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Responsibility to Protect

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The Responsibility to Protect

A Legal and Rights-based Perspective

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Executive summary

This report analyses the responsibility to protect from a legal and rights-based perspective. It shows that the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity is rooted in existing International Human Rights Law (IHRL) and International Humanitarian Law (IHL). The clause on the responsibility to protect adopted by consensus by the 2005 World Summit constitutes an important commitment towards implementing these universal rights and obligations which are lacking enforcement and continue to be violated, especially in armed conflicts.

The many human rights treaties containing strong protection obligations include the two human rights covenants of 1966: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as numerous human rights treaties with a more limited focus which have been ratified by most countries of the world. They contain provisions reflecting customary law and voluntarily undertaken binding treaty obligations. With the high number of ratifications of such instruments as the Covenants, the Convention on Genocide, CAT, CRC, CEDR, as well as the universal ratification of the 1949 Geneva Conventions, state parties have been put under concrete obligation to implement these. If taken seriously and conscientiously implemented at the national level, those instruments could have prevented most of the atrocities committed and helped to address others effectively, if necessary with the assistance of the international community.

Protection of the individual against atrocities, which is at the core of both IHRL and IHL, is a primary responsibility of states as the main bearers of obligations under international law. However, if a state is unable or unwilling to exercise its protection obligations, these shift to international organizations, including the United Nations or any other authority controlling the territory and its population. This report analyses the decision of the International Court of Justice (ICJ) in the Case Concerning Armed Activities on the Territory of Congo (2005), which affirms this principle, and demonstrates the resultant protection responsibilities of any power in control of a territory.

The crimes enumerated in the protection clause of the World Summit Outcome Document fall under the jurisdiction of the International Criminal Court (ICC), which was established to deal with the ‘most

serious crimes of concern to the international community', such as the crime of genocide (Article 6), crimes against humanity (Article 7), and war crimes (Article 8). Although the ICC has jurisdiction only over its state parties and those referred to its jurisdiction by the UN Security Council, these crimes evoke serious international legal consequences under all circumstances, also if tried by national courts. Genocide and crimes against humanity are considered crimes under all circumstances, whether in time of peace or war; neither immunities nor the statute of limitations apply; they fall under universal jurisdiction with an obligation of local trial or extradition; they involve increased international obligations for states to cooperate; and are not to be subject to amnesty.

The report further analyses various protection tools available within the UN human rights machinery, in particular the Human Rights Council with its new Universal Periodic Review (UPR) system and the special procedures, and the OHCHR, with its extensive field presence tasked with public reporting and support to national protection systems and public defenders. It concludes that those tools could play a much stronger role in preventing and addressing atrocities – through timely provision of information, early warning or thorough analysis of protection conditions in various countries.

The most important obstacle, however, to implementing the responsibility to protect clause within the UN is the prevailing institutional gap between human rights and security matters within the world organization. This problem was taken up by former Secretary General Kofi Annan in his 2005 report 'In larger freedom', in which he called for the integration of human rights into the work of the UN on an equal footing with security and development and by granting the human rights machinery conditions to operate in the mainstream of its activities, in close collaboration with the Security Council. If implemented, those measures could create the conditions for a consolidated, systemic UN approach to enacting the principle of the responsibility to protect.

The present report concludes that the responsibility to protect clause should be perceived as an opportunity to give force to the implementation of the underlying human rights instruments that often remain on paper or are not supported by sufficient national legislation and enforcement. It also identifies research and policy recommendations that may facilitate the operationalization of this important clause.

Introduction

The World Summit Outcome Document adopted by resolution A/60/1 of the UN General Assembly (GA) on 24 October 2005 contains provisions on the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity (paragraphs 138 and 139).¹ It was agreed by consensus among all participating member states. It explicitly states that each individual state has the responsibility to protect its populations from these atrocities, and that such providing protection entails prevention and the exercise of responsibility. The text further spells out obligations of the international community to ‘help States to exercise this responsibility’ (Para. 138) through the United Nations, using peaceful means, in accordance with Chapters VI and VII of the Charter, or collective action, in a timely and decisive manner through the Security Council, should peaceful means be inadequate and national authorities manifestly fail to protect their populations (Para. 139).

The provisions of the World Summit regarding the responsibility to protect (the protection clause) were reaffirmed in UN Security Council Resolutions 1674 (28 April 2006) on the protection of civilians in armed conflict and 1706 (31 August 2006) calling for the deployment of a UN peacekeeping force to Darfur.

¹ Para. 138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capacity.

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

While adoption of the clause has been generally welcomed, views on its practical utility are divided. Although most believe that it provides greater practical opportunities to act, to prevent or respond decisively to ‘future Srebrenicas and Rwandas’,² others claim that it weakens the prospects for operational application of the concept.³

The outcome document of the World Summit was adopted as a General Assembly resolution. Under international law, approval by the GA has a different consequence from a treaty that becomes effective through a required number of ratifications. The former is recommendatory rather than binding.⁴ However, this particular document has high political and moral significance, in particular since the commitments were undertaken by the world leaders and it addresses such a fundamental issue as the obligation to provide protection from genocide, war crimes, ethnic cleansing and crimes against humanity.

The obligations reflected in the clause stem from well established rules and principles of customary and treaty international human rights law (IHRL) and international humanitarian law (IHL), and these are universally binding. Thus, the provisions in the outcome document constitute their reflection, not the source of the obligation. It is therefore important to revisit the existing set of legal standards, institutional structures and the jurisprudence underpinning the clause from the rights-based perspective to see how they better can be understood and applied by various actors (primarily states) under the protection obligations proclaimed by the World Summit.

A review of main underlying protection standards and obligations could also contribute to a better understanding of the nature of the responsibility to protect – to recognize it as a means of protection of the person, rooted in universal human rights standards, and not a military doctrine aimed at justifying intervention.

This general recognition of protection standards included in IHRL and IHL does not translate itself into their equally universal application. They are, however, increasingly used as the concrete point of reference against which to judge the conduct of states. Moreover, they

² Todd Lindberg, ‘Protect the people’, *Washington Times*, 27 September 2005; Alex J. Bellamy, ‘Whither the Responsibility to Protect? Humanitarian Intervention on the 2005 World Summit’, *Ethics and International Affairs*, vol. 20, no.2, 2006, pp. 143-169.

³ Michael Byers, ‘High Ground Lost on UN’s Responsibility to Protect’, *Winnipeg Free Press*, 18 September 2005; Bellamy, ‘Whither the Responsibility to Protect?’

⁴ Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*, 3rd edn. (Oxford: Oxford University Press, 2008), p.152.

have provided the legal foundations for the creation of international criminal courts and tribunals, including the ICC, and have contributed to the emerging culture of accountability and international justice.

Even though human rights remain formally valid in times of armed conflict, the means of actual protection through national and international human rights bodies are rather limited. Moreover, some state parties to major human right treaties fail to fulfil their protection obligations towards their own populations as well as towards others affected by armed conflict, by opposing international protection measures in the context of the Security Council.

At the core of the problem is the gap between human rights and security issues within the UN framework (the Human Rights Council and OHCHR and the Security Council and political and security departments in the UN Secretariat) and in the policies of states. Although the interdependency between the two has been emphasized by former Secretary-General Kofi Annan⁵ and the HCHR, Sergio Vieira de Mello,⁶ the UN human rights machinery is not a part of the mainstream activities of the Security Council. The clause on responsibility to protect may provide a new framework for better integration of these two key pillars.

The responsibility to protect under IHRL

International human rights law (IHRL) is a set of rules established by convention or custom, codified in international treaties and national bills of rights and focused on the protection of the individual.⁷ The human rights system has been based on the responsibility of states as the main actors in the international arena and bearers of human rights obligations under international law. IHRL, in principle, applies both in times of war and peace.⁸

⁵ Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary General A/59/2005, March 2005.

⁶ ‘...The signal political failure of our era is the failure to understand the security threat posed by gross violations of human rights, and the failure to achieve practical consensus in acting against such a threat....The time has arrived for all states to redefine global security – to put human rights at the center of this concept’ Vieira de Mello, Sergio, ‘Only Member States can Make the UN Work’, *Sur International Journal on Human Rights*, No.1, 2004, pp.161-164, www.surjournal.org/eng.

⁷ Manfred Nowak, *Introduction to the International Human Rights Regime* (Leiden: Martinus Nijhoff, 2003).

⁸ The International Court of Justice (ICJ), in its broadly cited Advisory Opinion stated: ‘The protection of the ICCPR does not cease in times of war...’ Although there is a possibility of derogation of certain provisions in times of emergency, the right to life, prohibition of torture and slavery are not subject of derogation. For details see ILC, 58th session, 1 May – 9 June and 3 July – 11 August 2006.

The term human rights appear infrequently in the UN Charter, and most such references⁹ have a 'promotional' character relating specifically to the Charter's purposes or goals, not actions. Only the right to equal protection receives specific mention in the Charter (Art. 1.3, 13.1.b; 55). Despite these limitations, the Charter has served as the point of departure for further elaboration of human rights standards: in the 1948 Universal Declaration on Human Rights (UDHR),¹⁰ the two human rights covenants of 1966: the International Covenant on Civil and Political Rights (ICCPR) with 164 state parties, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) with 160, and a host of human rights treaties of more limited focus that have been ratified by most countries of the world.¹¹ They contain provisions reflecting customary law and voluntarily undertaken binding treaty obligations. The high number of ratifications of such instruments like the Covenants, the Convention on Genocide, CAT, CRC, CEDR as well as the universal ratification of the 1948 Geneva Conventions¹² puts state parties under concrete obligations as to implementation. If taken seriously and conscientiously implemented at the national level, those instruments could have prevented most of the atrocities committed and helped to effectively address others, if necessary with the assistance of the international community.

The protection obligations of states under these instruments include general and specific provisions aimed at certain groups (women, or vulnerable groups like children, IDPs, or persons with disabilities), or the nature of crimes (genocide, torture, forced disappearances).

General protection obligations

The general positive obligations of a state to protect and promote the human rights of all, without distinction or discrimination, including

See also Nowak, *Introduction to the International Human Rights Regime*; Steiner, Alston and Goodman, *International Human Rights in Context*.

⁹ Preamble, Arts. 1.3, 13.1, 55 56, 62.2 and 68; see Steiner, Alston and Goodman, *International Human Rights in Context*, p. 135.

¹⁰ The UDHR became in the meantime a part of customary law (see, Steiner, Alston and Goodman, *International Human Rights in Context*, p. 137).

¹¹ They include the 1948 Convention on the Prevention and Punishment of Genocide with 140 state parties, the 1951 Convention Relating to the Status of Refugees with 144, the 1966 Convention on the Elimination of Racial Discrimination (CERD) with 173, the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) with 185, the 1984 Convention against Torture (CAT) with 146, the 1989 Convention on the Rights of the Child (CRC) with 193, the 1990 International Convention on the Protection of Rights of All Migrant Workers (CRMW) with 40 and the two latest conventions from 2006, Convention on the Rights of Persons with Disabilities, with 45 and International Convention on the Protection of All Persons from Enforced Disappearance, with 7 state parties.

¹² Steiner, Alston and Goodman, *International Human Rights in Context*.

the right to life, liberty and security of person and the explicit ban of torture, cruel, inhumane and degrading treatment, and slavery are spelled out in the UDHR.¹³ The two Covenants have further developed those obligations in the form of treaties, making some obligations more precise. The ICCPR obliges state parties to respect and ensure the rights to ‘all individuals within its territory and subject to its jurisdiction...’ not only its citizens, but includes refugees, or migrant workers, groups particularly vulnerable to abuses in practice (Art. 2.1)¹⁴. If the existing legislation is not sufficient to fulfil this obligation, state parties are to adopt proper legislative measures (Art. 2.2), and, if the rights are violated, to ensure an effective remedy and its enforcement by competent authorities (Art. 2-3).

Special protection obligations

Internally Displaced persons (IDPs), children and women are disproportionately affected by violent conflict and atrocities. A host of international regulations (including treaties,¹⁵ declarations and resolutions of the United Nations) addresses their protection requirements and related obligations of states and other stake-holders.

Protection of Internally Displaced Persons (IDPs)

The Guiding Principles on Internal Displacement (1997) state the primary duty and responsibility of national authorities to provide protection and humanitarian assistance to IDPs within their jurisdiction (Principle 3). These principles reiterate their right to be protected against arbitrary displacement (Principle 6), genocide, murder, summary executions, enforced disappearances, indiscriminate attacks, starvation as a method of combat, use to shield military objectives (Principle 10), as well as against rape, mutilation, degrading treatment, gender-specific violence, forced prostitution, slavery, sexual exploitation, forced labour of children (Principle 11) and their recruitment into any armed forces (Principle 13) – the crimes that fall under the ICC terms of genocide, war crimes, ethnic cleansing and crimes against humanity.

Protection of children

The Convention on the Rights of the Child (CRC) of 1989, with 193 state parties, comprises a catalogue of state obligations to ensure the best interest of the child and protect her/his rights, such as the right to live (Art.6), protection against all forms of sexual exploitation (prostitution, coercion, pornography) (Art.34); abduction, traffic or sale of

¹³ Universal Declaration of Human Rights (UDHR), Preamble, Articles 2-4; International Covenant on Civil and Political Rights (ICCPR), Preamble, Articles 1-9.

¹⁴ Bertrand G. Ramcharan, ‘Contemporary Human Rights Ideas’, *Global Institutions*, 2008.

¹⁵ Ramcharan, ‘Contemporary Human Rights Ideas’, p. 5.

children (Art.35); torture, cruel treatment, capital punishment or life sentence (Art.37, a).¹⁶ The CRC also includes the obligation to protect children in armed conflicts, in particular to prevent their recruitment as soldiers (Art. 39) – the provision fully developed in the Optional Protocol on the Involvement on Children in Armed Conflicts (2000). The ICC Statute lists the recruitment of children under age 15 as a war crime.

Protection of women and girls against gender-based violence

Numerous international instruments relate to the protection of women and girls against gender-based violence, but there is no specific treaty/convention addressing the issue. Most comprehensive is the 1993 Declaration on the Elimination of Violence against Women, adopted by consensus by the UN General Assembly (GA res. 59/167) in the aftermath of the WCHR in Vienna. Although some of its provisions constitute a part of customary law, the Declaration is binding only politically, not legally. On the other hand, the value of the GA consensus declaration is that states themselves have adopted the text, and thus stated the minimum obligations resulting from it. It carries more weight than, for example, recommendations issued by from expert bodies.

Other instruments include the Geneva Conventions of 1949 and the Additional Protocols of 1977; the Refugee Convention of 1951 and the Protocol of 1967; the Convention on the Elimination of Discrimination against Women (CEDAW) of 1979 and the General Recommendation 19 on Violence against Women of 1992, and the Optional Protocol of 1999; the CRC of 1989 and the two Optional Protocols of 2000; the Rome Statute of the ICC and Security Council Resolutions 1325 (2000) and 1820 (2008).

Despite all these instruments and numerous efforts aimed at eradicating violence against women at national and international levels, rape and other forms of sexual violence against women are still massively employed in war- and post-war countries.

Protection against genocide, torture and forced disappearances

Genocide, torture and forced disappearances are subject to specific international instruments: the Convention on the Prevention and Punishment of the Crime of Genocide (1948) with the Convention against Torture and Other, Inhuman or Degrading Treatment or Punishment (CAT) (1984, GA res. 39/46) with 144 state parties, and the Convention on the Protection of All Persons from Enforced Disappearance

¹⁶ Similar provisions are contained in the 1993 Vienna Declaration (Para. 21) adopted by the UN World Conference on Human Rights (WCHR).

(2006)¹⁷. They are included in the Statute of the ICC. All the three instruments reflect international customary law in most of their provisions. They do not allow immunities; the statute of limitations does not apply; they fall under universal jurisdiction and involve increased states' obligations to cooperate.

The Conventions put clear and strong protection obligations on states to treat genocide, torture and forced disappearances as crimes under their legal system, to prevent them, under all circumstances, address them if they occur and bring the perpetrators to justice, irrespective of their standing in society, and provide redress to the victims. CAT includes a specific provision that there should be no admission of any statement made under torture (Art. 15) and no extradition or expulsion if there is danger of torture in the country of destination (Art. 3).

International Treaty Bodies

The main human rights treaties have associated monitoring bodies (committees) composed of independent experts to oversee their implementation, with authority to interpret the treaty.¹⁸ Some human rights treaties (e.g. ICCPR, CEDAW, CRC) require state parties to submit periodic reports on their implementation to treaty monitoring bodies. Such reports are increasingly accompanied by independent 'shadow reports' prepared by civil society. The reports, combined with comments, conclusions and recommendations of these bodies provide information useful for assessing the situation in the country, not least the status of protection.

The specific aspects of work of the committees differ. The CERD has an early warning system to prevent serious violations of the Convention.¹⁹ Some other committees (e.g., ICCPR, CEDAW, CRC, and CAT) are equipped with complaints procedures, based on separate Optional Protocols, allowing them to receive individual complaints or communications on violations of the treaty in question. Such com-

¹⁷ These crimes and related protection obligations are also addressed in the ICCPR, 1949 Geneva Conventions, and the 1993 Vienna Declaration and Programme of Action.

¹⁸ They include Human Rights Committee (for ICCPR), the Committee on Economic, Social and Cultural Rights (for ICESCR), Committee against Torture (for CAT), Committee on the Elimination of Discrimination against Women (for CEDAW), Committee on the Elimination of Racism and Racial Discrimination (for CERD), Committee on the Rights of the Child (for CRC), Committee on Migrant Workers (for ICRMW), Committee on the Rights of Persons with Disabilities (for CRPD) and Committee on Enforced Disappearances (for CPAFD).

¹⁹ Its recent warnings have concerned *inter alia* Darfur, Israel and Laos. See also Olivia Ball and Paul Greedy, 'The No-nonsense Guide to Human Rights', *New Internationalist*, Oxford, 2006.

plaints could have a direct bearing on the state's responsibility to protect.

International Treaty Bodies provide some information on the implementation of protection obligations by respective state parties. The nature of their work and its timeframe predispose them to identify issues and patterns of violations for early-warning use, to prevent further deterioration of the situation, more than providing immediate intervention. With the adoption of the responsibility to protect clause, the Treaty Bodies could be encouraged to generate and analyse the relevant material systematically, aiming to identify threats and suggest preventive measures within their mandates.

Responsibility of the power in control

The responsibility to protect rests with the authorities controlling the territory, in the first place the states. There are however, circumstances in which a state may be unable or unwilling to exercise its protection obligations, such as when:

- The government (central authority) is too weak to exercise its constitutional powers; it has lost control over all or part of the territory and cannot prevent negative consequences (violence) for the population or parts of it;
- National laws, policies, and judicial practices contradict international human rights standards and violate rights of people instead of protecting them (e.g. institutionalized racial, gender or ethnic inequalities);
- The state and its agents actively and massively violate the human rights of people (torture, extra-judiciary killings, disappearances, kidnappings).²⁰

When states fail to protect their people from human rights violations and atrocities, the responsibility shifts to international organizations, including the United Nations.²¹ Like other controlling powers (including a formally recognized occupying power), it is bound, to protect the inhabitants and respect IHL and IHRL.²² The decision of the Interna-

²⁰ Siobhan Wills, 'The Responsibility to Protect by Peace Support Forces under International Humanitarian Law', *International Peacekeeping*, vol. 13, No.4, December 2006, pp.477.

²¹ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), p.111; see also Annan, *In larger freedom* (para.135).

²² The applicability and role of the Covenant in times of armed conflict was affirmed by the UN Human Rights Committee in General Comment 29, stating that the ICCPR applies also in situations of armed conflicts to which the rules of IHL are applicable. 'While in respect of certain Covenant rights more specific

tional Court of Justice (ICJ) in the Case Concerning Armed Activities on the Territory of the Congo, of December 2005, affirms this principle and demonstrates its relevance. The ICJ ruled that Ugandan forces occupying the Ituri district in the Democratic Republic of Congo (DRC) are obliged to respect all the human rights treaties to which Uganda is party. Moreover, as the occupying power, Uganda was obliged under Article 43 of The Hague Regulations of 1907²³ to take all measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence and not to tolerate such violence by any third party including rebel groups acting on their own account.²⁴ Thus, the Court found Uganda responsible not only for acts of its military, but also that it had failed to stop violence that resulted in 100,000 deaths and 500,000 displacements that took place while the Uganda Peoples Defence Force stood by and did not attempt to protect civilians.²⁵

This opinion is especially relevant to ongoing violent conflicts in many parts of the world where parties in *de facto* control of certain regions – governmental forces or non-state actors – attempt to evade their responsibility for protecting civilian populations, claiming lack of knowledge of ongoing atrocities, inability to act, or disowning any responsibility in view of actions of other parties in conflict. As the responsibility to protect rests with *any* power effectively controlling the territory and is not limited to legal occupation, it applies to international forces as well as non-state actors.

The general comment of the UNHRC of 2004, on Article 2, of ICCPR goes in the same direction, emphasizing protection obligations of ‘those within the power of effective control of the forces of a state party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces

rules of IHL may be specifically relevant...both spheres of law are complementary, not mutually exclusive’ (General Comment 31).

²³ Art. 43: ‘The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore and ensure as far as possible, public order and safety, while respecting unless absolutely prevented, the laws in force in the country’.

²⁴ ICJ, *Case Concerning Armed Activities on the Territory of the Congo: Democratic Republic of Congo v Uganda*, 19 December 2005, Para. 217.

²⁵ Wills, ‘The Responsibility to Protect by Peace Support Forces under International Humanitarian Law’. The case constitutes a useful example of the convergence between the regimes of human rights law and international humanitarian law which strengthen the basis for the responsibility to protect in practice.

constituting a national contingent of a state party assigned to an international peace-keeping or peace-enforcement operation'.²⁶

In sum, any controlling power, including the UN, is responsible for protection of the inhabitants and for any violations of IHRL and IHL committed by its forces or agents.

Responsibility for major crimes under international law and jurisdiction

Protection against genocide, war crimes, ethnic cleansing and crimes against humanity – this is where the obligations of protection by the states and/or other controlling powers resulting from the IHRL and IHL²⁷ can be particularly great and intertwined. Many of today's human rights crimes violate both sets of laws, evoking protection obligations in all circumstances, by all actors.

These crimes fall under the jurisdiction of the International Criminal Court (ICC) established by the Rome Statute in 1998²⁸ to address the 'most serious crimes of concern to the international community', including genocide, crimes against humanity, war crimes and the crime of aggression.²⁹ They are defined under Article 6 (Genocide), Article 7 (Crimes against humanity) and Article 8 (Wars crimes) of the Statute. However, ICC has jurisdiction only over its state parties and those referred to its jurisdiction by the UN Security Council. It is complementary to national criminal jurisdictions.

These crimes evoke serious international legal consequences under all circumstances, also if tried by national courts. Genocide and crimes against humanity are considered crimes under all circumstances, whether in time of peace or war; neither immunities nor status of limi-

²⁶ UN Doc. CCPR/C/74/CRP.4/Rev.6, para.10, 21 April 2004.

²⁷ For definition of IHRL, see above; IHL – the Four Geneva Conventions of 1949 and 1977 Additional Protocols define minimum standards for international and non-international armed conflicts to regulate the methods of conducting hostilities, the treatment of combatants and protection of civilians. The four Geneva Conventions of 1949 have gained the strength of customary law. They also achieved universal ratification in 2006 (Steiner, Alston and Goodman, *International Human Rights in Context*). Their common Art. 3 contains provisions which apply to non-international conflicts and include most basic rights such as freedom from torture, murder, mutilation, and cruel treatment.

²⁸ Rome Statute of the International Criminal Court, UN doc. A/Conf.183/9, 17 July 1998.

²⁹ The crime of aggression can be addressed by the ICC once the provision has been adopted in accordance with its Articles 121 and 123 defining the crime as being consistent with the relevant provisions of the UN Charter and setting out the conditions for exercising jurisdiction of this provision. Due to the sensitivity of the issue the UN has not been able to agree on the definition of 'aggression' for decades.

tations apply; they fall under universal jurisdiction with an obligation of local trial or extradition; they involve increased international obligations on states to cooperate; and are not to be subject to amnesty.

Although these crimes carry individual responsibility, they may have multiple legal implications. Violations by individuals may also implicate states or other controlling powers, if these have been responsible for either condoning such crimes or not fulfilling their protection obligations. This point is particularly important in today's global world with increasingly influential non-state actors in international relations, who exercise significant power over the lives of other people and thus should be accountable for their actions. Although their legal responsibility is often blurred and their status differs from state actors, there is a tendency to make them accountable for their behaviour, in particular the crimes included under the Statute of the ICC.³⁰

The provisions of the ICC Statute, including definitions of crimes, draw heavily on the customary and statutory IHR and IHRL and the work of jurisprudence. Many see a growing convergence, or at least 'cross-fertilization', between the rules relating to and the elements of many war crimes, and the rules and interpretations relating to human rights protection (the right to life, freedom from torture, and the right to a fair trial) which could strengthen the coherence of the overall legal protection system to the benefit of the individual.

The ICC has benefited especially from the work of the International Criminal Tribunal for the Former Yugoslavia (ICTFY), established by Security Council Resolution 808 (1993), which has prosecuted persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 on the basis of both customary and conventional law. Its work has contributed to expanding the jurisprudence related to rape in wartime and its final recognition as a crime against humanity; better definition of torture and elements of genocide; and the elaboration of a doctrine of command responsibility, subsequently fully defined in the Rome Statute.

The struggle to end impunity³¹ in cases of most serious international crimes has given a new meaning to the universality principle, allowing national third-party courts (neither courts of countries in which violations took place, nor international tribunals) to deal with such charges in exceptional circumstances, when the justice system of the country

³⁰ See Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, (Oxford: Clarendon Press, 1994), p.5.

³¹ Dorota Gierycz, 'Transitional Justice – Does It Help or Does It Harm?', Oslo, NUPI Working Paper 737, 2008.

where the violations took place is unable or unwilling to proceed. Spain should be given due credit in this respect. The Spanish courts ordered the arrest of Augusto Pinochet during his visit to London in 1998,³² and followed up by undertaking the litigation and sentencing in Spain of an Argentinean citizen for crimes against humanity that had been committed in Argentina.³³ Courts in other countries followed suit. That the case of Darfur was referred to the ICC by the Security Council, although Sudan is not a party to the ICC, and the extradition of Charles Taylor on the order of the Special Court for Sierra Leone, demonstrate a new and important aspect of international justice.

UN Human Rights Machinery

The three-pillar concept

The United Nations Human Rights Machinery has a considerable potential for addressing the responsibility to protect. It includes the UN Human Rights Council and its Special Procedures, Human Rights Commissioner as well as various treaty bodies to monitor the implementation of the human rights treaties discussed above. After major protection failures in Srebrenica and in Rwanda, and facing a similar crisis in Darfur, Secretary-General Kofi Annan made a serious attempt to revive this apparatus, to make it more relevant and responsive to gross violations of human rights.

In his report *In larger freedom: towards development, security and human rights for all* (A/59/2005), Annan stated that development, security and human rights are all imperative, interdependent and mutually reinforcing, 'we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights' (Para. 17). The report called for high-level and sustainable UN engagement in human rights; a more active role for the High Commissioner for Human Rights in the deliberations of the Security Council and of the proposed Peacebuilding Commission; the incorporation of human rights into decision-making and discussion throughout the work of the organization (Para.144).

Further, the report acknowledged that the UN technical support to human rights promotion in the field 'is of little value where the princi-

³² Roht-Arriaza, Naomi, *The Pinochet Effect: Translational Justice in the Age of Human Rights* (Philadelphia, PA, University of Pennsylvania Press, 2005).

³³ The case of Adolfo Scilingo, <http://www.asil.org/-ilib/2005/04/ilib050426.htm#j3>.

ple of protection is being actively violated', and stressed the need for a greater human rights field presence during times of crisis to provide timely information to UN bodies (Para. 143) so they could prepare a crisis response and contribute to conflict prevention.

This three-pillar concept constitutes an unprecedented attempt to integrate human rights into the work of the UN on an equal footing with security and development, and to provide the human rights machinery with conditions for operating in the mainstream of its activities, in close correlation with the Security Council. If implemented, that concept could have created the conditions for a consolidated, systemic UN approach to enacting the principle of the responsibility to protect. Certainly, in view of the ongoing discussions on the responsibility to protect, the concept could be revisited and given proper attention.

Unfortunately, the concept encountered firm resistance from member states as well as from various parts of the UN system, and has gradually faded away. Some parts of the human rights machinery, however, like the UN High Commissioner for Human Rights (HCHR)³⁴ and that office and the Commission on Human Rights, converted into the Human Rights Council, have been considerably strengthened in the context of the overall UN reform.³⁵

The UN High Commissioner for Human Rights

The reforms clearly strengthened the protective functions of the OHCHR. In order to ensure timely and systematic response to gross violations of human rights, the rapid response unit was established;³⁶ UN human rights field offices were expanded and provided with a stronger protection mandate focused on support for human rights defenders, national protection systems and on countering impunity for past and ongoing serious human rights violations. Subsequently, the Secretary-General's Policy Committee decision 2005/24 on human rights in integrated missions further strengthened human rights components, and introduced obligatory periodic and thematic public reporting on the situation on the ground. Such public reports coming from all field missions can provide broader information otherwise rarely available to member states. If included in the mainstream work of the UN, the Security Council in particular, they could offer a more complete and realistic picture of the country and conflict under consideration, including elements of early warning against possible

³⁴ GA res. 48/141 of 1993. The UNHCHR is appointed by the Secretary-General with the approval of the General Assembly.

³⁵ As per HCHR's Strategic Management Plan, 2006-2007. In late 2007 there were 7 regional and 15 country HR offices, in addition to human rights advisers on some UN country teams and human rights officers at some UNDP offices.

³⁶ Annual report of UNHCHR Louise Arbour to the General Assembly, A/26/36

atrocities. In practice, however, this is not the case. Although reports are generally accessible, they are seen as part of the human rights domain and as such are rarely used by other parts of the UN system. Moreover, in some countries the reports are perceived as ‘counterproductive’, unnecessarily taking up ‘sensitive’ issues and antagonizing host countries and certain other governments. Thus they may be less regular and more ‘selective’. Despite such shortcomings, regular field reporting on the human rights situation plays an important awareness-raising role, and could be further used in the context of the responsibility to protect.

Human Rights Council, 2006

The Human Rights Council (GA resolution 60/251) is mandated *inter alia* to ‘contribute through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies’, ‘address the situations of violations of human rights, including gross and systematic violations, and make recommendations thereon’ and promote effective coordination and the mainstreaming of human rights within the UN system (Art. 3).³⁷

The Human Rights Council has at its disposal various measures to address gross violations of human rights once its members so decide. It can hold special sessions, public debates or use its Special Procedures, including the appointment of thematic human rights rapporteurs and working groups, country-specific rapporteurs, or Special Representative of the SG. As of 2007 there were over 40 thematic mechanisms, and four working groups. The special rapporteurs – especially in such areas as torture, extrajudicial executions,³⁸ enforced disappearances, arbitrary detentions, and violence against women – are particularly well placed to assess the facts on the ground and, if necessary, alert the Council to ongoing gross violations of human rights, or suggest means of prevention once they note the first symptoms. Being independent, they can make public statements on the issues, request fact-finding on the ground, denounce violators, collect data, engage in dialogue with governments, or demand an emergency session of the Council. Their reports provide first-hand information, which is often utilized more by NGOs than by the UN system. Special Procedures can play an important role in preventing, addressing and responding to gross violations of human rights.

³⁷ See also Ramcharan, ‘Contemporary Human Rights Ideas’.

³⁸ The Special Rapporteur on Extrajudicial Arbitrary and Summary Executions tried to alert the international community to the forthcoming genocide in Rwanda (1993), albeit unsuccessfully.

The Human Rights Council can also collect valuable information related to the responsibility to protect through its review and investigative procedures. It has introduced a new peer review mechanism – Universal Periodic Review (UPR) of each state – enabling analysis of its entire human rights record, including the treaty obligations and commitments emanating from UN conferences and summits. The Council could make a conscious effort to include the responsibility to protect as one of the leading topics/questions in these enquiries.

The Council has inherited from the Human Rights Commission the procedure of confidential examination of communications³⁹ dealing with alleged violations of human rights, which it applies with minor modifications. This can also be relevant to the responsibility to protect, although, in view of the procedural requirements, more as a means of information collection and long-term prevention than for immediate protective action.

It is difficult to assess the role of the Human Rights Council with regard to the responsibility to protect. The time since its creation has been too short, expectations too high and the attempts to distance it from the Human Rights Commission often unrealistic. While the Council has contributed to dialogue, and addressed some aspects of the responsibility to protect through Special Procedures, it has generally failed in exercising the responsibility to protect in the case of Darfur.⁴⁰ As a political body it has suffered from similar obstacles as those encountered by other parts of the UN intergovernmental structure.

Conclusions and recommendations

There can be no doubt as to the universal and unconditional nature of the legal obligation reflected in the World Summit Outcome Document of 2005 to protect populations from genocide, war crimes, ethnic cleansing and other crimes against humanity. This obligation is primarily binding on states, but also, if these are unable to act, on intergovernmental organizations and other actors exercising control over a given territory, and is rooted in existing customary and statutory IHRL and IHL.

However, the clause has not been translated into action, either by states or the UN Security Council. The Security Council is its own

³⁹ The Commission has dealt with alleged violations through the procedure of confidential examination of communications (complaints) in situations of human rights violations requiring attention of the Commission, under the 1503 procedure named after ECOSOC res. 1503 (1970) which established this procedure. (Steiner, Alston and Goodman, *International Human Rights in Context*, p. 812).

⁴⁰ UN press release SG/SM/10794, 12 December 2006.

master, and, judging from the recent experiences of with Darfur or Zimbabwe, it cannot be relied upon to uphold the promise ‘never again’. Neither are there indications that the Council will be prepared to relax its procedures in accordance with suggestions of the International Commission on Intervention and State Sovereignty (ICISS)⁴¹ for intervention in the name of the responsibility to protect. While some minor departures can be noted in the practice of the Council to authorize robust action under Chapter VII in response to gross violations of human rights, there has been no major shift from its traditional mandate of linking any intervention to a ‘threat to peace’ and defining the latter in a rather narrow manner.

The responsibility to protect clause needs to be recognized as an opportunity to give force to the implementation of the underlying human rights instruments, which too often remain on paper or are not supported by sufficient national legislation and enforcement. Two sets of measures – concerning research, and concerning policy – might help in achieving momentum towards implementing the responsibility to protect clause.

Research recommendations:

- Identification of key human rights standards and instruments most relevant to the responsibility to protect, and their publication in a handbook
- Comprehensive review of states’ records in these areas in line with the clause (legislative, administrative, and judicial measures, and their conduct related to emergencies and armed conflict)
- Analysis of states’ voting patterns in the UN HRC, human rights treaty bodies and the Security Council (based on case studies)
- Assessment of the OHCHR’s role and capacity (field and HQ) to act on the responsibility to protect
- Analysis of the established and possible links between the UN human rights machinery and the Security Council (reporting, briefings, early warning)
- Review of the three-pillar concept and a tailoring of its possible application to the responsibility to protect

⁴¹ Report of the International Commission on Intervention and State Sovereignty (ICISS), ‘*The Responsibility to Protect*’, 2001.

Policy recommendations:

- Regular submission of information relevant to the responsibility to protect by all UN human rights review mechanisms (in particular UPR, Special Procedures) and treaty bodies
- Regular, high-level involvement of the OHCHR in Security Council debates on cases related to the responsibility to protect
- Submission of special reports by the OHCHR to the Security Council in cases involving the responsibility to protect.