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# 'Failures to Protect' in International Law<sup>1</sup>

André Nollkaemper

## 1. 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 and political outrage to bystanders who should have done more. Modern scholarship<sup>2</sup> and recent United Nations practice<sup>3</sup> are replete with such 'failures to protect critiques'.<sup>4</sup>

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<sup>2</sup> E.g. C Bagnoli, 'Humanitarian Intervention as a Perfect Duty: A Kantian Argument' in T Nardin and MS Williams (eds.) *Humanitarian Intervention. NOMOS XLVII* (NYU Press, New York, 2006); SC Breau, 'The Impact of the Responsibility to Protect on Peacekeeping' 11 *Journal of Conflict & Security Law* (2006) 429; L Glanville, 'The Responsibility to Protect Beyond Borders' 12 *Human Rights Law Review* (2012) 1, 21 ('failure of the UN to prevent genocide'); N Grono, 'Briefing – Darfur: The International Community's Failure to Protect' 105 *African Affairs* (2006) 621; International Crisis Group, *Darfur: The Failure to Protect*, Africa Report No 89 (2005); H Nasu, 'Operationalizing the "Responsibility to Protect" and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict' 14 *Journal of Conflict & Security* (2009) 209, 235 ('failure to take action to protect civilians'); H Nasu, 'The Responsibility to React? Lessons from the Security Council's Response to the Southern Lebanon Crisis of 2006' 14 *International Peacekeeping* (2007) 339 ('the Security Council's failure to react'); J Pattison, 'Legitimacy and Humanitarian Intervention: Who Should Intervene?' 12 *The International Journal of Human Rights* (2008) 395; KC Tan, 'The Duty to Protect' in T Nardin and MS Williams (eds.) *Humanitarian Intervention. NOMOS XLVII* (NYU Press, New York, 2006) 84 ('failure to intervene to protect human rights'); NJ Udombana, 'When Neutrality is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan' 27 *Human Rights Quarterly* (2005) 1149, 1172 ('the UNSC's "failure to perform the role assigned to it"'); A de Waal, 'Darfur and the Failure of the Responsibility to Protect' 83 *International Affairs* (2007) 1039; JM Welsh and M Banda, 'International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?' 2 *Global Responsibility to Protect* (2010) 213.

<sup>3</sup> See e.g. in relation to Srebrenica UNGA 'Report of the Secretary-General pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica' (15 November 1999) UN Doc A/54/549, [501]; Rwanda: UNSC 'Letter dated 15 December 1999 from the Secretary-General addressed to the President of the Security Council' (16 December 1999) enclosing the 'Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda' (15 December 1999) UN Doc S/1999/1257, 59 and Sri Lanka Report of the Secretary-General's Internal Review Panel on 'United Nations Action in Sri Lanka' (14 November 2012).

<sup>4</sup> 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 in grounds for failure. What specifically had to be done to protect depends on the specific and contents of the obligation to protect that applies in a particular case.

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.<sup>5</sup> 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,<sup>6</sup> many commentators, in particular NGOs, now extend the blame for ‘failures to protect’ to outside actors. The emergence of the notion of ‘responsibility to protect’ has solidified this trend. Hardly any state is immune for a critique that it did not do enough in the face of a mass atrocity, if only because they did not allow the United Nations (UN) to respond effectively.

This discourse thus conceives of mass atrocities as situations that result from a combination of acts by perpetrators and omissions by bystanders. Thus, the Rwandese genocide can only be understood if we consider not only the acts of individual perpetrators, but also the role of Rwanda, the UN, its member states, and specifically France.<sup>7</sup> Likewise, the genocide in Srebrenica is seen as the 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 NATO.<sup>8</sup> 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 in 2011-2012. Such situations would not have happened, were it not for the combination of acts and omissions of perpetrators and bystanders.

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<sup>5</sup> For example, in the case of Uganda it can be argued that part of the atrocities could have been prevented if the main arm suppliers, which include Libya, the Soviet Union and the German Democratic Republic, would have withdrawn their support. See, on the support of the Idi Amin regime by Libya, G Arnold, *The A to Z of Civil Wars in Africa* (Scarecrow Press, Plymouth 2008) 188; by the Soviet Union, C Legum, ‘The Soviet Union, China and the West in Southern Africa’ 54 *Foreign Affairs* (1975) 745, 749 and DC Tatum, *Who Influenced Whom? Lessons from the Cold War* (University Press of America, USA, 2002) 192; and by the German Democratic Republic, GM Winrow, *The Foreign Policy of the GDR in Africa* (CUP, Cambridge, 1990) 141.

<sup>6</sup> 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/Res/60/1, [138].

<sup>7</sup> See on the role of the UN, *inter alia*, Carlsson Commission ‘Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda’ (15 December 1999) UN Doc S/1999/1257, 3; M Barnett, *Eyewitness to a Genocide. The United Nations and Rwanda*. (Cornell University Press, USA, 2002). See on the role of France, A Wallis, *Silent Accomplice: The Untold Story of France’s Role in the Rwandan Genocide* (IB Tauris & Co Ltd, London, 2007).

<sup>8</sup> A Nollkaemper, ‘Multi-level Accountability: A Case Study of Accountability in the Aftermath of the Srebrenica Massacre’ in Y Shany and T Broude (eds.) *The Shifting Allocation of Authority in International Law. Considering Sovereignty, Supremacy and Subsidiarity* (Studies in International Law, Hart Publishing, USA, 2008).

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, by the time of World War II. Indeed international law now allows us to frame protection of populations as a shared responsibility of bystanders. That is: atrocities may trigger not only a responsibility of the persons or entities that commit the acts in questions, but also a responsibility of bystanders. The eventual responsibility then may be shared by multiple actors.<sup>9</sup>

This ‘responsibility’ of multiple actors in relation to failures to protect has a double meaning. On the one hand, it refers to the responsibility to take action to protect civilians before (further) atrocities take place. This ‘ex ante’ responsibility may be reflected in legal obligations to protect, though (like the twin concept ‘responsibility to protect’, and like the use of the term ‘responsibility’ in article 24 of the UN Charter) the term usually is used in a wider meaning. On the other hand, the term refers to a responsibility ‘ex post’ for failures to protect. In this sense, the concept is used in conformity with the established meaning of international responsibility for internationally wrongful acts. A failure to protect critique may then refer to a shared responsibility of multiple actors in either of these meanings.

However, from a legal perspective there is something disingenuous about applying a ‘failure to protect critique’ in one brush to both perpetrators and bystanders. While international law offers a firm basis for holding (both in an *ex ante* and *ex post* sense) perpetrators (whether individuals or states) responsible, it treats bystanders radically different. There may be good moral grounds for a judgment that a particular outside actor ‘failed to protect’,<sup>10</sup> but international law rarely offers a basis for an allocation of blame to individual bystanders.<sup>11</sup> This is unlikely to change in the near future. Failures to protect of bystanders are built in and to a large extent induced and legitimised by the international legal system. Although international law provides a framework for political debate on how to respond to mass atrocities, and in this sense does provide guidance

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<sup>9</sup> See generally on the concept of ‘shared responsibility’, A Nollkaemper and D Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’, 34 Michigan Journal of International Law (2013) 359.

<sup>10</sup> J Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (OUP, Oxford 2010).

<sup>11</sup> 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)* [2007] ICJ Rep 43), we have not seen any successful claims against outside actors who failed to protect.

to bystanders for exercising their part of a shared responsibility, this framework allows individual bystanders to hide behind a failing political process, and to escape individual responsibility for failures to protect.<sup>12</sup>

This article provides a critical review of the failure to protect critique of bystanders.<sup>13</sup> It proceeds in four parts. Section 2 discusses the very limited degree in 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 3 discusses the failure to protect-critique on international organisations, notably the UN. While its distinct responsibilities make the UN in principle an easier target of failure to protect-critiques, the scope of its obligations and corresponding responsibilities for wrongdoing remains relatively limited. Moreover, the organisation relies on states that mostly will be able to hide behind it. Section 4 discusses how, as a result, international law allows states and international organisations to ‘pass the buck’ and hide behind other bystanders. The concluding Section 5 construes the failure to protect-critique as a critique on the political process within the parameters set by international law, rather than as a critique on the non-performance of individual obligations.

## 2. 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 individual perpetrators and commanders, as well as states to which their acts can be attributed. It is only in rather

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<sup>12</sup> In this respect the main argument of the article is comparable to, and supported by, the argument by S Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge, 2007).

<sup>13</sup> 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 sorts of other human rights abuses. While there is nothing to prevent one from using 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 UNGA ‘Report of the Secretary-General’, ‘Early Warning, Assessment and the Responsibility to Protect’ (2010) UN Doc A/64/864; JK Kleffner, ‘The Scope of the Crimes Triggering the Responsibility to Protect’ in Hoffmann and Nollkaemper, *Responsibility to Protect. From Principle to Practice* (AUP, 2012) 85.

exceptional situations that a bystander state can become responsible for failing to act on the basis of breach of an obligation to protect. Besides these situations, inaction cannot be construed as an omission in legal terms. Critically, as explained by the ICJ in the Genocide case, inaction also cannot result in responsibility based on complicity.<sup>14</sup>

This section will explore these situations, distinguishing between states exercising jurisdiction in the state where mass atrocities take place (section 2.1), states that by virtue of their influence over perpetrators may have had to offer protection (section 2.2), and other bystander states (section 2.3). It then will explain that international law, rather than compelling action by individual bystander states, justifies and to a large extent requires inaction (section 2.4).

## 2.1 States exercising extra-territorial 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 as Iraq or Afghanistan where third states, whether or not legitimised by the UN, exercised some form of authority in a period of continuing atrocities. Their presence may trigger obligations to protect under human rights and humanitarian law.<sup>15</sup> 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.<sup>16</sup> Such states may exercise (extra-territorial) jurisdiction over persons on the basis of authority and control over individuals,<sup>17</sup> or over persons present in an area over which it has effective control.<sup>18</sup>

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<sup>14</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 11) par 432.

<sup>15</sup> Although both bodies of law generally are only in limited cases applicable in cases of extra-territorial jurisdiction. See for human rights law e.g. F Coomans and MT Kamminga (eds.) *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, 2004); V Mantouvalou, 'Extending Judicial Control in International Law: Human Rights Treaties and Extraterritoriality' 9 *International Journal of Human Rights* (2005) 147; A Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' 14 *European Journal of International Law* (2003) 529; M Milanovic, *Extraterritorial Application of Human Rights Treaties. Law, Principles and Policy* (OUP, Oxford, 2011).

<sup>16</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 116, [172]–[180] (determining that Uganda had an obligation to protect in portions of the Congo that Uganda occupied). See also D Fleck, *The Handbook of International Humanitarian Law* (2<sup>nd</sup> edn, OUP, Oxford 2008) 280; M Hakimi 'State Bystander Responsibility' 21 *EJIL* (2010) 341 at 378.

<sup>17</sup> *Al-Skeini and Others v United Kingdom* (App no 55721/07) ECHR 7 July 2011 [133 onwards].

<sup>18</sup> *Al-Skeini and Others v United Kingdom* (App no 55721/07) ECHR 7 July 2011, [138 onwards].

However, the scope of obligations to protect of these states will be limited. Such obligations will correspond to the extent of the exercise of jurisdiction. They generally will not provide a basis for claims that that state should have protected persons against mass atrocities, beyond the area where it exercises some form of personal or territorial jurisdiction. For instance, there were good grounds for arguing that the Netherlands failed to protect individuals that it actively deported from its compound from Srebrenica,<sup>19</sup> it was much harder to argue that the Netherlands did not accord protection to all 7000 Bosnian men that were killed in Srebrenica - after all these persons were not under the jurisdiction of the Netherlands.<sup>20</sup>

The situation of an occupying state is comparable: the scope of the obligations in principle is limited to the area where the occupying state exercises jurisdictional control. The ICJ suggested that occupying states are required to uphold, in the areas that they occupy, human rights treaties to which they are party, as well as human rights treaties to which the occupied state is party, the Hague Regulations of 1907 and customary human rights law.<sup>21</sup> In situations where one or more states occupy an entire territory (such as Iraq when it was occupied by the US and the UK), such obligations indeed may be 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.<sup>22</sup> That certainly holds outside the areas where an occupying states exercises control.

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<sup>19</sup> Netherlands, The Hague Court of Appeal, *Nuhanović v The Netherlands* (5 July 2011) LJN BR0133; ILDC 1742 (NL 2011); B Boutin, 'Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanović and Mustafić: The Continuous Quest for a Tangible Meaning for "Effective Control" in the Context of Peacekeeping' (2012) 25 LJIL 521.

<sup>20</sup> Netherlands, Supreme Court, *Stichting Mothers of Srebrenica v Netherlands and United Nations* (13 April 2012) Final appeal judgment, LJN: BW1999; ILDC 1760 (NL 2012) (the *Mothers of Srebrenica* claim that the Netherlands is partly responsible for the fall of the Safe Area in Srebrenica and the consequences thereof, namely the murders on their family members and the loss of property).

<sup>21</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, [102]-[114]. Article 43 of the Hague Regulations imposes a duty on the occupant to 'take all the 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'; Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted in The Hague on 18 October 1907, entered into force on 26-01-1910).

<sup>22</sup> It can be added that even within the areas that are under their jurisdiction, the scope of obligations will be relatively limited. As noted by the 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, [82]-[83].

## 2.2 Influential bystander states

It now commonly is 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 the proposition is provided by the ICJ, which in the *Genocide Case*<sup>23</sup> held that states which do not exercise jurisdiction, or otherwise have a presence, in a state in which mass atrocities occur, nonetheless can 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 genocide is to ‘fail to protect’.

The Court was somewhat ambiguous as to which states would be part of this category. At one place, it stated that: ‘The obligation to prevent genocide 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’.<sup>24</sup> Thus, it suggested that not all states are under such an obligation, but only those states that have the influence or otherwise the capacity to avert the genocide.

Elsewhere, the Court suggested that capacity was not so much a trigger of an obligation to prevent, but rather a criterion for the assessment of the performance of that criterion. 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’.<sup>25</sup> Whether a state had discharged its obligation, then would depend on the capacity to influence effectively the action of persons likely to commit, or already committing, genocide.<sup>26</sup> This capacity would, in turn,

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<sup>23</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 11); M Gibney, ‘Universal Duties: the Responsibility to Protect, the Duty to Prevent (Genocide) and Extraterritorial Human Rights Obligations’ (2011) 3 *Global Responsibility to Protect* 123; A Gattini, ‘Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgment’ (2007) 18 *EJIL* 695; P Gaeta, ‘On What Elements Can a State Be Held Responsible for Genocide?’ 18 *European Journal for International Law* (2007) 631; M Milanovic, ‘State Responsibility for Genocide: A Follow-Up’ (2007) 18 *European Journal for International Law* (2007) 669; WA Schabas, ‘Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes’ 4 *International Studies Journal* (2007) 17.

<sup>24</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 11), [461] (emphasis added).

<sup>25</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 11) [430].

<sup>26</sup> See on In capacity as a foundation for an actor’s role in protection (and thus also as a normative basis for condemnation for failures to protect): A Orford, *International Authority and the Responsibility to Protect* (CUP, Cambridge, 2011) 16; J Pattison, ‘Assigning Humanitarian Intervention and the Responsibility to Protect’ in Hoffmann and Nollkaemper, *Responsibility to Protect* (n 13) 176; JM Welsh and M Banda, ‘International Law and the Responsibility to Protect: Clarifying or Expanding States’ Responsibilities?’ 2 *Global Responsibility to Protect* (2010) 213, 218-219; D Miller ‘The Responsibility to Protect Human Rights’ (Working Paper Series SJ006, Department of Politics and International Relations, Oxford University) (May 2007) 2-13.



depend on the geographical distance of the state concerned from the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that state and the main actors in the events.<sup>27</sup> 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 the states party. It is doubtful whether we can say that *all* states are legally bound to prevent and arrest 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 a breach of an international obligation.<sup>28</sup>

Also if we adopt the former, more limited, construction, the criterion of ‘capacity to influence effectively the action 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 extra-territorial jurisdiction. The criterion employed by the Court makes it implausible that only one of a few states could be singled out from this purpose. The Court indeed recognised ‘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’.<sup>29</sup> But it is not easy to determine which states then could be singled out for a failure to protect-critique. The criterion of geographical distance may be limiting, 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 EU 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.<sup>30</sup> A narrower criterion would be that a state ‘may have to restrain external actors if it substantially enables them to violate rights’.<sup>31</sup> However, this is not what the Court said, and the Court’s judgment opens the possibility of a wider group of potentially responsible actors.

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<sup>27</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 11) [430].

<sup>28</sup> D Shraga, ‘The Security Council and Human Rights—from Discretion to Promote to Obligation to Protect’ in B Fassbender (ed.) *Securing Human Rights: Achievements and Challenges of the UN Security Council* (OUP, Oxford, 2011) 11 at 28.

<sup>29</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 11), [430]; Glanville (n 2) 17.

<sup>30</sup> Hakimi (n 16) 356 (assigning the obligation primarily on the basis of capacity would be untenable).

<sup>31</sup> Hakimi (n 16) 366-367.

It has been argued that the obligation to protect outside the territory, beyond the obligation to prevent genocide, could extend to the other ‘responsibility to protect’ crimes: as war crimes, crimes against humanity, and ethnic cleansing,<sup>32</sup> which potentially could expand the network of actors that would be covered by this category. However, it is not obvious what would be the basis of such a far reaching analogy. The concept of responsibility to protect itself cannot fill the gap as it does not provide for an independent legal basis. Neither human rights law nor humanitarian law provide a comparable basis for targeting influential states.<sup>33</sup>

The net result, if we accept the expansive interpretation by the Court, is that it is only for the crime of genocide that bystander states, as a matter of law, can be subject of a failure to protect-critique. The category of states to which this critique can be applied is rather ill-defined, however. The ambiguity of the criterion formulated by the Court will make it difficult to single out responsible states and invites processes of buck-passing.<sup>34</sup>

### 2.3 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 who can be subject to a failure to protect-critique. International law is not entirely silent in such situations. In the *Wall 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 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.’<sup>35</sup> 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

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<sup>32</sup> Glanville (n 2) 28.

<sup>33</sup> See section 4.3.

<sup>34</sup> See further section 4.

<sup>35</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, [159]; See also G Gaja, ‘Do States Have a Duty to Ensure Compliance with Obligations *Erga Omnes* by Other States?’ in M Ragazzi (ed) *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff Publishers, Leiden, 2005) 32-33.

of its right to self-determination is brought to an end.’<sup>36</sup> Though made in the context of self-determination, the second statement seems to see to a more general consequence of breaches of *erga omnes* obligations. The ILC indeed formulated a broader obligation to cooperate in relation to serious breaches of obligations under peremptory norms.<sup>37</sup>

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.<sup>38</sup> In this respect the legal implications of the first statement by the Court appear to be very limited.

Second, as to a possible wider obligation to bring to an end violations of peremptory norms, there is not a hint of state practice or *opinio juris* in relation to events in, for instance, Darfur or Syria, that suggests that any state that would not act to protect persons from mass atrocities would commit an internationally wrongful act. While R2P presupposes underlying obligations,<sup>39</sup> in itself it does not create obligations for all states, as a matter of law.<sup>40</sup> In this respect, Alvarez’s observation that the UN would be liable in law for failing to act in the face of the Rwandan genocide are ‘absurdly premature’<sup>41</sup> applies more generally to claims that all states could be responsible for failing to protect people from mass atrocities.

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<sup>36</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, [159].

<sup>37</sup> Art 41 of the Articles on the Responsibility of States for Intentionally Wrongful Acts, in *Report of the International Law Commission to the General Assembly on Its Fifty-Third Session*, 56 U.N. GAOR Supp. No. 10, at 1, 43, U.N. Doc. A/56/10 (2001) [hereinafter ARISWA], reprinted in [2001] 2 Y.B. Int’l L. Comm’n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2). See generally, NHB Jørgensen, ‘The Responsibility to Protect and the Obligations of States and Organisations under the Law of International Responsibility’ in Hoffmann and Nollkaemper, *Responsibility to Protect* (n 13) 125.

<sup>38</sup> See, e.g. C Focarelli, ‘Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?’ 21 *European Journal of International Law* (2010) 125 ; F Kalshoven, ‘The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit’ 2 *Yearbook of International Humanitarian Law* (1999) 3 at 60 (Article 1 ‘cannot be said to impose upon states a legal obligation to act against other states that fail in their respect of the Convention’).

<sup>39</sup> Indeed, the change from the original International Commission on Intervention and State Sovereignty (ICISS) Report, ‘The Responsibility to Protect’ (International Development Research Centre, Canada, 2001) to the 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/Res/60/1, with the limitation to the four ‘core crimes’, can be seen as a distinct legalisation of the principle.

<sup>40</sup> See for discussion of moral philosophical foundations, J Pattison, ‘Assigning Humanitarian Intervention and the Responsibility to Protect’ in Hoffmann and Nollkaemper, *Responsibility to Protect. From Principle to Practice* (n 13) 173; JM Welsh, ‘The Responsibility to Protect and Humanitarian Intervention’ in Hoffmann and Nollkaemper, *Responsibility to Protect. From Principle to Practice* (n 13) 185.

<sup>41</sup> JE Alvarez, ‘The Schizophrenias of R2P’ in P Alston and E Macdonald (eds.) *Human Rights, Intervention and the Use of Force* (OUP, USA, 2008) 282.

Third, while the formulation as framed by the ICJ and the ILC does not exclude individual conduct, it seems to emphasise cooperation rather than unilateral action (if only because that would be more effective).<sup>42</sup> The basis for claims against individual bystander states faced with mass atrocities remains weak, if existent at all, and the obligation will make it easy for states to point to each other in explaining why nothing was done. Rather than providing for individual obligations, the obligation to cooperate supports a political process to respond to mass atrocities, in particular in the framework of the United Nations (see further section 5).

## 2.4 Justifying inaction

The mere fact that international law only in rare situations will provide a basis for failure to protect critiques of individual states, in itself does not 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 Western-European) 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 then would not translate into a claim of international responsibility.

However, international law severely restricts the means that bystander states could resort to. 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 to 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.'<sup>43</sup>

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<sup>42</sup> Yearbook of the International Law Commission 2001 Vol II) 114; J Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (CUP, Cambridge, 2002) 249; G Gaja, 'Do States Have a Duty to Ensure Compliance with Obligations *Erga Omnes* by Other States?' in M Ragazzi (ed.) *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff Publishers, Leiden, 2005) 34.

<sup>43</sup> Par 6 of the Commentary to article 54 of the ARISWA (n 37)

Second, the principle of non-intervention remains a formidable barrier for third states that seek to respond to mass atrocities in other states – in when they seek to support an opposition against an oppressive state that is said to engage in mass atrocities.<sup>44</sup> In the cases of Libya and Syria several states seem to have explored and push the limits set by the principle by supporting the opposition, but the principle of non-intervention remains a powerful argument against the legality of such actions, and in effect legitimises inaction by bystanders.

Third, international law precludes the use of force as an unilateral response to mass atrocities. This restriction is critical, as in most cases that we tend to characterise as failures to protect it would seem that only a threat or use of force could have resulted in actual protection.<sup>45</sup> By disallowing such use of force outside the context of the UN, international law justifies states to sit still. The debates in the UN on responsibility to protect have made clear that there is not a beginning of consensus among states to grant such a power to engage in forceful action in non-consenting states with a view to protect the population of such a state.<sup>46</sup> 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,<sup>47</sup> which sometimes takes the form of a (moral) *duty* to intervene,<sup>48</sup> and though some states do claim a right of humanitarian intervention<sup>49</sup> and some commentators find support in the R2P doctrine for such a right,<sup>50</sup> international law continues to ban (and for good

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<sup>44</sup> Generally M Jaminejad and M Wood, 'The Principle of Non-Intervention', 22 *Leiden Journal of International Law* (2009) 345.

<sup>45</sup> DJ Goldhagen, *Worse than War: Genocide, Eliminationism, and the Ongoing Assault on Humanity* (1<sup>st</sup> edn, Public Affairs, USA 2009).

<sup>46</sup> The Outcome Document confines the right to use force to the UN SC (see [139]) and contains no trace of recognition of a right of individual states, or other international organisations, to use force for humanitarian purposes.

<sup>47</sup> M Evans (ed.) *Just War Theory. A Reappraisal* (Edinburgh University Press Ltd, Edinburgh, 2005); M Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations* (4th edn, Basic Books, New York, 2006).

<sup>48</sup> RJ Regan, *Just War. Principles and Cases* (The Catholic University of America Press, USA, 1996) 6, 17. See also KC Tan, 'The Duty to Protect' in T Nardin and MS Williams (eds.) *Humanitarian Intervention. NOMOS XLVII* (NYU Press, New York, 2006) 84; C Bagnoli, 'Humanitarian Intervention as a Perfect Duty: A Kantian Argument' in T Nardin and MS Williams (eds.) *Humanitarian Intervention. NOMOS XLVII* (NYU Press, New York, 2006) 118 ('there is a strict moral duty to intervene when fundamental rights are violated').

<sup>49</sup> 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' (translation AN). This agreement is available at: <http://www.rijksoverheid.nl/regering/regeerakkoord/nederland-in-de-wereld> (last accessed 16 November 2012).

<sup>50</sup> AL Bannon, 'The Responsibility to Protect: the UN World Summit and the Question of Unilateralism' 115 *Yale Law Journal* (2006) 1157, 1164.

reasons – notably to prevent the risk of abuse)<sup>51</sup> the use of force by individual states or international organisations other than the United Nations.<sup>52</sup> It makes little sense to critique states for not using powers that they do not have.<sup>53</sup>

It follows that international law not only provides only a thin basis for failure to protect-critiques of individual states, but fundamentally supports and legitimises individual bystanders to remain bystanders.

### 3. 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 a threat to the peace and security,<sup>54</sup> draws the Council automatically in the network of actors that is expected to act in case of mass atrocities and that will be subject to a failure to protect-critique when it does not do so.<sup>55</sup>

However, as in the case of individual states, failures to protect rarely will translate into a legal claim against the organisation. 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,

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<sup>51</sup> AJ Bellamy and NJ Wheeler, 'Humanitarian Intervention in World Politics' in J Baylis, S Smith and P Owens (eds.) *The Globalization of World Politics: An Introduction to International Relations* (5<sup>th</sup> edn, OUP, Oxford, 2008) 514; B Wilkins, 'Humanitarian Intervention: Some Doubts' in A Jokic (ed.) and B Wilkins, *Humanitarian Intervention, Moral and Philosophical Issues* (Broadview Press Ltd, Toronto, 2003), 38; C Portela, 'Humanitarian Intervention, NATO and International Law. Can the Institution of Humanitarian Intervention Justify Unauthorized Action?' (Research Report 00.4, Berlin Information-Center for Transatlantic Security, Berlin, 2000) 16-17; JE Davis, 'From Ideology to Pragmatism: China's Position on Humanitarian Intervention in the Post-Cold War Era' 44 *Vanderbilt Journal of Transnational Law* (2001) 217, 223.

<sup>52</sup> I will leave aside here the possible role of the GA under the Uniting for Peace doctrine. See generally, UNGA Res 377 A (V) 'Uniting for Peace' (3 November 195) UN Doc A/Res/377(V) A; C Tomuschat, 'Uniting for Peace' (2008) UN Audiovisual Library of International Law, available at: [http://untreaty.un.org/cod/avl/pdf/ha/ufp/ufp\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/ufp/ufp_e.pdf) (last accessed 9 November 2012); D Zaum, 'The Security Council, the General Assembly, and War: The Uniting for Peace Resolution' in V Lowe et al (eds.) *The United Nations Security Council and War The Evolution of Thought and Practice since 1945* (OUP, Oxford, 2008).

<sup>53</sup> But see the assumption of powers in the Constitutive Act of the African Union (adopted 11 July 2000, entered into force in 2001) 2158 UNTS 3, art 4; A Abass, 'The African Union and the Responsibility to Protect. Principles and Limitations' in Hoffmann and Nollkaemper, *Responsibility to Protect* (n 13) 213.

<sup>54</sup> Shraga (n 28) 11-14.

<sup>55</sup> Article 24 of the UN Charter.

rather than a basis for international responsibility in the case of inaction. I will explore this basis both in regard to the Security Council (section 3.1) and peace-keeping operations (section 3.2).

### 3.1 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’ is appropriate.<sup>56</sup> Its failures in respect of Srebrenica<sup>57</sup> and Rwanda are well documented.<sup>58</sup> As Shraga notes, while the criminal responsibility for the genocide 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, unwilling to engage, or to engage with a decisive force.<sup>59</sup>

In such situations, there may also be grounds for a legal failure to protect-critique. The Charter gives the Council the responsibility for the maintenance of international peace and security,<sup>60</sup> and the Council is bound by obligations resting on the UN.<sup>61</sup> The UN as an international organisation with legal personality is bound by obligations under general international law pertaining to the protection of persons from mass atrocities.<sup>62</sup> To the extent that we accept the

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<sup>56</sup> See the overview in V Holt, G Taylor and M Kelly, ‘Protecting Civilians in the Context of UN Peacekeeping Operations, Successes, Setbacks and Remaining Challenges’ (Independent study commissioned by the Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs) (17 November 2009) 211.

<sup>57</sup> Shraga (n 28) 16.

<sup>58</sup> UNSC Res 912 (21 April 1994) UN Doc S/RES/912 [8]; D Shraga, ‘The Security Council and Human Rights—from Discretion to Promote to Obligation to Protect’ in B Fassbender (ed) *Securing Human Rights: Achievements and Challenges of the UN Security Council* (OUP, Oxford, 2011) 27.

<sup>59</sup> Shraga (n 28) 16.

<sup>60</sup> LM Goodrich, E Hambro and AP Simons, *Charter of the United Nations: Commentary and Documents* (3<sup>rd</sup> edn, CUP, New York, 1969) 203.

<sup>61</sup> Generally on United Nations Security Council obligations, see A. Reinisch, ‘Developing Human Rights and Humanitarian Law: Accountability of the Security Council for the Imposition of Economic Sanctions’, 95 *American Journal of International Law* (2001) 851, 855-857. Footnotes in this excerpt are also copied from Reinisch. See also F Magnússon, ‘Targeted Sanctions and Accountability of the United Nations Security Council’ 13 *Austrian Review of International and European Law* (2008) 35; MG Kohen, ‘There is No Need to Change the Composition of the Security Council: It Is Time for Stressing Accountability’ in L Boisson de Chazournes and M Kohen, *International Law and the Quest for its Implementation* (Martinus Nijhoff Publishers, Leiden, 2010) 85.

<sup>62</sup> A Peters, ‘The Security Council’s Responsibility to Protect’ 8 *International Organizations Law Review* (2001) 15; E Davidsson, ‘The Security Council’s Obligations of Good Faith’ 14 *Florida Journal of International Law* (2003) 541; Rudolf Dolzer, ‘Lecture Commentary: Regime Change and the Changing Universe of Values in Contemporary International Law’ 98 *American Society of International Law* (2004) 299; G Evans and M Sahnoun, ‘The

obligation to prevent genocide as an obligation under customary law, this also would bind the Council.<sup>63</sup> In the *Genocide* case, the Court did not express itself on the customary nature of the obligation to prevent genocide. It seems very doubtful if such an obligation could be construed on the basis of actual practice. However, given the link between genocide as ‘a crime under international law’, on the one hand, and the prohibition to commit genocide and the obligation to prevent genocide, on the other,<sup>64</sup> and in the light of the fact that the customary international law nature of the principles underlying the Genocide Convention was recognised by the ICJ in its 1951 Advisory Opinion on the *Reservations to the Genocide Convention*,<sup>65</sup> it would seem that the Council could indeed be subject to an obligation to protect. This is particularly relevant since the UN, more than any other actor, would have the capacity and the means (including those specified in articles 41 and 42 of the Charter) to protect.<sup>66</sup>

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.<sup>67</sup> Any obligation of the organisation as a whole has to accommodate the nature of the powers of the organs, and cannot in itself transform a power to authorise 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 easily be qualified as breach of an international obligation that would engage the international responsibility of the United Nations.

Because of 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.<sup>68</sup>

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Responsibility to Protect’ 81 *Foreign Affairs* (2002) 99; A Reinisch, ‘Developing Human Rights and Humanitarian Law: Accountability of the Security Council for the Imposition of Economic Sanctions’, (2001) 95 *AJIL* 851 at 857.

<sup>63</sup> Shraga (n 28) 25.

<sup>64</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 11) par 166.

<sup>65</sup> *Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 23; Shraga (n 28) 32.

<sup>66</sup> Shraga (n 28) 33.

<sup>67</sup> Article 42 UN Charter. See Shraga (n 28).

<sup>68</sup> E.g. Report of the Secretary-General’s Internal Review Panel on ‘United Nations Action in Sri Lanka’ (14 November 2012) 29 [81] (one of the elements of the systemic failure of the UN was ‘inadequate political support from Member States as a whole’).



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.<sup>69</sup> As a general proposition, member states are not responsible for a wrongful act of the organisation.<sup>70</sup> More to the point, also the participation of a state in the creation or adoption of an act of an organisation does not in itself constitute a source of member state responsibility for the acts of the international organisation.<sup>71</sup> This also holds for the use of the veto by the permanent members.<sup>72</sup>

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.<sup>73</sup> There is no shortage of principles that lend themselves to creative interpretation in relation to member states that block effective action. However, in the light of their reception and application in state practice, it would seem that neither the obligation to cooperate<sup>74</sup> nor the prohibition to aid or assist in the commission of a wrongful act by the organisation<sup>75</sup> 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 what 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.

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<sup>69</sup> E Davidsson, 'The Security Council's Obligations of Good Faith' 14 *Florida Journal of International Law* (2003) 541, 543.

<sup>70</sup> Art 62 ILC Draft Articles on the Responsibility of International Organizations (2011) adopted at the 63<sup>rd</sup> Session (Yearbook of the International Law Commission 2011 Vol II) UN Doc A/66/10 [87] (DARIO).

<sup>71</sup> A Peters, 'The Responsibility to Protect: Spelling Out the Hard Legal Consequences for the UN Security Council and Its Members' in U Fastenrath and others (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP, Oxford, 2011) 320.

<sup>72</sup> Peters, 'The Responsibility to Protect' (n 71) 320-321; Sienho Yee, 'Member Responsibility' and the ILC Articles on the Responsibility of International Organizations: Some Observations, in: Maurizio Ruggazi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff 2013), 325-336

<sup>73</sup> Articles 40-41 ARISWA (n 36). See further section 4.3 below.

<sup>74</sup> *Supra* section 2.3.

<sup>75</sup> Art 15 Draft Articles on the Responsibility of International Organizations (2011) adopted at the 63<sup>rd</sup> Session (Yearbook of the International Law Commission 2011 Vol II) UN Doc A/66/10 (ARIO); Peters, 'The Responsibility to Protect' (n 71) 321-322.

### 3.2 Peace keeping<sup>76</sup>

Critique for failures to protect may not only be directed to the Security Council, but also to peace-keeping 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,<sup>77</sup> made it as a matter of law pointless to blame peace keepers for a failure to protect.<sup>78</sup> In regard to the atrocities in Rwanda<sup>79</sup> and Burundi,<sup>80</sup> where peace keepers were in place but could not act, one may on moral or political grounds blame the UN for not empowering the mission, but the blame could hardly be directed to the mission itself.

For modern peace-keeping missions a failure to protect-critique has more bite. Mandates provide for the use of force for protection of civilians,<sup>81</sup> and may turn the force in peace enforcement rather than peacekeeping.<sup>82</sup> Examples are the mandates of the AU/UN Hybrid Operation in Darfur (UNAMID) to take ‘the necessary action’ to protect civilians,<sup>83</sup> Sierra Leone,<sup>84</sup> Liberia,<sup>85</sup> Côte d’Ivoire,<sup>86</sup> Haiti,<sup>87</sup> Chad and the Central African Republic,<sup>88</sup> the DRC,<sup>89</sup> and the Sudan.<sup>90</sup>

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<sup>76</sup> See the chapters by Scott Sheeran and Nicholas Tsagourias in this volume.

<sup>77</sup> R Zacklin, ‘The Use of Force in Peacekeeping Operations’ in N Blokker and N Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality: a Need for Change?* (Koninklijke Brill NV, Leiden, 2005); H Nasu, *International Law on Peacekeeping. A Study of Article 40 of the UN Charter* (Koninklijke Brill NV, Leiden, 2009) 25; T Findlay, *The Use of Force in UN Peace Operations* (OUP, Oxford, 2002) 1, 20; KE Cox, ‘Beyond Self-Defense: United Nations Peacekeeping Operations & the Use of Force’ 27 *Denver Journal of International Law and Policy* (1999) 239; T Findlay, *The Use of Force in UN Peace Operations* (OUP, Oxford, 2002) 20.

<sup>78</sup> The question may be raised whether the absence of legal powers by peace keeping troops to use force other than for self-defence is ever a legal justification for *not* using force. See H Nasu, *International Law on Peacekeeping. A Study of Article 40 of the UN Charter* (Koninklijke Brill NV, Leiden, 2009) 25-26 (peacekeeping forces are ‘urged to restrain the use of armed force, but are not prohibited from taking such a course of action’).

<sup>79</sup> I Carlsson, ‘The UN Inadequacies’ 3 *Journal of International Criminal Justice* (2003) 837.

<sup>80</sup> K Powell, *The African Union’s Emerging Peace and Security Regime: Opportunities and Challenges for Delivering on the Responsibility to Protect* (Institute for Security Studies, South Africa, 2005) 35.

<sup>81</sup> H Nasu, *International Law on Peacekeeping. A Study of Article 40 of the UN Charter* (Koninklijke Brill NV, Leiden, 2009) 27; Shraga (n 28) 24; Breau (n 2) 429.

<sup>82</sup> Breau (n 2) 444-446.

<sup>83</sup> UNSC Res 1769 (31 July 2007) UN Doc S/Res/1769 [15]; Shraga (n 28) 30.

<sup>84</sup> UNSC Res 1270 (22 October 1999) UN Doc S/Res/1270, [14].

<sup>85</sup> UNSC Res 1509 (19 September 2003) UN Doc S/Res/1509, [3j].

<sup>86</sup> UNSC Res 1528 (27 February 2004) UN Doc S/Res/1528, [6i], [16] and UNSC Res 1933 (30 June 2010) UN Doc S/Res/1933, [16b].

<sup>87</sup> UNSC Res 1542 (30 April 2004) UN Doc S/Res/1542, [7If].

<sup>88</sup> UNSC Res 1778 (25 September 2007) UN Doc S/Res/1778, [6a]; UNSC Res 1861 (14 January 2009) UN Doc S/Res/1861, [7ai] and UNSC Res 1923 (25 May 2010) UN Doc S/Res/1923.

<sup>89</sup> UNSC Res 1291 (24 February 2000) UN Doc S/Res/1291, [8]; UNSC Res 1484 (30 May 2003) UN Doc S/Res/1484; UNSC Res 1493 (28 July 2003) UN Doc S/Res/1493, [25]; UNSC Res 1565 (1 October 2004) UN Doc S/Res/1565, [4b]; UNSC Res 1756 (15 May 2007) UN Doc S/Res/1756, [2a]; UNSC Res 1794 (21 December 2007) UN Doc S/Res/1794, [5], [8]; UNSC Res 1856 (22 December 2008) UN Doc S/Res/1856, [3a]; UNSC Res 1906 (23

Depending on the formulation of the mandate, they will have to protect, by force if necessary, civilian population in imminent threat of physical violence.

Yet, failures of a peace-keeping force to perform their mandate cannot necessarily be qualified as a wrongful act. A mandate is not an obligation. It may be argued that the empowerment creates a 'legitimate expectation' for injured parties that the force will be used,<sup>91</sup> but it remains to be seen how far this gets one in a court of law.

Of course, general obligations under human rights law and humanitarian law, to the extent binding on the UN, remain applicable. The question is how far they extend, and in particular whether they will extend beyond the area where the peace-keeping force exercises control (such as 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.'<sup>92</sup> As indicated by the phrase 'within their means', the scope of a failure to protect-critique is limited by a combination of 'their areas of operation, capabilities, and available resources'.<sup>93</sup> If these conditions are satisfied, it may be possible to claim as a matter of law that a peace-keeping force (and thus the UN) failed to exercise its obligations to protect. However, it would seem that this was the case only in very few, if any, of the mass atrocities of the last decades. Given the notorious lack of actual capabilities granted to peace-keeping troops, it is only in rare cases that such critique can translate into a viable legal claim. There are ample examples where the inability of troops to protect was not so much due to a lack

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December 2009) UN Doc S/Res/1906, [5a], [7], [22]-[23] and UNSC Res 1925 (28 May 2010) UN Doc S/Res/1925, [12a-c].

<sup>90</sup> UNSC Res 1590 (24 March 2005) UN Doc S/Res 1590, [16]; UNSC Res 1706 (31 August 2006) UN Doc S/Res/1706, [12a]; UNSC Res 1769 (31 July 2007) UN Doc S/Res/1769 [15]; UNSC Res 1919 (29 April 2010) UN Doc S/Res/1919, [4] and UNSC Res 1935 (30 July 2010) UN Doc S/Res/1935 [2].

<sup>91</sup> Generally on legitimate expectations see: M Byers, *Custom, Power, and the Power of Rules. International Relations and Customary International Law* (CUP, Cambridge, 1999) Chapter 7.

<sup>92</sup> Report of the Panel on United Nations Peace Operations (Brahimi Report) (2000) UN Doc A/55/305 and UN Doc S/2000/809, [62]. See similarly Commentary of the International Committee of the Red Cross to Common Article 1 of the 1949 Geneva Conventions, JS Pictet, *The Geneva Conventions of 12 August 1949: Commentary* (International Committee of the Red Cross, Geneva, 1952). See also S Wills, *Protecting Civilians: The Obligations of Peacekeepers* (OUP, Oxford, 2009) 267-268 (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.')

<sup>93</sup> Shrager (n 28) 24.

of legal powers, but to a lack of resources. These include UNAMIR in Rwanda, which the Security Council had reduced to a minimal force,<sup>94</sup> UNPROFOR in Bosnia and Herzegovina,<sup>95</sup> UNAMID in Burundi (2004), which ‘lacked sufficient troop capacity, logistics, and funding’<sup>96</sup> 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 the Sudan to allow deployment of non-African troops, and the lack of contributions of means of transportation and critical aviation capabilities’.<sup>97</sup>

In such situations, a failure to protect-critique may well circumvent the peace-keeping 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<sup>98</sup> may be relied on to support the proposition that member states should cooperate to enable peace keeping missions to realise their mandates to protect civilians from mass atrocities. But the obligation lacks the power to remove the essentially voluntary nature of a decision to provide troops to peace-keeping missions, and does not provide a basis for singling out particular states for a legal failure-to-protect-critique.

#### **4. Diffused responsibility**

It follows from the above two sections that it is possible to construe the responsibility to protect populations from mass atrocities as a shared responsibility.<sup>99</sup> International law empowers both states and the UN to act, even though it limits the means that may be employed by the former are limited. In some cases, bystanders may be obliged to act. At a minimum, the obligation to

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<sup>94</sup> I Carlsson, ‘The UN Inadequacies’ 3 *Journal of International Criminal Justice* (2005) 837.

<sup>95</sup> UNGA ‘Report of the Secretary General pursuant to General Assembly Resolution 53/35’, ‘The Fall of Srebrenica’ (1999) UN Doc A/54/549, [56].

<sup>96</sup> Shraga (n 28) 16.

<sup>97</sup> Shraga (n 28) 16; A Abass, ‘The United Nations, The African Union and the Darfur Crisis. Of Apology and Utopia’ 54 *Netherlands International Law Review* (2007) 415; A de Waal, ‘Darfur and the Failure of the Responsibility to Protect’ 83 *International Affairs* (2007) 1039; see also The Report of the Panel on United Nations Peace Operations (Brahimi Report) (2000) UN Doc A/55/305 and UN Doc S/2000/809, [63].

<sup>98</sup> Art 41 ARISWA (n 37).

<sup>99</sup> See on the concept of shared responsibility Nollkaemper and Jacobs (n 9), see also L May, *Sharing Responsibility* (University of Chicago Press, Chicago, 1992).

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 are empirically connected to the outcome—along with the acts of perpetrators.<sup>100</sup>

It also follows from the above that international law generally does not translate this shared responsibility in particular obligations for particular states. 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, stands for 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.’<sup>101</sup> 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.’<sup>102</sup> Except for the perpetrators, it seems difficult if not impossible to say that the outcome would not have happened but for the actors act or omission. The actors are only a causal factor, one of ‘a plurality of distinguishable causal conditions.’<sup>103</sup>

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.

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<sup>100</sup> Compare see D Thompson, ‘Designing Responsibility: The Problem of Many Hands in Complex Organizations’, In *The Design Turn in Applied Ethics*, J van den Hoven, S Miller, and T Pogge (ds), (Cambridge UK: Cambridge University Press, forthcoming), available at [http://scholar.harvard.edu/files/dft/files/designing\\_responsibility\\_1-28-11.pdf](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’).

<sup>101</sup> DF Thompson, ‘Moral Responsibility of Public Officials: the Problem of Many Hands’ 74 *American Political Science Review* (1980) 905, 905. For further discussion on the subject, see Thompson, ‘Designing Responsibility’(n 100).

<sup>102</sup> M Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organizations* (CUP, Cambridge, 1998) 46. For a comparable point, see L May, *Sharing Responsibility* (University of Chicago Press, Chicago, 1992) 37-38.

<sup>103</sup> See Thompson, ‘Designing Responsibility’(n 100), citing J Feinberg, *Doing and Deserving* (Princeton University Press, Princeton, 1970) 201-202. See for a construction of shared responsibility in relation to situations where causation is not possible May (n 98) at 37-38.

It is true that, in the rare cases where multiple actors have international obligations to protect populations from mass atrocities, that multiplicity of actors in itself does not necessarily affect the obligations of each of the individual actors. Neither does it affect their possible responsibility for failure to perform an obligation. International law in principle allows for the co-existence of multiple responsibilities in relation to failures to protect. This is true for the coexistence of responsibility of perpetrators and bystanders, and within the category of bystanders itself.

As to the former, the obligations to protect of states exercising extra-territorial jurisdiction and of ‘influential states’ generally will co-exist with those of the territorial state. The mere fact that a third state exercises jurisdiction does not relieve the territorial state from its obligations; just as the fact that the territorial state retains its obligation does not relieve the state that exercises extra-territorial jurisdiction from its obligations.<sup>104</sup> Also the mandate of peacekeeping operations to protect civilians will be without prejudice to the government’s obligations.<sup>105</sup> Likewise, while under the responsibility to protect doctrine, the territorial state’s inability or unwillingness to protect triggers the responsibilities of third states and international organisations,<sup>106</sup> the transfer of responsibilities triggered by inability is not necessarily binary and exclusive. Illustrative is that while SC Resolution 1973 allowed for military action (with a reference to R2P), it reiterated the primary responsibility of Libya.<sup>107</sup> Both the territorial state and outside actors then may be obliged to act – and in principle these responsibilities do not exclude or undermine each other.

As to the category of bystanders itself, 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.<sup>108</sup> When considering whether the obligations of Serbia to prevent genocide would be affected by the action or inaction of other states, the ICJ held that:

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<sup>104</sup> *Ilascu* (n 104) [331]; *Catan and Others v Moldova and Russia* (App nos 43370/04, 18454/06, 8252/05) (GC) ECHR 19 October 2012, [109]-[110]. It is to be added that while the fact that there is a multiplicity of actors obligated to take action to protect persons from mass atrocities in principle need not affect the responsibility of any single actor, it may affect the contents of obligations or the scope of responsibility. For instance, 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 from their obligations to protect civilians, it will influence what as a legal matter may be required and expected by them.

<sup>105</sup> *Shraga* (n 28) 24.

<sup>106</sup> 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/Res/60/1, [139].

<sup>107</sup> UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

<sup>108</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 11).

it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains 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.<sup>109</sup>

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.

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 (scope of) 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 (allegedly) were responsible for (part of) the events to evade their responsibility and to ‘pass the buck’ to other actors.<sup>110</sup>

The phenomenon of buck-passing is well-illustrated by the co-existence of obligations of individuals and states. The emergence of the possibility to attribute 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 their responsibility, and assign responsibility to individual perpetrators.<sup>111</sup> It allowed third states (and ‘the international community’) to abstain from invoking responsibility of state perpetrators and to limit themselves to imposing responsibility on individual perpetrators.<sup>112</sup>

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

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<sup>109</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 11) [430].

<sup>110</sup> Nollkaemper, ‘Multi-level Accountability’ (n 8).

<sup>111</sup> LC Backer, ‘The Führer Principle of International Law: Individual Responsibility and Collective Punishment’ 21 *Penn State International Law Review* (2003) 509.

<sup>112</sup> This also served interests of stability: the international community had a prime interest to let the state of, for instance, Iraq or Serbia continue and re-establish itself quickly as a stable political entity – sacrificing individual state agents did not endanger that objective.

to protect triggers the responsibilities of third states and international organisations.<sup>113</sup> As noted above, the triggering of responsibility of outside actors does not necessarily terminate the responsibilities 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 relieved from its obligations once outside actors step in, and in that sense invite buck-passing. States may prefer this, as it then does not carry the political costs of fighting a civil war.<sup>114</sup> At the same time, the primary responsibility of the territorial state, as well as the principle of non-intervention, may 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 peace keeping operations to protect civilians and without prejudice to the government’s responsibilities,<sup>115</sup> 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.<sup>116</sup> The nature and contents of the criteria formulated by the Court are indeterminate and flexible and inevitably invite to blame-shifting.

Only in rare cases, 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 standard of effective control, used in the ARIO<sup>117</sup> allows

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<sup>113</sup> 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/Res/60/1, [139].

<sup>114</sup> SMH Nouwen, ‘Complementarity in Practice: Critical Lessons from the ICC for R2P’ (Symposium: The International Criminal Court and the Responsibility to Protect) *Finnish Yearbook of International Law* (2010) 53; SMH Nouwen and WG Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’ 21 *European Journal of International Law* (2010) 941, 949.

<sup>115</sup> Shraga (n 28) 24.

<sup>116</sup> Hakimi (n 16) 356 (assigning the obligation primarily on the basis of capacity would be untenable).

<sup>117</sup> ILC Draft Articles on the Responsibility of International Organizations (2011) adopted at the 63rd Session (Yearbook of the International Law Commission 2011 Vol II) UN Doc A/66/10 [87].



for multiple attribution.<sup>118</sup> In the *Nuhanovic* 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 determined whether the UN or the state had the power to prevent the conduct.<sup>119</sup> If this is the relevant criterion, it would seem possible that both the UN and the troop contributing state would have the power to prevent the removal. The Court expressly recognised the possibility of double attribution.<sup>120</sup> In the *Behrami and Saramati* cases,<sup>121</sup> the ECtHR construed the applicable criterion for attribution in exclusive terms. Also the UN supports an exclusive mode of attribution – be in on a different ground, taking the position that peacekeeping troops are to be considered as subsidiary organs of the UN.<sup>122</sup>

Either way the ‘effective control debate’ has proven 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 then may profit from its immunity from litigation)<sup>123</sup> When the criterion is construed in a way that allows for double attribution, this does not necessarily solve the problem. The terms of the ARIIO – where the question of attribution is governed by the standard of ‘effective control’,<sup>124</sup> introduce inherent flexibility, allowing for arguments pointing to several actors. Also the argument that the entity

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<sup>118</sup> James Crawford & Simon Olleson, *The Nature and Forms of International Responsibility*, in: M.D. Evans (ed.), *International Law* (OUP, 2010), p. 444.

<sup>119</sup> Netherlands, The Hague Court of Appeal, *Nuhanović v The Netherlands* (5 July 2011) LJN BR0133; ILDC 1742 (NL 2011) [5.9].

<sup>120</sup> Netherlands, The Hague Court of Appeal, *Nuhanović v The Netherlands* (5 July 2011) LJN BR0133; ILDC 1742 (NL 2011) [5.3]. Also some scholars have taken the position that conduct of contributing troops can always be attributed to both the sending state and the UN. See e.g. A Sari, ‘Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases’ 8 *Human Rights Law Review* (2008) 151, 160-161; L Condorelli, ‘Le Statut des Forces de l’ONU et Le Droit International Humanitaire’ 78 *Rivista di Diritto Internazionale* (1995) 881; L Condorelli ‘Le Statut des Forces des Nations Unies et le Droit International Humanitaire’ in C Emmanuelli (ed.), *Les Casques Bleus: Policiers ou Combattants?* (Wilson & Lafleur, Montréal 1997).

<sup>121</sup> *Behrami and Behrami v France and Saramati v France, Germany and Norway* (App nos 71412/01 and 78166/01) ECHR 2 May 2007.

<sup>122</sup> ILC, ‘Report of the International Law Commission on the Work of its Sixty-First Session’ (4 May–5 June and 6 July–7 August 2009) UN Doc A/64/10, 64.

<sup>123</sup> Netherlands, Supreme Court, *Stichting Mothers of Srebrenica v Netherlands and United Nations* (13 April 2012) Final appeal judgment, LJN: BW1999; ILDC 1760 (NL 2012).

<sup>124</sup> Article 7 ILC Draft Articles on the Responsibility of International Organizations (2011) adopted at the 63rd Session (Yearbook of the International Law Commission 2011 Vol II) UN Doc A/66/10 [87] (DARIO).

*best* placed to prevent should take action<sup>125</sup> is inherently ambiguous, and allows and invites actors to point to others who would be more capable of preventing such abuses.

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

A particular consequence of the multitude of bystanders is that that while it may be possible to find individual actors responsible when these act in breach of specific obligations to protect, 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 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 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 in full force in respect of the obligations to provide reparation in the *Genocide case*. The Court 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’.<sup>126</sup> The Court declined to order Serbia and Montenegro to pay compensation because of the collective nature of failures to prevent.

This example illustrates that international law structures its primary and secondary rules<sup>127</sup> relating to failures to protect in a way that makes it possible for each of multiple parties to

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<sup>125</sup> T Dannenbaum, ‘Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers’ 51 *Harvard International Law Journal* (2010) 113, 158.

<sup>126</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 11) [463]. See critical discussion by Gattini (n 23) 707-712.

<sup>127</sup> See generally on the distinction Ulf Linderfalk, *State Responsibility and the Primary-Secondary Rules Terminology—The Role of Language for an Understanding of the International Legal System*, 78 *Nordic J. Int’l L.* 53, 72 (2009).

contribute to a wrong, yet to remain below the threshold where its responsibility would be engaged or, in any case, where it would have to provide reparation for the consequences.

## **5. Failures to protect-critique as a political critique**

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

However, it appears from the above that this complex of obligations and powers only in rare situations allows for a failure to protect-critique of individual actors that is grounded in international law. The multiplication of powers and obligations across various actors reflects the reality that effective power is not vested in any single institution – because of the discretionary nature of its powers, also the Security Council falls short of that. Perhaps the hope is that, paraphrasing the words of the ICJ in the *Genocide* case, the combined efforts of several states, each complying 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.<sup>128</sup> However, as illustrated in the preceding section, this reliance on multiple actors can easily transform from a strength into a weakness of the system, and allows states and international organisations to duck the question of responsibility.

It may be said that this failure to assign a special duty to act may be seen as a weakness of the normative system.<sup>129</sup> A clarification of obligations as well as secondary rules, that indicate more clearly who is responsible for what to some extent may ameliorate this weakness. Criteria can

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<sup>128</sup> Glanville (n 2) 17.

<sup>129</sup> JM Welsh and M Banda, 'International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?' 2 *Global Responsibility to Protect* (2010) 213, 219; D Miller 'The Responsibility to Protect Human Rights' (Working Paper Series SJ006, Department of Politics and International Relations, Oxford University) (May 2007) 2, 3-4.

specify what individual actors should or should not do.<sup>130</sup> This can involve a clarification of the task of peace keeping missions<sup>131</sup> and of individual states.<sup>132</sup> 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 having the UN making broader assessment of failures, not just internally but for all actors involved; and improving access to remedies against the UN.

However, it would seem that seeking a clarification of the allocation of obligations and responsibilities to individual actors may start out on the wrong premise. The responsibility to act in cases of mass atrocities is best understood as a collective enterprise, which does not easily allow for individualisation of responsibilities. 'Failure to protect' critiques thus do not put blame any individual actor, but rather on the collectivity of states and international institutions (or: 'the international community') that failed to use their powers to provide to protection.

The relevance of international law in relation to failures to protect therefore does not so much lie in the grounds for determining responsibility of individual actors that failed to act, but rather in its ability to provide a framework for deliberation on whether and how to act.<sup>133</sup> 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 provide the primary mechanism for performing the obligation of cooperation. The Genocide Convention, human rights law and humanitarian law provide critical parameters for the exercise of such cooperation. These obligations may not easily provide a basis

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<sup>130</sup> See Thompson, 'Designing Responsibility'(n 100).

<sup>131</sup> E.g. V Holt, G Taylor and M Kelly, 'Protecting Civilians in the Context of UN Peacekeeping Operations, Successes, Setbacks and Remaining Challenges' (Independent study commissioned by the Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs) (17 November 2009) 212-213.

<sup>132</sup> E.g. JE Alvarez, 'The Schizophrenias of R2P' in P Alston and E Macdonald (eds.) *Human Rights, Intervention and the Use of Force* (OUP, USA, 2008) 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').

<sup>133</sup> See also M Koskeniemi, 'Solidarity Measures: State Responsibility as a New International Order?', 72 *British YB Int'l Law* (2002) 337.

for claims for wrongfulness in cases of individual failures to protect, but they do circumscribe political processes. In that sense, they may inform critiques of states and international organisations for the conduct and outcome of such processes.

Most critically, such obligations allow for a more substantive construction of the responsibility of the Security Council to act in the face of mass atrocities. This responsibility of the Council, and of the member states, no longer can be understood in terms of an unlimited discretion. In this sense, international law now indeed provides for a sharing of responsibility between perpetrators, the UN and its member states, and provides a firm basis for a failure to protect-critique of each of them.