of conduct involving the multiple commission of acts against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The term 'civilian population' encompasses any group of people linked by shared characteristics that made them the target of an attack, it does not mean that the entire population of a state or a territory must be affected, but rather emphasizes the collective nature of the crime.<sup>276</sup> It affirms that even if isolated inhumane

---

<sup>269</sup> Cryer *et al.*, *supra* note 30, p. 239.

<sup>270</sup> Werle, *supra* note 245, p. 302.

<sup>271</sup> Decision on the Prosecution Application under Article 58(7) of the Statute, The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Al Abd-al-Rahman ("Au Kushayb"), (ICC-02/05-01/07), 27 April 2007; Also in Bemba, *supra* note 249, para. 33.

<sup>272</sup> Prosecutor vs Tadić, ICTY, (trial chamber) Judgment of 7 May 1997. para. 653.

<sup>273</sup> *Ibid.*

<sup>274</sup> Triffterer, *supra* note 26, p. 179.

<sup>275</sup> Cassese *et al.*, *supra* note 29, p. 361.

<sup>276</sup> Werle, *supra* note 245, p. 293.

acts could constitute grave infringements of human rights, they still fall short of the stigma attached to crimes against humanity.<sup>277</sup>

Civilians or civilian population is not defined under the Statute. However, according to relevant rules of international humanitarian law particularly under Article 50 of Additional Protocol I to the Geneva Conventions, civilian population comprises of those persons who are not taking active part or no longer taking part in hostilities, including members of armed forces who laid down their arms and persons placed *hors de combat* by sickness, wounds, detention or any other reason. The fact that the term civilian population is defined under international humanitarian law should not implicate that crimes against humanity are somehow connected to armed conflict. In determining the victims of crimes against humanity, national and international courts have adopted the approach of international humanitarian law and employ the term civilian population to determine if a person or a population is civilian for the purpose of deciding whether crimes against humanity or other crimes have occurred.<sup>278</sup> This is mainly to exclude non civilians, i.e. the military, from the category of victims of crimes against humanity since perpetrating such crimes against them would amount to war crimes and a breach of the Geneva Conventions.<sup>279</sup>

The type of the attack could be any mistreatment of the civilian population and need not necessarily be a military one or even involve the use of force.<sup>280</sup> The Pre Trial Chamber of the ICC, by citing the elements of crime, has affirmed that there is no need to prove a military attack and that attack refers to a course of conduct, a campaign or operation carried out against the civilian population.<sup>281</sup> This course of conduct may involve the commission of acts of violence or even non violent attacks, such as establishment of a system of apartheid.<sup>282</sup>

The said course of conduct must however include multiple commissions of acts, which is present when the same act is committed many times or if different acts are committed.<sup>283</sup> Multiple acts refer either to more than one generic act, even though this is not required, or more than a few isolated incidents that would fit under one or more of the enumerated constituent offences.<sup>284</sup> It should be interpreted to mean that it does not require more than

---

<sup>277</sup> Cassese, *supra* note 31, p. 101.

<sup>278</sup> Triffterer, *supra* note 26, p. 180.

<sup>279</sup> Cassese *et al.*, *supra* note 29, p. 375.

<sup>280</sup> Werle, *supra* note 245, p. 297.

<sup>281</sup> Bemba, *supra* note 249 para. 75.

<sup>282</sup> Schabas, *supra* note 237, pp. 154-155.

<sup>283</sup> Werle, *supra* note 245, p. 297.

<sup>284</sup> Triffterer, *supra* note 26, p. 234.

one enumerated generic act or else it would be inconsistent with the widespread or systematic requirements.<sup>285</sup>

Both the ICC statute and the jurisprudence of the ad hoc tribunals indicate that there should either be multiple acts or multiple victims to warrant the label ‘attack directed against a civilian population.’<sup>286</sup> The mass murder of civilians, for instance, may suffice as an attack against civilian population and there is no requirement that another type of separate attack against the same civilians should be proven.<sup>287</sup>

#### 4.2.2. The *Mens rea*

The relevant rules of international law require two mental elements for crimes against humanity; one is the awareness of the existence of a widespread and systematic practice and the other is the *mens rea* proper to the underlying offences.<sup>288</sup> In other words it means that in addition to the requisite mental element for the particular offences, it is necessary that the accused knows the attack is occurring as a result of widespread and systematic attack.<sup>289</sup> An accused that lacks such knowledge cannot be guilty of crimes against humanity, although he or she could be liable under national courts for the specific criminal behavior.<sup>290</sup>

In the elements of crime, it is stated that required knowledge of the widespread and systematic context of the crime should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.<sup>291</sup> In case of an emerging widespread or systematic attack against a civilian population, the mental element is satisfied if the perpetrator intended to further such an attack.<sup>292</sup> This is consistent with the jurisprudence of the ad hoc tribunals which have ruled that the perpetrator must know that there is an attack on a civilian population and also that his or her actions are part of the attack.<sup>293</sup>

The ICC has also affirmed this by saying that it is not required to prove that the perpetrator had knowledge about all characteristics of the attack or the precise details of the plan or policy of the State or organization.<sup>294</sup> The rationale behind

---

<sup>285</sup> *Ibid.*

<sup>286</sup> Cryer *et al.*, *supra* note 30, p. 237.

<sup>287</sup> Triffterer, *supra* note 26, p. 175.

<sup>288</sup> Cassese, *supra* note 31, p. 114.

<sup>289</sup> Cryer *et al.*, *supra* note 30, p. 244.

<sup>290</sup> Schabas, *supra* note 237, p. 155.

<sup>291</sup> Elements of crimes, *Crimes against humanity*, Introduction, para. 2.

<sup>292</sup> *Ibid.*

<sup>293</sup> Triffterer, *supra* note 26, p. 182. Referring to, for instance, the Kordic, Blasikic, Musema and other cases from ICTY and ICTR.

<sup>294</sup> Bashir, *supra* note 255, para. 87.

requiring such level of knowledge is that international criminal law intends to punish persons, who are aware of the fact that the crimes they are perpetrating or plan to perpetrate are part of a general framework of criminality and are not only encouraged to misbehave but also hope to enjoy impunity.<sup>295</sup>

According to Article 30(3) of the Rome statute that deals with the *mens rea*, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. The jurisprudence of the *ad hoc* tribunals have ruled that it suffices to show the existence of awareness, willful blindness or knowingly taking the risk that one act is part of an attack.<sup>296</sup> This indicates that knowledge can be actual or constructive and that it is not necessary to demonstrate that the perpetrator knew his/her actions were inhumane, or rose to the level of crimes against humanity.<sup>297</sup>

In conceivable circumstances, the existence of a widespread or systematic attack would be notorious and knowledge could not credibly be denied.<sup>298</sup> In case it is not, the ICC has ruled that knowledge of the attack and the perpetrators awareness that his conduct was part of such attack may be inferred from circumstantial evidence.<sup>299</sup> Such knowledge can be inferred from historical and political circumstances in which the acts of violence occurred and the functions of the accused when the crimes were committed such as the position of the accused in the political or military hierarchy.<sup>300</sup>

The personal motives of the perpetrator when taking part in an attack on civilian population are irrelevant in determining whether a crime against humanity occurred, the accused might not even share the purpose or goal behind the attack, it suffices to prove that the accused knew his/her acts were part of widespread and systematic attack.<sup>301</sup> However in his/her defense, the accused might, by proving that the acts were committed for purely personal reasons, rebut the assumption that his or her acts were part of an attack.<sup>302</sup> This does not mean that for the conduct to fall within the definition of crimes against humanity, it is a prerequisite for the act not to have been carried out for the purely personal motives of the perpetrator as held by the ICTY in the Tadić case.<sup>303</sup>

In general *mens rea* can take other forms than intent, such as recklessness or negligence. But for cases of crimes against humanity mere negligence seem not to be sufficient because first, international rules prohibiting the crime

---

<sup>295</sup> Cassese, *supra* note 31, p. 115.

<sup>296</sup> Cryer *et al.*, *supra* note 30, p. 244.

<sup>297</sup> Triffterer, *supra* note 26, p. 182.

<sup>298</sup> Cryer *et al.*, *supra* note 30, p. 244.

<sup>299</sup> Bemba, *supra* note 249, para.431.

<sup>300</sup> Schabas, *supra* note 237, p.156.

<sup>301</sup> Triffterer, *supra* note 26, p. 182.

<sup>302</sup> Schabas, *supra* note 237, p. 156.

<sup>303</sup> Tadić, *supra* note 243, para. 272.

specifically refer to underlying offences for which national criminal systems usually require intent or at least *dolus eventualis* (indirect intention) and crimes against humanity are regarded as so grave that it would be contradictory to provide that they may result from mere negligence.<sup>304</sup>

Crimes against humanity may be committed in advertent recklessness or *dolus eventualis*, which would be satisfied, when for instance, an accused is acting as an agent of a system and does not directly and immediately cause the inhumane act, but anticipates all the specific consequences of his/her misconduct. It is sufficient that he/she is aware of the risk that his action might bring about serious consequences for the victim, on the account of the violence and arbitrariness of the system he delivers the victim to.<sup>305</sup>

The ICTR statute provides crimes against humanity could only be committed on discriminatory grounds, but subsequent instruments and jurisprudence have developed to exclude the need to show discriminatory intent or motive with respect to crimes against humanity in general.<sup>306</sup> However, additional *mens rea* is required for persecution as crimes against humanity to show the intent to subject a person or a group to discrimination, ill treatment or harassment so as to bring about great suffering or injury, based on discriminatory grounds.<sup>307</sup> This added element of persecutory or discriminatory animus for persecution amounts to an aggravated criminal intent.<sup>308</sup>

### **4.3. Constituent offences under crimes against humanity**

As already discussed above, crimes against humanity are committed when one or more of the constituent offences are committed in a widespread and systematic context. The list of the constituent offences have developed over decades, by incorporating additional inhumane acts into its category, from the Nuremberg Charter to the statutes of the *ad hoc* tribunals and the Rome Statute.<sup>309</sup>

The constituent offences could be committed, by commission or omission, with the mental element of intent and knowledge required under Article 30 of the Rome statute. With respect to legal and normative requirements under constituent offences, it is not required that the perpetrator personally considered

---

<sup>304</sup> Cassese *et al.*, *supra* note 29, p. 364.

<sup>305</sup> Cassese, *supra* note 31, p. 114.

<sup>306</sup> Schabas, *supra* note 237, p. 157.

<sup>307</sup> Cassese, *supra* note 31, p. 115.

<sup>308</sup> Cassese *et al.*, *supra* note 29, p. 364.

<sup>309</sup> Cryer *et al.*, *supra* note 30, p. 245.

the conducts inhumane or severe; it is sufficient that the perpetrator was aware of the underlying facts.<sup>310</sup>

‘Murder’ happens when one or more persons are killed. In the elements of crime it is stated that the term ‘killed’ is interchangeable with the term ‘caused death’.<sup>311</sup> The perpetrator, by his commission or omission, meant to cause death or was aware that death would occur in the ordinary course of events.<sup>312</sup>

As defined under Article 7(2)(b) of the Rome statute, ‘extermination’ includes the intentional infliction of conditions of life, including but not limited to, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population. Like crimes against humanity of murder, the perpetrator killed or caused death of one or more persons, to bring about the destruction of part of a population.<sup>313</sup> What distinguishes it from murder is that the killings occur in a large scale.<sup>314</sup> This crime resembles genocide in many ways, except that there need be no proof of intent to destroy the population being attacked.<sup>315</sup>

‘Enslavement’ is defined, under Article 7(2)(c) of the Rome statute, as 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. It encompasses exercising powers attached to the right of ownership, such as purchasing, selling, lending or bartering a person or persons, or imposing on them a similar deprivation of liberty elements, including exacting forced labor.<sup>316</sup>

As explained under Article 7(2)(d) of the Rome statute, ‘Deportation or forcible transfer of population’ means forced displacement of individuals by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law. The deference between deportation and forcible transfer lies in whether a border is crossed; in the former case the transfer is to another state’s territory and in the latter case it is within the state.<sup>317</sup> The prohibition aims at safeguarding the aspirations of individuals to live in their communities and homes without outside interference.<sup>318</sup> The term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention,

---

<sup>310</sup> *Ibid*, p. 246.

<sup>311</sup> Elements of crimes, *Crimes against humanity*, Article 7(1)(a), para. 1.

<sup>312</sup> Schabas, *supra* note 237, p. 158.

<sup>313</sup> Elements of crimes, *Crimes against humanity*, Article 7(1)(b).

<sup>314</sup> Werle, *supra* note 245, p. 307.

<sup>315</sup> Schabas, *supra* note 237, p. 159.

<sup>316</sup> Elements of crimes, *Crimes against humanity*, Article 7(1)(c).

<sup>317</sup> Werle, *supra* note 245, p. 314.

<sup>318</sup> Schabas, *supra* note 237, p. 163.

psychological oppression or abuse of power or by taking advantage of a coercive environment.<sup>319</sup>

Crimes against humanity of ‘imprisonment’ as described under Article 7(1)(e) of the Rome statute, involve the severe deprivation of physical liberty of one or more persons in violation of fundamental rules of international law. In the jurisprudence of the ICTY, imprisonment is understood as contemplating arbitrary imprisonment without due process of law, as part of a widespread or systematic attack against a civilian population.<sup>320</sup>

As defined under Article 7(2)(e) of the Rome statute, ‘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.<sup>321</sup> Such formulation departs from the formulation of torture in both the Torture Convention and the jurisprudence of the *ad hoc* tribunals which required the pain to be inflicted with the purpose of extracting information from the victim, or to punish the victim or to intimidate or coerce the victim, or for any reason based on discrimination of any kind.<sup>322</sup> The ICC formulation, which could lead to a retreat from such additional requirement even under customary international law, does not have a means-end relationship and includes pain caused even without a particular purpose.<sup>323</sup>

Crimes against humanity of ‘Sexual violence’ are committed when an act of a sexual nature is committed against one or more persons or when such person or persons are caused to engage in an act of a sexual nature by force, or by threat of force or coercion, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.<sup>324</sup> As per Article 7(1)(g) of the Rome statute, they include crimes of rape, Sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity.

‘Persecution’ means, under Article 7(2)(g), the intentional and severe deprivation of fundamental rights of individuals for reason of the identity of the group or collectivity contrary to international law. It is specific in that, it contemplates racist or other discriminatory acts and policies of a state that may in fact be authorized by its legal regime.<sup>325</sup> Persecution differs from all other crimes constituting crimes against humanity in that, what is targeted is a group as such or an individual specifically because of his/her membership in this

---

<sup>319</sup> Elements of crimes, *Crimes against humanity*, Article 7(1)(d).

<sup>320</sup> Schabas, *supra* note 237, p. 166.

<sup>321</sup> Elements of crimes, *Crimes against humanity*, Article 7(1)(f).

<sup>322</sup> Schabas, *supra* note 237, p. 167.

<sup>323</sup> Werle, *supra* note 245, p. 322.

<sup>324</sup> Elements of crimes, *Crimes against humanity*, Article 7(1)(g)-6.

<sup>325</sup> Schabas, *supra* note 237, p. 175.

group or collectivity.<sup>326</sup> It belongs to the same genus as the crime of genocide in that, when persecution escalates to the extreme form of willful and deliberate acts designed to destroy a group or part of a group it amounts to genocide.<sup>327</sup>

Article 7(2)(i) of the Rome statute describes ‘enforced disappearance of persons, as 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. It requires the intentional commission of two types of conduct; deprivation of liberty and withholding information with an additional intension of removing the person from the protection of the law.’<sup>328</sup>

The crime of ‘apartheid’, under Article 7(2)(h), involves inhumane acts committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups with the intention of maintaining that regime.<sup>329</sup> This crime is closely related to the crime of persecution except that it does not require a behavior to be based specifically on discriminatory grounds.<sup>330</sup>

Since it is practically impossible to enumerate all behaviors deserving of punishment as crimes against humanity, the Rome statute incorporated a ‘catch all’ provision under Article 7(2)(k) by criminalizing ‘other inhumane acts’ of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. In the elements of the crime it is stated that for an inhumane act to be included under this provision, must have a similar character, by nature and gravity, to the acts referred to in Article 7, paragraph 1.<sup>331</sup> There is no clear guideline on how this similarity should be determined. The ICC Pre Trial Chamber ruled in the Katanga and Ngudjolo chui case that it should be done in case by case basis taking in to account factors such as the nature of the act or omission, the context in which it occurred and the personal circumstances of the victim.<sup>332</sup> The word ‘intentionally’ is interpreted to confirm the general *mens rea* for crimes against humanity which would be satisfied not only when the perpetrator undertakes such actions or omissions with the express intent to bring about great suffering but also when he/she was aware that such the consequence will occur in the ordinary course of events.<sup>333</sup>

---

<sup>326</sup> Werle, *supra* note 245, p. 332.

<sup>327</sup> Schabas, *supra* note 237, p. 178.

<sup>328</sup> Werle, *supra* note 245, p. 336.

<sup>329</sup> Article 7(2)(h), Rome statute.

<sup>330</sup> Werle, *supra* note 245, p. 339.

<sup>331</sup> Elements of crimes, *Crimes against humanity*, Article 7(1)(k).

<sup>332</sup> Katanga, *supra* note 256, para. 449.

<sup>333</sup> *Ibid*, para. 455, *also* under elements of crimes, Article 7 (1) (k), para. 3.

Some commentators claim that the enumeration of constituting offences under Article 7 paragraph 1 is an exhaustive one.<sup>334</sup> Even if it is so, the list includes ‘catch all’ provisions<sup>335</sup> such as the one under Article 7 (2(k)) that could arguably allow the addition of inhuman acts, that are described by the ICC Trial chamber as serious violations of customary international law and basic rights drawn from international human rights law, that are of a similar character to the acts enumerated under paragraph 1 of Article 7.<sup>336</sup>

---

<sup>334</sup> Schabas, *supra* note 237, p. 157.

<sup>335</sup> An open indication like ‘inhumane acts of similar character’ also exist in connection with sexual violence in Article 7(1)(g) and apartheid Article 7(1)(j) which would have been covered under this sub article anyway.

<sup>336</sup> Katanga, *supra* note 256, para. 448.

# 5 Gross violations of economic social and cultural rights as an R2P case

In this chapter I intend to analyze my research findings to try to rediscover the place of gross violations of ESC rights within the R2P doctrine and thereby answer my research questions. In the last three chapters, separate analysis was made on the rules and standards governing R2P, ESC rights and crimes against humanity. In this chapter, an attempt will be made to make the connection between gross violation of ESC rights and R2P through crimes against humanity.

## 5.1. Violations of ESC rights as crimes against humanity

The traditional view that ESC rights are categorically non-justiciable and do not entail immediate legal obligations has changed. It is now established that they entail immediate obligation on states obliging them to guarantee the exercise of these rights without discrimination and to take steps towards their full realization.<sup>337</sup> From among the three types or levels of obligations ESC rights impose on States, that are the obligations to respect, to protect and to fulfill, the obligation to respect is the least affected by the progressive nature of the rights and is rather immediate since it mainly requires abstinence of the state from intervening in individual's exercise of their rights. Under their obligations to protect and fulfill, states are under the immediate obligation to discharge them without any discrimination.<sup>338</sup>

Unwillingness of a State to comply with its obligations, manifested through its active denials of ESC rights, or by its omissions such as failure to exercise due diligence, failures to act in accordance with prescribed legal obligations, failures to fulfill obligations of an immediate nature, and the prevailing absence of obligatory legal measures or remedial mechanisms constitute violations of state obligations.<sup>339</sup>

When such violations are gross and entail multiplicity of victims, it could be argued that they may reach to the level of crimes against humanity. Crimes against humanity exist not only with regard to violations of what are considered integrity rights, such as the right to life, to be free from torture and so on, but whenever odious offences that constitute a serious attack on human dignity are committed. The focus of these crimes is on the outcome of the attack, the right

---

<sup>337</sup> General Comment No. 3, *supra* note 24, para. 1.

<sup>338</sup> *See* Chapter 3.2.

<sup>339</sup> Leckie, *supra* note 33, p. 98.

which right is violated is more or less immaterial as long as it is established that the acts involve inhumane acts which severely damage human beings.<sup>340</sup>

However, crimes against humanity cannot be invoked whenever some people die of hunger or thirst, or when some urban poor or rural dwellers are evicted from their homes. Even if gross violations of ESC rights severely damage human dignity and are odious, they will only reach the level of crimes against humanity when they fulfill both the *actus reus* and *mens rea* criteria under such crimes. The *actus reus* criterion requires the violations to occur as part of a ‘widespread’ or ‘systematic’ attack against civilian populations and also to fall under one or more of the constituent offences. For instance, when the civilian population is starved to death in violation of the right to adequate food a crime against humanity of murder would be committed and if the violation did not result in death it would fall under ‘other inhumane acts’ as crimes against humanity. The *mens rea* criterion is fulfilled if these violations are occurring with knowledge of the attack.

The ‘widespread’ criterion excludes mere violations of ESC rights that affect small number of people or that involve sporadic or random events from the realm of crimes against humanity. Violations of ESC rights must be gross and take place in a large scale and affect a large number of victims. There is no numerical limit on how much victims should be affected for this criterion to be satisfied and that is to be seen in a case by case basis.<sup>341</sup> In the President Omar Al-Bashir decision for arrest warrant, the ICC Pre Trial Chamber considered an attack on the civilian population that affected hundreds of thousands of individuals and took place across large geographical area as ‘widespread’.<sup>342</sup> In the Bemba case the same Chamber held that the widespread criterion is satisfied because it found a substantial ground to believe that a large number of civilians were victims of the attack without mentioning any numbers.<sup>343</sup>

In connection to the ‘systematic’ criteria, it is not yet settled whether or not a plan or a policy should exist for an attack to constitute crimes against humanity. The jurisprudence of the *ad hoc* criminal tribunals suggests that it is not required under customary international law.<sup>344</sup> However, under the Rome statute, which defines crimes against humanity for the purpose of its application in the ICC, the existence of a plan or a policy is required. The disjunctive formulation of the widespread or systematic attack criteria under the Rome statute seems to be refuted by the policy or plan requirement under Article 7 (2(a)). This would indicate that a ‘widespread’ attack on a civilian population

---

<sup>340</sup> Skogly, *supra* note 27, p. 67.

<sup>341</sup> Triffterer, *supra* note 26, p.178.

<sup>342</sup> Bashir, *supra* note 255, para. 84.

<sup>343</sup> Bemba, *supra* note 249, 15 June 2009, para. 129.

<sup>344</sup> See Chapter 4.2.1.2.

does not qualify as a crime against humanity unless it is committed in pursuant to or in furtherance of a state or organizational policy.<sup>345</sup>

In both the jurisprudence of the *ad hoc* tribunals and the Rome statute it is not required for the policy or plan to be formalized and could be inferred from circumstantial evidence. In connection to this, the ICC in its decision on indictments over the situation in the republic of Kenya was satisfied that there were reasonable grounds to believe the attack against the civilian population was committed in pursuant to a policy by relying on circumstantial evidences such as meetings, transport of perpetrators, purchase of weapons and others.<sup>346</sup> Such circumstantial evidences are not that difficult to establish in connection to active denials of ESC rights which involve overt actions to deny people their ESC rights, such as forced evictions undertaken by states.

However, gross violations of ESC rights could also be committed with the omissions of states. Notwithstanding the progressive nature of obligations under ICESCR, states are under an immediate obligation to act without discrimination of any kind and to take necessary action towards fulfilling these obligations. Violations can occur by omission when states fail to do so, or when they fail to exercise due diligence to stop or respond to the violations, but such omission needs to be in furtherance of a policy for it to rise to the level of crimes against humanity. Such policy should also be of deliberate failure that consciously seeks to encourage such attacks or the result, and should not be a mere omission inferred purely from the absence of governmental or organizational action.<sup>347</sup>

The *mens rea* criterion is fulfilled if the perpetrator acted with knowledge that such gross violations of ESC rights are part of a widespread or systematic attack against the civilian population. The *mens rea* will be satisfied not only by showing direct intention of violation but also indirect intension where the perpetrator was aware of the fact that violations would bring about serious harm on the victims, without necessarily desiring the result but by accepting it.<sup>348</sup> Therefore, it is not necessary to show that the perpetrator desired the suffering that could result from deprivation of food, eviction from housing or denial of health facilities but it is enough if he was indifferent with a *dolus eventualis* mental state.<sup>349</sup>

The other criterion to consider gross violations of ESC rights as crimes against humanity is that such violation must fall under one of the constituting offences. In the list of crimes under Article 7 of the Rome statute there are not too many

---

<sup>345</sup> Werle, *supra* note 245, p. 303.

<sup>346</sup> Samoei *et al.* *supra* note 264, para. 28.

<sup>347</sup> Elements of crimes, *Crimes against humanity*, Introduction, para. 3.

<sup>348</sup> *See* Chapter 4.3

<sup>349</sup> Cassese *et al.*, *supra* note 29, p. 364.

offences that directly denote violations of ESC rights. But, these violations could be committed as a means to commit one of the enumerated offences, such as murder, persecution or extermination. If they fail to satisfy the elements of these offences, they would still constitute crimes against humanity if they fall under ‘other inhumane acts’ in Article 7(2(k)). This means that for gross violations of ESC rights such as denial of food, water, housing and medical care to be considered as crimes against humanity, it must be established that they constitute an inhumane act that subjected the survivors to severe mental or physical harm or a severe attack on human dignity.<sup>350</sup>

An assessment to see if gross violations of ESC rights constitute an inhumane act under the meaning of Article 7 must be made separately for particular violations. Arguably the gross violations that are studied in this thesis, on violations of the rights to adequate housing and food, could very well constitute ‘inhumane act’ within the meaning of Article 7. The *mens rea* of ‘other inhumane acts’ is one of intentionality, except that it consists of the intention to inflict serious physical or mental suffering or to commit a serious attack upon the human dignity of the victim, or where the perpetrator knew that its act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity.<sup>351</sup> Denial of humanitarian food aid for people who would otherwise risk starvation by authorities, for instance, who might not have desired to cause serious suffering but have accepted it with reckless disregard would satisfy such *mens rea*.

### **5.1.1. Gross violations of the right to housing as a crime against humanity**

It is established that forced evictions are *prima facie* gross violations of the right to adequate housing and it is the human rights obligation of states to refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions.<sup>352</sup> Forced evictions as gross violations of the right to adequate housing could constitute crimes against humanity. Widespread or systematic evictions could validly fall under Article 7(2(d)) ‘deportation or forcible transfer of population’ or under Article 7(2(k)) ‘other inhumane acts’.

Forced evictions constitute crimes of deportation or forcible transfer under Article 7(2(d)) depending on whether or not they involved removal of the civilian population to another country or within the same country. This does not however mean that all evictions would satisfy the conditions under Article 7(2(d)). The conditions for acts to fall under Article 7(2(d)) were elaborated by the UN fact-finding mission to Zimbabwe that was established by the UN

---

<sup>350</sup> Ford, *supra* note 134, p. 249.

<sup>351</sup> Wong, Jarrod, *supra* note 11, p. 253.

<sup>352</sup> *See* Chapter 3.3.2.

Special Envoy on Human Settlements Issues in Zimbabwe to assess the scope and impact of operation Murambatsvina, a clean-up operation of cities that was launched by the government of Zimbabwe in 2005 and resulted in the displacement of hundreds of thousands of people.<sup>353</sup> The three conditions for acts to evictions to fall under Article 7(2(d)) are firstly, that the act must be coercive, secondly the evicted people should be lawfully present on the area they were evicted from and thirdly, the eviction should be happening outside the permit under international law that allows states to derogate the exercise of these rights.<sup>354</sup>

The mission concluded in the case that despite the acts causing serious suffering on the population, the acts fail short of satisfying the conditions under Article 7(2(d)) to constitute crimes against humanity.<sup>355</sup> By stating that the conditions were not fulfilled since evictees were not lawfully present in the areas, police threats were imagined rather than real and so people demolished their own structures out of fear, and the acts of Zimbabwe might fall under the exceptional grounds under which forced evictions are permitted such as fighting criminality, protecting public health and morals.<sup>356</sup>

This obviously should not be taken to mean that all eviction cases could not fall under Article 7(2(d)), it should rather mean that whenever forced evictions fulfill such conditions, which they usually do to constitute forced evictions in the first place; they would constitute a crime against humanity. According to General Comment 7 on forced evictions, the prohibition on forced evictions does not, in the first place, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights.<sup>357</sup>

Even if forced evictions fail short of fulfilling the conditions under Article 7(2(d)) they could still constitute crimes against humanity, under the catch all provision of Article 7(2(k)). They would qualify as ‘other inhumane acts’ if they are serious enough in their outcome to cause great suffering and serious injury to the body or to mental or physical health.<sup>358</sup> There is a jurisprudential support to this claim. The African Commission on human and people rights, in

---

<sup>353</sup> Report of the Fact-Finding Mission to Zimbabwe to assess the scope and Impact of Operation Murambatsvina, *the UN Special Envoy on Human Settlements Issues in Zimbabwe*, (2005), p. 7.

<sup>354</sup> *Ibid*, pp. 65-66.

<sup>355</sup> *Ibid*.

<sup>356</sup> One will obviously observe that some of the mission’s conclusions were unsound. For instance in claiming that victims were destroying their own homes for fear of the authorities but not the authorities themselves, there was a blatant disregard to the elaboration on the term “forcibly” under the ICC elements of crime as an act which is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.

<sup>357</sup> General Comment No. 7, *supra* note 228, para. 3.

<sup>358</sup> Skogly, *supra* note 27, p. 73.

the SHRO Case found Sudan in violation of its human rights obligations stating that the state and its agents actively participated in the forced eviction of the civilian population from their homes and villages and rendered this kinds of treatment as cruel and inhuman that threatened the very essence of human dignity.<sup>359</sup>

### **5.1.2. Gross violations of the right to food as a crime against humanity**

From among the various types of violations on the right to adequate food, 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 crimes against humanity.<sup>360</sup> Gross violations of the right to adequate food by denial of access to food for particular individuals or groups would form part of the crime of persecution under Article 7(2)(g) if it involves the deprivation of the human rights to food on discriminatory grounds.<sup>361</sup>

In cases where deprivation was not based on discriminatory ground, it could fit as ‘other inhumane acts’ under Article 7(2)(k). There is support for this claim from the jurisprudence of the Extraordinary Chambers in the Courts of Cambodia, which affirmed that for an inhumane act to be established, it must be proved that the victim suffered serious harm to body or mind and determined that the prisoners in S-21 suffered serious bodily and mental harm from the deplorable conditions of detention deliberately imposed upon them, including the deprivation of adequate food and hygiene among others, and therefore considered this treatment as ‘inhumane’.<sup>362</sup>

Under General Comment 12, the prevention of access to humanitarian food aid in conflict situations or other emergency situations constituted a gross violation of ESC rights.<sup>363</sup> Such violations would escalate to crimes against humanity when actions or omissions of states prevent people from receiving food that could otherwise be available to them without this interference and resulted in massive suffering.<sup>364</sup> It could be argued that when a government or other organization deliberately and intentionally blocks food aid from reaching people in an immediate danger of starvation, it could be considered as

---

<sup>359</sup> SHRO case, *Communications 279/03 – Sudan Human Rights Organization & The Sudan 296/05 – Centre on Housing Rights and Evictions/The Sudan*, African commission on human and peoples' rights (May 2009), para. 164.

<sup>360</sup> Aba and Hammer, *supra* note 197, p. 9.

<sup>361</sup> Carrier-Desjardins, Laurence, *The Crime of Persecution and the Situation in Darfur: A Comment on the Al Bashir Arrest Warrant Decision*, Hague Justice Portal (2010), p. 7.

<sup>362</sup> Duch, *Judgment Kaing Guek Eav alias Duch*, Extraordinary Chambers in the Courts of Cambodia, File/Dossier No. 001/18-07-2007/ECCC/TC, (26 July 2010), paras. 372 and 368.

<sup>363</sup> General comment 12, *supra* note 182, para. 19.

<sup>364</sup> Skogly, *supra* note 27, pp. 69-70.

inhumane acts and fit the criteria of Article 7(2)(k).<sup>365</sup> The claim that starvation constitutes an inhumane act causing great suffering was affirmed by the extraordinary Chambers in the Courts of Cambodia in the Duch case, after discovering that detainees were deliberately fed starvation rations and that deliberate starvation was applied as a policy.<sup>366</sup>

David Marcus in his article ‘famine crimes in international law’ argued that some famine crimes should constitute crimes against humanity. In addition to intentional famine crimes by which governments deliberately use hunger as a tool of extermination as defined under Article 7(2)(b) of the Rome statute, he argued that crimes against humanity could be committed when governments implement policies that themselves engender famine, and then recklessly continues to pursue these policies ignoring evidence that its policies are creating, inflicting, or prolonging the starvation of a significant number of persons.<sup>367</sup> Since mere negligence is not a sufficient *mens rea* for crimes against humanity, authorities who initiate economic policies that lead to mass starvation are not criminal by this very act, however when authorities were still coercing people in a way that was leading to mass starvation even after realizing that that their conduct in carrying out such policies was leading to famine, the *mens rea* would be satisfied.<sup>368</sup>

## **5.2. Applying R2P to gross violations of ESC rights**

The scope of R2P is as limited as, or as broad as the scope of the four threshold crimes. As already discussed, gross violations of ESC rights are more likely to constitute crimes against humanity than war crimes, genocide, or ethnic cleansing. In cases where gross violations of ESC rights qualify as crimes against humanity they would come within the reach of the R2P doctrine. It however is not such an easy conclusion to reach at. There is at least a need to settle the issue with situations where the international community rejected the application of R2P when possible crimes against humanity involving ESC rights were claimed to have been committed.

---

<sup>365</sup> *Ibid*, p. 71.

<sup>366</sup> Duch, *supra* note 361, paras. 207, 269, 278, 372.

<sup>367</sup> Marcus, David, Famine Crimes in International Law, *The American Journal of International Law*, Vol. 97, No. 2 (2003), p. 247.

<sup>368</sup> *Ibid*, p. 279.

### **5.2.1. Does it indicate a dead end? Rejecting the application of R2P in situations such as Zimbabwe and Burma**

At least in two situations where R2P has been invoked to apply to gross violations of ESC rights, in the cases of Zimbabwe and Burma, the large-scale and serious impact of deliberate government policy or neglect of duties of care by governments caused great suffering on ordinary people. In both cases the application of R2P was rejected. Arguably these rejections do not indicate a dead end for the application of R2P to gross violations of ESC rights as none of these cases have expressly ruled out its application but were rather denied due to other reasons, such as their connection with natural disasters.

In Zimbabwe, where the debate didn't go much further, there were questions as to whether the wider socio-political issues, including the policy recklessness involved in Mugabe's destruction of the economy and health system, constituted R2P crimes.<sup>369</sup> By claiming that the calculated violence against members of the opposition and their supporters and human rights activists in connection with the contested 2008 election, the possibly preventable cholera epidemic, the mass displacement brought on by the 2005 re-settlement campaign (operation Murambatsvina), and the widespread starvation and food insecurity amounted to crimes against humanity.<sup>370</sup>

Some scholars' labeled Mugabe's failure to protect its population by despoliation of the population and unleashing a campaign of murderous violence as a *prima facie* atrocity crime.<sup>371</sup> However, these calls from scholars and supporters of the R2P, on the international community to invoke R2P to prevent crimes in Zimbabwe from continuing or escalating, it could not succeed because of limited political will from regional and foreign states to commit to any significant preventive or reactive measure and lack of sufficient clarity on how R2P relates to the human rights violations in Zimbabwe. The crisis was finally given a political solution with the signing of a power sharing peace agreement between Mugabe and the opposition without further exploring the chances of invoking external R2P.<sup>372</sup>

On the other hand, the situation in Burma gave rise to an extensive debate both within the academics and among states. After Burma was hit by cyclone Nargis, the Burmese government refused to allow humanitarian aid to reach victims of the cyclone by intercepting efforts to reach survivors by seizing a shipment of

---

<sup>369</sup> International coalition for the Responsibility to Protect, *Crisis in Zimbabwe*, available at <http://responsibilitytoprotect.org/index.php/crises/crisis-in-zimbabwe>, visited on 10,05,2011.

<sup>370</sup> Global center for the Responsibility to protect, Zimbabwe: What Can be Done, Who Must Act? <http://globalr2p.org/media/pdf/MtgSummZimJan2009.pdf> visited on 10, 05, 2011.

<sup>371</sup> Evans, *supra* note 2, p. 72.

<sup>372</sup> *Supra* note 368.

food from the UN and refused to allow its distribution by foreign aid workers. The lack of aid left 2.5 million survivors vulnerable to hunger, exposure, and disease.<sup>373</sup>

Subsequently France asked the Security Council, after its foreign minister Bernard Kouchner claimed that the situation calls for R2P, to pass a resolution which could authorize the delivery of aid to be imposed on Burma.<sup>374</sup> The request, however, was not acted upon due to China, Vietnam, South Africa and Russia had argued against the involvement of the Security Council.<sup>375</sup> The argument that dominated the decision to reject the application of R2P revolved around the claim that R2P should not apply to natural disasters. In the 2001 ICISS report natural or environmental catastrophes, where the state is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened was expressly identified as one of the Just causes for R2P to apply.<sup>376</sup> The argument goes on stressing that the exclusion of the reference to natural disasters from the 2005 Summit Outcome Document clearly suggests a deliberate rejection by states of the applicability of R2P to natural disasters.<sup>377</sup> They conclude that the Burma case should not come before the Security Council as an R2P issue given that it involved a natural disaster.<sup>378</sup>

This argument cannot indicate a dead end to the claim that R2P should apply to gross violations of ESC rights as it was barking the wrong tree. It unnecessarily focuses on the fact that natural disasters do not constitute one of the situations initiating R2P under the agreement reached at the 2005 World Summit, without fully investigating the possibility by which the prevention of aid delivery by the Burmese government could constitute crimes against humanity.<sup>379</sup> Even if the disaster might have began as a natural disaster, it turned into a human made disaster in which crimes that could well constitute crimes against humanity were committed, with many needless deaths resulting.<sup>380</sup> As Evans rightfully puts it, ‘when a government default is as grave as the course on which the Burmese generals did, there is at least a *prima facie* case to answer for their

---

<sup>373</sup> Wong, *supra* note 11, pp. 242-243.

<sup>374</sup> France was not the only country to call for, or allude to, the possibility of coercive aid delivery. EU ministers released a statement calling for ‘free and unfettered access to international humanitarian experts and to take urgent action to facilitate the flow of aid’. Further, British Prime Minister Gordon Brown commented that ‘as far as air drops are concerned, we rule nothing out’. Australian Prime Minister Kevin Rudd called on the international community to ‘bash the doors down in Burma’ to get critical aid to the people as soon as possible, *in* McLachlan and Langmore, *supra* note 10, p. 44.

<sup>375</sup> Wong, *supra* note 11, p. 244.

<sup>376</sup> ICISS Report, *supra* note 5, para. 4.20.

<sup>377</sup> Wong, *supra* note 11, p. 245.

<sup>378</sup> *Ibid.*, p. 247.

<sup>379</sup> McLachlan and Langmore, *Supra* note 10, p. 45.

<sup>380</sup> Cohen, *supra* note 12, p. 255.

obstructions being a crime against humanity-of a kind which would attract the R2P principle'.<sup>381</sup>

To the extent that R2P applies, it does so because of the state's criminal failure to protect its citizens from harm in the wake of the natural disaster and not because of the deaths immediately caused by the natural disaster.<sup>382</sup> If investigated, the acts of Burma should very well be defined as crimes against humanity as the acts have affected multiple victims. It may not have been the regime's direct intention to cause suffering and death to more of its citizens, but it was their intention to deny access to humanitarian relief supplies and experts. This denial exacerbated the humanitarian disaster and caused further severe suffering and death and could fall under 'other inhumane acts' under crimes against humanity.<sup>383</sup>

The other argument echoed in objecting R2P application is the fear that doing so would broaden the scope of R2P. The Burmese diplomats have argued that applying R2P to situations like Burma would politicize a grave humanitarian crisis, and would set a dangerous precedent by asserting that its 'improper' use here would encourage reliance on the doctrine to justify all forms of humanitarian interventions.<sup>384</sup>

I found this argument to be flawed for two reasons. One is the world already agreed on limiting the scope of R2P to the four atrocity crimes. As affirmed by Secretary General Ban ki Moon, extending R2P to cover calamities such as natural disasters, would undermine the 2005 consensus.<sup>385</sup> However, in Burma, if the focus was not on the original source of the disaster, that is the cyclone, but on the subsequent acts of the Burmese authorities which constitutes a *prima facie* commission of crimes against humanity it would have been clear that it satisfied one of the R2P threshold crimes without extending its scope. It is one thing to accept an R2P doctrine that has very limited application, but it is another to deny its applicability to situations that are already covered in the doctrine. There is no better way to put it than McLachlan-Bent and Langmore who stated that;

*"If we are not prepared to use the language of R2P to consider situations against the criteria for fear of damaging the principle, it will remain untested, ineffective and useless. By ignoring the opportunity R2P provides to save lives, even in situations that are not straightforward, the international community once again fails those*

---

<sup>381</sup> Haacke, Jürgen, *Myanmar, the Responsibility to Protect, and the Need for Practical Assistance*, Global Responsibility to Protect 1 (2009), p. 167.

<sup>382</sup> Wong, *supra* note 11, p. 246.

<sup>383</sup> McLachlan and Langmore, *Supra* note 10, p. 45.

<sup>384</sup> Wong, *supra* note 11, p. 245.

<sup>385</sup> Report of the Secretary-General, *supra* note 51, para. 10.b.

*who cannot help themselves, and condemns more people to suffer and perish.”*<sup>386</sup>

The other problem of the argument is the rejection of the application of R2P by continuing to use R2P as a synonym for military intervention. It is true that R2P advocates the notion of sovereignty as responsibility. However R2P has a three pillar responsibility which in its second pillar advocates assistance and cooperation to help states protect their populations from atrocities. Even under pillar three, military intervention is seen as a last resort when all peaceful actions are inadequate and the state manifestly fails to protect its population. Even military action does not necessarily mean military intervention and invasion of a sovereign country. What makes the argument more flawed and the fear unfounded is that, in the Burma case the suggested mode of intervention was a Security Council resolution which would authorize the delivery of aid and impose this on Burma. Therefore, clearly let alone for this argument to indicate that R2P does not apply to cases of gross violations of ESC cases, it was not even sound in connection to the Burma situation.

### **5.2.2. Re-discovering the place of gross violations of ESC rights in the R2P doctrine**

As per the 2005 world summit outcome, R2P applies to crimes against humanity. Thus arguably, when active denials of ESC rights or when deliberate failure to act constitutes a crime against humanity, R2P should apply. However, the argument should never be interpreted to mean that R2P should potentially sweep all forms of threats to human security, including environmental disasters and pandemic threats within its scope. It should nevertheless be invoked when there is a *prima facie* case that crimes against humanity are committed.

The existing obligations of both states and the international community under ESC rights could be seen under each pillar of R2P. Under pillar one, R2P reaffirms the human rights obligations of states under ICESCR. If gross violations are occurring through active denials of ESC rights, or by its deliberate omissions such as persistent deficiencies of due diligence, states have the responsibility to protect its population and prevent the situation from escalating to the level of crimes against humanity.

Pillar two has a certain similarity with the obligation for international cooperation and assistance under the Article 2(1) of the ICESCR. They both cover situations by which a state needs international assistance and cooperation to live up to its obligations. The international community's obligation to assist and cooperate with states in their effort to fully realize ESC rights, would be a responsibility under pillar two of R2P when the inability of the state to realize

---

<sup>386</sup> McLachlan and Langmore, *Supra* note 10, p. 60.

ESC rights reaches to the point by which it constitutes crimes against humanity.<sup>387</sup> Nonetheless, I am not suggesting that this would make the obligation of the international community under the ICESCR to a legally enforceable right since R2P itself requires the political will of the international community to be invoked and implemented.

Under pillar three the international community is responsible for responding collectively if one or more of the threshold crimes are being committed and the concerned state is manifestly failing to provide protection to its population. This responsibility would arguably be triggered when gross violations of ESC rights that constitute crimes against humanity are committed. It is important to note here that although it is not clear what level of evidence is required before the doctrine applies, R2P does not require a conviction for crimes against humanity based on proof beyond reasonable doubt before it can be invoked.<sup>388</sup> Since it is the Security Council that makes the assessment and authorizes appropriate measures, the assessment is also political.

Therefore even the controversial issues for convicting a perpetrator in court for violations of ESC rights as crimes against humanity, might not be determinant in triggering R2P. With regard to, the policy requirement under crimes against humanity, for instance, which is unsettled because of the different standards in the Rome statute and the jurisprudence of the *ad hoc* tribunals, it suffices for the application of R2P to determine manifest failure of the state from circumstantial evidence since such plan or policy need not be formalized. Furthermore, the need for a ‘timely’ and ‘decisive’ response as spelled out under the R2P doctrine, has to necessarily involve international engagement before the situation causes extensive damage which would leave the international community with little time to respond and so make it difficult to investigate in detail if all elements of the threshold crime are fulfilled. This is evidenced in the recent resolution of the Security Council that invoked R2P to the situation in Libya. Resolution 1973 in its preamble stated that ‘the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity’ without getting into the details of how the legal criteria of crimes against humanity are fulfilled.

The ‘manifest failure’ criteria under pillar three would be satisfied in situation where the state is the perpetrator of the crime against its own population, not only by grossly violating their ESC rights such as in case of forced evictions, but also through its deliberate omissions where its failure to act constitutes a crime against humanity under international law.<sup>389</sup> As required under crimes against humanity, not mere omission but a deliberate omission to take action,

---

<sup>387</sup> See Chapter 2.3. and 3.1.

<sup>388</sup> Ford, *supra* note 134, pp. 237-238.

<sup>389</sup> Wong, *supra* note 11, p. 246.

which is consciously aimed at encouraging such attack satisfies these criteria.<sup>390</sup> Therefore, R2P may only be properly invoked to those situations involving the intentional failure to act. Such as in the Burma case where denial of food, water, shelter and medical care occurred repeatedly as a result of a deliberate policy of denying aid to the victims.<sup>391</sup>

An attempt to disassociate R2P from gross violations of ESC rights would be expected from non-interventionists that are skeptical for the fear that this would promote intervention as a solution to every problem. This fear however, is rather unfounded since it is based on the wrongful equation of R2P with military intervention. In arguing that especially for violations of ESC rights R2P would most likely not result in military intervention, I concur with Haacke's opinion that in fact the most appropriate measures in such situations would be in terms of the responsibility to prevent and react which include a range of measures short of the use of military force by, for instance rendering humanitarian assistance for the purpose of human protection.<sup>392</sup> Violations of ESC rights that could constitute crimes against humanity include active denials of food to parts of the population or denial of emergency food or forced evictions. By their nature, these situations call for less than a full military response and it is hardly conceivable that military intervention would be used to react to them. By their nature even in the Burma case, what was suggested was military delivery of aid, and not a military intervention but since an air drop would have involved an invasion of sovereign air space, security council authorization would still be required in the event to justify the effort.<sup>393</sup>

Neither in its objective nor in its formulation under the 2005 Summit is R2P only limited to deliberate state sponsored atrocities. Arguably, crimes committed either by commission or deliberate omission of states through gross violations of ESC rights that reach the level of crime against humanity should trigger R2P. By then R2P would offer protection to those it is meant to protect by affirming indivisibility of human rights and echoing the responsibility of the international community to intervene in circumstances resulting in the massive denial and violation of ESC rights when the state generally responsible for preventing such violations is no longer capable or willing to provide such protection.<sup>394</sup>

---

<sup>390</sup> Elements of crimes, *Crimes against humanity*, Introduction, para. 3.

<sup>391</sup> Ford, *supra* note 134, p. 259.

<sup>392</sup> Haacke, *supra* note 380, p. 183.

<sup>393</sup> Wong, *supra* note 11, p. 262.

<sup>394</sup> Leckie, *supra* note 33, p. 116.

## 6 Conclusion

Three possible conclusions could be drawn from the analysis in this thesis. The first is that there is a legal case for the application of R2P to gross violations of ESC rights. The analysis on R2P proved that the doctrine is as broad as or as limited as the four atrocity crimes it is meant to apply to. It was further proved that, widespread or systematic violations of ESC rights such as denial of food to portion of the population or denial of emergency food aid on the right to food or forced evictions on the right to housing could qualify as crimes against humanity. These gross violations of ESC rights not only through active denials of ESC rights, but also through deliberate omissions such as persistent deficiencies of due diligence, with the *mens rea* of direct intent or indirect intent of furthering a policy would therefore fall under the reach of R2P.

Second, the rejection of the application of R2P in cases like Zimbabwe and Burma have occurred for reasons that has nothing to do with invalidating the claim that R2P applies to gross violations of ESC rights that could constitute crimes against humanity. Let alone to indicate a dead end to the claim, the debate has benefited it in at least two ways. First, it has affirmed that atrocities could very well be committed in ways other than affirmative perpetration of atrocities, but also through gross violations of states obligation under ESC rights and giving a blind eye to these violations would be to refute the very reason the doctrine was created. Second, such debate has marked a new beginning within politicians, academics and states to try to discover the place of gross violations of ESC right in the R2P doctrine.

The third conclusion concerns the making of a political case for the application of R2P to gross violations of ESC rights. The fact that the measures under R2P are to be taken through the Security Council, which is a political organ, will make political will of states an important factor for the application of R2P to such cases. The Security Council has already come as far as rendering that international peace and security would be affected when states fail to protect their own population from atrocity crimes. One way of increasing the political will of states is to keep dissociating R2P from military intervention. The international community by using the R2P umbrella would be able to fulfill its double duty, under the ICESCR and the R2P doctrine to galvanize political and humanitarian action to respond to crimes against humanity committed through gross violations of ESC rights without using military action.

In reaching such conclusions, the three analytical stages under Ronald Dworkin's methodology of constructive interpretation have been employed. In the pre interpretive stage, identification of rules and standards that regulate R2P, crimes against humanity and ESC rights were identified under chapters

two, three and four. Interpretative analysis and justifications to the identified rules were also made in those chapters. In the last chapter, post interpretative analysis was made to re-discover the place of gross violations of ESC rights in the R2P doctrine through crimes against humanity and argue a case for the constructive interpretation of R2P to enable it apply to atrocities committed through gross violations of ESC rights through active commissions or deliberate omissions.

Such constructive interpretation would re-conceptualize R2P by placing the responsibility on the international community to respond not just to government's failure to protect its people from the affirmative commission of mass atrocities, but also from large scale harm based on deliberate omission through gross violations of ESC rights, where it constitutes a crime against humanity under international law. If not, there is a very real danger that R2P, instead of serving as the proclamation of the international community to protect civilians from mass atrocities, will be reduced to a mere slogan and banish to the realm of historical attempts of international law to extend protection to people who need it.

# Bibliography

## Treaties, Resolutions and General Comments

Charter of the United Nations, (1945)

Elements of crimes, ICC-ASP/1/3.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *Fourth Geneva Convention*, 12 August 1949.

International covenant on Economic, Social and Cultural Rights, *adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.*

Rome Statute of the International Criminal Court, *entered in to force July 2002.*

The Ezulwini consensus, *common African position on the proposed reform of the UN*, AU executive council (2005)

The Convention on the Prevention and Punishment of the Crime of Genocide, *Adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948.*

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations* (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23.

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24.

UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights* (Art. 2, para. 2, of the ICESCR), 2 July 2009, E/C.12/GC/20.

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: "The right to adequate food"* (Article 11 of the Covenant), 12 May 1999, E/C.12/1999/5.

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing* (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23.

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, 20 May 1997, E/1998/22.

UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*: resolution adopted by the General Assembly, 5 March 2009, A/RES/63/117.

UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.

UN Human Rights Committee (HRC), *General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13.

UN Security Council Resolution, *Protection of civilians in armed conflict*, S/RES/1676 (2006).

UN Security Council Resolution, *The situation in Libya* , S/RES/1970 (2011).

UN Security Council Resolution, *The situation in Libya* , S/RES/1973 (2011).

UNGA Resolution, *Responsibility to protect*, A/RES/63/308 (2009)

World Summit Outcome, GA Res. 60/1, (2005)

## **Books**

Alson, Philip, *International law and the human right to food*, in Alson, p. and Tomasevski k. (Eds), *The right to food*, (Martinus Nijhoff publishers, 1984)

Amnéus, Diana, *Responsibility to protect by military means; emerging norms in humanitarian intervention?*( Stockholm university, 2008)

Bellamy, Alex J. *Responsibility to protect*, (Polity press, 2009)

Cassese, A., Gaja, G., Kirsch,P., Pellet, A., and Swart, B., *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford University Press, 2002)

Cassese, Antonio, *International criminal law*, 2<sup>nd</sup> ed., (Oxford University Press, 2008)

Chekwe, Chisangua P. and Flood, Nora, *From division to integration; economic social and cultural rights as basic human rights*, in Merali, I. and Oosterveld, V., *Giving meaning to economic social and cultural rights*, (University of Pennsylvania press, 2001)

Cooper, Richard H. and Kohler, Juliette V.( Ed), *Responsibility to Protect: The Global Moral Compact for the 21st Century*, ( Palgrave Macmillan 2009)

Craven, Matthew, *The international covenant on economic social and cultural rights; a perspective on its development*, (Clarendon press, 1995)

Cryer, R., Friman, H., Robinson. D., and Wilmshurst, E., *An introduction to international criminal law and procedure*, 2<sup>nd</sup> ed., (Cambridge University Press, 2010)

Dworkin, Ronald, *Law as Integrity*, (Law's Empire 1986)

Evans, Gareth, *The responsibility to protect; ending mass atrocity crimes once and for all*, (Brookings institution press 2008)

Evans, Malcolm D. *International law*, 2<sup>nd</sup> ed. (oxford university press 2006)

Häusermann, Julia, *The realization and implementation of economic, social and cultural rights*, in Beddard, Ralph and Hill, Dilys M.,(Eds) *Economic social and cultural rights; progress and achievement*, (Macmillan press ltd, 1992)

Kuwali, Dan, *The responsibility to protect: implementation of Article 4(h) intervention*,(Martinues Nijhoff publishers 2011)

Leckie, Scott, *The human right to adequate housing*, in Eide, A., Krause C. and Rosas, A., (Eds), *Economic social and cultural rights: a textbook second revised edition*, ( Martinus Nijhoff publishers, 2001)

Schabas, William A., *The International criminal court; a commentary on the Rome statute*, (Oxford University Press, 2010)

Scheinin, Martin, *Economic and social rights as legal rights*, in Eide, A., Krause C. and Rosas, A., (Eds), *Economic social and cultural rights: a textbook second revised edition*, ( Martinus Nijhoff publishers, 2001)

Sepúlveda, Magdalena, *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia, 2003)

Triffterer, Otto (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (C.H:Beck, Hart, Nomos 2nd ed 2008)

Werle, Gerhard, *Principles of international criminal law*, 2<sup>nd</sup> ed. ( T.M.C. Asser Press, 2009).

## Articles

Aba, Elodie and Hammer, Michael, *Options and barriers to broadening the scope of the responsibility to protect to include cases of economic social and cultural rights abuse*, One world trust briefing number 116 ( 2009)

Bard, Robert L., *The Right to Food*, Iowa law review (1985)

Bellamy, Alex J., Reike, Ruben, *The Responsibility to Protect and International Law*, Global Responsibility to Protect, Vol. 2, No.3, (2010)

Brunnée, Jutta and Toope, Stephen J. *The Responsibility to Protect and the Use of Force: Building Legality?* Global Responsibility to Protect, Vol. 2, No.3, (2010),

Carmona, Magdalena S., *The obligations of 'international assistance and cooperation' under the International Covenant on Economic, Social and Cultural Rights. A possible entry point to a human rights based approach to Millennium Development Goal 8*, The International Journal of Human Rights Vol. 13, No. 1, (February 2009)

Carrier-Desjardins, Laurence, *The Crime of Persecution and the Situation in Darfur: A Comment on the Al Bashir Arrest Warrant Decision*, Hague Justice Portal (2010)

Chandler, David, *R2P or Not R2P? More State Building, less Responsibility*, Global Responsibility to Protect 2 (2010)

Cohen, Roberta, *The Burma Cyclone and the Responsibility to Protect*, Global Responsibility to Protect 1 (2009)

Deng, Francis M., *From 'Sovereignty as Responsibility' to the 'Responsibility to Protect'*, Global Responsibility to Protect, Vol. 2, No. 4, (2010)

Eide, Asbjørn, *Economic social and cultural rights as human rights*, in Eide, A., Krause C. and Rosas, A., (Eds), *Economic social and cultural rights: a textbook second revised edition*, ( Martinus Nijhoff publishers, 2001)

Eide, Asbjørn, *The right to an adequate standard of living including the right to food*, in Eide, A., Krause C. and Rosas, A., (Eds), *Economic social and cultural rights: a textbook second revised edition*, ( Martinus Nijhoff publishers, 2001)

Ford, Stuart, *Is the failure to respond appropriately to a natural disaster a crime against humanity? R2P and individual criminal responsibility in the aftermath of cyclone Nargis*, Deny. j. Int'l l. & Pol'y Vol. 38 No. 2 (2010)

Gierycz, Dorota, *The Responsibility to Protect: A Legal and Rights-based Perspective*, Global Responsibility to Protect, Vol. 2, No.3, (2010)

Glanville, Luke, *The International Community's Responsibility to Protect*, Global Responsibility to Protect, Vol. 2, No.3, (2010),

Haacke, Jürgen, *Myanmar, the Responsibility to Protect, and the Need for Practical Assistance*, Global Responsibility to Protect 1 (2009)

Hasselbacher, Lee, *State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection*, Northwestern university journal of international human rights, Vol. 8, Issue 2, (2010)

Hessbruegge, Jan A., *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, Journal of international law and politics, Vol. 36 (2004)

Koch, Elisabeth I., *The Justiciability of Indivisible Rights*, Nordic journal of international law, Vol. 72, Issue 1, ( 2003)

Kuennemann, Rolf, *The Extraterritorial Scope of the ICESCR*, FIAN International, (2004)

Leckie, Scott, "Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights", Human Rights Quarterly 20.1 (1998)

Luck, Edward C ., *Sovereignty, Choice, and the Responsibility to Protect*, Vol. 1, No. 1, ( 2009)

Marcus, David, Famine Crimes in International Law, *The American Journal of International Law*, Vol. 97, No. 2 (2003)

McLachlan B. Ashley and Langmore, John, *A Crime against Humanity? Implications and Prospects of the Responsibility to Protect in the Wake of Cyclone Nargis*, *Global Responsibility to Protect* 3 (2011)

Newman, M., *Revisiting the 'Responsibility to Protect'*, *The Political Quarterly*, 80 (2009)

Serrano, Mónica, *Implementing the Responsibility to Protect: The Power of R2P Talk*, *Global Responsibility to Protect*, Vol. 2, No. 1-2, (2010)

Skogly, Sigrun I. "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)

Welsh, Jennifer M.; Banda, Maria, *International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?* *Global Responsibility to Protect*, Vol. 2, No.3, (2010),

Western, Jon, *Humanitarian Intervention, American Public Opinion, and the Future of R2P*, *Global Responsibility to Protect*, Vol. 1, No. 3, (2009)

Wong, Jarrod, *Reconstructing the Responsibility to Protect in the Wake of Cyclones and Separatism*, *Tulane Law Review*, Vol. 84, (2009)

## **Reports, studies and interpretative guidelines**

Advisory council on international affairs, *The Netherlands and R2P*, (2010)  
Ertürk, Yakin, 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, (2006).

ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001)

Kofi Annan, *Secretary-Generals annual report to the General Assembly*, (1999)

Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, (June 1986)

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, (*Jurists* 1997)

Report of the Fact-Finding Mission to Zimbabwe to assess the scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe” ( 2005).

Report of the High-level Panel on Threats, Challenges and Change, *A more secure world: Our shared responsibility*, United Nations (2004)

Report of the Secretary-General, *Human security*, UN General Assembly, 05/03/2010, A/64/701,

Report of the Secretary-General, *Implementing the responsibility to protect*: UN General Assembly, 12 January 2009, A/63/677.

United Nations Development Programme( UNDP), *Human Development Report*, (1994)

### **Web materials**

Global center for the Responsibility to protect, Zimbabwe: What Can be Done, Who Must Act? <http://globalr2p.org/media/pdf/MtgSummZimJan2009.pdf>, visited on 10, 05, 2011.

International coalition for the Responsibility to Protect, *Crisis in Zimbabwe*, available at <http://responsibilitytoprotect.org/index.php/crises/crisis-in-zimbabwe>, visited on 10,05,2011.

# Table of Cases

Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, (*ICC-01/09-01/11*), 8 March 2011.

Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba, (*ICC-01/05-01/08*), 15 June 2009.

Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba, (*ICC-01/05-01/08*), 15 June 2009

Decision on the Prosecution Application under Article 58(7) of the Statute, The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Al Abd-al-Rahman ("Au Kushayb"), (*ICC-02/05-01/07*), 27 April 2007

Judgment Kaing Guek Eav alias Duch, Extraordinary Chambers in the Courts of Cambodia, *File/Dossier No. 001/18-07-2007/ECCC/TC*, (26 July 2010)

Katanga *et al*, Decision on the confirmation of charges, (*ICC-02/05-01/09*), 30 September 2008.

Prosecutor vs Tadić, ICTY, (*appeals chamber*) judgment of 15 July 1999.

Prosecutor vs Tadić, ICTY, (*trial chamber*) judgment of 7 May 1997.

SHRO case, *Communications 279/03 – Sudan Human Rights Organization & The Sudan 296/05 – Centre on Housing Rights and Evictions/The Sudan*, African commission on human and peoples' rights (May 2009)

Warrant of Arrest for Omar Hassan Ahmad Al Bashir, (*ICC-02/05-01/09-1*), 4 March 2009.