Part II Collective Security and the Non-Use of Force, Ch.20 ‘Failures to Protect’ in International Law

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Chapter 20  ‘Failures to Protect’ in International Law

I. Introduction

Every new mass atrocity tends to provoke a critique of outside actors that failed to protect populations. Many observers are no longer content with condemning perpetrators and extend their moral outrage to bystanders who should have done more. Modern scholarship and recent UN practice are replete with such ‘failures to protect critiques’. The shift of ‘failures to protect-critiques’ to include bystanders is a relatively recent phenomenon. Blame for the Armenian genocide, the Holocaust, the Cambodian crimes against humanity, and the mass killings in Uganda under Idi Amin was mainly attributed to perpetrators—even though outside actors could have made a difference by withdrawing support or by intervening. In the wake of the Rwandan and Balkan atrocities in the 1990s, this has changed. While international law continues to place the primary responsibility to protect on the territorial state, the blame for ‘failures to protect’ is now extended to outside actors. The emergence of the notion of ‘responsibility to protect’ has solidified this trend. Hardly any state is immune from a critique that it did not do enough in the face of a mass atrocity, if only because it did not allow the UN to respond effectively. This discourse therefore construes mass atrocities as situations that result from a combination of acts by perpetrators and omissions by bystanders. Thus, the Rwandan genocide can only be understood if we consider not only the acts of individual perpetrators on the one hand, but also the role of Rwanda, the UN, its member states, and especially France on the other. Likewise, the genocide in Srebrenica is seen as a result of both the conduct of individual perpetrators and the Bosnian Serb Republic, and the acts and omissions of Serbia, the UN, its member states, in particular the Netherlands, and the North Atlantic Treaty Organization (NATO). Similar analyses can be made for the atrocities committed in Sierra Leone and Liberia (1991–2002), Burundi (1972 and 1993), Darfur (from 2003 onwards), Sri Lanka (2009), and in Libya and Syria (2011–2012). Such situations would not have occurred were it not for the combination of acts and omissions of perpetrators and bystanders.

International law to a very limited extent, has followed the moral and political critiques of bystanders. In the past decades, international law has inched along in several respects and now has more to say to bystanders than, say, at the time of the Second World War. Indeed, international law now allows us to frame protection of populations as a shared responsibility of bystanders. However, from a legal perspective there is something disingenuous about applying a ‘failure to protect-critique’ in one stroke to both perpetrators and bystanders. While international law offers a firm basis for holding perpetrators (whether individuals or states) responsible, it treats bystanders radically differently. There may be good moral grounds for a judgement that a particular outside actor ‘failed to protect’, but international law rarely offers a basis for an allocation of blame to individual bystanders. This is unlikely to change in the near future. The failures to protect of bystanders are built in and to a large extent induced and legitimized by the international legal system. International law provides a framework for political debate on how this shared responsibility should be performed: who should protect, where, and when. But this framework allows individual bystanders to hide behind a failing political process and to escape individual responsibility for failures to protect.
This chapter provides a critical review of the failure to protect—critique of bystanders. It proceeds in four parts. Section II discusses the very limited degree to which international law provides a basis for holding individual bystander states responsible for a failure to protect, and explains that international law in fact discourages and, in essential respects, precludes individual action to respond to mass atrocities. Individual bystanders are to remain just that (even though they can, of course, protest and undertake other diplomatic action). Section III discusses the failure to protect—critique of international organizations, notably the UN. While one can argue that the shared responsibility to protect should be performed by the UN—and the distinct responsibilities of the UN in principle make it an easier target of failure to protect—critiques—the basis of the obligation is similarly weak; Section IV discusses how, as a result, international law allows states and international organizations to ‘pass the buck’ and hide behind other bystanders. The concluding Section V construes the failure to protect—critique as a critique of the political process within the parameters set by international law, rather than as a critique of the non-performance of individual obligations.

II. Bystander States

By and large, international law protects bystander states from a legal critique that they failed to protect a population in a foreign state. International law supports blaming both individual perpetrators and commanders, as well as the states to which their acts can be attributed. It is only in rather exceptional situations that a bystander state can become responsible for failing to act on the basis of a breach of an obligation to protect. Otherwise, omissions would be legally irrelevant. Critically, a mere omission to act cannot, as explained by the International Court of Justice (ICJ) in the Genocide case, result in responsibility based on complicity.

This section will explore these situations, distinguishing between states exercising jurisdiction in the state where mass atrocities take place (Section II.A), states that by virtue of their influence over perpetrators may have had to offer protection (Section II.B), and other bystander states (Section II.C). It then will explain that international law, rather than compelling action by individual bystander states, justifies and, to a large extent, requires inaction (Section II.D).

A. States Exercising Extraterritorial Jurisdiction

Bystander states that exercise jurisdiction in a territory where atrocities take place may, in particular situations, be responsible for failing to act. This covers situations such as Iraq or Afghanistan where third states, whether or not legitimized by the UN, exercised some form of authority during a period of continuing atrocities. Their presence may trigger obligations to protect under human rights and humanitarian law. This category will also encompass states that occupy, whether or not based on a UN mandate, the territory of another state in which mass atrocities take place. Such states may exercise (extraterritorial) jurisdiction over persons they have detained, or over persons in respect of which they exercise ‘public powers normally to be exercised by a sovereign government’. However, the scope of the obligation to protect of these states will be limited and will correspond to the extent of the exercise of jurisdiction. They will not generally provide a basis for claims that the state should have protected persons against mass atrocities, beyond the area where it exercises jurisdiction. For instance, while there were good grounds for arguing that the Netherlands failed to protect individuals that it had actively deported from its compound from Srebrenica, it was much harder to argue that
the Netherlands did not accord protection to all 7,000 Bosnian men who were killed in Srebrenica—after all, these persons were not under the jurisdiction of the Netherlands.\(^{19}\)

The situation of an occupying state is comparable: the scope of the obligation is in principle limited to the area where the occupying state exercises control. The ICJ suggested that occupying states are required to uphold, in the areas that they occupy, not only the human rights treaties to which they themselves are party to, but also the human rights treaties to which the occupied state is a party as well as customary human rights law.\(^{20}\) In situations where one or more states occupy an entire territory (e.g., Iraq when it was occupied by the US and the UK), such obligations may indeed give rise to a failure to protect-critique. However, it is also true that the typical situations of mass atrocities that have given rise to failure to protect-critiques do not arise in situations of occupation.\(^{21}\) That certainly holds true outside the areas where an occupying state exercises control.

### B. Influential Bystander States

It is now commonly held that the fact that some bystander states have the capacity to exert influence over perpetrators may trigger obligations to protect. The legal basis for that proposition is provided by the ICJ which, in the Genocide case,\(^{22}\) held that states which do not exercise jurisdiction, or otherwise have a presence, in a state in which mass atrocities occur, can nonetheless have an obligation to prevent genocide, and can be responsible for failing to perform that obligation. Surely a failure to perform an obligation to prevent is to ‘fail to protect’.\(^{(p.443)}\) The Court was somewhat ambiguous as to which states would fall into this category. In one particular instance, it stated that: ‘The obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention on any State party which, in a given situation, has it in its power to contribute to restraining in any degree the commission of genocide’.\(^{23}\) It therefore suggested that not all states are under such an obligation, only those states that have the influence or otherwise the capacity to avert genocide.

Elsewhere, the Court suggested that capacity was not so much a trigger for an obligation to prevent, but rather a criterion for the assessment of the performance of that obligation. The Genocide Convention imposes an obligation upon all states parties ‘to employ all means reasonably available to them, so as to prevent genocide so far as possible’.\(^{24}\) Whether a state had discharged its obligation would then depend on its capacity to effectively influence the actions of persons likely to commit, or already committing, genocide.\(^{25}\) That capacity would, in turn, depend on the geographical distance of the state concerned from the events, and on the strength of political links, as well as links of all other types, between the authorities of that state and the main actors in the events.\(^{26}\) However, the apparent absence of any practice in terms of legal claims in cases of genocide, casts doubt on the support for this construction by states parties. It is doubtful whether we can say that all states are legally bound to prevent genocide wherever it occurs, and to employ to that end ‘all means reasonably available to them so as to prevent genocide, as far as possible’, and that failure to do so would entail for them a secondary international obligation to make reparation for breach of an international obligation.\(^{27}\)

Also if we adopt the former, more limited, construction, the criterion of ‘capacity to influence effectively the actions of persons likely to commit, or already committing, genocide’ in principle allows for a much wider category of states subject to a failure to protect-critique than the category of states that exercise extraterritorial jurisdiction. The criterion employed by the Court makes it implausible that only one of a few states could be singled out for that purpose. The Court indeed recognized (p. 444) the possibility that the combined efforts of several states, each complying with its obligation to prevent, might have achieved the result—averting the commission of genocide—which the efforts of only one state were insufficient to produce.\(^{28}\) But it is not easy to determine which states could
then be singled out for a failure to protect-critique. The criterion of geographical distance may be limiting, but that is not true for the criterion of ‘strength of political links’. In many situations of mass atrocities, powerful actors like China, Russia, the US, or even the European Union could, depending on the case, not easily be excluded from this group. This possible extension casts serious doubt on the question whether capacity can be a workable criterion as a ground for obligations to protect.\textsuperscript{29} A narrower criterion would be that a state ‘may have to restrain external actors if it substantially enables them to violate rights’.\textsuperscript{30} However, this is not what the Court said, and the Court’s judgment opens the possibility for a wider group of potentially responsible actors.

It has been argued that the obligation to protect outside the relevant territory could extend to other ‘responsibility to protect’ crimes—such as war crimes, crimes against humanity, and ethnic cleansing\textsuperscript{31}—which could potentially expand the network of actors covered by the category. However, the basis of this is not obvious. The concept of responsibility to protect in itself cannot fill the gap as it does not provide an independent legal basis. Furthermore, neither human rights law nor humanitarian law provide a comparable basis for targeting influential states.\textsuperscript{32}

The net result is, if we accept the expansive interpretation of the Court, that it is only for the crime of genocide that bystander states can as a matter of law be the subject of a failure to protect-critique. However, the category of states to which this critique can be applied is rather ill-defined. The ambiguity of the criterion formulated by the Court makes it difficult to single out responsible states and invites a certain amount of buck-passing.\textsuperscript{33}

C. Other Bystander States

For situations not covered by the obligations discussed in the two preceding sections, it will be even more difficult to single out individual states which can be subject to a failure to protect-critique. International law is not entirely silent on such situations. In the Wall advisory opinion, the ICJ identified obligations that apply to all bystander states, and that are potentially relevant in situations of mass atrocities. The Court suggested that ‘all States parties to the Fourth Geneva Convention (p. 445) relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have…the obligation…to ensure compliance by Israel with international humanitarian law as embodied in that Convention.’\textsuperscript{34} It also stated that it is for all states ‘to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.’\textsuperscript{35} Although made in the context of self-determination, the second statement seems to be a more general consequence of a breach of erga omnes obligations. The International Law Commission (ILC) indeed formulated a broader obligation to cooperate in relation to serious breaches of obligations under peremptory norms.\textsuperscript{36}

Three comments are in order. First, in state practice there is little or no support for the proposition that states that do not act in the face of violations of the Geneva Conventions in and by a third state are responsible.\textsuperscript{37} In this respect, the legal implications of the first statement of the Court appear to be very limited.

Secondly, in relation to a possible wider obligation to bring an end to violations of peremptory norms, there is no hint of state practice or \textit{opinio juris} in relation to events in, for instance, Darfur or Syria, to suggest that any state that did not act to protect persons from mass atrocities would commit an internationally wrongful act. While responsibility to protect (R2P) presupposes some underlying obligations,\textsuperscript{38} in itself it does not create obligations for all states, as a matter of law.\textsuperscript{39} In this respect, Alvarez’s observation that it would be ‘absurdly premature’\textsuperscript{40} for the UN to be liable in law for (p. 446) failing to act in
the face of the Rwandan genocide, applies more generally to claims that all states could be responsible for failing to protect people from mass atrocities.

Thirdly, while the wording of the ICJ and the ILC does not exclude individual conduct, it seems to emphasize cooperation rather than unilateral action (if only because that would be more effective). The basis for claims against individual bystander states faced with mass atrocities remains weak, if it exists at all, and such obligations would make it easy for states to point to each other so as to explain why nothing was done. Rather than providing for individual obligations, the obligation to cooperate supports a political process in order to respond to mass atrocities, in particular within the framework of the UN (see further Section V).

D. Justifying Inaction

The mere fact that international law provides a basis for failure to protect-critiques of individual states, only in rare situations does not in itself mean that such states are not empowered to act. International law allows third states a variety of means to respond to mass atrocities, and many states (in particular the US and those in Western Europe) have made wide use of such powers. States that do not use the powers to act that international law allows them, may still be subject to a failure to protect-critique, even though such a critique would not then translate into a claim of international responsibility.

However, international law severely restricts the means to which bystander states can resort. While all states may (and many states do) protest against mass atrocities in other states, international law largely denies states the means to take effective action. Three such (related) limitations are particularly relevant.

First, international law limits the right to take countermeasures against states engaged in mass atrocities to ‘lawful’ measures. As the Commentary to Article 54 ARISWA notes, at present ‘there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest.’

Secondly, the principle of non-intervention remains a formidable barrier for third states seeking to respond to mass atrocities in other states—such as when they seek to support an opposition against an oppressive state that is believed to be engaging in mass atrocities. In the cases of Libya and Syria, several states seem to have explored and pushed the limits set by the principle of supporting the opposition, (p. 447) but the principle of non-intervention remains a powerful argument against the legality of such action, and in effect legitimizes inaction of bystanders.

Thirdly, international law precludes the use of force as a unilateral response to mass atrocities. This restriction is critical, as in most cases that we tend to characterize as failures to protect it would seem that only a threat or use of force could have resulted in actual protection. By disallowing such use of force outside the context of the UN, international law justifies states to remain inactive. The debates in the UN concerning the responsibility to protect have made it clear that there is no emerging consensus among states to grant such a power to engage in forceful action in non-consenting states with a view to protecting the population in those states. Though the idea that outsiders have a moral entitlement to intervene has a long pedigree, in particular in the form of the just war doctrine, which sometimes takes the form of a (moral) duty to intervene and though some states do claim a right of humanitarian intervention and some commentators find support in the R2P doctrine for such a right, international law continues to ban (and for good reasons—notably to prevent the risk of abuse) the use of force by individual states.
or international organizations other than the UN.\textsuperscript{51} It makes little sense to criticize states for not using powers that they do not have.\textsuperscript{52}

It follows that international law not only provides no more than a thin basis for failure to protect-critiques of individual states, but fundamentally supports and legitimizes individual bystanders to remain bystanders.

\section*{III. The United Nations}

Compared to individual states, the UN is a much more likely target for a failure to protect-critique in cases of mass atrocities. The Security Council’s responsibility for the maintenance of peace and security, combined with the modern interpretation of seeing mass atrocities in terms of threats to peace and security,\textsuperscript{53} automatically draws the Council into the network of actors that are expected to act in cases of mass atrocities and that will be subject to failure to protect-critiques when they do not do so.\textsuperscript{54}

However, as in the case of individual states, failures to protect will rarely translate into a legal claim against the organization. The provision of the UN Charter, combined with the rules of human rights law, humanitarian law, and the Genocide Convention that may be applicable to the UN, primarily provide a framework for political debate over whether and when to intervene, rather than a basis for international responsibility in the case of inaction. I will explore this basis both with regard to the Security Council (Section III.A) and peacekeeping operations (Section III.B).

\subsection*{A. The Security Council}

The record of the Council in relation to mass atrocities has not always been a good one. There have been ample examples where a moral or political ‘failure to protect-critique’ (p. 449) is appropriate.\textsuperscript{55} Its failures in respect of Srebrenica\textsuperscript{56} and Rwanda are well documented.\textsuperscript{57} As Shraga notes, while criminal responsibility for the genocides in Rwanda and Srebrenica, and for the crimes against humanity in Darfur, was that of the Hutus, the Bosnian-Serbs, and the Janjaweed militia supported by the government of Sudan, respectively, it was largely facilitated by the Security Council, which was unwilling to engage, or to engage with, decisive force.\textsuperscript{58}

In such situations, there may also be grounds for a legal failure to protect-critique. The Charter gives the Council the responsibility for maintenance of international peace and security,\textsuperscript{59} and the Council is bound by obligations resting on the UN.\textsuperscript{60} The UN as an international organization with legal personality is bound by obligations under general international law pertaining to the protection of persons from mass atrocities.\textsuperscript{61} To the extent that we accept the obligation to prevent genocide as an obligation under customary law, this would also bind the Council.\textsuperscript{62} In the \textit{Genocide} case, the ICJ did not express itself on the customary nature of the obligation to prevent genocide and it seems very doubtful that such an obligation could be construed on the basis of existing practice. However, if the obligation to prevent is read into the obligation not to commit, as the Court did,\textsuperscript{63} and if that latter obligation is to be construed as an obligation under customary international law,\textsuperscript{64} it would seem that the Council could indeed be (p. 450) subject to an obligation to protect. This is particularly relevant since the UN, more than any other actor, would have both the capacity and the means (including those specified in Art 41 and 42 of the Charter) to protect.\textsuperscript{65}

However, the combination of the Council’s responsibility under the Charter with customary obligations resting on the UN will not easily allow a claim for wrongful omission in the case of inaction. The performance of international obligations has to be reconciled with, and remains subject to, the discretionary powers of the Council.\textsuperscript{66} Any obligation of the organization as a whole has to accommodate the nature of the powers of the organs, and cannot in itself transform a power to authorize the use of force into a duty to do so. While it is perfectly possible to say that the Council, by failing to use its powers, contributed to a
mass atrocity which it could have prevented or at least curtailed, inaction by the Council in
the face of mass atrocities may not be easily qualified as a breach of an international
obligation that would engage the international responsibility of the UN.

Owing to the difficulty of addressing a failure to protect-critique to the Council, it is not
uncommon to address such a critique to the member states that did not allow the Council to
act. However, the bases for such a critique are of a moral or political, rather than a legal,
nature. In current international law, there is no support for the proposition that member
states of the Council are responsible for a failure of the Council to act since, as a general
proposition, member states are not responsible for a wrongful act of the organization.

More to the point, the participation of a state in the creation or adoption of an act of an
organization does not in itself constitute a source of member state responsibility for the
acts of the international organization. This also holds true for the use of the veto by the
permanent members of the Council.

(p. 451) Of course, international legal responsibility can be incurred by member states for
their own conduct, in breach of their own obligations which required them to act, under the
Genocide Convention or under general international law. There is no shortage of
principles that lend themselves to creative interpretation in relation to member states that
block effective action. However, in light of their reception and application in state practice,
it would seem that neither the obligation to cooperate nor the prohibition against aiding
or assisting in the commission of a wrongful act by the organization can provide a basis
for a claim of wrongdoing against member states that did not allow the Council to act. The
transfer of responsibility to the Council to act in situations of mass atrocities does not
require individual members to act beyond that which they are required to do under their
own obligations, and international law does not provide a basis for subjecting them to a
failure to protect-critique.

B. Peacekeeping

Critique for failures to protect may not only be directed to the Security Council, but also to
peacekeeping operations mandated by the Council. For a long time, the absence of
mandates to use force to protect civilians—traditionally a central element of UN
peacekeeping practice—made it pointless as a matter of law to blame peacekeepers for a
failure to protect. In regard to the atrocities in Rwanda and Burundi, where
peacekeepers were in place but could not act, it is possible on moral or political grounds to
blame the UN for not empowering the mission, but the blame can hardly be directed at the
mission itself.

(p. 452) For modern peacekeeping missions a failure to protect-critique has more bite.
Mandates provide for the use of force for the protection of civilians, and may in turn
evolve into peace enforcement rather than peacekeeping. Examples are the mandates of
the African Union/United Nations Hybrid Operation in Darfur (UNAMID) to take ‘the
necessary action’ to protect civilians, Sierra Leone, Liberia, Côte d’Ivoire, Haiti, Chad and the Central African Republic, the Democratic Republic of the Congo, and Sudan. Depending on the formulation of the mandate, they must protect, by force if
necessary, civilian populations in imminent threat of physical violence.

Yet, failures by a peacekeeping force to perform its mandate cannot necessarily be qualified
as a wrongful act. A mandate is not an obligation, certainly not one which correlates to a
right of injured parties outside the UN. It could be argued that an empowerment creates a
‘legitimate expectation’ of injured parties that force will be used, but it remains to be seen
how far this would carry in a court of law.
Of course, general obligations under human rights law and humanitarian law, to the extent that they are binding on the UN, remain applicable. To the extent that such obligations apply, the question is how far they extend, and in particular whether they extend beyond the area where the peacekeeping force exercises control (eg its prisons and military camps), into the area where the territorial state, or armed groups, exercise control. The Brahimi Report noted that peacekeepers ‘who witness violence against civilians should be presumed to be authorized to stop it, within their means, in support of basic United Nations principles.’ As indicated by the phrase ‘within (p. 453) their means’, the scope of a failure to protect-critique is limited to a combination of ‘their areas of operation, capabilities, and available resources’. If these conditions are satisfied, it may be possible to claim as a matter of law that a peacekeeping force (and thus the UN) failed to exercise its obligations to protect. However, it would seem that this has been the case in very few—if any—of the mass atrocities of the last decades. Given the notorious lack of actual capabilities granted to peacekeeping troops, it is only in rare cases that such a critique could translate into a viable legal claim. There are ample instances where the inability of troops to protect was not so much due to lack of legal powers, but to the lack of resources. These include the United Nations Assistance Mission for Rwanda (UNAMIR), which the Security Council had reduced to a minimal force, the United Nations Protection Force in Bosnia and Herzegovina (UNPROFOR), UNAMID in Burundi (2004), which ‘lacked sufficient troop capacity, logistics, and funding’, and the African Union Mission in Sudan (AMIS), which ‘was hampered by insecurity, lack of significant troops, logistical and operational challenges, the refusal of the government of Sudan to allow deployment of non-African troops, and the lack of contributions of means of transportation and critical aviation capabilities’.

In such situations, a failure to protect-critique may well circumvent the peacekeeping mission as such, and direct itself to the member states that did not provide peacekeeping forces with the necessary means to perform their mandate (somewhat comparable to critiques of member states that did not allow the Security Council to act). The obligation to cooperate to bring to an end serious breaches of peremptory norms may be relied on to support the proposition that member states should cooperate to enable peacekeeping missions to fulfill their mandates so as to protect civilians from mass atrocities. But the obligation lacks the power to remove the essentially voluntary nature of a decision to provide troops for peacekeeping missions, and does not provide a basis for singling out particular states for a legal failure-to-protect-critique.

(p. 454) IV. Diffused Responsibility

It follows from the previous two sections that it is possible to construe the responsibility to protect populations from mass atrocities as a shared responsibility. International law empowers both states and the UN to act, even though it limits the means that may be employed by the former. In some cases, it also obliges bystanders to act. At a minimum, the obligation to cooperate applies to situations where mass atrocities are committed by a third state. In this respect, it may be said that all actors that refrain from acting are a cause, in the sense that they had to do something, and their omissions along with the acts of the perpetrators are empirically connected to the outcome.

It also follows from this that international law does not generally translate this shared responsibility in particular obligations to specific obligations. The shared responsibility rests on all. In this respect, failures to protect can be said to arise out of ‘problems of many hands’. This concept, originating in literature on public administration, is based on the proposition that when many persons contribute to harmful outcomes, ‘it is difficult even in principle to identify who is morally responsible for political outcomes.’ Unless accompanied by a scheme for allocation of obligations and responsibilities to individual actors, the involvement of ‘many hands’ will lead to a diffusion of responsibility: ‘As the
responsibility for any given instance of conduct is scattered among more people, the
discrete responsibility of every individual diminishes proportionately.\textsuperscript{101} With the exception
of the perpetrators, it seems difficult if not impossible to say that the outcome would not
have occurred but for the actor’s act or omission. The actors are only a causal factor—one
of ‘a plurality of distinguishable causal conditions’.\textsuperscript{102}

(p. 455) This phenomenon thus magnifies the difficulty of singling out individual bystanders
for their failure to protect in relation to mass atrocities. In addition to the weakness of the
normative basis for claims against such states, the very multitude of actors who may be in a
position to act diffuses the responsibility of any single actor.

It is true that, in the rare cases where multiple actors have international obligations to
protect populations from mass atrocities, a multiplicity of actors in itself does not
necessarily affect the obligations of each of the individual actors, nor does it otherwise
affect their possible responsibility. International law in principle allows for the coexistence
of multiple responsibilities in relation to failures to protect. This holds true for the
coexistence of responsibility between perpetrators and bystanders, and within the category
of bystanders itself.

As for the former, the obligation to protect of states exercising extraterritorial jurisdiction
and of ‘influential states’ will generally coexist alongside those of the territorial state. The
mere fact that a third state exercises jurisdiction does not relieve the territorial state of its
obligations; just as the fact that the territorial state retains its obligation does not relieve
the state that exercises extraterritorial jurisdiction of its obligations.\textsuperscript{103} Also, the mandate
of peacekeeping operations to protect civilians will be without prejudice to the
government’s responsibilities.\textsuperscript{104} Likewise, while under the responsibility to protect
doctrine, the territorial state’s inability to protect triggers the responsibilities of third states
and international organizations,\textsuperscript{105} the transfer of responsibilities triggered by inability is
not necessarily binary and exclusive. One illustration is that while Security Council
Resolution 1973 allowed for military action (with a reference to R2P), it reiterated the
primary responsibility of Libya.\textsuperscript{106} Both the territorial state and outside actors may then be
obliged to act—and in principle these responsibilities do not exclude or undermine one
another.

As to the latter, the fact that an obligation to protect rests on a multitude of outside actors
does not reduce the obligations of each individual actor. On this point, paragraph 430 of the
Genocide case is relevant.\textsuperscript{107} When considering whether the (p. 456) obligations of Serbia
to prevent genocide would be affected by the action or inaction of other states, the ICJ held
that:

\begin{quote}
\text{it is irrelevant whether the State whose responsibility is in issue claims, or even}
\text{proves, that even if it had employed all means reasonably at its disposal, they would}
\text{not have sufficed to prevent the commission of genocide. As well as being generally}
\text{difficult to prove, this is irrelevant to the breach of the obligation of conduct in}
\text{question, the more so since the possibility remains that the combined efforts of}
\text{several States, each complying with its obligation to prevent, might have achieved}
\text{the result—averting the commission of genocide—which the efforts of only one}
\text{State were insufficient to produce.}\textsuperscript{108}
\end{quote}

The Court thus held that the fact that multiple actors may act in the face of a mass atrocity,
does not alter the fact that each state can be responsible for its failure to prevent genocide,
even if it could not by itself have averted the genocide. The fact that a bystander state is
one of many, does not as such affect its individual obligations.
However, despite the independence of individual obligations and responsibilities, the multitude of actors that potentially have a role in the protection of populations against mass atrocities may complicate the determination of the responsibility of any single actor. The fact that international law obliges, or empowers, multiple actors, without providing clear criteria for the allocation of obligations and powers between such actors, may allow actors that were (allegedly) responsible for (part of) the events to evade their responsibility and to ‘pass the buck’ to others.109

The phenomenon of buck-passing is well illustrated by the coexistence of obligations of individuals and states. The emergence of the possibility of attributing individual responsibility to perpetrators after 1945, and in particular in the late 1990s, has made it easier for states to deflect responsibility to individual authors of international crimes. It allowed them to escape state responsibility, and restrict responsibility to that of individual perpetrators.110 It allowed third states (and ‘the international community’) to abstain from imposing formal responsibility on state perpetrators and to limit them to imposing responsibility on individual perpetrators.111

Buck-passing is also facilitated by the principles that apply to the relationship between territorial states and bystanders. Under the responsibility to protect doctrine, the territorial state’s inability to protect triggers the responsibilities of third states and international organizations.112 As noted previously, triggering the responsibility of outside actors does not necessarily terminate the responsibilities (p. 457) of the territorial state, and there exists a grey zone where both territorial states and outside actors can assume the responsibility to protect persons from mass atrocities, without any clarity as to who is to do what. The triggering device of ‘inability’ may induce a territorial state to deem itself to be relieved from its obligations once outside actors step in, and in that sense invites buck-passing. States may prefer this situation, since it does not carry the political costs of fighting a civil war.113 At the same time, the primary responsibility of the territorial state, as well as the principle of non-intervention, will induce outside actors to continue to defer to the territorial state.

A similar ambiguity arises once external actors are present in the territory where the atrocities take place. For instance, while the obligations of peacekeeping operations to protect civilians are without prejudice to the government’s responsibilities,114 the relationship between the obligations and responsibilities of such operations on the one hand and the territorial state, on the other, is equivocal, and the law invites blame-shifting games.

In relation to ‘influential states’, a similar analysis can be made. Grounding the obligations and responsibilities of such states on the criteria of ‘capacity’ does not appear to provide a workable criterion to delineate obligations and responsibilities of multiple states.115 The nature and contents of the criteria formulated by the Court are indeterminate and flexible and inevitably lead to blame-shifting.

It is only in rare cases that areas of responsibility may be of an exclusive nature. Arguably, though controversially, this applies to attribution of conduct between the UN and troop-contributing states. It is somewhat unclear whether the standard of effective control, used in the ARIO,116 allows for multiple attribution.117 In the Nuhanović case, the Court of Appeal of The Hague took the position that for determining who had effective control over an act, it needed to be established whether the UN or the state had the power to prevent the conduct.118 If this is the relevant criterion, it would seem possible that both the UN and the troop-contributing state had the power to prevent the removal. The Dutch court expressly recognized the possibility of double attribution.119 In the Behrami and (p. 458) Saramati cases,120 the European Court of Human Rights (ECtHR) construed the applicable criterion for attribution in exclusive terms. The UN also supports an exclusive mode of
attribution—albeit on a different ground—taking the position that peacekeeping troops are
to be considered as subsidiary organs of the UN.121

Either way, the ‘effective control debate’ has proved unable to prevent blame-shifting
arguments. For actors who construe the criterion in an exclusive manner, it seems to have
induced and allowed actors to ‘pass the buck’ to others (in this case the UN, which may
then profit from its immunity from litigation).122 When the criterion is construed in a way
that allows for double attribution, this does not necessarily solve the problem. The terms of
the ARIO—where the question of attribution is governed by the standard of ‘effective
control’123—introduce inherent flexibility, allowing for arguments pointing to several actors.
Also the argument that the entity best placed to prevent should take action124 is inherently
ambiguous, both allowing and inviting actors to point to others who would be more capable
of preventing such abuses.

In those situations where multiple bystanders contribute through their omissions to a mass
atrocities, this very multiplicity may thus complicate the possibility of holding each individual
actor responsible. In such situations, the absence of third party institutions that can
determine responsibility, of course, further supports the process of buck-passing.

A particular consequence of a multitude of bystanders is that while it may be possible to
find individual actors responsible when specific obligations apply, it may be much more
difficult to determine which actor(s) are to provide reparation. This problem may occur, in
particular, when obligations are framed as obligations of conduct, and the rules on
causation are construed in such a way that no sufficient connection can be found between
individual wrongs and the harmful outcome. In such a case, states can be held responsible
for their wrongs, but they will not be required to provide reparation in relation to the
eventual harmful outcome that cannot fully be traced to their acts or omissions. There may
thus be a mismatch (p. 459) between individual responsibility of states for individual
wrongful acts, and the harmful outcome that the collectivity produces.

This phenomenon of dilution of responsibility manifested itself with full force in respect of
the obligation to provide reparation in the Genocide case. The ICJ found that it had not been
shown that in the specific circumstances of the events, the use of the means of influence by
Serbia and Montenegro ‘would have sufficed to achieve the result which the Respondent
should have sought’.125 The Court declined to order Serbia and Montenegro to pay
compensation because of the collective nature of the failures to prevent.

This example illustrates that international law structures its primary and secondary rules126
relating to failures to protect in such a way that makes it possible for each of the multiple
parties to contribute to a wrong, yet to remain below the threshold where their
responsibility would be engaged or, in any event, where they would have to provide
reparation for the consequences.

V. Failures to Protect-Critique as a Political Critique

Over time, the number of actors involved in the protection of persons against mass
atrocities has expanded, with the recognition and development of positive obligations of the
territorial state, the clarification of obligations of states exercising extraterritorial
jurisdiction, the emergence of a general obligation to cooperate, with the ICJ’s ruling in the
Genocide case, and with the assumption of powers by the Security Council to act in cases of
mass atrocities without physical transboundary effects.

However, it appears from the earlier discussion that this complex of obligations and powers
only rarely allows for a failure to protect-critique of individual actors that is grounded in
international law. The multiplicity of powers and obligations across various actors reflects
the reality that effective power is not vested in any single institution—and, because of the
discretionary nature of its powers, the Security Council also falls into that category. Perhaps
the hope is that—to paraphrase the ICJ in the Genocide case—the combined efforts of
several states, each complying (p. 460) with its obligation to prevent or performing its power to prevent, might achieve the result (averting the commission of genocide) which the efforts of only one state would be insufficient to produce. However, as illustrated in the preceding section, this reliance on multiple actors can easily transform from a strength of the system into a weakness, and allows states and international organizations to duck the question of responsibility.

It may be said that this failure to assign a special duty to act could be seen as a weakness of the normative system. A clarification of obligations as well as secondary rules, that indicate more clearly who is responsible for what, may to some extent ameliorate this weakness. Such criteria can specify what individual actors should or should not do. This can involve clarification of the task of peacekeeping missions and of individual states.

In this respect at least, the ICJ’s ruling on Serbia and Montenegro’s responsibility for its failure to prevent was a welcome step forward.

Improvements may, to some extent, also be sought by strengthening the institutional and procedural avenues for holding various actors to account. Specific options may include broadening the ex post facto assessment, for instance by requiring the UN to make broader assessments of failures, not just internally but for all actors involved; and improving access to remedies against the UN.

However, it would seem that seeking clarification with regards to the allocation of obligations and responsibilities to individual actors will only, in rare cases, allow for the individualization of responsibilities, and may indeed start out from the wrong premise. Responding to mass atrocities is by its very nature a collective enterprise, which does not easily allow for individualization of responsibilities. ‘Failure to protect’ critiques thus do not put blame on an individual actor, but rather on the collectivity of states and international institutions (or ‘the international community’) that failed to use their powers to provide protection, without this triggering responsibility of individual actors.

The relevance of international law in relation to failures to protect is therefore not to provide a ground for responsibility of individual actors, but rather its ability to provide a framework for deliberation on whether and how to act. This framework is supported by the obligation to cooperate to bring to an end violations of peremptory norms, in combination with the responsibility and powers of the Security Council. The UN, and in particular the Council, thus provides the primary mechanism for performing the obligation of cooperation. The Genocide Convention, human rights law, and humanitarian law are relevant for such cooperation. These obligations may not easily provide a basis for claims for wrongfulness in cases of failures to protect, but they do circumscribe political processes and as such may underlie and support critiques of states and international organizations for the outcome of such processes.

Footnotes:

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3 The term ‘protect’ in the concept ‘failure to protect’ (indicating what should have been done) can stand for a wide variety of conduct, ranging from preventative acts (as in the prevention of genocide) to swift action when mass atrocities are carried out. In this respect, the term ‘failure to protect’ is the mirror image of ‘responsibility to protect’, and the wide variety of acts by which one can carry out that responsibility can each be translated as grounds for failure. What specifically had to be done to protect depends on the specifics and content of the obligation to protect that applies in a particular case.

4 eg in the case of Uganda it could be argued that some of the atrocities could have been prevented if the main arms suppliers, which included Libya, the Soviet Union, and the German Democratic Republic, had withdrawn their support. See: on the support of the Idi Amin regime by Libya, Guy Arnold, *The A to Z of Civil Wars in Africa* (Plymouth: Scarecrow Press, 2008), 188; by the Soviet Union, Colin Legum, ‘The Soviet Union, China and the West in Southern Africa’ (1975) 54 *Foreign Affairs* 745, 749 and Dale C. Tatum, *Who Influenced Whom? Lessons from the Cold War* (Lanham, MD: University Press of America, 2002), 192; and by the German Democratic Republic, Gareth M. Winrow, *The Foreign Policy of the GDR in Africa* (Cambridge: Cambridge University Press, 1990), 141.


7 André Nollkaemper, ‘Multi-Level Accountability: A Case Study of Accountability in the Aftermath of the Srebrenica Massacre’ in Yuval Shany and Tomer Broude (eds), *The Shifting...*


10 With the exception of Serbia’s fate in the Genocide case (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Rep 2007, 43), we have not seen any successful claims against outside actors who failed to protect.

11 In this respect the main argument of the chapter is comparable, and supported by, the argument by Scott Veitch, Law and Irresponsibility: On the Legitimation of Human Suffering (Abingdon: Routledge, 2007).

12 The chapter limits itself to failures to protect from mass atrocities, in particular those that can be qualified as genocide, crimes against humanity, and large-scale war crimes, rather than protection of all types of other human rights abuses. While there is nothing to prevent use of the term failure to protect in relation to incidental abuses or killings, it is in particular in relation to this more limited category of mass atrocities that the phrase ‘failures to protect’ has been used. In this respect, the concept of failures to protect is the mirror image of responsibility to protect. See General Assembly, ‘Report of the Secretary-General, ‘Early Warning, Assessment and the Responsibility to Protect’ (2010), A/64/864; Jann K. Kleffner, ‘The Scope of the Crimes Triggering the Responsibility to Protect’ in Julia Hoffmann and André Nollkaemper, Responsibility to Protect. From Principle to Practice (Amsterdam: Amsterdam University Press, 2012), 85.


16 eg Al-Skeini and Others v. UK (App no 55721/07), ECTHR, 7 July 2011.

17 Al-Skeini and Others v. UK (App no 55721/07), ECTHR 7 July 2011, para 149.


19 Netherlands, Supreme Court, *Stichting Mothers of Srebrenica v. Netherlands and United Nations* (13 Apr 2012), Final appeal judgment, LJN: BW1999; ILDC 1760 (NL 2012) (the Mothers of Srebrenica claimed that the Netherlands was partly responsible for the fall of the safe area in Srebrenica and the consequences thereof, namely the murder of their family members and their loss of property).


21 It should be added that even within areas under their jurisdiction, the scope of obligations will be relatively limited. As noted by the UK House of Lords in *Al Skeini*, occupation does not necessarily give the occupying force sufficient control to secure the wide range of protections provided by the European Convention on Human Rights (ECHR); see *Al-Skeini and Others v. Secretary of State (Consolidated Appeals)* [2007] UKHL 26, paras 82–3.


29 Hakimi, ‘State Bystander Responsibility’, 356 (assigning the obligation primarily on the basis of capacity would be untenable).
32 See Section IV.
33 See further Section IV.
34 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, para 159; see also Giorgio Gaja, ‘Do States Have a Duty to Ensure Compliance with Obligations Erga Omnes by Other States?’ in Maurizio Ragazzi (ed), International Responsibility Today: Essays in Memory of Oscar Schachter (Leiden: Martinus Nijhoff, 2005), 32–3.
35 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, para 159.
37 See eg Carlo Focarelli, ‘Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?’ (2010) 21 European Journal of International Law 125; Frits Kalshoven, ‘The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit’ (1999) 2 Yearbook of International Humanitarian Law 3, 60 (Art 1 ‘cannot be said to impose upon states a legal obligation to act against other states that fail in their respect of the Convention’).
38 Indeed, the change from the original International Commission on Intervention and State Sovereignty (ICCIS) Report, The Responsibility to Protect (Ottawa: International Development Research Centre, 2001) to the World Summit Outcome Document, GA Res 60/1 (24 Oct 2005), A/RES/60/1, with the limitation to the four ‘core crimes’, can be seen as a distinct legalization of the principle.
42 Para 6 of the Commentary to Art 54 of the ARISWA.


45 The Outcome Document confines the right to use force to the Security Council (see para 139) and contains no trace of recognition of a right of individual states, or other international organizations, to use force for humanitarian purposes.


47 Richard J. Regan, Just War. Principles and Cases (Washington DC: The Catholic University of America Press, 1996), 6, 17. See also Tan, ‘The Duty to Protect’ in Nardin and Williams, Humanitarian Intervention, 84; Carla Bagnoli, ‘Humanitarian Intervention as a Perfect Duty: A Kantian Argument’ in Nardin and Williams, Humanitarian Intervention, 118 (‘there is a strict moral duty to intervene when fundamental rights are violated’).

48 See the coalition agreement of the Dutch cabinet ‘Rutte II’, which states that ‘for a contribution to international crisis management operations, either a mandate in accordance with international law is required or there should be a humanitarian emergency situation. Requests in this regard will be considered in the light of our international responsibility and our national interests’ (author’s own translation). This agreement is available at <http://www.rijksoverheid.nl/regering/regeerakkoord/nederland-in-de-wereld>.


54 UN Charter, Art 24.


The customary international law nature of the principles underlying the Genocide Convention was recognized by the ICJ in its 1951 advisory opinion on the Reservations to the Genocide Convention, Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide, Advisory Opinion, ICJ Rep 1951, 15, 23; Shraga, ‘The Security Council and Human Rights’ in Fassbender, Securing Human Rights, 32.


eg Report of the Secretary-General’s Internal Review Panel on ‘United Nations Action in Sri Lanka’ (14 Nov 2012), 29, para 81 (one of the elements of the systemic failure of the UN was ‘inadequate political support from Member States as a whole’).


ARISWA, Arts 40–1.

Section II.C.


The question may be raised whether the absence of legal powers by peacekeeping troops to use force other than for self-defence is ever a legal justification for not using force. See Nasu, International Law on Peacekeeping, 25–6 (peacekeeping forces are ‘urged to restrain the use of armed force, but are not prohibited from taking such a course of action’).


84 SC Res 1509 (19 Sept 2003), S/RES/1509, para 3j.
86 SC Res 1542 (30 Apr 2004), S/RES/1542, para 7If.
91 Report of the Panel on United Nations Peace Operations (Brahimi Report) (2000), A/55/305 and S/2000/809, para 62. See similarly Commentary of the International Committee of the Red Cross to Common Article 1 of the 1949 Geneva Conventions, Jean S. Pictet, The Geneva Conventions of 12 August 1949: Commentary (Geneva: International Committee of the Red Cross, 1952). See also Siobhâna Wills, Protecting Civilians: The Obligations of Peacekeepers (Oxford: Oxford University Press, 2009), 267–8 (noting that ‘where the force has a mandate to provide protection and the host-State is unable or unwilling to respond in sufficient time to protect the lives of the persons under imminent attack, it ought to be best practice to require peacekeepers to respond, if they have the capacity to do so. This would be in line with the principle of Article 1 and also with the expectations generated by deployment of a peacekeeping force’).
97 ARISWA, Art 41.

99 Compare see Dennis Thompson, ‘Designing Responsibility: The Problem of Many Hands in Complex Organizations’ in Jeroen van den Hoven, Seumas Miller, and Thomas Pogge (eds), The Design Turn in Applied Ethics (Cambridge: Cambridge University Press, 2012), available at <http://scholar.harvard.edu/files/dft/files/designing_responsibility_1-28-11.pdf> (‘to assert that an individual is a cause on this criterion only empirically connects his or her action with the outcome—along with the actions of many other hands and the influence of many other forces. It does not establish that the individual is the most important cause, even less that the individual is morally responsible for the entire outcome’).


103 Ilascu and Others v. Moldova and Russia (App No. 48787/99) ECtHR, 8 July 2004, para 331; Catan and Others v. Moldova and Russia (App nos 43370/04, 18454/06, 8252/05) (Grand Chamber) ECtHR, 19 Oct 2012, paras 109–10. It should be added that while the fact that there are a multiplicity of actors obligated to take action to protect persons from mass atrocities, in principle this need not affect the responsibility of any single actor, it may affect the content of obligations or the scope of responsibility. Eg in case of civil strife, as in Sri Lanka or Colombia, because of the role and power of rebel movements, the ability of territorial states to take action to protect civilians from mass atrocities may be weak. While this will not relieve them of their obligations to protect civilians, it will influence what, as a legal matter, may be required and expected by them.


105 World Summit Outcome Document (2005), para 139.


109 Nollkaemper, ‘Multi-Level Accountability’ in Shany and Broude, The Shifting Allocation of Authority in International Law.

110 Yuval Shany and Tomer Broude (eds), The Shifting Allocation of Authority in International Law (Oxford: Hart, 2008).
This also served the interests of stability: the international community had a prime interest to allow the state, eg Iraq or Serbia, to continue and re-establish itself quickly as a stable political entity—sacrificing individual state agents did not endanger that objective.

World Summit Outcome Document (2005), para 139.


Hakimi, ‘State Bystander Responsibility’, 356 (assigning the obligation primarily on the basis of capacity would be untenable).

DARIO, para 87.


Behrami and Behrami v. France and Saramati v. France, Germany and Norway (App nos 71412/01 and 78166/01), ECtHR, 2 May 2007.


DARIO, Art 7, para 87.


131 eg Alvarez, ‘The Schizophrenias of R2P’ in Alston and Macdonald, *Human Rights, Intervention and the Use of Force*, 279 (‘Perhaps it is time, in light of the ICJ’s Bosnia decision, for a protocol to the Genocide Convention indicating much more clearly what its signatories have a right to do in the face of on-going genocide in another signatory state’).